[Cite as *State v. Johnson*, 2018-Ohio-2780.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL G.P. JOHNSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0099

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16 CR 358

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503 for Plaintiff-Appellee and

Atty. Edward A. Czopur, DeGenova & Yarwood, LTD., 42 N. Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: June 21, 2018

Robb, P.J.

{¶1} Defendant-Appellant Michael G.P. Johnson appeals after being convicted of attempted murder in the Mahoning County Common Pleas Court. Appellant contends the affidavit in support of the warrant for his DNA lacked probable cause. He alleges counsel provided ineffective assistance by failing to object to other acts evidence at trial. He also concludes the evidence was insufficient to prove the elements of attempted murder, claiming the assault stopped before the victim's death without the prompting of an intervening event. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} The victim met Appellant online and dated him for approximately one year. (Tr. 337). She lived with him and her child in a house on North Worthington Avenue in Youngstown. (Tr. 308, 337). On March 27, 2016, which was Easter Sunday, the victim went to her father's house, started some of her laundry, went to her grandmother's residence for dinner, and then brought her child to her friend's house. (Tr. 309, 339). As planned, she met her father in the parking lot of a store at 9:00 p.m. to retrieve the laundry he finished for her. (Tr. 310-311). They made plans to meet at his house the next evening and go out for dinner. (Tr. 311). The victim stopped at a corner store to buy cigarettes and then went home. (Tr. 340). She entered her house through the side door and walked through the kitchen to the bedroom where Appellant was sitting at a computer table. He asked why she took so long to meet with her father, and he got up from the chair. (Tr. 341). What happened next the victim cannot remember.

{¶3} On Monday evening, the victim did not meet her father as expected. He called her multiple times but could only reach her voicemail. (Tr. 312). After unsuccessfully trying to phone her on Tuesday, he went to her house around 7:00 p.m., saw her car in the driveway, knocked on the door and on a window next to the door, and heard her dog barking. (Tr. 313-314). He became concerned upon further unsuccessful attempts to contact her by phone. On Wednesday, the victim's father

called his son and asked him to call the victim's other brother with instructions to "kick in the door or do whatever he has to do and find out where she's at." (Tr. 315).

{¶4} The victim's brother tried calling the victim, but his calls went straight to voicemail. (Tr. 322). He went to the victim's house, saw her car in the driveway, and heard her dog barking. (Tr. 323). He said she never went anywhere without her dog. (Tr. 324). The side door was open, but the screen door was locked; he yelled and banged on the screen door. (Tr. 323-324). He looked in a window and noticed chairs on their sides. He opened the window and climbed inside the house. (Tr. 324). When he entered the victim's bedroom, he saw her lying on her side on the floor "brutally beaten" wearing only pink sweatpants. (Tr. 325). He testified: she had bruises all over her arms and backs; her eyes were swollen shut; she had hair missing; and her head appeared burned. (Tr. 327). He was unsure if she was alive as she did not respond at first; eventually, she made a movement and a humming noise. (Tr. 328). He observed a small heater was blowing hot air in her face; he believed it was so close "she couldn't really breathe" (and he demonstrated the distance for the jury with the microphone). (Tr. 327). He called 911 and then his family. While waiting, he noticed the oven was open and on. (Tr. 331).

{¶5} The victim was transported to the hospital by ambulance. She was so badly beaten her father could not recognize her when he arrived at the hospital. (Tr. 316). The emergency room surgeon said she arrived in critical condition. He explained she was not completely unconscious but neither was she awake and oriented. (Tr. 284). She scored 8 on the Glasgow Coma Scale, which ranges from 3-15 and measures neurological function after a trauma. (Tr. 286-287). The surgeon described her condition as including a major head injury, a major loss of consciousness and neurological activity, and multiple and/or severe concussions. (Tr. 287, 292, 297). Her level of neurological dysfunction caused airway control problems and required intubation and ventilation. (Tr. 287-289). The victim also exhibited evidence of strangulation which obstructed her airway. The pressure from trying to breathe while being strangled caused airways in her mediastinum to burst as evidenced by the abnormal presence of air in the chest cavity (pneumomediastinum). (Tr. 291).

{¶6} The victim had multiple blunt force trauma injuries presenting as: bruises on her head (including a deeper cephalohematoma on her forehead), neck, torso (front and back), both arms, both legs, and feet; two black eyes, which were practically swollen shut; and a blow-out orbital fracture to the left eye, which required the surgical implantation of a metal plate. (Tr. 289, 290, 343-344). She also suffered what appeared to be cigarette burns, abrasions, and whip marks. (Tr. 289). She had a condition involving muscular breakdown caused by lying in one place for too long and dehydration. (Tr. 292). The injuries appeared to have taken place over the course of a day or two as some bruises were more mature than others and some wounds appeared fresh. (Tr. 295-296).

{¶7} She was in the hospital for three weeks, with two of those weeks in intensive care. (Tr. 317). She was not conscious for most of the days she spent in intensive care. On April 11, 2016, a police officer briefly interviewed the victim in the hospital after she awoke. The victim was asked to watch the recording of this interview at a break during trial to refresh her recollection. At the time, she thought she had only been in the hospital two or three days. She testified she told the officer she knew the perpetrator was not Appellant, even though she could not remember anything about the incident. (Tr. 377, 379). After being released, the victim met with this officer on April 22, 2016 and did not mention Appellant's presence in the house. She had little memory of Easter day when she awoke in the hospital and gradually remembered pieces of that day. (Tr. 345-348). Months after the incident, the victim remembered Appellant was at the house as she arrived home. (Tr. 367, 369).

{¶8} After taking photographs at the house, the Youngstown Police Officer assigned to the crime scene unit went to the hospital to photograph the victim. While he was there, a nurse removed a cigarette butt and a piece of plastic from the victim's hair. The officer secured these objects and the victim's sweatpants. (Tr. 402). The victim's pants appeared to have blood and other bodily fluids on them. (Tr. 405). A forensic scientist with the state Bureau of Criminal Investigation (BCI) found a stain on the pants that tested positive on a presumptive blood test. (Tr. 429). Another BCI forensic scientist found DNA on the cigarette butt, the piece of plastic, and the pants. Appellant's DNA was procured by search warrant for comparison. The BCI scientist

concluded: the bloodstain on the victim's pants contained DNA consistent with Appellant's DNA (a statistic that was rarer than one in one trillion, which is the highest statistic they report) and did not contain the victim's DNA; the piece of plastic was a mixture, with the major contributor being consistent with the victim (a statistic rarer than one in one trillion) and the minor contributor being consistent with Appellant (a statistic of one in 500,000); and the cigarette butt was consistent with the victim's DNA (a statistic rarer than one in one trillion). (Tr. 440-443). No unidentified DNA was found on these objects. (Tr. 441).

{¶9} On August 25, 2016, Appellant was indicted for attempted murder and felonious assault (serious physical harm).[1] On January 31, 2017, the court granted Appellant's motion for leave to file a motion to suppress instanter. Appellant's suppression motion argued the affidavit in support of the search warrant for his DNA was lacking in probable cause because it was vague and there was no indication the victim's brother was reliable or credible (as there was no assertion that independent police work corroborated his statements). The motion also argued the good faith exception would not apply because it was not objectively reasonable for the officer to rely on the warrant. The state filed a memorandum in opposition. As the trial judge was also the judge who issued the search warrant, a visiting judge presided over the suppression motion.

{¶10} Oral arguments were presented on the contents of the affidavit at a hearing on February 6, 2017. The judge noted: the affidavit need only show a fair probability that evidence will be found on the person to be searched; the police and the issuing magistrate are entitled to make reasonable inferences; and the assertions made in the affidavit can be hearsay (even in cases where the declarant has some incentive to incriminate the subject of the warrant). The judge pointed out: the declarant was the brother of the victim; he was the first person on the scene; he was presumed to be familiar with the situation; and although Appellant was said to be living with the victim, he did not search for the victim and find her on the floor. The judge mentioned the case

[1] The indictment involving this victim was filed as a superseding indictment in a case involving another victim where Appellant was charged with two alternative felonious assault charges against a different woman for an incident on May 30, 2016. The court granted a motion to sever the cases.

law instructs the court to lean toward upholding the warrant in doubtful instances. The court concluded the totality of circumstances justified the issuance of the warrant. The court alternatively found the good faith exception would apply if the warrant was unconstitutionally issued. The court's February 7, 2017 judgment entry denied the suppression motion for the reasons recited into the record.

{¶11} The jury trial proceeded the day after the suppression hearing. The state presented the testimony of the emergency room surgeon, the victim, her father, her brother, the first responding officer, the officer assigned to the crime scene unit, and the two BCI forensic scientists. The defense presented the testimony of the officer who questioned the victim when she awoke in the hospital and after her release. This officer testified she noticed small straws and baggies on top of mirrors on a desk in the victim's house. (Tr. 455-456).

{¶12} In addition to the testimony already related above, the victim explained the memory issues caused by the incident. She has no memory of being interviewed by the officer after waking up in the hospital. (Tr. 365-366). She eventually regained a memory of arriving home to Appellant asking her why it took her so long to get her laundry and then standing up from a chair, but this is her last memory until sometime after she awoke in the hospital. The victim also remembered attending a birthday party at her female cousin's house a few weeks before Easter. The victim brought her child, Appellant, and his eight-year-old daughter. Appellant argued with her cousin, said he "don't care about putting his hands on women," was asked to leave, and "shoved [the cousin] in her chest." (Tr. 350-351). The victim put the children in the car and yelled at Appellant to get in the car, but he kept getting out of the car to confront the cousin's son in the street. Eventually, the cousin's son hit Appellant and threw him to the ground. (Tr. 352). Appellant got in the car and immediately called his daughter's mother; he told her the story and said "somebody has to get paid back." (Tr. 353). The victim testified she and Appellant were fighting because of the incident at her cousin's house, they broke up, and "a week or so later he came back but didn't move all his stuff back." (Tr. 361).

{¶13} The jury found Appellant guilty of attempted murder and felonious assault. The counts merged, and the state elected to proceed on the attempted murder count at

the May 25, 2017 sentencing. The court sentenced Appellant to eleven years for attempted murder.[2] Appellant filed a timely notice of appeal from the May 31, 2017 sentencing entry.

ASSIGNMENT OF ERROR ONE: AFFIDAVIT IN SUPPORT WARRANT

{¶14} Appellant sets forth three assignments of error, the first of which contends:

"The warrant allowing the State to obtain a DNA sample from Appellant was not based on probable cause, therefore, the trial court erred in denying Appellant's motion to suppress."

{¶15} Under the Fourth Amendment, a warrant must be based upon probable cause. For a search warrant to be issued, the evidence must be sufficient for the issuing judge to conclude there is a "fair probability" that evidence of a crime will be found in the place or on the person specified. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, 37 N.E.3d 123, ¶ 13. The court should evaluate the nexus between the alleged crime and the objects to be seized and/or the place to be searched. *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 34. The affiant can make reasonable inferences, and the facts behind any significant inferences should be disclosed to the issuing judge who can make their own inferences. *Id.* at ¶ 39-41. "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *State v. Henderson*, 51 Ohio St.3d 54, 57, 554 N.E.2d 104 (1990), quoting *United States v. Ventresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

{¶16} When reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant, the reviewing court is to determine whether the issuing judge had a "substantial basis" for concluding probable cause existed. *Gates*, 462 U.S. at 238-239; *Jones*, 143 Ohio St.3d 266 at ¶ 13. Courts are to examine the totality of the circumstances presented in the affidavit. *Jones*, 143 Ohio St.3d 266 at ¶ 13. A reviewing court affords great deference to the issuing judge's probable cause determination, and marginal cases are to be resolved in favor of upholding the warrant.

[2] The sentence was consecutive to a five-year term imposed (after Appellant's guilty plea) in the felonious assault case involving the other victim in the severed indictment.

Id. at ¶ 14, citing *State v. George,* 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph two of syllabus. These principles apply not only to the appellate court but also to the trial court evaluating the suppression motion as to the warrant which involves a review of the issuing judge's decision. *George,* 45 Ohio St.3d at 329-330. "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review." *Id.* at 329, quoting *Gates*, 462 U.S. at 236.

{¶17} Appellant alleges "unsubstantiated hearsay" recited in the affidavit did not provide the issuing judge a substantial basis for concluding probable cause existed to justify taking a DNA sample from Appellant. He complains the warrant was based on a single witness, who was said to be the victim's "brother" who found her on the floor. Appellant assumes the police did not know the witness was the victim's *half*-brother and believes this supports his argument that they did not independently corroborate facts relied upon for the warrant (such as the claim that Appellant lived with her or was violent in the past). He concludes this witness supplied the police "with vague assumptions that they did nothing to authenticate."

{¶18} It is well-settled that hearsay may form the basis for the finding of probable cause to issue a warrant. *See, e.g., Ventresca*, 380 U.S. at 107-108. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238, 245 (finding there was "a substantial basis for crediting the hearsay" from an anonymous letter); *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 33. *See also* Crim.R. 41(C)(2) ("The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.").

{¶19} In this case, there was no concern as to whether a crime was actually committed as the victim's beaten body provided this evidence. Male DNA was obtained from items on her body. As the state points out, there are no concerns associated with cases involving anonymous tips, and this case does not involve a known criminal or

confidential informant. The affiant was not required to voice to the magistrate whether the police corroborated certain statements from the witness, such as by verifying Appellant lived with the witness's sister. The totality of the circumstances was to be considered, as opposed to focusing on one issue such as corroboration. On the issue of veracity, this was an identified citizen who was involved in the rescue of his sister. It was reasonable to infer his basis of knowledge of the victim's life (including whom she lives with and her boyfriend's violence) was derived from his status as her brother. There was an indication the victim's family was unable to contact her for days and then she was found in the house it was believed she shared with Appellant. There was a nexus between the assault on the victim and Appellant. The issuing judge had "a substantial basis for crediting the hearsay." *Gates*, 462 U.S. at 245. There was a fair probability Appellant was connected to the assault and his DNA would be found on evidence collected from the victim's body. Even if the information could be characterized as doubtful or marginal, the deference accorded the magistrate's determination of probable cause also leads to the conclusion that the search warrant was valid. This assignment is overruled.

ASSIGNMENT OF ERROR TWO: OTHER ACTS

{¶20} Appellant's second assignment of error alleges:

"Appellant was denied the effective representation of counsel by trial counsel's failure to object to the admission of 'other acts' evidence relative to the alleged fight between Appellant and [the victim's] cousin, which was prejudicial and inadmissible effecting the outcome of the trial."

{¶21} We review a claim of ineffective assistance of counsel under a two-part test, which requires the defendant to demonstrate: (1) trial counsel's performance fell below an objective standard of reasonable representation; and (2) prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both prongs must be established; if the performance was not deficient, then there is no need to review for prejudice, and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶22} In evaluating the alleged deficiency in performance, our review is highly deferential to trial counsel's decisions; there is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *Bradley*, 42 Ohio St.3d at 142-143, citing *Strickland*, 466 U.S. at 689. We are to refrain from second-guessing the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Instances of debatable trial strategy very rarely constitute ineffective assistance of counsel. *See State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987). There are "countless ways to provide effective assistance in any given case." *Bradley*, 42 Ohio St.3d at 142, citing *Strickland*, 466 U.S. at 689.

{¶23} To show prejudice, a defendant must prove his lawyer's errors were so serious that there is a reasonable probability the result of the proceedings would have been different. *Carter*, 72 Ohio St.3d at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶24} This assignment of error is based upon the victim's testimony about the incident between Appellant and her cousin a few weeks before Easter, which we reviewed in our Statement of the Case supra. The state introduced this story in opening statements and proposed the theory that the victim ended up becoming the person who "had to pay" for the incident. (Tr. 266-267, 272). The defense made no objection during opening statements. When the victim testified about the incident at her cousin's house, no objection was lodged. In closing arguments, the state reiterated its theory about the prior incident being the motive behind the assault on the victim. (Tr. 478-479, 490, 493). No objections were made. Instead the defense responded in closing by arguing: the contention that Appellant waited weeks after a fight with another man (during which he was not injured) and took revenge by assaulting the victim was "beyond all grounds of believability." (Tr. 488).

{¶25} Appellant complains counsel should have objected to the evidence concerning the incident with the victim's cousin. He contends the testimony included so-called "other acts" evidence and was objectionable because: (1) it was not relevant under Evid.R. 401; (2) it was not a permissible use of other acts evidence under Evid.R. 404(B); and (3) the probative value was substantially outweighed by the danger of unfair prejudice under Evid.R. 403. *Citing State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20 (setting forth a three-step analysis). He notes the trial court did not have a chance to rule on these discretionary issues due to counsel's failure to present objections on these grounds.

{¶26} "Evidence which is not relevant is not admissible." Evid.R. 402. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." *Id.* The other acts statute 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.

R.C 2945.59. Pursuant to rule: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B). This list of exceptions is not exclusive. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 18.

{¶27} The rule does not bar evidence which is intrinsic to the crime being tried or helps prove an element of the offense such as intent. *See State v. Smith*, 49 Ohio St.3d

137, 139-140, 551 N.E.2d 190 (1990). Evidence of other acts is admissible if it is so connected with the offense that proof of one incidentally involves the other, it explains the circumstances of the offense, or it logically tends to prove an element of the offense. *State v. Roe*, 41 Ohio St.3d 18, 23, 535 N.E.2d 1351 (1990). A court can admit evidence of other acts which form the immediate background of and which are inextricably related to an act which forms the foundation of the charged offense. *State v. Lowe*, 69 Ohio St.3d 527, 531, 634 N.E.2d 616 (1994).

{¶28} Although motive is not an element of an offense, it is a permissible purpose for using other acts evidence. In *Nields*, the trial court allowed a police officer to testify about his response to a domestic violence dispatch several weeks before the murder during which the victim told the officer she was afraid of the defendant and wanted him to leave her home. *Nields*, 93 Ohio St.3d at 10, 22. The Supreme Court overruled the defendant's other acts argument as the evidence: "tended to show his motive to murder" the victim; showed the defendant's "strained relationship" with the victim; "illustrated the tumultuous relationship between defendant and [the victim]" in an incident that took place just weeks before the murder; and "tended to prove the absence of accident and was evidence suggesting intent." *Id.* at 22.

{¶29} During the incident at issue here, the victim joined in her family's demands for Appellant to leave the party, and he would not listen. The victim yelled at Appellant before her cousin's son hit him and threw him to the ground. As they drove away from the scene of the incident, Appellant immediately called someone, recounted the incident, and voiced, "somebody has to get paid back." (Tr. 353). Appellant wanted the victim to hurt her cousin. He spoke about finding her cousin. The victim testified she and Appellant "were fighting because of what happened at my cousin's house" and they broke up (until "he came back" without moving his belongings back). (Tr. 361).

{¶30} The state points out the evidence was not used to show Appellant's character in order to prove a conforming action. Rather, the evidence was used to show motive, which is a permissible use of other acts evidence, citing *State v. Gonzalez*, 7th Dist. No. 06 MA 58, 2008-Ohio-2749, ¶ 71. It also had the tendency to show Appellant was developing some type of revenge plan against the victim's family. The state notes Appellant's declarations were his own statements admissible under

Evid.R. 801(D)(2)(a). The other acts evidence laid the foundation for his statements and gave them meaning.

{¶31} Appellant contends the state's theory of motive would have been considered nonsensical had an objection been entered as the incident occurred weeks prior to the victim's assault, was mundane, and was not a physical fight between Appellant and the victim. Pursuant to R.C. 2945.59, the acts can be "contemporaneous with or prior or subsequent thereto." A matter of weeks does not evince a loss of temporal connection. Additionally, there was at least an argument between Appellant and the victim over the incident, enough of one that they broke up. Even if his plans of revenge may not have originally included the victim as the target, it was not irrational to theorize it evolved to include her due to their fighting over the incident, their break-up, and their subsequent unstable relationship (as he came back to the house but did not move all of his belongings). Another aspect of motive was her refusal to participate in his plan to take revenge upon her cousin. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Evidence of the incident had the tendency to make the existence of motive more probable than without the evidence and was therefore relevant.

{¶32} Pursuant to Evid.R. 403(A), "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Notably, "evidence against a defendant is meant to be prejudicial; it is only unfair prejudice that concerns the court and only unfair prejudice that can substantially outweigh the probative value." *State v. Smith*, 7th Dist. No. 15 BE 0064, 2017-Ohio-2708, ¶ 30, quoting *State v. Agee*, 7th Dist. No. 12 MA 100, 2013-Ohio-5382, ¶ 40. "Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant." *State v. Wright*, 48 Ohio St.3d 5, 8, 548 N.E.2d 923 (1990). This court concludes the probative value of the victim's testimony on the incident at her cousin's house was not *substantially* outweighed by *unfair* prejudice.

{¶33} If the evidence was admissible, then there is no indication the results were unreliable or the proceeding fundamentally unfair due to the lack of objection. *See*

generally Carter, 72 Ohio St.3d at 558, citing *Lockhart*, 506 U.S. at 369. As aforementioned, we strongly presume trial counsel's decision falls within the wide range of reasonable professional assistance, we refrain from second-guessing what could be seen as a strategic decision, and we ordinarily do not adjudicate debatable tactics. *See Bradley*, 42 Ohio St.3d at 142-143, citing *Strickland*, 466 U.S. at 689; *Carter*, 72 Ohio St.3d at 558; *Thompson*, 33 Ohio St.3d at 10. Besides the reasons expressed supra, counsel's lack of objection may have been strategic, e.g., to let the prosecution set forth what was viewed as a nonsensical theory of motive hoping the jury would agree with the defense's view that such a motive was absurd. In accordance, this assignment of error is overruled.

ASSIGNMENT OF ERROR THREE: ATTEMPTED MURDER

{¶34} Appellant's third assignment of error alleges:

"The evidence was insufficient to show that Appellant's actions, if successful, would have caused the death of Ms. Stuckey resulting in his conviction for attempted murder to be based on insufficient evidence."

{¶35} Appellant points out if a conviction is not supported by sufficient evidence, the defendant cannot be retried as jeopardy attached. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997) (unlike a case reversed on weight of the evidence, which can be retried), citing *Tibbs v. Florida*, 457 U.S. 31, 41, 47, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The state points out even in cases where there is an evidentiary error, all evidence offered by the State and admitted by the trial court, whether erroneously or not, can be considered to determine whether the evidence was sufficient to sustain the guilty verdict. *See State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 16-20, citing *Lockhart v. Nelson*, 488 U.S. 33, 35, 38, 40-42, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). In any event, we overruled the prior assignment of error on the admission of evidence.

{¶36} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541. An evaluation of witness credibility is not involved in a sufficiency review as the question is whether the evidence is sufficient if believed. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79, 82; *State v. Murphy*, 91 Ohio St.3d

516, 543, 747 N.E.2d 765 (2001). In other words, sufficiency involves the state's burden of production rather than its burden of persuasion. *See Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶37} A conviction cannot be reversed on grounds of sufficiency unless the reviewing court determines, after viewing the evidence in favor of the state, that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *State v. Goff*, 82 Ohio St.3d 123, 1998-Ohio-369, 694 N.E.2d 916 (1998). In viewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *See, e.g., State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999).

{¶38} The elements of murder are purposely causing the death of another. R.C. 2903.02. The attempt statute provides: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02. Attempted murder is established by proving the defendant "purposely engaged in conduct that, if successful, would have caused the death of another." *See In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 52. *See also State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 25 ("engage in conduct that, if successful, would result in purposely causing the death of another").

{¶39} Appellant asserts the evidence does not sufficiently establish the requisite intent. He claims the assault stopped before a death was caused without an intervening cause, i.e., no outside force made the assault stop. He suggests the evidence indicates the conduct was successful and did not cause death. He also emphasizes the state failed to elicit a medical opinion that the injuries would have caused death (if left untreated). He points out the injuries were not caused by a deadly weapon, quoting *State v. Eley*, 77 Ohio St.3d 174, 180, 672 N.E.2d 640 (1996) (noting intent to kill "may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound").

{¶40} Contrary to Appellant's suggestion, the state need not prove why the attempted murder was not a successful murder. A rescuer's discovery of the victim

alive without evidence the defendant was interrupted may be one circumstance for a jury to consider, but such a scenario does not defeat the state's attempted murder case. In other words, the lack of interruption is not an element of the offense.

{¶41} Moreover, the victim's father called repeatedly Monday evening, he banged on the door and window on Tuesday, and the victim's brother came to the house on Wednesday. We additionally note the surgeon also found evidence some injuries were inflicted many hours after other injuries and found evidence the victim was lying in the same position for an extended period of time. The victim's brother observed a space heater was located very close to the victim and was blowing directly into the victim's face giving him the impression that it was impeding her breathing. He feared she was dead when he first encountered her and tried to wake her.

{¶42} A person acts purposely when he or she specifically intends to cause a certain result. R.C. 2901.22(A). "[I]ntent to kill may be presumed where the natural and probable consequence of the wrongful act done is to produce death." *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 53. Because a defendant's intent dwells in his or her mind, the surrounding facts, circumstances, and resulting inferences are all used to demonstrate intent. *See, e.g., State v. Treesh*, 90 Ohio St.3d 460, 484-485, 739 N.E.2d 749 (2001). Circumstantial evidence inherently possesses the same probative value as direct evidence. *Id.* at 485, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus.

{¶43} Criminal attempt includes an act or omission constituting a "substantial step in a course of conduct planned to culminate" in the commission of the offense. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 175. A substantial step requires conduct that is "strongly corroborative" of the defendant's "criminal purpose." *Id.* A purpose to kill can be based upon the circumstances surrounding an attack, regardless of whether the attacker uses a weapon; relevant circumstances can include "the vulnerability of the victim and the force with which the victim was struck, a blow to the head may be probative of intent to kill." *State v. Clay*, 10th Dist. No. 99AP-404 (Mar. 28, 2000) (citing cases).

{¶44} The surgeon was asked whether the victim's injuries would have been fatal without treatment; however, there was an objection to the form of the question, and

an answer was not then elicited. As the state points out, the prosecution was not required to set forth specific medical testimony that the injuries suffered could have led to her death if not treated. *See State v. Locklear*, 10th Dist. No. 06AP-259, 2006-Ohio-5949, ¶ 17 ("Defendant does not direct this court to any case law requiring the state to establish a purpose to kill through medical or other expert testimony addressing the severity of the victim's injuries."). Attempted murder can be committed without the victim sustaining any injury from the attempted act of murder as the "intent of the accused, not the result, is the determinative factor." *Id.*, quoting *Clay*, 10th Dist. No. 99AP-404, citing *State v. Talley*, 11th Dist. No. 97-L-169 (Sept. 25, 1998).

{¶45} Additionally, the victim's multiple injuries, critical condition, lack of consciousness, and major traumatic neurological dysfunctions were described by the emergency room surgeon who treated the victim as she entered the hospital just after her brother rescued her. She was comatose for nearly two weeks. She lost her memory of the entire beating event. A major blow was inflicted to the victim's forehead. Both of her eyes were swollen shut. One of her eyes was hit so hard that she suffered a blow-out orbital fracture which required the implantation of a metal plate to keep the eye in position. She had serious injuries to other places on her head such that hair will still not grow in spots. She suffered concussions. She was shirtless and had bruises and abrasions all over her body. Photographs of the victim taken by the hospital and by the crime scene officer were admitted.

{¶46} Besides being beaten, subjected to cigarette burns, and whipped, she was strangled. This was evident to the surgeon from the bruising on her throat, and the victim testified she woke to find the left side of her throat crushed. The strangulation was not merely a quick bruising grab of the throat. The surgeon discovered air in an area of her chest that should not have contained air; this indicated her attempts to breathe during strangulation built up enough pressure to cause air to break through airways in her chest.

{¶47} A rational jury could conclude Appellant developed an intent to kill when he resorted to strangulation or at some point during the brutal beating which included heavy blows to the head. The totality of the circumstances provides circumstantial evidence of Appellant's intent. A rational juror could find beyond a reasonable doubt

that Appellant purposely engaged in conduct which if successful would have caused the victim's death. He took a substantial step in purposely strangling the victim to death, and the evidence was strongly corroborative of Appellant's criminal purpose to cause the victim's death. Upon viewing all of the evidence and reasonable inference in the light most favorable to the prosecution, the state presented sufficient evidence to demonstrate Appellant attempted to purposely cause the victim's death. This assignment of error is overruled.

{¶48} The trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.