[Cite as *State v. Jarrell*, 2021-Ohio-2333.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMES JARRELL,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0119

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 15 CR 943

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

JUDGMENT:
Reversed and Remanded.
Conviction Vacated.

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

Atty. Louis M. DeFabio, 4822 Market Street, Suite 220, Youngstown, Ohio 44512, for Defendant-Appellant.
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Dated: June 22, 2021

WAITE, J.

{¶1} Appellant James Jarrell appeals an October 17, 2018 Mahoning County Court of Common Pleas judgment entry convicting him of various offenses associated with the murder of his stepmother, T.J., following his jury trial. Appellant argues that the trial court erroneously excluded evidence, including sexual child abuse of Appellant perpetrated by T.J., sexual abuse perpetrated by a childhood acquaintance, and that Appellant suffered a head injury as a child. He also argues that several statements made by the state during closing arguments constitute prosecutorial misconduct. Finally, he contends the court improperly imposed consecutive sentences. Appellant's argument regarding the admissibility of evidence related to the sexual abuse of Appellant by T.J. has merit pursuant to *State v. Nemeth,* 82 Ohio St.3d 202, 694 N.E.2d 1332 (1998). However, Appellant's arguments as to the other two items of evidence he seeks to admit are meritless. The remainder of Appellant's arguments are moot. Accordingly, the judgment of the trial court is reversed. Appellant's convictions are hereby vacated and the matter is remanded for a new trial.

Factual and Procedural History

{¶2} Appellant admits he killed his stepmother, T.J., after the two argued about their relationship. According to Appellant, he met T.J. for the first time when he was eight years old. At that time, she was married to her now ex-husband. (Trial Tr., p. 680.)

According to Appellant, he and T.J. engaged in sexual touching on the day they met. Appellant alleges this conduct continued, but it is unclear how frequently.

{¶3} Several years later, when Appellant was fifteen or sixteen years old, his father began dating T.J. and they married shortly thereafter. When T.J. moved into the Jarrell house, the touching immediately escalated to sexual intercourse between T.J. and Appellant. They also regularly used drugs together. According to Appellant, when T.J. ran out of drugs, she would ask him to have sex with their male drug dealer. (Trial Tr., p. 684.)

{¶4} While Appellant's father admitted that T.J. drank alcohol in excess and used cocaine, he denied that she had a sexual relationship with Appellant. However, he acknowledged that T.J. did not have a good relationship with any of his children except for Appellant. Although he knew T.J. used drugs, Appellant's father would not allow Appellant into the marital residence when he was not home because of Appellant's drug use.

{¶5} According to Appellant, on the day of the killing T.J. had invited him to the house. (Trial Tr., p. 686.) He asked a friend, Z.J., to give him a ride. Z.J. is apparently a drug dealer. When they approached the house, Appellant cautioned Z.J. not to pull into the driveway and Appellant reclined his seat. He testified that T.J. had instructed him to avoid being seen coming to the house because the neighbors would tell his father. (Trial Tr., p., 688.) Z.J. testified that although he did not specifically know there was a sexual relationship between Appellant and T.J., he once observed them hug in a manner that would not be expected between a stepmother and stepson.

{¶6} When Appellant entered the house, T.J. hugged him and then washed his clothes while he took a shower. According to Appellant, it was raining outside and his clothes were wet. When he exited the shower, T.J. provided him with some of his father's clothes. After Appellant settled in, T.J. initiated a conversation regarding the future of their relationship. She informed him that she intended to divorce his father. She asked Appellant to move to Florida with her to continue their relationship. When Appellant responded that moving to Florida would not be in his best interests because his life was in a state of disarray, she took his hand and placed it on her crotch and said, "you don't love me." (Trial Tr., p. 692.) He responded that he did love her.

{¶7} She then became physically and verbally abusive, stating "[y]ou don't know how to be a man" and calling him a "faggot." (Trial Tr., p. 692.) As she screamed, she threw nearby objects at him, including a can of beer or a beer bottle. When she picked up a glass snow globe and charged at him, Appellant reached for a box cutter that was nearby and began to swing it at her. He testified that he remembered cutting her, but did not know how many times.

{¶8} When he realized she was dead, he did not think anyone would believe him about the circumstances leading to her death. He washed the blood off of his hands and changed into another set of his father's clothes. He took two credit cards and some jewelry before leaving the house in T.J.'s car. Appellant used the credit cards to purchase gas and a few items at WalMart. He also purchased heroin, testifying that he planned to overdose and commit suicide. (Trial Tr., p. 694.) At some point, he met up with Z.J. and they used drugs together.

{¶9} Appellant drove T.J.'s car to Pittsburgh to seek help from a friend. While he was in Pittsburgh, detectives from Youngstown contacted the Pittsburgh Police Department and put a BOLO ("be on the lookout" order) on the car. Two plain clothed detectives in an unmarked vehicle saw Appellant sitting in the car while parked at a gas station. Appellant was arrested and transported to Youngstown.

{¶10} On September 17, 2015, Appellant was indicted on the following charges: one count of aggravated murder, an unclassified felony in violation of R.C. 2903.01(B),(F); one count of murder, an unclassified felony in violation of R.C. 2903.02(A),(D); one count of aggravated robbery, a felony of the first degree in violation of R.C. 2911.01(A)(1), (C); one count of tampering with evidence, a felony of the third degree in violation of R.C. 2921.12(A)(1), (B); and one count of receiving stolen property, a felony of the fifth degree in violation of R.C. 2913.51(A), (C).

{¶11} Prior to trial, Appellant obtained a psychological report from Dr. Sandra McPherson. Dr. McPherson evaluated Appellant and diagnosed him with post-traumatic stress disorder ("PTSD") as a result of his childhood sexual abuse involving not only T.J. but also due to a separate incident involving a childhood acquaintance who had earlier molested Appellant. The report also noted that Appellant had suffered a significant head injury when he was a child. The state filed a motion in limine to exclude the report and any accompanying testimony from Dr. McPherson. The state also sought to prevent Appellant's mother and sister from testifying about the abuse. The trial court granted the state's motion, finding that the report was intended to support a defense of diminished capacity, which is not recognized in Ohio.

{¶12} Appellant testified at trial. He attempted to raise the issue of sexual abuse, but was limited as to this testimony after the trial court sustained an objection from the state. Based on Appellant's testimony, the trial court did allow an instruction to the jury on voluntary manslaughter. Appellant was found guilty of murder, tampering with evidence, and receiving stolen property. The jury acquitted him of aggravated murder and aggravated robbery.

{¶13} The trial court sentenced Appellant to a period of incarceration of fifteen years to life for murder, thirty-six months for tampering with evidence, and twelve months for receiving stolen property. The court ordered the sentences to run consecutively, for an aggregate prison term of nineteen years to life with credit for 1,127 days served. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

> The trial court erred by prohibiting testimony and evidence relating to Battered Child Syndrome and/or PTSD as said evidence was admissible pursuant to the Ohio Supreme Court's decision in State v. Nemeth.

{¶14} Appellant contends that the trial court abused its discretion by excluding Dr. McPherson's report and her potential testimony, which was relevant to his argument regarding voluntary manslaughter. As the evidence was intended to demonstrate a history of child abuse that triggered Appellant's sudden passion and fit of rage, he argues this evidence is admissible pursuant to *Nemeth.* The evidence was also necessary to respond to the state's repeated commentary on his lack of corroboration regarding his allegations of sexual abuse.

{¶15} The state responds that Dr. McPherson did not diagnose Appellant with battered child syndrome, thus her report and the potential testimony of Appellant's mother and sister are irrelevant. The state also argues that Appellant did not testify that he acted under a sudden passion or a fit of rage. Even so, the state points out that words are generally insufficient to support a voluntary manslaughter claim.

{¶16} There are four separate evidentiary issues within this assignment of error, including the admissibility of: (1) evidence pertaining to sexual abuse involving T.J., (2) evidence pertaining to sexual abuse involving a childhood acquaintance, (3) evidence of a head injury Appellant suffered as a child, and (4) testimony from Appellant's mother and sister pertaining to the abuse inflicted by T.J. While each argument is related, a distinct analysis of each is required.

{¶17} Appellant was diagnosed with PTSD. According to Dr. McPherson's report, her diagnosis was based on an interview with Appellant, psychological testing, ancillary information, and an interview with Appellant's sister. Appellant's sister spoke to Dr. McPherson about an incident where she observed Appellant and T.J. engaging in inappropriate behavior. The report detailed the alleged sexual abuse of Appellant by T.J. and was consistent with Appellant's testimony; however, the report provided a more in-depth look at the abuse. The report also addressed abuse Appellant suffered from a childhood acquaintance and a head injury he suffered as a child. These latter two incidents are limited to a few lines in the report.

{¶18} According to the report, Appellant's coping mechanism involves a high level of emotional reactivity due to the extent of his trauma. The report also noted that Appellant has an issue with male sexuality due to T.J. subjecting him to male partners at

a young age. Dr. McPherson found that Appellant's description of the abuse was consistent with her test results. Based on the testing, Dr. McPherson diagnosed Appellant with major depressive disorder, PTSD as a result of multiple sexual abuse experiences, and substance abuse and dependance. Dr. McPherson opined that the abuse perpetrated by T.J. is considered extreme based on Appellant's repeated victimization.

Child Abuse - T.J.

{¶19} The leading case regarding child abuse that results in the killing of the abuser is *Nemeth.* In *Nemeth,* the defendant's mother violently physically abused him for several years. *Id.* at 202. On the date of the incident, the defendant's mother was abusive and, believing his life was in danger, he killed her. The defense sought to introduce a report diagnosing him with PTSD/battered child syndrome for purpose of establishing a self-defense claim and as a justification for a lesser included offense to murder. *Id.* at 204.

{¶20} At oral argument in the instant case, the state suggested that *Nemeth* is limited to cases involving violent abuse and does not apply to cases involving sexual abuse. Contrary to the state's claim, there is no support for the argument that *Nemeth* is limited to violent abuse, alone. *Nemeth* clearly articulates a general rule that expert testimony is admissible if it is relevant. While it is true that *Nemeth* involved violent abuse, nothing within the opinion limits its application to that type of abuse.

{¶21} In fact, the oral arguments in *Nemeth* relied on a case involving sexual abuse and this is discussed in *Nemeth. Nemeth,* 82 Ohio St.3d at 207, 694 N.E.2d 1332 (1998), citing *State v. Stowers*, 81 Ohio St.3d 260, 690 N.E.2d 881 (1998); *Nemeth* at fn.

1, citing *Stowers, supra.* While *Stowers* did not involve the death of the abuser, it did involve the admissibility of expert testimony on the issue of whether a violently abused child fits the general characteristics observed in sexually abused children. *Id.* at 262.

{¶22} The *Nemeth* Court applied *Stowers'* guiding principles and determined that "[g]eneral information on battered child syndrome would also tend to show that [the defendant's] behavior was consistent with that of an abused child and would lend support to his testimony that he had been abused both generally and just prior to the killing." *Nemeth* at 207, citing *Stowers,* at 262.

{¶23} If the *Nemeth* Court found it appropriate to rely on *Stowers,* then it stands to reason that *Nemeth* is applicable to sexual abuse cases where expert testimony is offered by the defense. Notably, *Nemeth* has been applied to several other cases involving sexual abuse. See *State v. Butts,* 8th Dist. Cuyahoga No. 108381, 2020-Ohio-1498; *State v. Slaven*, 5th Dist. Delaware No. 12 CAA 08 0062, 2013-Ohio-3552; *State v. Jennings,* 10th Dist. Franklin 2001 WL 1045490 (Sept. 13, 2001). Although none of these cases involved the death of the abuser, their reliance on *Nemeth* furthers the proposition that this case is not limited to physically violent child abuse claims, but stands for the proposition that if expert testimony is relevant and satisfies Evid.R. 702, it is admissible.

{¶24} Significantly, the *Nemeth* Court specifically stated that:

> The defense in this case did not ask that battered child syndrome be recognized as a new defense or an independent justification for the killing of an abusive parent. The proffer made at trial was limited to expert testimony that would explain the psychological effects of long-term child

> abuse, and was proffered in support of a self-defense theory as well as a charge on voluntary manslaughter. As such, the issue before us is an evidentiary matter and is governed by the Ohio Rules of Evidence. Because there was no basis for excluding the testimony under the Rules of Evidence, and because we find that the trial court's exclusion of this testimony to be prejudicial to the defendant, we need not reach the constitutional issues addressed by the court of appeals.

Id. at 206-207.

{¶25} We note that the state relies on *State v. Hamad*, 11th Dist. Trumbull No. 2017-T-0108, 2019-Ohio-2664, appeal not allowed, 157 Ohio St.3d 1466, 2019-Ohio-4419, 133 N.E.3d 537. However, *Hamad* is readily distinguishable from the instant case. In *Hamad,* the record demonstrated that "there [was] no history of physical abuse between the victims." *Id.* at ¶ 98. The record also showed that "[u]ntil the assault and shooting took place on February 25, only verbal threats and harassing behavior had been exchanged" between the defendant and victim. *Id.* In the instant case, there was an attempt to present evidence of a lengthy history of sexual abuse that appears to span more than two decades. *Hamad* did not involve either violent physical or sexual abuse. Instead, it involved "an exchange of offensive communications" that led to a physical confrontation. *Id.* at ¶ 2.

{¶26} The state also argues that *Nemeth* does not apply because Dr. McPherson diagnosed Appellant with PTSD, not battered child syndrome. This argument ignores the plain language of *Nemeth*, which explained that battered child syndrome has many labels, including PTSD. The *Nemeth* Court noted that the psychological effects and behavioral

symptoms have long been recognized by the medical and legal professions regardless of which term is used. *Id.* at 206.

{¶27} In the trial court's decision to grant the state's motion in this case, the court referenced *Nemeth* but relied on *State v. Fulmer,* 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052; *State v. Wilcox*, 70 Ohio St.2d 182, 436 N.E.2d 523 (1982); and *State v. Jackson,* 32 Ohio St.2d 203, 291 N.E.2d 432 (1972). In *Fulmer,* the defendant produced expert testimony that he acted under the influence of an aspirin overdose at the time of the incident. The defense attempted to use the evidence to show that he was "metabolically deranged." *Id.* at ¶ 64. The Court determined that the evidence was relevant to whether the defendant was capable of forming the requisite intent to commit the crime at issue. *Id.* As such, the Court determined the defense was the functional equivalent of a diminished capacity defense, which is not recognized within Ohio. *Id.* at ¶ 69.

{¶28} In *Wilcox,* the defendant attempted to introduce evidence to show that he was "borderline retarded, schizophrenic, dyslexic, and to be suffering from organic brain syndrome." *Wilcox*, 70 Ohio St.2d at 182, 436 N.E.2d 523 (1982). The Court held that "a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime." *Id*. at 199.

{¶29} In *Jackson,* the defendant similarly attempted to introduce evidence that he was suffering from a mental disease or defect which so impaired his reason at the time of the criminal act that he did not act knowingly. *Id.* at 205-206. In a limited analysis, the Court explained that in order to attack intent based on capacity, a defendant must show

that he was either too intoxicated to form intent (a state of unconsciousness) or have such "defect of reason as not to know the nature and quality of the illegal act or that it is wrong (insane)." *Id*. at 206.

{¶30} We note that *Fulmer* was decided after *Nemeth* but does not cite to *Nemeth.* This is because the two cases address wholly separate issues. *Fulmer,* along with *Jackson* and *Wilcox*, address evidence of an impaired mental state which is intended to show that the defendant did not act knowingly, whereas *Nemeth* addresses evidence of an abusive relationship between the victim and defendant in order to support either a self-defense instruction or voluntary manslaughter charge. As the evidence in this case was sought in an attempt to show that the history of abuse caused Appellant to become enraged and act with sudden passion, and not to argue that he was so impaired he lacked the ability to understand the nature of his actions, *Nemeth* and not *Fulmer, Jackson,* and *Wilcox*, applies.

{¶31} In accordance with *Nemeth,* such evidence is admissible so long as it is relevant and meets the criteria of Evid.R. 702. *Id.* at 207. Pursuant to Evid.R. 401: " 'Relevant evidence' means evidence having 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."

{¶32} The state contends that the evidence is irrelevant, relying on *State v. Sallie*, 81 Ohio St.3d 673, 693 N.E.2d 267 (1998). However, *Sallie* is also readily distinguishable from the instant matter. The issue before the *Sallie* Court was whether trial counsel provided ineffective assistance of counsel by failing to argue that the defendant suffered from battered woman's syndrome. At trial, however, the defendant did not claim self-

defense. Rather, she claimed the shooting was an accident. As the defendant claimed the shooting was accidental, and not a conscious act of self-defense, the Court concluded that any evidence regarding battered woman's syndrome was irrelevant. *Id.* at 676.

{¶33} The *Nemeth* Court held that evidence of child abuse is relevant to the determination of whether the accused "had acted with prior calculation and design as charged in the indictment, (2) had acted with purpose as required for the lesser included offense of murder, (3) had created the confrontation or initiated the confrontation or initiated the aggression, and (4) had an honest belief that he was in imminent danger." *Id.* at 207.

{¶34} Relevant to the instant matter, the *Nemeth* Court also explained that

> Expert testimony on battered child syndrome would, in this case, tend to enhance the probability that [the defendant's] account of the facts leading up to the killing was truthful and would lend credibility to his assertion that he was in a state of rage and dissociation at the time of the killing. A diagnosis of battered child syndrome and an explanation of its effects would therefore be relevant in determining whether the case warranted a jury charge on voluntary manslaughter.

Id. at 207-208.

{¶35} At the outset, it is important to consider the *Nemeth* court's explanation that "[t]he triggering event for posttraumatic stress disorder can be any traumatic event that involved 'actual or threatened death or serious injury, or a threat to the physical integrity of self or others' and where the person's response involved 'intense fear, helplessness,

or horror." *Id.* at 212. The Court explained that these responses are triggered by an "interpersonal stressor" that can manifest itself in "fear and anxiety, abnormal expressions of aggression or impaired impulse control, reenacting or physiologically reexperiencing the abuse, avoidance (often in the form of hypervigilance), helplessness, somatic complaints, and various forms of dissociation." *Id.* at 213.

{¶36} As in *Nemeth,* Appellant argues that Dr. McPherson's report and testimony was relevant to lend credence to his account of the facts leading up to the killing and to provide credibility for his assertion that he was in a state of rage at the time of the incident, both of which are aspects of his voluntary manslaughter argument. He also contends that the evidence is admissible to rebut the state's repeated comments that he could not corroborate his abuse claims, and to dispel any misconceptions the jurors may have had as to why he did not previously inform anyone of the abuse.

{¶37} We begin our review of Appellant's voluntary manslaughter argument by noting that the trial court did instruct the jury on voluntary manslaughter. Thus, the trial court implicitly found that Appellant's testimony, limited as it was, provided a sufficient basis to warrant a voluntary manslaughter instruction. However, contrary to the state's contentions, we cannot limit our analysis of Appellant's voluntary manslaughter argument to his testimony, alone. This is because the question before us is whether Dr. McPherson's report and testimony would have made a voluntary manslaughter conviction more or less probable. Thus, in determining whether that evidence is relevant, we must also consider the extent of what Dr. McPherson's report and potential testimony would have added to Appellant's testimony.

{¶38} In beginning our review of Appellant's testimony, we first address the state's assertion that a defendant must specifically state legal "buzzwords" such as "sudden passion" and "fit of rage" within their testimony. This assertion is incorrect. Unlike attorneys, lay members of society tend to lack the legal knowledge and sophistication to articulate these terms. Even without using those specific terms, a defendant can sufficiently demonstrate the concepts by describing emotions, actions, or reactions that emulate this standard.

{¶39} Here, Appellant did not explicitly use the phrases "sudden passion" or "fit of rage" during his testimony. Thus, we review his testimony to determine whether the substance of that testimony established facts that would show "sudden passion" and "a fit of rage."

{¶40} According to Appellant, T.J. became physical with him, throwing things at him and charging at him with a glass snow globe in her hand. Prior to that, she made sexual advances towards him while becoming verbally abusive. The state discounts the language used by T.J. by arguing that words alone are insufficient to establish sudden passion. While the state is generally correct, this is the point where the expert report and testimony of Dr. McPherson become essential to Appellant's claims. It is Dr. McPherson's report that links the decades of sexual abuse and sexual confusion to the import these words and actions had on Appellant's behavior.

{¶41} For instance, Dr. McPherson's report states that T.J. used the sexual abuse to "toy" with Appellant. Applied to the events leading up to the killing, T.J placed Appellant's hand on her crotch, pushed her chest against him and questioned his love for her. Her actions in making sexual advances while questioning his love for her could be

construed as "toying" with his emotions. Thus, what is important here are not just the words themselves but also the history of the abuse combined with the sexual advancements and the effect that combination had on Appellant's emotional state.

{¶42} During the altercation, T.J. questioned Appellant's sexuality by calling him a "faggot" and telling him he did not know how to be a man. Again, in order to understand the significance of this, Appellant cites to the report where Dr. McPherson opines that T.J. caused sexual confusion in Appellant by subjecting him to male sexual partners at a young age. In other words, Dr. McPherson links the decade of T.J.'s abuse to Appellant's reaction to T.J.'s words, sexual advances, and physical outburst and explains how this combination could have triggered Appellant, causing him to react in the way that he did, resulting in T.J.'s death.

{¶43} During cross examination, the state responded to Appellant's description of T.J.'s verbal abuse by asking, "[h]ave you heard of sticks and stones?" (Trial Tr., p. 704.) Appellant responded, "[m]a'am, she is hitting me. With all of her past history, my emotional state at the time --." (Trial Tr., p. 704.) Before Appellant could finish his sentence, the trial court sustained an objection by the state. It is unclear why the trial court sustained the objection. However, from this limited excerpt it is clear Appellant tried to explain his emotions and why T.J.'s words and actions caused him to react in the manner he did, but he was not permitted to provide that testimony.

{¶44} As discussed at length in *Nemeth,* testimony of an abusive relationship between the victim and defendant is relevant to demonstrate the "triggering event" of PTSD. The event need not rise to the level of threat of death or serious injury but can be "a threat to the physical integrity of self or others." *Id.* at 212. The Court explained that

this triggering event is relevant to behavior such as "abnormal expressions of aggression or impaired impulse control" and various forms of dissociation. *Id.* at 213. We note that in Dr. McPherson's report she determined that Appellant's coping mechanism involved a high level of emotional reactivity.

{¶45} The state also repeatedly confronted Appellant with the lack of corroboration of Appellant's testimony that he was abused by T.J. For instance, the state commented: "[s]o what is [Appellant] going to do? He is going to attack the only person that can contradict his story, the woman he killed. He is going to blame her for his behavior. He is going to tell you through no corroboration that they were having an affair * * *." (Trial Tr., pp. 778-779.) The prosecution said it was "convenient" that Appellant never filed a police report regarding his abuse nor had any witnesses to corroborate the abuse. (Trial Tr., p., 713.) Again, we note that Appellant's corroborating witnesses in this regard were not permitted to testify. The state also questioned why none of the witnesses knew of the abuse, despite the fact that the state was aware of the conclusions in Dr. McPherson's report and that Appellant was prevented from having other witnesses testify.

{¶46} The *Nemeth* Court emphasized that evidence of battered child syndrome is particularly relevant to dispel a juror's misconception that if abuse had occurred, the victim would have told someone or filed a police report. The Court explained that "[i]t is the lack of corroborating evidence that makes expert testimony even more crucial in these cases. The defense needs expert testimony to refute the seemingly logical conclusion that serious abuse could not be taking place if no one outside the home was aware of it." *Id.* at 209.

{¶47} In addressing this issue, the case relies on *State v. Gray*, 2nd Dist. Montgomery No. 26473, 2016-Ohio-5869. *Gray* involved a murder committed by a person who had allegedly suffered sexual abuse earlier in his life. Importantly, the appellant's victim was not his abuser. The appellant attempted to claim that he killed the victim because he had been abused by someone else, that this abuse caused him to have a violent reaction sufficient to excuse his killing of the victim. The expert report and testimony that was offered concluded that "that the defendant's abnormal mental condition shows that the defendant did not have the specific mental state required for the crime, though he was aware that his action was wrong and was able to control it." *Id.*, at ¶ 27. The Second District held that the evidence appellant offered:

> [Did] not fit the rationale given for the exceptions in battered-syndrome cases. Whatever problems [the defendant] has, they are not the result of abuse by [the victim]. Also, [the defendant] does not mention any common misconceptions that [the doctor's] testimony would dispel. He argues only that her testimony would help the jury understand why the events of his childhood might explain his extreme response to the alleged threat posed by [the victim].

Id. at ¶ 32. In other words, the evidence did not show that the defendant suffered "from battered-woman syndrome or battered-child syndrome as a result of abuse at the hands of the 'victim.' " *Id.* at ¶ 31. Instead, he attempted to rely on prior abuse by someone other than the victim to explain why he killed the victim. *Gray* does appear to be an example of a "diminished capacity" case, and as earlier discussed, this theory does not

exist in Ohio as a defense. Thus, *Gray* is clearly distinguishable from the instant matter even though both cases involve sexual abuse.

{¶48} In summation, the admissibility of evidence concerning any kind of abuse is governed by *Nemeth.* Admission of the evidence in the instant matter was solely sought to explain the psychological effects of the long-term sexual abuse in order to justify and support voluntary manslaughter. The evidence was also relevant to rebut the state's repeated insistence that Appellant could not corroborate his abuse and the inference that he was lying about the abuse.

{¶49} As the evidence is relevant, the issue becomes whether it is admissible under Evid.R. 702. Pursuant to Evid.R. 702, a witness may testify as an expert if all of the following apply:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.* * *

{¶50} As addressed by the *Nemeth* Court, evidence of battered child syndrome is necessary to assist the jury where there is a lack of corroborating evidence "as a trier of

fact is likely to believe that the abuse allegations are fabricated in response to the charges levied against the child-defendant." *Id.* at 209. Additionally, the Court explained that the evidence assists in helping the jury to understand the effects of the abuse as "[p]rolonged exposure to abuse results in feelings of powerlessness, embarrassment, fear of reprisal, isolation, and low self-esteem." *Id.* at 208. The same rationale applies to those charged as an adult. *Id.* at 209, citing *Koss, supra.* Dr. McPherson's report and testimony fall squarely into this category.

{¶51} As to the second prong of Evid.R. 702, the record does not reflect that the state objected to or otherwise questioned Dr. McPherson's qualifications. Hence, we may infer that the witness satisfied the second prong of the test.

{¶52} As to the third prong, the *Nemeth* Court held that "the behavioral and psychological effects of prolonged child abuse on the child have been generally accepted in the medical and psychiatric communities and therefore unquestionably meet the requisite level of reliability for admission as the subject of expert testimony." *Id.* at 212. Thus, the evidence is based on scientific information.

{¶53} As to prejudice, the *Nemeth* Court set forth two reasons for their holding: "[b]ecause there was no basis for excluding the testimony under the Rules of Evidence, and because we find that the trial court's exclusion of this testimony to be prejudicial to the defendant * * *." *Id.* at 207. It appears axiomatic that a defendant will be prejudiced by the exclusion of otherwise relevant, partially exculpable evidence. To the extent that prejudice must be shown, this jury did not find Appellant guilty of the most serious offenses with which he was charged, aggravated murder and aggravated robbery. Based on the jury's failure to find Appellant guilty of these two offenses, it can be inferred that

jury believed Appellant's testimony at least in part. Based on the jury's reluctance to convict Appellant on the most serious offenses, the improperly excluded evidence could very well have resulted in a conviction on voluntary manslaughter instead of murder. Thus, this record reveals that Appellant was prejudiced by the exclusion of the evidence.

{¶54} Appellant's argument that he was entitled to expert testimony regarding the sexual abuse perpetrated by T.J. has merit. As such, Dr. McPherson's report and her testimony are admissible as they relate to this particular evidence, but our determination as to this evidence is limited to only the evidence applicable to T.J.'s abuse of Appellant, as we discuss below.

Sexual Abuse – Acquaintance

{¶55} Appellant also sought to admit evidence pertaining to sexual abuse inflicted on him by the uncle of a childhood friend. As earlier discussed, evidence of child abuse is relevant only where the defendant's conduct is directed towards the abuser. *Gray* at ¶ 31. This principal is consistent with *Nemeth.* Hence, any evidence that Appellant had been abused by some other person would not be relevant to Appellant's sudden passion or a fit of rage towards T.J. As such, any evidence within Dr. McPherson's report that addressed the abuse perpetrated by anyone other than T.J. is inadmissible.

{¶56} We note here that there are a limited number of references to a third-party abuser in Dr. McPherson's report. As this evidence is not admissible, these limited references must be redacted from the report and cannot be referenced within Dr. McPherson or any other witness' testimony.

Testimony of Appellant's Mother and Sister

{¶57} Appellant also contends that the trial court erroneously excluded the testimony of his mother and his sister. According to Appellant, his mother and sister would have provided testimony in support of his claims of abuse perpetrated by T.J., the abuse he suffered from his childhood acquaintance, and the head injury he suffered as a child.

{¶58} In response, the state argues that because Dr. McPherson's report was excluded, any similar testimony offered by Appellant's mother and sister would have been irrelevant.

> 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.

Evid.R. 402.

{¶59} 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 which is not relevant is not admissible." Evid.R. 402.

{¶60} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Griffin*, 7th Dist. Mahoning No. 16 MA 0029, 2017-Ohio-7796, ¶ 27, citing *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). "Error may not be predicated upon a ruling which admits or excludes evidence unless a

substantial right of the party is affected" and the issue is properly preserved. Evid.R. 103(A).

{¶61} At trial, defense counsel informed the court that the witnesses would provide testimony regarding the abuse Appellant suffered from the victim and from a childhood acquaintance, and would discuss his prior head injury. It is unclear why the court deemed their testimony inadmissible; however, it appears that the court's decision may have been based on the exclusion of Dr. McPherson's report.

{¶62} As previously discussed, any testimony regarding the abuse perpetrated by T.J. is relevant and admissible. Dr. McPherson's report indicates that Appellant's sister "caught" Appellant and T.J. engaging in inappropriate behavior. Thus, it appears she may have had personal knowledge pertaining to those accusations. The record does not indicate if Appellant's mother had personal knowledge of the abuse; however, there is no reason to prohibit her testimony to the extent she has such knowledge. As such, Appellant's argument as to the testimony of his mother and sister has merit as it pertains to Appellant's sexual abuse perpetrated by T.J.

Head Injury

{¶63} Appellant sought to introduce evidence that he suffered some sort of head injury as a child. Again, in *Fulmer* the Ohio Supreme Court reiterated that the partial defense of diminished capacity is not recognized in Ohio. *Id.* at ¶ 66. The Court explained that the appellant's attempt to introduce evidence of a metabolic derangement (the aspirin overdose) was the "functional equivalent" of a diminished capacity argument because it sought to show that he lacked the mental capacity to form the specific mental state required. *Fulmer* at ¶ 69. Further, the Court explained that "[i]f the evidence generates

only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted." *Id*. at ¶ 72, citing *State v. Robinson*, 47 Ohio St.2d 103, 111-112, 351 N.E.2d 88 (1976).

{¶64} Similarly, the Courts in *Jackson* and *Wilcox* held that evidence designed to show an inability to form the requisite mental capacity is inadmissible as evidence of diminished capacity. See *Jackson and Wilcox* (evidence of mental disease or defect or evidence that the defendant suffered from borderline mental retardation, was schizophrenic, dyslexic, and suffering from organic brain syndrome inadmissible.)

{¶65} Appellant has not explained how he seeks to use evidence pertaining to his injury. It would appear he seeks to introduce it as evidence that the injury affected his mental capacity. As such, Appellant's argument pertaining to the head injury is similarly without merit. Dr. McPherson's report contains only a limited reference to the injury which must be redacted.

{¶66} In summation, Appellant's arguments as to evidence pertaining to his sexual abuse perpetrated by T.J. have merit and are sustained. The remaining arguments within Appellant's first assignment of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 2

The Prosecutor engaged in prosecutorial misconduct during closing arguments, thus depriving Appellant of his right to a fair trial.

{¶67} Appellant contends that the prosecutor made a series of comments during closing arguments that constituted prosecutorial misconduct. Appellant groups these into separate categories: denigration of defense counsel, appeals to the emotions of the jury,

and other remarks. Appellant acknowledged that he did not object to all of the comments at issue.

{¶68} Due to resolution of Appellant's first assignment of error, Appellant's conviction is vacated and this matter is reversed and remanded for a new trial. Thus, this assignment of error is moot. We must note, however, that the state repeatedly made comments regarding Appellant and his counsel that were disturbing, disrespectful and improper. Even after being chided by the court, the state continued to make such comments until the court was forced to call a sidebar conference. At its conclusion, the state made yet one more such comment. While we are disturbed by the record in this regard, we are certain that on remand, the issue will not be capable of repetition. Therefore, this assignment of error is moot.

ASSIGNMENT OF ERROR NO. 3

The trial court erred in imposing maximum, consecutive sentences.

{¶69} While Appellant concedes that the trial court made the requisite statutory findings, Appellant argues that the imposition of consecutive sentences is improper where the reason for the consecutive nature of his sentence is the mere fact that a murder occurred. Appellant argues that his two convictions for nonviolent offenses, tampering and receiving stolen property, were ordered to run consecutively solely because a murder was committed.

{¶70} In response, the state argues that the killing was particularly gruesome and that hiding the murder weapon impaired law enforcement's ability to resolve the case.

The state also contends the fact that Appellant stole credit cards and the vehicle after the murder supports consecutive sentences.

{¶71} Because we have found partial merit with Appellant's first assignment and have remanded the matter for a new trial, Appellant's third assignment of error is moot.

Conclusion

{¶72} Appellant argues that trial court improperly excluded evidence of sexual child abuse perpetrated against him by T.J. Pursuant to *Nemeth,* Appellant's argument is correct and this evidence is admissible. However, his argument that the court improperly excluded evidence of sexual abuse concerning an abuser who is not involved in this case and evidence that he suffered a head injury as a child is without merit. Appellant's remaining arguments regarding improper comments by the state and consecutive sentences are moot. As such, the judgment of the trial court is reversed. Appellant's convictions are vacated and the matter is remanded for a new trial.

Donofrio, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error as to evidence pertaining to sexual abuse have merit and are sustained and his remaining arguments within that assignment are without merit and are overruled. Appellant's remaining assignments are moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is reversed and Appellant's convictions are hereby vacated. We remand this matter to the trial court for a new trial according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

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.