[Cite as *State v. Franklin*, 2012-Ohio-1267.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-G-2979**
- vs -	:	
SANDRA E. FRANKLIN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Geauga County Court of Common Pleas, Case No. 09 C 000082.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Steven D. Bell, Steven D. Bell Co., L.P.A., Millside Centre, Suite 11, 8803 Brecksville Road, Brecksville, OH 44141, and *John B. Gibbons*, 2000 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} After a jury trial, appellant, Sandra E. Franklin, was found guilty of murder, R.C. 2903.02(A); felonious assault, R.C. 2903.11(A)(2); and involuntary manslaughter, R.C. 2903.04(A). On May 26, 2010, the trial court sentenced appellant to 15 years to life and imposed a $15,000 fine for murder. The trial court found felonious assault and involuntary manslaughter to be allied offenses of similar import and merged the charges

with the murder charge. Therefore, appellant was not sentenced on those counts. Appellant appeals from the trial court's sentencing entry as well as the June 16, 2010 entry, denying her motion for judgment of acquittal and for new trial. Appellant does not contend that she did not stab her husband, Dr. Peter S. Franklin, and cause his death. Instead, among other issues, appellant claims she did not purposely cause his death and that she acted in self-defense.

9-1-1 Phone Calls

{¶2} On August 16, 2009, after appellant stabbed her husband, Dr. Franklin and appellant placed separate calls to 9-1-1. Dr. Franklin told the operator that he was intentionally stabbed in his chest with a knife by his wife. He said they were involved in an argument and his wife "won." That first call placed by Dr. Franklin was dropped, and the operator called him back. In the second call, he told the operator his last name and that his wife was still in the house. That second call was also dropped. The operator called Dr. Franklin back again but the third call went directly to his voicemail.

{¶3} In appellant's 9-1-1 call, she told the operator that her husband attacked her so she stabbed him with a kitchen knife. Appellant's call was dropped. The operator called appellant back. During the second call, appellant said her husband hit and scratched her, she stabbed him in the chest, and he was outside somewhere.

{¶4} As a result of the calls, Patrolmen Brian Frew, Ryan Patete, and Christopher Smith with the Bainbridge Township Police Department were dispatched to the Franklin residence. Upon arrival, Dr. Franklin was observed lying in the grass outside the house. He later died at the hospital.

Appellant's Statements and Videotaped Interview with Police

{¶5} Following the incident, appellant was interviewed by Officer Andrew Kelley with the Bainbridge Township Police Department at the police station. The interview was videotaped, played for the jury in open court, and transcribed. In the interview, she gave various versions of the event.

{¶6} Appellant stated that an argument ensued between her husband and her in their kitchen. Regarding the layout of their home, the kitchen leads down to a hallway, bathroom, and laundry room. Consistent with her 9-1-1 call, appellant stated that an argument occurred between her husband and her. At one point, appellant said her husband hit her hard on her face in the kitchen and she fell to the ground. She claimed her husband then held something sharp to her throat and she stabbed him with a knife that was on the kitchen counter. Appellant claimed she stabbed her husband because she feared for her life and was not going to allow him to kill her. Appellant later stated, however, that the altercation occurred in the hallway down by the bathroom and that she went up to the kitchen and grabbed the knife. Appellant also said that her husband hit her going up the steps to the kitchen and that she went in the kitchen and grabbed the knife on the counter. Appellant also said that the altercation happened in the kitchen area which went into the hallway and laundry room.

{¶7} During her interview, appellant also provided a background of events that transpired in the recent past. Specifically, appellant alleged that her husband had threatened her for years and he had a girlfriend, Jessica Pendleton. Pendleton and appellant had both worked in Dr. Franklin's office. Appellant claimed that her husband later gave her job to Pendleton. Appellant also said that she and her husband had discussed divorce because he was in love with "his girlfriend." Appellant told Officer

Kelley that she wanted her husband to leave but he refused, saying that he would kill her before he let her have his property.

Cause of Death

{¶8} There was no dispute as to the cause of death. The state produced the testimony of Dr. Krista Pekarski, with the Cuyahoga County Coroner's Office who performed the autopsy on Dr. Franklin. She described the cause of death as a single stab wound, 4.5 inches in depth, to Dr. Franklin's left chest which penetrated through the rib cage, into his lung, and transected bone. The course of the solitary fatal wound was front to back, left to right and downward. Dr. Pekarski officially ruled that the cause of death was the stab wound inflicted by appellant and that the manner of death was a homicide. Dr. Pekarski characterized the amount of force necessary to cause the wound as being "severe."

{¶9} Dr. Cyril Wecht, a Pittsburgh based forensic pathologist, testified for appellant that the knife used by appellant and found at the scene went through Dr. Franklin's skin subcutaneous tissue, muscle, left third rib, and into the lower lobe of the left lung. Dr. Wecht opined that it would take no great amount of force if Dr. Franklin was in motion toward appellant.

Marital Strife

{¶10} The jury heard evidence of marital strife including issues involving property, alleged infidelity, and threats by both Dr. Franklin and appellant to each other, all centering around a looming divorce.

{¶11} In the spring of 2007, Pendleton got a part-time job with the Franklins at their residence tending to horses and cleaning their barn. Her job duties later grew to

house cleaning and cooking and eventually to becoming a receptionist at Dr. Franklin's office. Pendleton rented property from the Franklins. She testified that both Dr. Franklin and appellant told her that only appellant's name was on all of Dr. Franklin's property. However, before the couple got married, all of Dr. Franklin's property was in his name.

{¶12} Pendleton further testified regarding an incident at the Franklin residence that occurred in the spring of 2009. She observed appellant, who was chopping onions in the kitchen, become angry with her husband and heard her threaten to stab him. Specifically, Pendleton stated that appellant, in a non-joking manner, took a knife, stabbed it into a cutting board, and threatened to stab Dr. Franklin with it.

{¶13} Appellant later fired Pendleton because, as previously stated, appellant believed Pendleton was having an affair with Dr. Franklin. Pendleton denied that she was romantically involved with Dr. Franklin and in support of her denial, testified that she had a live-in boyfriend. Pendleton denied that Dr. Franklin told her that he was in love with her.

{¶14} On August 3, 2009, less than two weeks before Dr. Franklin's death, Kristin Kinkopf took her friend to his medical appointment at Dr. Franklin's office. Kinkopf observed appellant telling Pendleton that she was not to be seen on the property any longer. She also overheard appellant, who was very upset, talking on her cell phone. Appellant mentioned that she found emails between her husband and Pendleton and that she wanted a divorce. Kinkopf also overheard appellant state that she could not believe that her husband wanted her to leave, that his assets were still "tied up," and that she would "see him dead first" if he left her.

{¶15} A few days later on August 7, 2009, Joann Hochstetler contacted appellant due to an advertisement appellant placed to rent a house. After appellant showed her the house, Hochstetler testified that she received a voicemail message from Dr. Franklin. He said that the house was not available because he and his wife were going through a divorce and that he was going to take possession of the property. Hochstetler later received a phone call from appellant who told her that it was her house, that she had papers to prove it, and that she was going to rent it to her.

{¶16} Hochstetler further testified that appellant seemed irritated and agitated that Dr. Franklin had contacted her. Appellant asked Hochstetler to not speak with Dr. Franklin about the house and to deal directly with her and told Hochstetler that she wanted to change the locks so her husband could not enter the home. Appellant discussed with Hochstetler the looming divorce and the problems she was having with her husband, specifically mentioning Pendleton. Appellant told Hochstetler that Dr. Franklin wanted a divorce. However, Hochstetler had the impression that appellant did not want a divorce. Regarding the Franklins' marital relationship, Hochstetler stated that appellant told her she did not know how much more she could take.

{¶17} Sometime later on August 7, 2009, appellant reported a domestic complaint that her husband threatened to kill her regarding rental property that she owned. Patrolman Smith met with the couple. He testified that appellant told him that she and Dr. Franklin were having marital problems and that her 73-year-old husband was in love with the 22-year-old Pendleton. Upon questioning Dr. Franklin about his wife's complaint, Dr. Franklin also said that he and his wife were having marital

problems and that he had planned on staying at the property that his wife had intended to rent to Hochstetler.

Abuse

{¶18} With respect to appellant's contention that there was a history of marital abuse, she mentioned domestic violence during her interview with Officer Kelley. Appellant specifically referred to the foregoing August 7, 2009 incident that occurred a little over one week prior to her husband's death. In support of her allegation of abuse over the years, appellant presented the testimony of four witnesses: Drs. Charles Sevastos and James Edwards, appellant's physicians; Dr. Catherine Scanlon, the couples' marriage counselor; and Christina Alaei, appellant's friend.

{¶19} Appellant was a patient of Dr. Sevastos, who treated her in 2008 and 2009 for bruises she told him she sustained as a result of domestic altercations with her husband. On cross-examination, Dr. Sevastos testified that appellant initially came to see him in 2007. During that visit, appellant told Dr. Sevastos that she was concerned that her husband was trying to poison her coffee. Appellant also talked about divorce, claiming that her husband was having an affair and that she was afraid that her husband was trying to take all of the property. Dr. Sevastos testified that appellant exhibited episodes of "paranoid ideation."

{¶20} Dr. Scanlon testified by video deposition that she met with the Franklins and discussed their possible divorce, property issues, management of the medical office, and appellant's suspicion that her husband was having an affair. Appellant told Dr. Scanlon that on one occasion in 2008, she was abused by Dr. Franklin.

{¶21} In addition, Dr. Edwards testified he treated appellant in May of 2009 as a result of an injury she claimed she sustained during a domestic dispute with Dr. Franklin. Specifically, appellant told Dr. Edwards that her husband hit her in the head with a clipboard.

{¶22} Finally, Alaei testified that she was at appellant's brother's house on August 9, 2009. Appellant arrived there around 10:00 p.m. and was visibly upset. Appellant showed them a bruise on her arm and stated that it was caused by her husband. Alaei testified that appellant was afraid to go back home because Dr. Franklin had threatened to kill her.

{¶23} The jury also heard the testimony of Hochstetler, who testified for the state that she would be surprised if Dr. Franklin physically abused appellant because he did not appear to be a violent person.

Financial Motivation

{¶24} In an effort to establish a motive, the state produced the testimony of Vincent Picone, a self-employed insurance agent. In March of 2008, appellant called Picone inquiring about a life insurance policy for her husband. Dr. Franklin earned an annual salary of $250,000 and owned property valued at $3,000,000. After discussing the matter, the final proposal was $19,000 per year for a $1,000,000 term life insurance policy. Picone stated that Dr. Franklin did not want the policy at that point and declined coverage.

{¶25} Thereafter, Picone received another call from appellant saying that they wanted the insurance after all. Picone went to their residence. Upon arrival, Dr. Franklin

opened the door, saw Picone, told him he did not want the policy, and closed the door. Picone got back in his car and drove away.

{¶26} The following day, appellant called Picone once again saying that they changed their minds and wanted to make another appointment with him. Picone went back to their home and received a check for approximately $19,700. The effective date of the policy was September 1, 2008. According to Picone, appellant was the sole beneficiary and would receive $1,000,000 tax free upon Dr. Franklin's death.

{¶27} Picone also acknowledged that it is unusual for someone like Dr. Franklin, i.e., a practicing physician with a $250,000 annual salary and $3,000,000 in assets, not to have any life insurance.

{¶28} In addition to Picone's testimony, the jury also heard the testimony from defense witness Keith Baker, an insurance agent. He stated that the rule of thumb used to determine how much life insurance is appropriate for an individual with earnings comparable to that of Dr. Franklin would be anywhere from six to nine times his annual income. Thus, Baker stated that the $1,000,000 policy was actually below the rule of thumb.

Physical/Corroborating Evidence

{¶29} There was physical evidence presented regarding the altercation leading to Dr. Franklin's death in the form of scratches on appellant's forearm, bruises on appellant's forearm, scratches on appellant's chest, redness on appellant's face, bruises on Dr. Franklin's left wrist, and the scene. In an effort to support her claim of self-defense, appellant attempted to show that all of her injuries were caused by her

husband and that the injury to his wrist was caused as a result of their physical altercation preceding his death.

Scratches on Appellant's Forearm

{¶30} Patrolmen Frew and Patete were the first to arrive at the scene. Neither officer noticed any scratches on appellant when they arrived. Patrolman Patete saw no injuries on appellant when he placed her under arrest and cuffed her behind her back. Appellant told Patrolman Patete that she stabbed her husband because he threatened to kill her but she did not report any injuries to him at that time.

{¶31} Thereafter, Patrolman Patete placed appellant in the back of his cruiser. He then went inside the residence to look for any other suspects or injured people. Patrolman Patete later returned to the cruiser and removed appellant because she complained of chest pains. EMT attended to her at the scene by placing heart monitor pads on appellant's chest. During the medical assistance, Patrolman Patete saw scratches for the first time on appellant's forearm.

{¶32} However, Patrolman Patete testified that while appellant was in cuffs at the scene and in the cruiser, she could have scratched herself with her fingernails. In fact, he demonstrated to the jury how appellant could have scratched her forearm while in cuffs.

{¶33} John Dobies, an EMT with the Bainbridge Township Fire Department, documented the events/injuries at the scene. On the medical run report, Dobies listed what appellant related to him regarding her version of the incident. The report states that there were scratches caused by Dr. Franklin as a result of him scraping keys down

appellant's left arm. However, Dobies did not personally observe any injuries on appellant and only documented what appellant told him.

{¶34} Later at the station, Officer Kelley noticed scratches on the top of appellant's left forearm during their interview. Appellant told Officer Kelley that her husband scratched her but she did not mention being scratched with a set of keys. Patrolman Patete stated that the scratches he observed on appellant's forearm at the scene while receiving treatment for chest pains after he removed her from the cruiser, and the scratches he later observed at the station were different in appearance. At the station, the scratches appeared to be longer, redder, and a bit more swollen.

{¶35} In addition, and as stated, Patrolman Frew saw no scratches on appellant when he arrived at the scene. It was not until Patrolman Frew later photographed appellant at the station that he observed for the first time scratches on her left forearm.

{¶36} In an apparent response to the state's evidence for the potential self affliction of scratches and the worsening of the scratches between her removal from the cruiser and the interview at the jail, Dr. Wecht explained that injuries often develop over time. This testimony was presumably offered in an effort to show that appellant could have been scratched during the altercation despite the fact that the scratches were not observed prior to being placed in cuffs. Dr. Wecht also testified that the abrasions on appellant's forearm could have been caused by a utility knife, which was alleged by appellant to have been used by Dr. Franklin during the altercation, but could not say that the scratches were caused by a utility knife.

Bruises on Appellant's Forearm

{¶37} Mark Glass, an EMT with the Auburn Fire Department, noticed a couple of bruises on appellant's left forearm at the scene. Glass said that the bruises did not appear to be fresh but rather were yellowed in nature and indicative of an older injury.

Scratches on Appellant's Chest

{¶38} Appellant did not report any scratches to her chest and no one saw any scratches on her chest at the scene. However, photographs taken at the jail reveal scratches on appellant's upper left chest near her clavicle.

{¶39} EMT Glass testified that because appellant reported difficulty breathing and some chest pain at the scene, he placed electrodes on her upper clavicles and lower abdominal region. Glass did not observe any scratches to her chest area. Also, Patrolman Patete did not notice any injury to appellant's chest area when the EMT placed heart monitor pads on her chest at the scene.

{¶40} During appellant's interview with Officer Kelley at the station, she did not mention being scratched in her upper chest area and did not show him any scratches to her chest. Patrolman Patete said that after her interview with Officer Kelley, appellant was placed in a holding cell, which contained a sink, for approximately 20 to 30 minutes. After that period, Patrolman Patete observed scratches for the first time on appellant's chest after asking her to remove her jewelry. He stated that the scratches on her chest appeared "fresh." Patrolman Patete testified that appellant was not in cuffs in the holding cell and could have scratched her chest. Officer Kelley wanted to investigate whether appellant scratched herself and, therefore, asked appellant if he could take some fingernail scrapings. Appellant refused.

{¶41} Dr. Wecht testified that the abrasions on appellant's chest could have been caused by Dr. Franklin scratching her with a utility knife. However, Dr. Wecht could not say that they, in fact, were caused in that manner.

Redness on Appellant's Face

{¶42} At the scene, EMT Glass did not observe any red marks on appellant's face. Nevertheless, Glass testified that the report at the scene, taken by EMT Dobies, stated that appellant had red marks on the left side of her face. However, as stated, Dobies listed on the medical run report what appellant related to him regarding her version of the incident. Dobies did not personally observe any injuries on appellant and only documented what she had told him.

{¶43} Patrolman Patete saw no redness or marks on appellant's face either at the scene or later at the station. During appellant's interview at the station, appellant told Officer Kelley that her husband slapped her in the face. Officer Kelley did not notice any redness to appellant's face but told her that he did because appellant wanted him to make note of it. Officer Kelley testified that he complied with appellant's request because he wanted to gain her confidence, a part of his interviewing technique.

{¶44} Thus, no one saw any redness or marks on her face either at the scene or later at the station. Moreover, the photographs of appellant's face taken at the jail and admitted into evidence show no redness to her face.

Bruises on Dr. Franklin's Wrist

{¶45} Dr. Wecht testified regarding a bruise on Dr. Franklin's left wrist apparently to support appellant's contention that there was a physical altercation between Dr. Franklin and her. Dr. Wecht stated that the bruise on Dr. Franklin's left wrist was

consistent with an injury that he could have suffered on the date at issue. Specifically, Dr. Wecht stated that the bruise on Dr. Franklin's wrist could have been caused, but did not testify that it was in fact caused, by him hitting appellant. Dr. Wecht added that Dr. Franklin's bruise could also have been caused when he fell to the ground after he was stabbed or when he was being treated by EMT on the scene.

The Scene

{¶46} Officer Kelley testified that appellant changed her story of where the incident took place. Appellant initially said that it happened in the kitchen on the second floor, then said that it took place on the first floor where the bathroom and laundry room are located.

{¶47} Inside the residence, in the first floor bathroom, reddish-brown stains on the counter tested positive for blood. Daniel Wintreich, a special agent with BCI, observed, but did not test, a paper towel with reddish-brown stains in a wastebasket in the hallway leading from the laundry room to the kitchen. In the kitchen, he saw a large butcher knife on the counter with blood on it. He stated that there were no signs that a struggle occurred in that area. He said that the kitchen was pretty clean with "no blood, no tissue, nothing else of note." Besides the knife, Wintreich testified that there was no evidence of a crime in the kitchen area. He explained that typically when there is a stabbing there is substantially more blood than what was found in the kitchen. He did not find a pen-knife/utility knife anywhere either inside or outside the Franklin residence.

{¶48} Wintreich said that the Bainbridge Township Police Department had exclusive control over the crime scene. Wintreich testified that he had been involved in

hundreds of stabbing scenes throughout his career and that this one was unusual because of the lack of blood.

{¶49} The state also introduced the testimony of Chad Britton and Brenda Gerardi, forensic scientists with BCI. Britton analyzed the knife, which tested positive for blood. He examined the clothing worn by appellant, which revealed blood stains on her shirt, skirt, and left shoe. He took swabs from stains on the bathroom counter/sink and from the paper towel found in the wastebasket, which were presumptive positive for blood. Britton also took fingernail swabs from Dr. Franklin, which turned up presumptive positive for blood to his left hand.

{¶50} Throughout her career, Gerardi performed/completed over 700 DNA cases. She provided expert testimony that the stains found on appellant's shirt were consistent with her own DNA. The stains on appellant's skirt and left shoe were consistent with Dr. Franklin's DNA. Gerardi further stated that the knife found in the kitchen, the paper towel from the wastebasket, the stain from the bathroom counter, and the fingernail scrapings from Dr. Franklin were all consistent with Dr. Franklin's DNA. She stated to a reasonable degree of scientific certainty that appellant's DNA could be excluded from Dr. Franklin's fingernail scrapings.

{¶51} Appellant also presented the testimony of Dr. Julie Heinig, an assistant laboratory director at DNA Diagnostics Center. Dr. Heinig tested a pen-knife/utility knife that appellant alleged Dr. Franklin used to injure her during the incident for trace DNA. The results revealed that appellant's and an unknown male's DNA were on the instrument. Dr. Heinig did not have a known blood sample from Dr. Franklin for

comparison purposes and, therefore, she could not say one way or the other that the DNA found on the pen-knife/utility knife was Dr. Franklin's.

{¶52} However, when and how appellant's DNA found on the pen-knife/utility knife got there could not be established. Appellant was released from jail on August 17, 2009, one day after Dr. Franklin's death. However, the pen-knife/utility knife was not delivered to Dr. Heinig for testing by Robert Friedman, referred to by Dr. Heinig as an investigator, until August 28, 2009.

{¶53} In light of this timeline and lack of an ability to date precisely when the DNA was transferred to the pen-knife/utility knife, Dr. Heinig acknowledged that appellant could have placed her DNA on the pen-knife/utility knife after she was arrested and released from jail but before testing.

Rebuttal Testimony

{¶54} Dr. Franklin's former wife, Elizabeth Franklin, testified with respect to Dr. Franklin's character trait of peacefulness. Elizabeth met her late husband in South Africa while he was in the Peace Corp. She and Dr. Franklin married in 1965 and remained so for 18 years. The couple had one child, a son who was killed in an oil explosion. Elizabeth stated that Dr. Franklin entered into the field of medicine to help others. She said he had a conscience and had enormous feelings for others. Elizabeth testified that during the course of their marriage, Dr. Franklin was rarely angry and never hurt anyone. They never had any issues over money or any concerns over property. She described Dr. Franklin as a caring humanitarian and very generous with his money. Elizabeth said Dr. Franklin was never argumentative with her and she never feared him. Nevertheless, they eventually grew apart and later divorced.

{¶55} On cross-examination, Elizabeth testified that both she and Dr. Franklin were unfaithful during their marriage. She said that in October of 2008, Dr. Franklin told her that his marriage to appellant was over as far as he was concerned.

Post-trial Motions and Sentencing

{¶56} At the conclusion of the evidence, appellant moved the trial court to dismiss count four of the indictment, voluntary manslaughter. This motion was granted without objection due to insufficient evidence.

{¶57} Following the trial, the jury found appellant guilty of counts one, two, and three.

{¶58} Appellant filed a motion for judgment of acquittal and for new trial, asserting that there was insufficient evidence to sustain a conviction for murder; that the jury's verdict with regard to murder, felonious assault, and involuntary manslaughter was contrary to law; and that the jury's rejection of her affirmative defense of self-defense was against the manifest weight of the evidence. The motions were ultimately overruled.

{¶59} The court merged felonious assault and involuntary manslaughter with the murder charge, after finding them to be allied offenses of similar import and, therefore, sentenced appellant on murder only to 15 years to life and a $15,000 fine. Appellant timely appealed, asserting the following six assignments of error:

{¶60} "[1.] The trial court erred by failing to grant [appellant] her Motion for Judgment Acquittal pursuant to Rule 29(A) and (C) Ohio Rules of Criminal Procedure and Motion for New Trial as the State of Ohio failed to establish that [she] had the specific intention to cause the death of her husband, Dr. Peter Franklin.

{¶61} "[2.] The Judgment of the Jury that [appellant] acted purposefully and with the specific intention to cause the death of her husband, Dr. Peter Franklin was against the Manifest Weight of the Evidence.

{¶62} "[3.] The Jury determination that [appellant] did not establish the affirmative defense of Self Defense is against the Manifest Weight of the Evidence.

{¶63} "[4.] The Trial Court Erred by permitting the introduction of irrelevant, prejudicial testimony from Peter Franklin's former wife that did not relate to his character trait of peacefulness.

{¶64} "[5.] [Appellant's] right to due process of law as guaranteed by the United States and Ohio Constitutions was denied by the misconduct of the Prosecuting Attorney who made inflammatory, emotional and improper comments to the Jury in final argument.

{¶65} "[6.] The Trial Court erred by failing to insure that conversations between a deliberating juror and a member of the court staff were not recorded on the record and in the presence of [appellant.]"

First Assignment of Error

{¶66} In her first assignment of error, appellant argues the trial court erred by failing to grant her motion for judgment of acquittal pursuant to Crim.R. 29(A) and (C) and her Crim.R. 33(A)(4) motion for new trial because the state failed to establish that she had the specific intention to cause the death of her husband.

{¶67} In *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus, the Supreme Court of Ohio established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied: "[p]ursuant to Crim.R. 29(A), a 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." "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, at ¶18.

{¶68} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *13-14:

{¶69} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶70} "'"(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶71} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶72} "*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at *8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶73} With regard to a motion for new trial, the allowance or denial is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Hill* (1992), 64 Ohio St.3d 313, 333. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶74} Crim.R. 33(A)(4) provides in part: "A new trial may be granted on motion of the defendant for *** causes affecting materially his substantial rights *** [including] that the verdict is not sustained by sufficient evidence or is contrary to law. ***."

{¶75} With respect to murder, R.C. 2903.02(A) states: "No person shall purposely cause the death of another ***."

{¶76} "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain

nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶77} The trial court gave the following jury instruction regarding "purpose to cause death":

{¶78} "What's purposely? Purpose to cause death is an essential element of the crime of murder.

{¶79} "A person acts purposely when it is her specific intention to cause a certain result.

{¶80} "It must be established in this case that at the time in question, there was present in the mind of the Defendant a specific intention to purposely cause the death of Peter S. Franklin.

{¶81} "Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result.

{¶82} "To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

{¶83} "The purpose with which a person does an act is known only to herself, unless she expresses it to others or indicates it by her conduct.

{¶84} "The purpose with which a person does an act is determined from the manner in which it is done, the weapon used, and all the other facts and circumstances in evidence.

{¶85} "***

{¶86} "You may infer a purpose to cause the death of another where the natural or [probable] consequences of the Defendant's act is to produce death in light of all the surrounding circumstances.

{¶87} "Such circumstances include the weapon used and its capability to destroy life.

{¶88} "If you find that the Defendant used a deadly weapon against another in a manner calculated to destroy life, the purpose to cause death may be, but is not required to be, inferred from the use of the weapon.

{¶89} "Whether an inference is made rests entirely with you.

{¶90} "***

{¶91} "What about motive? Proof of motive is not required. The presence or absence of motive is one of the circumstances bearing upon purpose." OJI CR 417.01.

{¶92} The evidence was sufficient such that a jury could conclude that appellant had the specific intention to purposely cause the death of her husband. The testimony revealed that appellant plunged a large butcher knife, i.e., a weapon capable of destroying life, into Dr. Franklin's chest with enough force to transect bone. The coroner's official cause of death was the stab wound inflicted by appellant and the manner of the death was a homicide. Although proof of motive is not required under OJI CR 417.01, the state nevertheless established that appellant had a financial motive to kill her husband, a circumstance bearing upon her purpose.

{¶93} Pursuant to *Schlee*, supra, there is sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of murder were proven; that appellant's substantial rights were not affected; and that the verdict

was not contrary to law. Thus, the trial court did not err in overruling appellant's motions for acquittal and new trial.

{¶94} Appellant's first assignment of error is without merit.

Second and Third Assignments of Error

{¶95} Appellant's second and third assignments of error are interrelated and will be discussed in a consolidated fashion. In these assignments, appellant contends that the jury's decision that she acted purposely and with specific intent to cause the death of her husband and that she did not establish the affirmative defense of self-defense are against the manifest weight.

{¶96} "'[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶97} "'In determining whether the verdict was against the manifest weight of the evidence, "(***) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (***)"' (Citations omitted.) ***" (Emphasis sic.) S*chlee*, supra, at *14-15.

{¶98} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶99} With regard to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶100} This case is not unlike most in that there is no direct testimony that appellant acted purposely. However, purpose can be inferred from the facts in evidence. Again, it is uncontroverted that appellant stabbed her husband using a large butcher knife. The force of the stab was severe and transected bone. The official cause of death was ruled a homicide. There is ample evidence in the record of a financial motive, and otherwise, for appellant to kill her husband. Thus, there was enough evidence for the jury to infer purpose, i.e., that appellant had the specific intent to purposely cause the death of her husband.

{¶101} In order to establish a claim of self-defense, the defendant must prove by the greater weight of the evidence that he was not at fault in creating the situation giving rise to the altercation; and he had reasonable grounds to believe and an honest belief, even if mistaken, that he was in imminent danger of bodily harm. *State v. Fink*, 11th Dist. No. 2007-A-0073, 2008-Ohio-1503, at ¶21, citing 4 Ohio Jury Instructions (2006), Section 411.33(2); *State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, at ¶20; *Stevens v. Provitt,* 11th Dist. No. 2002-T-0076, 2003-Ohio-7226, at ¶26 (holding self-defense may be asserted if a defendant has reasonable grounds and an honest belief that he was in immediate danger of bodily harm).

{¶102} Regarding the evidence of self-defense, appellant presented evidence through her videotaped interview at the police station, and otherwise, that she stabbed

her husband because she felt she was in imminent danger of bodily harm. However, it is clear that the jury rejected her testimony which it was entitled to do.

{¶103} Moreover, there was virtually nothing in the way of corroborative evidence that definitively supported appellant's defense.

{¶104} Regarding both the scratches on appellant's left forearm and the scratches on appellant's chest, it is clear that appellant claimed that she incurred these injuries during the altercation. However, prior to being placed under arrest, put in handcuffs and placed in the back of the cruiser, nobody saw any scratches on appellant's forearm. Moreover, Patrolman Patete testified that after being placed in the cruiser, appellant had the opportunity to and indeed the ability to self-inflict scratches on her left forearm.

{¶105} Moreover, the scratches on appellant's chest were not observed by anyone administering care to her despite the fact that the care providers opened her blouse and placed electrodes on appellant's left clavicle area when administering treatment on the scene.

{¶106} Moreover, the testimony clearly established that while at the police station after being placed in a holding cell without handcuffs for approximately twenty minutes, the officers first observed the scratches to appellant's chest when asking her to remove her jewelry.

{¶107} Based upon their suspicion that appellant was inflicting harm to herself by scratching both her forearms and her chest, Officer Kelley asked appellant to take fingernail scrapings. She refused.

{¶108} In response to this testimony regarding the scratches on both the forearms and the chest, Dr. Wecht testified that even if the scratches were not observable at the scene, they could have been inflicted during the altercation and simply developed over time.

{¶109} Quite obviously, the evidence regarding the alleged corroborative scratches were capable of conflicting conclusions either favorable or unfavorable to appellant.

{¶110} Regarding the bruise on appellant's forearm, the evidence was fairly one-sided and unfavorable. Specifically, EMT Glass viewed the bruise on the scene and specifically stated that the bruise was yellowed in nature indicative of an older rather than fresh injury. The bruise on Dr. Franklin's forearm brought forth by appellant in order to establish that an altercation occurred prior to the stabbing was also capable of multiple and various conclusions both favorable and unfavorable to appellant. Specifically, Dr. Wecht testified that the bruise could have been caused in up to three ways: during the altercation; after the altercation when Dr. Franklin fell to the ground; or after the altercation when EMT was administering care to Dr. Franklin.

{¶111} Regarding appellant's allegation that she was slapped in the face by Dr. Franklin during the altercation, nobody saw any redness or other injury to her face to substantiate the claim and the photographs did not show any injury.

{¶112} Regarding the scene, special agent Wintreich, testified that if the altercation took place in the kitchen as appellant variously stated, he would have expected to see substantially more blood than was found in the area and that there were no signs of a struggle in the kitchen area.

{¶113} Last, regarding the pen-knife/utility knife that appellant claims Dr. Franklin used to injure her on the scene, it is clear that appellant's DNA was on the instrument. However, appellant only established that an unknown male's DNA was on the pen-knife, not that Dr. Franklin's DNA was present. Further, the manner in which this evidence was recovered and presented to Dr. Heinig could reasonably give the jury ample reason not to give it much credence. Specifically, the pen-knife tested was not provided to Dr. Heinig until August 28, 2009, approximately 12 days after the incident. Moreover, in light of the fact that appellant was released from jail one day after the incident, the state established that there was ample opportunity for appellant to have placed her DNA on the pen-knife after the incident but before it was tested. Obviously, when faced with the conflicting evidence that appellant was injured with the pen-knife at the scene, the jury was permitted to conclude this matter either way it saw fit.

{¶114} All of this coupled with the financial motive and prior threats appellant made close in time to the incident leads to a conclusion that the jury did not clearly lose its way.

{¶115} The jury simply did not believe appellant's version and none of the physical evidence served as an impediment to its conclusion.

{¶116} Alternatively, even if the jury found that some or all of the physical evidence supported aspects of appellant's version, that would not require the jury to conclude that appellant acted in self-defense.

{¶117} Appellant's second and third assignments of error are without merit.

Fourth Assignment of Error

{¶118} In her fourth assignment of error, appellant maintains the trial court committed plain error by permitting the introduction of irrelevant, prejudicial testimony from Dr. Franklin's former wife that did not relate to his character trait of peacefulness.

{¶119} Specifically, appellant takes issue with the following alleged irrelevant, prejudicial testimony from Dr. Franklin's former wife: Dr. Franklin was in the Peace Corp.; taught South African refugees; built roads in rural South Africa; was a member of a group called Physicians for Social Responsibility; spoke French fluently; participated in the evacuation of orphaned children from war torn Vietnam; struggled financially when he first set up his family medical practice; volunteered as a young doctor at a free clinic and later on a Navaho Indian Reservation; experienced guilt over the tragic death of his young son; did not litigate financial issues with Elizabeth during their 1983 divorce proceedings; he "could get angry;" was a brilliant student and very bright academically; was a reckless sailor on Lake Erie; was comfortable talking to his horses and loved to work on his computer; and he did not like the way that appellant thinks or behaves.

{¶120} Initially, we note that appellant filed two motions in limine and the trial court limited evidence of Dr. Franklin's character to be introduced only for peacefulness pursuant to Evid.R. 404. However, appellant failed to object to the testimony at trial.

{¶121} A motion in limine does not preserve for purposes of appeal any error in the disposition of the motion in limine. "'An appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached during the trial.'" *State v. Grubb* (1986), 28 Ohio St.3d 199, 203, quoting *State v. Leslie* (1984), 14 Ohio App.3d 343, 344. The failure to

object at trial to the allegedly inadmissible evidence constitutes a waiver of the challenge. *State v. Wilson* (1982), 8 Ohio App.3d 216.

{¶122} "It is well established that 'the failure to object [at the trial court level] constitutes a waiver of any claim of error relative thereto, unless, *but for the error, the outcome of the trial clearly would have been otherwise.*' (Emphasis added.)" *State v. Schlee,* 11th Dist. No. 2004-L-070, 2005-Ohio-5117, at ¶28, quoting *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus, citing *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). "Furthermore, 'notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" Id., citing *State v. Gordon* (Mar. 22, 1996), 11th Dist. No. 92-A-1696, 1996 Ohio App. LEXIS 1078, at *3-4, quoting *Long,* at paragraph three of the syllabus.

{¶123} Regarding appellant's relevancy argument, Evid.R. 401 states: "'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."

{¶124} Evid.R. 402 provides: "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. Evidence which is not relevant is not admissible."

{¶125} Evid.R. 403 states:

{¶126} "(A) Exclusion mandatory.

{¶127} "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.

{¶128} "(B) Exclusion discretionary.

{¶129} "Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

{¶130} Evid.R. 404 provides in part:

{¶131} "(A) Character evidence generally.

{¶132} "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

{¶133} "***

{¶134} "(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible ***."

{¶135} Although appellant now takes issue with certain specific statements made by Dr. Franklin's former wife, Elizabeth, we conclude that even if the testimony should not have been admitted, it did not affect the outcome of the trial. Thus, the trial court did not commit plain error.

{¶136} Moreover, in the main Elizabeth's testimony simply demonstrated her familiarity with Dr. Franklin as well as of their prior relationship in order to establish her qualification to testify as to his peaceful character.

{¶137} Accordingly, the trial court did not commit plain error and appellant's fourth assignment of error is without merit.

Fifth Assignment of Error

{¶138} In her fifth assignment of error, appellant argues that her right to due process of law as guaranteed by the United States and Ohio Constitutions was denied by the misconduct of the prosecutor who made inflammatory, emotional and improper comments to the jury during closing argument.

{¶139} At the outset, we note that appellant failed to object to any of the prosecutor's remarks made during closing argument.

{¶140} When a defendant fails to object to the prosecutor's remarks made during closing argument, a plain error analysis under Crim.R. 52(B) is required. *State v. Entze*, 11th Dist. No. 2003-P-0018, 2004-Ohio-5321, at ¶40. As previously stated, "[i]t is well established that 'the failure to object [at the trial court level] constitutes a waiver of any claim of error relative thereto, unless, *but for the error, the outcome of the trial clearly would have been otherwise.*'" (Emphasis added.) *Schlee,* supra, at ¶28, quoting *Underwood*, syllabus, citing *Long*; Crim.R. 52(B). "Furthermore, 'notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" Id., citing *Gordon*, supra, at *3-4, quoting *Long,* at paragraph three of the syllabus.

{¶141} To make a finding of prosecutorial misconduct, a reviewing court must determine whether the challenged statements were improper, and if so, whether the remarks affected the defendant's substantial rights. *State v. Smith* (2000), 87 Ohio St.3d 424, 442. A conviction will not be reversed because of prosecutorial misconduct unless it so taints the proceedings that a defendant is deprived of a fair trial. Id.

{¶142} "*** The prosecution is entitled to a certain degree of latitude in summation ***." *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589. A prosecutor may comment upon the evidence in his closing argument and state the appropriate conclusions to be drawn therefrom. *State v. Kish*, 11th Dist. No. 2001-L-014, 2002-Ohio-7130, at ¶52. However, prosecutors "may not express their personal beliefs or opinions regarding the guilt of the accused, and they may not allude to matters not supported by admissible evidence." *State v. Lott* (1990), 51 Ohio St.3d 160, 166.

{¶143} Isolated comments of the prosecutor are not to be taken out of context and "given their most damaging meaning." *State v. Hill* (1996), 75 Ohio St.3d 195, 204. Rather, the closing argument must be reviewed in its entirety to determine if the remarks of the prosecutor were prejudicial. *State v. Moritz* (1980), 63 Ohio St.2d 150, 157.

{¶144} In the instant case, appellant specifically takes issue with the following seven remarks made by the prosecutor during closing argument:

First Remark

{¶145} "The State of Ohio is not required to prove motive, and in a few moments, the Judge will instruct you on that. But let's be honest. It is a little hard to ignore a million dollar life insurance policy that's in play.

{¶146} "Vince Picone told you that Dr. Franklin did not want this insurance policy, and sent him away on numerous occasions because he did not want this policy, only to be continuously contacted by the Defendant.

{¶147} "She eventually got her way. A policy was obtained in 2008, and the million dollar policy was secured.

{¶148} "Mr. Picone testified that the Defendant would have had rights to the million dollars free and clear because Dr. Franklin had absolutely no property in his name, and therefore, wouldn't have to be paying any estate taxes.

{¶149} "Mr. Picone also told you that the annual premium was due on the (sic) September 1st, 2009, a mere 15 days after Dr. Franklin was killed.

{¶150} "I think it is safe to assume that based on their marital problems, that Dr. Franklin probably would not have written that $19,000.00 check on September 1st, 2009, had he been alive."

{¶151} With respect to this first remark, the prosecutor's reference to the life insurance policy, in the context of appellant's financial motive, was essentially true and supported by the evidence. We fail to see any prosecutorial misconduct.

Second Remark

{¶152} "Even $5,000.00 a day Dr. Wecht couldn't wiggle his way out of that one."

{¶153} This second remark was made after the prosecutor argued that appellant failed to meet her burden of proof that she acted in self-defense and referenced the jury instruction regarding "excessive force." In context, the prosecutor's second remark was permissible. The monetary reference was permissible to show bias and the latter part of the remark to show the lack of persuasive evidence.

Third Remark

{¶154} "And what is it, I will tell you one thing, Dr. Franklin may be dead, but his money put on a good defense. They didn't waste any money.

{¶155} "They have this fancy gizmo and computers and projectors and they fly in people from around the country and go to the best DNA Diagnostics and get one of the best attorneys in America.

{¶156} "But one thing they cannot buy, Ladies and Gentlemen of the Jury, that gives me hope, they can't buy you. They can't influence you."

{¶157} Regarding the first sentence of this remark, the prosecutor stated that it was Dr. Franklin's money that put on a good defense. Although there was a significant amount of testimony regarding appellant's financial incentive including but not limited to the fact that she would recover under an insurance policy and receive far more property than she would have had the parties gotten divorced, there was no direct evidence that it was actually Dr. Franklin's money that paid for the defense. Accordingly, that aspect of the statement is not supported by the admitted evidence. However, the remainder of the remark falls within the gambit of legitimate argument during close. The prosecutor simply pointed out that the defense spent a significant amount of money to put on a sophisticated defense with top-level experts and attorneys and then pointed out that despite that, they fell short of establishing their case.

{¶158} Although the reference to Dr. Franklin's money putting on a good defense was not supported by the evidence and, to that extent improper, we conclude that this remark did not negatively impact upon appellant's substantial rights or paint the proceedings as such that appellant was deprived of a fair trial. Again, there was

significant evidence regarding how appellant would financially gain from Dr. Franklin's death.

Fourth Remark

{¶159} "He is paying for everything but he gets to live out in the horse trailer while she lives in grand style here, BMW, Flashy is her license plate, and the Cadillac Escalade. She is living the life of Reilly and he is stuck out in the back."

{¶160} There was testimony that during relevant time periods, Dr. Franklin was living in a trailer on the Franklin's property while appellant stayed in the Franklin's home. Accordingly, with respect to this fourth remark, the prosecutor merely stated the facts which were supported by the record. We fail to see any prosecutorial misconduct.

Fifth Remark

{¶161} "The State of Ohio doesn't have to prove a thing about that insurance policy. The insurance policy is just part of the time line that would show you that certain things were coming to a head in Mrs. Franklin's life that we felt were necessary to give you the idea of why things would cause somebody to act the way she did.

{¶162} "The only thing the State of Ohio has to prove to you is that on August 16th, just like I told you in the beginning at the opening, on August 16th, that woman purposely caused the death of her husband.

{¶163} "So that 20 minutes you had about insurance was nothing but a red herring. Don't waste your time on the insurance issue. It means nothing to this case."

{¶164} Reading this fifth remark in context, we fail to see any prosecutorial misconduct. The prosecutor, while shifting the focus at that moment away from the insurance policy, stressed to the jury that the state's burden was only to prove that

appellant purposely caused the death of her husband regardless of her financial motive. This is a wholly accurate and permissible statement.

Sixth Remark

{¶165} "The same thing happened. This is not a new case. It all boils down to greed. Ladies and Gentlemen of the Jury, she wanted it all.

{¶166} "With Dr. Franklin gone, there is no more arguing over the property with Dr. Franklin. There [are] no arguments about the money with Dr. Franklin.

{¶167} "With Dr. Franklin gone, she gets the insurance, and with Dr. Franklin gone, there would be nobody who could ever testify against her."

{¶168} This remark is a wholly accurate portrayal of appellant's motive, financial and otherwise, and is supported by the evidence and permissible inferences. We fail to see error or prejudice.

Seventh Remark

{¶169} "[T]here would be nobody who could ever testify against her."

{¶170} This seventh remark is a true, legitimate statement. We fail to see any prosecutorial misconduct.

{¶171} We note again that appellant failed to object to any of the foregoing remarks made by the prosecutor during closing argument.

{¶172} Contrary to appellant's assertions, there are no similarities between what occurred in this case and what occurred in *State v. Keenan* (1993), 66 Ohio St.3d 402. In *Keenan*, the Supreme Court of Ohio reversed a judgment of the Eighth District Court of Appeals, holding that the prosecutor's histrionic approach, which was saturated with emotion, personal opinions, and improper comments, denied the appellant of a fair trial.

In our case, appellant received a fair trial and her substantial rights were not prejudiced by any of the prosecutor's remarks. The trial court did not commit plain error by allowing the state to conduct an appropriate closing argument.

{¶173} Appellant's fifth assignment of error is without merit.

Sixth Assignment of Error

{¶174} In her sixth and final assignment of error, appellant contends her constitutional rights were violated when the trial court's bailiff had an "off the record" conversation with one of the deliberating jurors. Specifically, appellant alleges she was prejudiced when the bailiff informed the juror, at the instruction of the court, that the court would not meet with her and that she was to serve the remainder of her jury duty.

{¶175} Preliminarily, we note that appellant did not object to the communication made between the bailiff and the juror. Thus, we will review this assignment of error under the plain error standard pursuant to Crim.R. 52(B).

{¶176} R.C. 2945.33 deals with keeping and conduct of the jury after the case is submitted and provides in part:

{¶177} "When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court, except in cases where the offense charged may be punishable by death, may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. Such officer

shall not communicate to any person, before the verdict is delivered, any matter in relation to their deliberation. ***"

{¶178} The record establishes the following: a deliberating juror asked to speak with the bailiff in private; the bailiff declined to speak with the juror; the juror then made a statement to the bailiff regarding some concerns she wanted to relay to the judge; the bailiff made no response to the juror; the bailiff then informed the court about what the juror did; the bailiff and judge shared what happened with the parties; and, with agreement of the parties, the judge instructed the bailiff to tell the juror that the court would not meet with the juror and that she was to serve the remainder of her jury duty which lasted another week.

{¶179} The trial court did not commit plain error by making that instruction to the bailiff. Moreover, because the trial court ordered the communication, the bailiff's conduct did not violate R.C. 2945.33. In addition, because the communication was not substantive in nature, as it did not address any legal issue, fact in controversy, or law applicable to the case, the presumption of prejudice does not arise. *State v. DiPietro*, 10th Dist. No. 09AP-202, 2009-Ohio-5854, at ¶18.

{¶180} Appellant's sixth assignment of error is without merit.

{¶181} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Geauga County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.