

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

CHRISTOPHER BERRY

Appellant

07 - 0517

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 87493

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT CHRISTOPHER BERRY**

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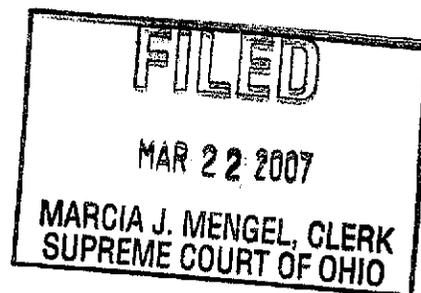


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Opinion of the Eighth District Court of Appeals, *State v. Berry* (announced, January 25, 2007; journalized Feb. 5, 2007)1

**EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS A MATTER OF
GREAT GENERAL AND PUBLIC INTEREST**

The instant case raises several significant issues. The Court's attention is specifically drawn to Propositions of Law I, II and V.

Proposition of Law I calls upon this Court to examine when evidence of a crime committed at an unknown location can give rise to search the suspect's home. This is a recurring issue on which this Court's guidance is needed. The natural place for police to search is the suspect's home. But what evidence is necessary in this regard when, as here, there is no evidence that the crime was committed at or near the home? While basic instincts take the police to suspect's homes in search of evidence, is there a sufficiently articulable basis for this instinct, so as to satisfy the Fourth Amendment? The answer to these question shape police investigations every day. By speaking to this issue, this Court will either enable police to get warrants more readily in the future, or warn the police and lower courts of the dangers of automatically associating the home as a repository of evidence, thus saving the police from mistakes in the future. Either way, this case is important.

Proposition of Law II discusses staleness. In this age of advanced serological and scientific examination, crime scenes can preserve evidence indefinitely. Old notions of staleness need to be examined in light of these scientific breakthroughs. Here, the Eighth District upheld the propriety of a search conducted some six months after the crime allegedly occurred. If the Eighth District is correct that staleness is not a problem, then this Court should use this case to make this the common law of the State of Ohio. If the Eighth District is incorrect, then this Court should intercede and ensure that other courts do not make a similar mistake. Once again, either way, this case is important.

Finally, Proposition of Law V asks this Court to revisit *State v. Thomas* (1988), 40 Ohio St.3d 213, 218, and hold that jurors cannot consider a lesser included offense unless they have first unanimously found the defendant not guilty of the greater offense. Under *Thomas*, jurors can consider the lesser included offense when deadlocked on the greater offense. This encourages compromise. In many cases, it is unfair to the State and to crime victims that the defendant escapes conviction for the greater offense, when a hung jury and retrial would have resulted in his conviction for the greater offense. In other cases, this invitation to compromise is unfair to defendants. Either way, this Court will wisely expend its resources by re-examining its precedent in this regard.

For these reasons, this case is worthy of this Court's consideration.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of a motion to suppress evidence and from a trial verdict.

Warranted Search and Motion to Suppress

On May 12, 2005, a Common Pleas Court Judge issued a search warrant for the premises at 3206 W.90th on the basis of an affidavit submitted by Detective John McGinty of the Metroparks Ranger Department. The following information was set forth in the search warrant application

The affidavit explained that a deceased female, Stephanie Yates, was found in the Metroparks. Her body was wrapped in a multi-colored bed sheet and further wrapped in garbage bags. Her arms and legs were bound with ACE bandages. The sheet appeared to be a "top-bed" sheet, leading McGinty to conclude that a matching "bottom" sheet and pillowcases existed. She was nude except for a single sock on her right foot.

McGinty learned from the coroner's office that the body had incurred 22 stab wounds which caused Yates to bleed to death. Lack of blood at the scene indicated that Yates had not died in the Metroparks; rather, her body had been cleaned elsewhere and then transported. Hairs were recovered that were consistent with both African-American males and females. Carpet fibers, brown, beige or tan in color, were found on Yates' body.

On May 3, 2005, a CODIS DNA-profile data bank search revealed that Christopher Berry was the source who had deposited semen in Yates' vaginal cavity shortly before her death. Berry, an ex-convict in the Ohio prison system, was released on December 23, 2003.

McGinty and a partner utilized BMV records to ascertain that the 90th Street address was Berry's residence; the residence was owned by Berry's girlfriend since November, 2004. Information from an acquaintance revealed that Berry lived there in December, 2004-January, 2005. Postal records indicated that Berry moved from the address in March, 2005. However, surveillance just before the search warrant was issued revealed that Berry was still at the 90th Street residence – he answered the door when McGinty knocked on an undercover ruse, and he was seen entering the premises with a key and taking out the trash.

Based on the above, McGinty sought a warrant to search the 90th Street premises for:

Physical property, including a smooth-edged single-sided knife, blade or metal instrument, being less than four inches in length, any biological material including blood, skin, hair, saliva, and or any other cloth, clothing, rag, or any other surface containing such biological material, as well as an ankle-length sock with red and green decorations with the inscription "snow-digit;" any and all ace-type bandages or other cloth medical bandage, a multi-colored bed sheet or pillow case with colored pattern consisting of a square printed pattern in a grid-like arrangement, reference fiber samples of any and all brown, beige, or tan carpeting or carpet-like material, and any and all evidence of violations of the laws of the State of Ohio, to wit: Ohio Revised Code Chapter 2903 *et seq.*

Incriminating evidence used at trial was recovered from the premises, including serological evidence of the victim's blood that was found on the walls in the bedroom. In

addition, police discovered that a portion of the mattress in the bedroom had been cut out and removed.

Trial Proceedings

The case went to trial on one count of aggravated murder.

Questioning by Jurors and Alternates

Over defense objection, the trial court permitted the jurors and alternate jurors to submit questions for the witnesses at trial.

Sufficiency of Evidence

The sufficiency of the evidence is not being disputed. In addition to the serological evidence discussed above, there was evidence presented that the sheet wrapped around the victim's body was of the same pattern to that of a bed set given to the defendant by his mother as a wedding present. There was also evidence that Mr. Berry confessed to the murder to two inmates where he was incarcerated.

Prosecutor's Closing Argument

During closing argument, the prosecutor said the following:

I am going to show you State's Exhibit 84, State's Exhibit 166. These are photographs of Stephanie Lee Yates. These are the photographs, ladies and gentlemen, that I want you to remember as we go through the evidence, the exhibits, the photographs of her at unquestionably her weakest moment in life and the most degrading moment in her life are the ones that I want you to look at and study, remember as you deliberate. When you go back to your daily lives after the course of your service is over, these are the photographs I want you to remember.

In a homicide case lie this, you folks see but a slice of the spectrum of Stephanie Lee Yates' lie. It's a small piece. As I indicated to you, it's her weakest moment. She made poor choices during the course of her life. But nonetheless, I want you to remember that like everyone she came into this world born to a mother. She progressed through kindergarten, elementary school, middle school and had no moments with her family.

As she progresses through high school she became a member of the dance team, a cheerleader. Her brother Ted tells us she engaged in some modeling and she began to develop eating disorder, suffered through bouts of depression that lead primarily to what unquestionably we can categorize as alcoholism and then that lead to drug abuse and substance abuse.

If you didn't know this, I am certain you know this now. Substance abuse is without question the most vicious evil that I have come across during my years as a prosecutor because it is completely unbiased and unprejudiced. It affects everyone in our society. It doesn't matter a person's race, gender, age, income, status in life, none of those things are immune to that type of evil.

With that said, let me posit this to you. The defendant is not only a vicious and brutal killer, as the evidence will show, he is a thief. He has stolen from Stephanie Lee Yates or her family any hope or any chance she might have had at redemption. Her brother, Ted, provides perhaps the shining example of redemption. He testified as difficult as it might have been that he had difficulties with substance abuse when he was a teenager. He overcame them, has been sober for 17 years. He now has a wife, a family. He is a successful businessman residing in Twinsburg, Ohio and member of the Alabama bar.

These are the things that the defendant stole from Stephanie Lee Yates, her chance at age 34 or 35 or 25 or 45, whatever it might have been, he stole any chance that she might have the opportunity to redeem herself and become a contributing member of society and a loving sister, daughter, stepdaughter, mother

Jury Instructions

Over defense objection, the trial court instructed the jury that, if either they had decided the defendant was not guilty of aggravated murder or if they could not agree upon a verdict on the aggravated murder charge, the jury should then proceed to determine if the defendant were guilty of the lesser included offense of murder.

Verdict

The jury found the defendant guilty of murder.

ARGUMENT

Proposition of Law I:

Evidence that a person committed a murder at an unknown location, in and of itself, does not establish probable cause to search his or her residence for evidence of the murder.

Proposition of Law II:

Even if there is probable cause to believe that physical and serological evidence exists at a particular location, a six-month passage of time causes any prior-existing probable cause to search the premises to become stale.

Proposition of Law III:

Material omissions in a search warrant application cause the warrant to be invalid and require the court to conduct a hearing to determine if the omission was intentional. If intentionally perpetrated, a material omission requires suppression of the evidence even if the remaining information in the search warrant application still establishes probable cause for the warrant to issue.

The trial court improperly refused to suppress the evidence obtained during the warranted search of the West 90th Street residence. This denied Mr. Berry his rights under the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. It is axiomatic that there must be probable cause to believe contraband is at the location to be searched. E.g., *Illinois v. Gates* (1983), 462 U.S. 213, *State v. Gales* (2001), 143 Ohio App.3d 55, 61. The decision of a magistrate to issue a warrant is deserving of deference. However, the trial court must suppress the evidence obtained from a warranted search when there is not a “substantial basis for concluding that probable cause existed.” *Id.*

Here the warrant was lacking in three regards. First, the warrant did not establish that the house was the scene of the homicide and thus the situs of biological evidence. It was not enough that there was probable cause to believe Mr. Berry was involved in Yates’ death. It was also necessary to believe that evidence of the homicide would be at the West 90th residence. Here, the

residence was the joint home of Mr. Berry and Rakeisha Fox, his companion. In light of that fact, it was far more likely that Mr. Berry would have had sexual relations with Yates at a location other than the home, such as her house or elsewhere. Yet the affidavit does nothing to eliminate Yates' home as a crime scene – no information is provided in this regard. Similarly, the sheet in which Yates' body was wrapped, which spurred the request for search for its matching components, was never identified as being a sheet that was marked for retail sale as opposed to being exclusively used by a hotel chain. While, in this latter regard, evidence was presented at trial about the retail availability of the sheet, that information was not part of the warrant application and was not shown to have yet been known to the police.

Second, the six month passage of time between the homicide and the search, combined with the evidence that the residence was no longer Mr. Berry's sole residence, undermined any previously existing probable cause. The judicial officer failed to consider this important fact. *Gates*.

Material Omissions

Finally, although not known at the time of the suppression motion, evidence at trial revealed that the police withheld a vital piece of information which they knew prior to submitting the search warrant application – Rakeisha Fox told the police in May that the house had recently been remodeled , to include replacing carpeting and repairing walls. This information, had it been disclosed, would have further undermined the warrant application on the basis of staleness. *Franks v. Delaware* (1978), 438 U.S. 154. Here, the mid-trial revelation should have caused the trial court to revisit the suppression issue and suppress the evidence. Alternatively, counsel was ineffective in violation of the Sixth Amendment for failing to ask for a *Franks* hearing to determine whether the omission was intentional.

The Eighth District Court of Appeals, in affirming the conviction in this case, held that any omission was not material because the remainder of the affidavit still established probable cause. This Court should reject this analysis and hold that a material omission that was intentionally perpetrated requires suppression of the evidence obtained pursuant to the warranted search.

Proposition of Law IV:

An instruction on a lesser included offense should not be given unless warranted by the evidence.

Proposition of Law V:

A jury should be instructed that consideration of a lesser included offense is only permissible if it has unanimously concluded that the defendant is not guilty of the greater offense.

The trial court should not have instructed the jury on the lesser included offense of murder. This denied Mr. Berry due process under the Fourteenth Amendment. *State v. Wilkins* (1980), 64 Ohio St.2d 382, 384. The evidence was clear that, if Mr. Berry was the murderer, then he acted with prior calculation and design. The victim was stabbed repeatedly, and the State's informants testified that Mr. Berry said he moved Yates to the bathroom to kill her after assaulting her in the bedroom.

Moreover, the trial court improperly invited compromise by not requiring the jury to decide unanimously on aggravated murder before moving to considering the murder charge. This violated Mr. Berry's Sixth and Fourteenth Amendment rights to a fair trial by jury. See generally, *United States v. Tsanas* (C.A. 2, 1978), 572 F.2d 340, cert. den. 435 U.S. 995.

Proposition of Law VI:

It is improper for the trial court to allow jurors and alternate jurors to submit questions to witnesses during trial.

Mr. Berry acknowledges that this issue has already been decided by this Court in *State v. Fisher* (2003), 99 Ohio St.3d 127, insofar as it relates to jurors but not insofar as the issue relates to alternate jurors.

With respect to jurors, Mr. Berry asks this Court to overrule *Fisher*. Jury questioning violates Mr. Berry's constitutional rights to trial by jury, due process and counsel, all in violation of the Fifth, Sixth and Fourteenth Amendments. It does so by fundamentally disrupting the adversary process by causing jurors to lose their neutrality. *United State v. Johnson* (C.A. 8, 1989), 892 F.2d 707 (Lay, C.J., joined by MicMillan, J., concurring). Jurors become advocates as they lose their objectivity by seeking out facts instead of processing the evidence presented. *State v. Bush* (C.A. 2, 1995), 47 F.3d 511, 515.

In addition, the Sixth Amendment right to trial by jury is compromised because juror questioning improperly accelerates the deliberative process. *State v. Gilden* (2001), 144 Ohio App.3d 69, 74-75 (ov'd by *Fisher*). Moreover, by inviting the jury to go beyond the evidence, the right to counsel is compromised in violation of the Sixth Amendment as juror questions go beyond defense counsel's tactical prerogatives in presenting the case. *Id.*

The aforementioned problems have all been addressed in *Gilden*. In addition, jury questioning creates inequities between those jurors who are fluent in writing and those who are not. The former are more inclined to submit written questions – the manner that the trial court allowed the questioning in this case. As a result, there is a Fourteenth Amendment Equal Protection Clause violation that has been inflicted upon Mr. Berry. Compounding this problem

was the trial court's failure to advise the parties prior to voir dire that it would permit juror questioning. Had this been known, the parties could have addressed the issue during voir dire.

In this case, the problems discussed above were exacerbated by allowing alternate jurors to also ask questions. Thus, in addition to the other problems discussed, the jury that deliberated on this case may have relied upon evidence adduced through the questions of alternates – not jurors or counsel. Cf. *State v. Gross* (2002), 97 Ohio St.3d 121.

Finally, it should be noted that the structural nature of this error requires reversal without a showing of prejudice. E.g., *Sullivan v. Louisiana* (1993), 598 U.S. 275, 279.

Proposition of Law VII:

A conviction must be reversed when the prosecutor's closing argument includes an impassioned plea for the jury to focus on victim impact, an attack on counsel's veracity, and an implicit expression of the prosecutor's personal belief in the defendant's guilt.

Mr. Berry was denied due process and the right to trial by jury, as guaranteed by the Fifth, Sixth and Fourteenth Amendments, by virtue of the prosecutor's closing argument, that began with an impassioned plea centered on victim impact. The prosecutor asked the jury to focus on the victim's life and how it would have evolved but for her homicide.

In addition, the prosecutor violated due process and the right to counsel, guaranteed by the Sixth and Fourteenth Amendments, when he disparaged the defense counsel's "shell game" and dismissed the defense arguments as common boilerplate.

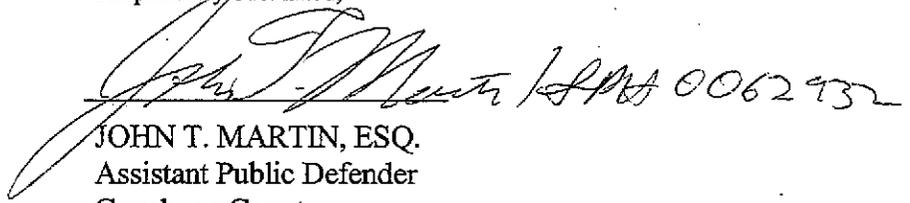
Finally, in violation of due process, the prosecutor went so far as to comment on other cases where similar arguments were made and in which the prosecutor had charged the right person, thus injecting the impression that he personally believed in the defendant's guilt. This, again, violated due process. *Berger v. United States* (1935), 295 U.S. 78, 88.

Even where, as here, there was no objection by defense counsel, reversal is warranted.
State v. Hart (1994), 94 Ohio App.3d 665.

CONCLUSION

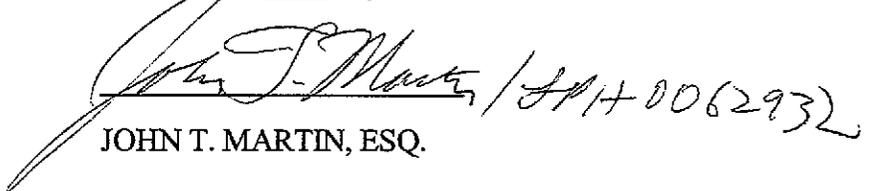
For the reasons discussed, this case involves matters of public and great general interest and substantial constitutional questions. Appellant requests that this Court grant jurisdiction and allow this case so that the important issue presented in this case will be reviewed on the merits.

Respectfully Submitted,


JOHN T. MARTIN, ESQ.
Assistant Public Defender
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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was hand delivered upon William D. Mason, Cuyahoga County Prosecutor, and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 22nd day of March, 2007.


JOHN T. MARTIN, ESQ.

FEB - 5 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87493

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER BERRY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, VACATED IN PART AND
REMANDED FOR RESENTENCING**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-466432

BEFORE: Dyke, J., Sweeney, P.J., McMonagle, J.

RELEASED: January 25, 2007

JOURNALIZED: FEB - 5 2007

CA05087493

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FILED & JOURNALIZED
PER APP. R. 22(E)

FEB 05 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JAN 25 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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ANN DYKE, J.:

Defendant-appellant, Christopher Berry ("appellant"), appeals his convictions and sentence. For the reasons set forth below, we affirm his convictions but vacate his sentence and remand the case for resentencing.

On May 31, 2005, the Cuyahoga County Grand Jury indicted appellant on three counts: count one alleged aggravated murder, in violation of R.C. 2903.01(A), with notice of prior conviction pursuant to R.C. 2929.13 and repeat violent offender specifications pursuant to R.C. 2929.01; count two alleged kidnapping, in violation of R.C. 2905.01(A)(2), with the same notice of prior conviction and repeat violent offender specifications; and count three alleged tampering with evidence, in violation of R.C. 2921.12. Appellant pleaded not guilty to all counts in the indictment.

The trial of this matter commenced on October 31, 2005. Prior to jury selection, the trial court held a hearing to address several motions filed by appellant. First, the court denied appellant's pro se motion for a speedy trial dismissal. Next, the court heard testimony and arguments regarding appellant's motion to suppress his oral statement given to police and his motion to suppress evidence obtained during a warranted search.

The trial court overruled both motions. Appellant then stipulated to a prior conviction and moved to bifurcate the repeat violent offender specification

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to a bench trial, which was granted.

On November 1, 2005, a jury was impaneled. The trial court gave the jury preliminary instructions. In these instructions, the trial court informed the jury that they would be able to submit questions for the witnesses. Defense counsel objected to the jury's ability to ask questions.

The case then proceeded to opening statements. Subsequently, the state presented its evidence, which established the following facts.

On or about January 1, 2005, the police found the body of the victim, Stephanie L. Yates, in a heavily wooded area approximately 20 feet from the roadway in the Cleveland Metroparks located near Shephard Road in the city of North Olmsted. The body was naked, no blood was present, her hands and feet were bound by ace bandages, her head was wrapped in a black plastic garbage bag, she was wearing one sock, her body was wrapped in a multi-colored bed sheet, and she was entirely placed into a second black plastic garbage bag.

After examining the body, the coroner determined that the victim died as a result of 22 stab wounds to her body. The coroner determined the time of death to be sometime around Christmas time in 2004. Upon the victim's body, the coroner found multiple hairs, determined to be that of an African-American male and female, and fibers, believed to be carpet fibers.

Additionally, the coroner discovered semen present in the victim's vagina.

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The coroner determined that the semen had been deposited shortly before the victim's death. DNA tests of the semen revealed it was appellant's sperm.

As a result, the police conducted an investigation of appellant, which included a search of 3206 West 90th Street, Cleveland, Cuyahoga County, Ohio, the residence of his girlfriend, Rakeisha Fox on March 12, 2005. The police confirmed that the West 90th residence was the legal residence of appellant during the time of the death of the victim. Police further believed that appellant continued to reside at the residence after the murder and until the time of his arrest.

It was at this residence that police discovered blood splatters containing the victim's DNA in a bedroom. Additionally, the police discovered a mattress, in which a portion of it had been removed.

Police further searched the home of appellant's mother, which was located on Fairville Road in Cleveland and which appellant listed as his legal address effective March 1, 2005. There police discovered a pillowcase that had a pattern nearly identical to the bed sheet that was wrapped around the victim's body when the police discovered the body in the Metroparks. Appellant's mother confirmed that she had purchased the bedding for appellant as a present.

Finally, the state presented the testimony of two jail inmates who stated that appellant admitted to them that he had killed the victim.

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After the state rested its case, appellant moved for a Crim.R. 29 motion for acquittal as to all counts. The court overruled his motion. Appellant then entered two exhibits and rested his case.

After closing arguments and prior to jury deliberation, the court provided the jury with the instruction that included in count one a charge of the lesser included offense of murder. Subsequently, the jury proceeded to deliberation.

On November 8, 2005, the jury found appellant guilty of the lesser included offense of murder, kidnapping and tampering with evidence. Two days later, the trial court sentenced appellant to 15 years to life on count one, five years on count two, and one year on count three, with all sentences to be served consecutively, for a total of 21 years to life in prison.

Appellant now appeals and submits five assignments of error for our review. Appellant's first assignment of error states:

"The trial court erred in not suppressing the evidence obtained from Mr. Berry's residence pursuant to a warranted search."

Within this assignment of error, appellant asserts the trial court erred in denying his motion to suppress evidence resulting from the warranted search of the 3206 West 90th Street residence, which sought discovery of the following items:

"Physical property including a smooth-edged single-sided knife, blade or

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metal instrument, being less than four inches in length, any biological material including blood, skin, hair, saliva, and/or any other cloth, clothing, ankle length sock with red and green decorations with the inscription "snow-digit;" any and all ace-type bandages or other cloth medical bandage, a multi-colored bed sheet or pillow case with colored pattern consisting of a square printed pattern in a grid-like arrangement, reference fiber samples of any and all brown, beige, or tan carpeting or carpet-like material, and any and all evidence of violations of the laws of the State of Ohio, to wit: Ohio Revised Code Chapter 2903 *et seq.*"

In maintaining this proposition, appellant makes three arguments. First, appellant contends that the warrant did not establish probable cause to believe the residence was the scene of the homicide. Second, appellant maintains that the passage of time between the homicide in December of 2004 and the search of the residence in May of 2005 did not establish probable cause that evidence would still be present. Last, appellant asserts that testimony revealed at trial that the police were informed in May that the carpet was replaced and walls repaired in the West 90th residence was not previously disclosed in the warrant application and thus constituted a material omission that should have invalidated the search warrant. For the following reasons, we find no merit in each of appellant's assertions.

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Sufficiency of Evidence to Establish Probable Cause

The Fourth Amendment to the United States Constitution guarantees people the right to be free from unreasonable searches and seizures and provides that no warrants shall issue but upon probable cause. In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant, the duty of the reviewing court is to determine whether the issuing judge had a substantial basis to conclude that probable cause existed. *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph two of the syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 76 L.Ed.2d 527, 103 S.Ct. 2317. Neither a trial court, nor an appellate court should substitute its judgment for that of the issuing judge by conducting a de novo review. *Gates*, supra at 236; *George*, supra.

In making the determination of whether there was a substantial basis to conclude that probable cause existed, the reviewing court must:

"Make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, supra at 238; *George*, supra at paragraph one of syllabus.

In conducting any after-the-fact scrutiny of an affidavit submitted in

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support of a search warrant, reviewing courts should afford great deference to the issuing judge's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. *Gates*, supra at 237, fn.10; *George*, supra at paragraph two of syllabus.

In the instant matter, appellant first argues that the trial court erred in failing to grant his motion to suppress because the underlying search warrant was not supported by probable cause. In maintaining this proposition, appellant argues that the affidavit failed to establish a fair probability that the West 90th Street residence was the scene of the victim's death. We find appellant's argument without merit.

The affidavit in support of the search warrant stated DNA tests established that appellant had sex with the victim shortly before her death. Additionally, the coroner concluded that the stabbing must have occurred somewhere other than the Metroparks because the body was cleaned of any traces of blood. Detective McGinty also averred that appellant legally resided at the searched residence through the time of the murder in December of 2004 until March 1, 2005. Even after March 1, 2005, at which time appellant changed his legal address, Detective McGinty believed that it was more probable than not that appellant continued to reside at the West 90th residence. On May 6, 2005, detectives appeared at the residence and appellant answered the door. The

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detectives had a brief encounter with appellant at that time. The affidavit further stated that for 72 hours prior to March 12, 2005, the detectives conducted periodic surveillance of the residence and witnessed appellant taking out the trash, as well as using a key twice to enter the premises. Finally, the affidavit stated that an informant verified that the owner of the residence, Rakeisha Fox, was appellant's girlfriend and appellant lived at the residence during Christmas time, which is consistent with the time frame for the victim's disappearance and death.

We agree with the trial court that this information provided a substantial basis upon which the magistrate could conclude that probable cause existed to search the West 90th Street residence. Appellant argues that the affidavit did not establish probable cause that biological evidence would be at the residence. Appellant argues that since appellant lived with his girlfriend at the residence, it would have been difficult for him to bring the victim there to have sexual relations with her. He also maintains that the bed sheet that the victim's body was wrapped in may have been used by an area hotel or hotel chain. Keeping in mind that we are to resolve any doubtful or marginal cases in favor of upholding the warrant, we decline to adopt appellant's far reaching assertions and find the fair probability to be, considering the averments made by Detective McGinty, that biological evidence may have been found at the residence. See

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Gates, supra at 237, n.10; *George*, supra at paragraph two of syllabus.

Despite appellant's assertions, in order to have probable cause to search the residence, the police need not establish that the murder actually occurred on the premises. It is enough to establish that it is a fair probability that appellant was the perpetrator, that he resided at the residence, and that contraband or evidence of the crime might be found in the West 90th residence. We, therefore, conclude that from the totality of these facts and circumstances there was, at the time the warrant was issued, probable cause to believe that evidence could be found at the subject premises. See *State v. Brown* (1984), 20 Ohio App.3d 36, 38, 484 N.E.2d 215.

Staleness

With regard to appellant's contention that the information was stale, the court in *State v. Carlson* (1995), 102 Ohio App.3d 585, 600-601, 657 N.E.2d 591, stated:

"Under the staleness doctrine, 'staleness is not measured merely on the basis of the maturity of the information.' Consequently, 'there is no arbitrary time limit on how old information [supporting probable cause] can be.' Rather, the test for staleness is whether the available information justifies a conclusion that contraband is probably on the person or premises to be searched." *Id.*, citations omitted.

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Appellant asserts that, even if biological or other evidence were present in the West 90th residence in December of 2004, the affidavit failed to explain why such evidence would be present at the time of the search, six months later. In asserting this proposition, appellant relies heavily on the fact that the residence was no longer appellant's legal residence.

Detective McGinty averred that he believed that it was more probable than not that appellant continued to reside at the West 90th residence after March 1, 2005, even though appellant did not list the residence as his legal residence. In support of this position, Detective McGinty averred that on May 6, 2005, detectives appeared at the residence and appellant answered the door. He further stated that for 72 hours prior to March 12, 2005, the detectives conducted periodic surveillance of the residence and witnessed appellant taking out the trash and using a key twice to enter the premises. Finally, Detective McGinty averred that an informant verified that the owner of the residence, Rakeisha Fox, was appellant's girlfriend.

In light of the foregoing averments, it was fairly probable that appellant still resided at the West 90th Street residence. Consequently, the issuing judge, as well as the trial court correctly determined that there was a fair probability that any evidence, most of which was not of the perishable kind, would be present at the residence. Thus, the officers' search under the warrant was

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objectively reasonable and the evidence found was admissible.

Material Omission

Finally, appellant argues that evidence discovered at trial revealed that the police did not include in the search warrant application that Rakeisha Fox, appellant's girlfriend, told them in May of 2005 that she had recently replaced some carpeting and repaired some walls in the West 90th Street residence. Appellant contends that this information undermined the warrant application. Therefore, appellant argues, the trial court should have revisited the suppression issue when it came to light at mid-trial, or in the alternative, appellant's counsel was ineffective for failing to request a *Franks* hearing.

The United States Supreme Court set forth the law on a defendant's burden when challenging the veracity of an affidavit used to obtain a search warrant as follows:

"Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the

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affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks v. Delaware* (1978), 438 U.S. 154, 155-156, 98 S.Ct. 2674, 57 L.Ed.2d 667.

Omissions count as false statements if "designed to mislead, or * * * made in reckless disregard of whether they would mislead, the magistrate." *United States v. Colkley* (C.A. 4, 1990), 899 F.2d 297, 301 (emphasis deleted).

Without addressing whether the police materially omitted evidence of remodeling done at the West 90th Street residence in the affidavit, we find the search warrant nevertheless valid. The Court in *Franks*, supra, stated that the warrant would still be valid if, by setting the false information to one side, the remaining content of the affidavit is sufficient to establish probable cause. *Franks*, supra at 156. Here, because we are dealing with an alleged material omission, we do not set the information to one side, but instead include it in the warrant application.

By including the information that carpet had been replaced and walls repaired in the West 90th Street residence, we nevertheless find the affidavit's remaining contents sufficient to establish probable cause. Remodeling the residence would not destroy evidence of a murder weapon, specific bed sheet,

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specific sock and bandages. Furthermore, the fiber samples or biological materials could have been discovered in areas not disturbed by the remodeling. In fact, allegations of recent remodeling might well support a finding of probable cause. More specifically, the police believed that appellant washed the victim's body in the bathroom of the residence due to the fact that the coroner determined that the perpetrator cleaned blood off the victim thoroughly before disposing of the body. Therefore, because we are mindful that we are obligated to resolve any doubtful or marginal cases in favor of upholding the warrant, we are unable to conclude that the search of 3206 West 90th Street violated appellant's constitutional rights. See *Gates*, supra at 237, fn.10; *George*, supra at paragraph two of syllabus. Consequently, we find the trial court did not err in failing to suppress the evidence, nor was counsel ineffective for failing to ask for a *Franks* hearing. Appellant's first assignment of error is without merit.

Appellant's second assignment of error states:

"The trial court erred in allowing jurors, and particularly alternate jurors, to submit questions of the witnesses at trial."

Within this assignment of error, appellant asserts two arguments. First, appellant maintains that the trial court erred in permitting the jury to submit questions for the witnesses. Appellant correctly acknowledges that the aforementioned position is in direct contradiction to the Supreme Court of Ohio's

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decision in *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, but submits that the case was wrongly decided.

In *Fisher*, the court held "the decision to allow jurors to question witnesses is a matter within the discretion of the trial court and should not be disturbed on appeal absent an abuse of that discretion." *Id.* at 136. We decline to adopt any other holding than that prescribed in *Fisher*. Therefore, because appellant has made no claim that the trial court abused its discretion and in fact, acknowledges that the form of questioning employed by the trial court was consistent with that contemplated in *Fisher*, we find appellant's argument without merit.

Next, appellant contends that the trial court, at the least, should not have permitted alternate jurors to submit questions for the witnesses. We agree with appellant that the Supreme Court of Ohio did not specifically address this issue in *Fisher*, *supra*. Nevertheless, we decline to make a distinction between regular jurors and alternate jurors in this regard.

Alternate jurors are impaneled at the same time and in the same manner as regular jurors. Crim.R. 24(G)(1). Additionally, they "have the same qualifications, are subject to the same examination and challenges, take the same oath, have the same functions, powers, facilities and privileges as the regular jurors." *Id.* Furthermore, they are present during the entire trial and

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are prepared to deliberate should they become a member of the deliberating panel. *State v. Reiner*, 89 Ohio St.3d 342, 351, 2000-Ohio-190, 731 N.E.2d 662, judgment reversed on other grounds, 532 U.S. 17, 121 S.Ct. 1252, 149 L.Ed.2d 158. Therefore, we find that because regular jurors are permitted to ask questions of witnesses, so too are alternate jurors. Appellant's second assignment of error is without merit.

Appellant's third assignment of error states:

"The prosecution violated Mr. Berry's constitutional rights under Article I, Section 10 of the Ohio Constitution, the Fifth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it engaged in improper closing argument designed to appeal to the passions of the jury."

In analyzing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187, 739 N.E.2d 300, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. "The touchstone of analysis is the fairness of the trial, not the culpability of the prosecutor." *Id.*, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged

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misconduct, the defendant has not been prejudiced, and his conviction will not be reversed. See *State v. Loza*, 71 Ohio St.3d 61, 78, 1994-Ohio-409, 641 N.E.2d 1082.

Generally, prosecutors are entitled to considerable latitude in closing argument. *State v. Ballew*, 76 Ohio St.3d 244, 255, 1996-Ohio-81, 667 N.E.2d 369. In closing argument, a prosecutor may comment freely on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, citing *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 263 N.E.2d 773. "Moreover, because isolated instances of prosecutorial misconduct are harmless, the closing argument must be viewed in its entirety to determine whether the defendant has been prejudiced." *Ballew*, supra; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420, 613 N.E.2d 212.

Initially, we note that appellant failed to object to any of the alleged improper statements that the state made during closing argument. Therefore, he has waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604-605, 605 N.E.2d 916. "Plain error does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894.

Appellant complains that, during the state's closing argument, the

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prosecutor appealed to the passions of the jury by focusing on the life of the victim and what she could have accomplished had she not died. Additionally, appellant argues that the prosecutor improperly attacked the credibility of defense counsel by referring to his argument as a "shell game" and suggesting that defense counsel's arguments were "common" boilerplate trial tactics. Finally, appellant complains that the prosecutor improperly informed the jury of a previous case he had prosecuted. In this regard, the prosecutor stated:

"My last thought is this; about three, four years ago, a different case, an attorney informed a jury, implored the law enforcement agency at the trial table to go back and reinvestigate this case, go back and get the right guy, go back and get the real perpetrator and send the defendant home to his mom and his family.

I sat there and I thought, well, who else are they going to investigate. I told them the same thing I am going to tell you. Here's the perpetrator. All others were excluded by DNA evidence and the investigation itself. This is it. There is nobody else."

We do not find that the prosecutor's statements denied appellant a fair trial, nor do we find that the outcome of the trial court would have been different had the prosecutor not made the statements. While the arguments were emotional in nature, they were not "so inflammatory as to render the jury's decision a product solely of passion and prejudice against the appellant." *State*

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v. Williams (1986), 23 Ohio St.3d 16, 20, 490 N.E.2d 906. Additionally, we have previously determined that a prosecutor does not engage in prejudicial misconduct during closing arguments when he or she argues to a jury about the trial strategy being used by the defense counsel. *State v. Palmer*, Cuyahoga App. No. 87318, 2006-Ohio-4893. Furthermore, a review of the record demonstrates that ample evidence existed upon which the jury could base its verdict of guilty for murder, kidnapping and tampering with evidence. Consequently, appellant's third assignment of error is without merit.

Appellant's fourth assignment of error states:

"The trial court improperly instructed the jury that it could find the defendant guilty of the lesser included offense of murder, even without first finding him not guilty of aggravated murder."

In the instant matter, appellant was indicted and tried on a charge of aggravated murder. The trial court, over appellant's objection, instructed the jury as to the lesser included offense of murder. The jury returned a verdict of guilty of murder and the trial court entered judgment thereon.

Appellant asserts that the trial court improperly instructed the jury as to murder. Appellant maintains that the trial court should have never instructed the jury with the lesser included offense of murder because there was evidence presented that could go to prior calculation and design, which is only an element

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of the greater offense of aggravated murder.

Initially, we note that murder, in violation of R.C. 2903.02, is a lesser included offense of aggravated murder, in violation of R.C. 2903.01(A). *State v. Mason* (1998), 82 Ohio St.3d 144, 161, 694 N.E.2d 932, 951. The only difference between the two offenses is murder does not have an element of prior calculation and design, while aggravated murder does. The mere fact that an offense is a lesser included offense of the crime charged does not entitle a defendant to instruction by the court on both offenses. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. Rather, an instruction as to the lesser included offense is only mandated "where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *Id.*

In *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 303, the Supreme Court of Ohio explained the rule regarding when instructions on lesser included offenses must be given. In so doing, the court held:

"The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant."

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Id. at 388.

In the instant matter, the trial court properly instructed the jury with the lesser included offense of murder. The only evidence of prior calculation and design originated from the testimony of Thomas Pickney, a jailhouse informant. Under a reasonable view of such evidence, it is quite possible that a jury could choose not to believe the informant's testimony, but could believe the remainder of the state's case. Under such circumstances, "the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *Thomas*, supra. Accordingly, the trial court properly instructed the jury on the lesser included offense of murder.

Appellant further argues that the trial court's instruction to the jury on murder as the lesser included offense to aggravated murder was improper because it allowed the jury to consider the lesser included offense without first reaching a unanimous verdict on the greater offense. In the instant matter, the trial court instructed the jury as follows:

"You may consider the lesser-included offense if you find that the State failed to prove beyond a reasonable doubt each and every essential element of aggravated murder but did proof [sic] beyond a reasonable doubt each and every essential element of the lesser included offense of murder. You may also consider the lesser-included offense, if all of you are unable to agree on a verdict

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of either guilty or not guilty of aggravated murder. In that event, you will continue your deliberation to decide whether the State has proved beyond a reasonable doubt all of the essential elements of the lesser-included offense of murder.”

It is true that the trial court instructed the jury that it may consider the lesser included offense without first reaching a unanimous verdict on the greater offense. Despite appellant’s contentions, however, such an instruction is completely proper. In *State v. Thomas* (1988), 40 Ohio St.3d 213, 218, 533 N.E.2d 286, the Supreme Court of Ohio held, “[t]he jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense.” *Id.* As we are bound by precedent, we find appellant’s argument without merit and overrule his fourth assignment of error.

Appellant’s fifth assignment of error states:

“The trial court erroneously imposed a sentence that exceeded the minimum and concurrent terms of imprisonment on the basis of findings made by the trial judge pursuant to a facially unconstitutional statutory sentencing scheme.”

In his final assignment of error, appellant contends that the trial court erred in ordering consecutive sentences without first considering concurrent

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sentences. Appellant recognizes *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, which was decided after he filed his notice of appeal, but before he filed his appellate brief. Appellant, however, maintains that *Foster* is inapplicable to him because it violates his rights against ex post facto legislation and his due process rights.

We find appellant's argument without merit and apply *Foster* to this case. In *Foster*, the Supreme Court of Ohio found several provisions of S.B. 2 unconstitutional, including R.C. 2929.14(E)(4), 2929.14(A), 2929.14(B) and (C), and 2929.19(B)(2). *Foster*, supra, applying *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435. Therefore, the court severed and excised these provisions from S.B. 2 and ordered that cases on direct review be remanded for a new sentencing hearing. *Foster*, supra at 29-31. The court explained that during resentencing, the trial court has full discretion to impose a prison sentence within the statutory range and is no longer required to make findings or state reasons for imposing maximum, consecutive, or more than the minimum sentence. *Id.* at paragraph seven of the syllabus; see, also, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus.

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In the instant matter, the trial court relied on unconstitutional provisions when it imposed appellant's consecutive sentences. Thus, appellant's sentences are void. Accordingly, we vacate his sentences and remand the case to the trial court for resentencing in accordance with *Foster*.

Appellant insists, however, that any sentence imposed under *Foster's* new remedy violates his rights against ex post facto legislation and due process rights. We find appellant's argument to be premature as he has yet to be sentenced under *Foster*. *State v. Erwin*, Cuyahoga App. No. 87333, 2006-Ohio-4498; *State v. McCarroll*, Cuyahoga App. No. 86901, 2006-Ohio-3010; *State v. Chambers*, Cuyahoga App. No. 87221, 2006-Ohio-4889; *State v. Rady*, Lake App. No. 2006-L-012, 2006-Ohio-3434; *State v. Pitts*, Allen App. No. 01-06-02, 2006-Ohio-2796; *State v. Sanchez*, Defiance App. No. 4-05-47, 2006-Ohio-2141. Accordingly, this argument is without merit.

Conviction affirmed, sentence vacated and remanded for resentencing.

It is ordered that appellee and appellant split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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A certified copy of this entry shall constitute the mandate pursuant to
Rule 27 of the Rules of Appellate Procedure.



ANN DYKE, JUDGE

JAMES J. SWEENEY, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR