

SIN THE SUPREME COURT OF OHIO
2007

07-1046

STATE OF OHIO,

Case No.

Plaintiff-Appellant,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

CHRISTOPHER SWANN,

Court of Appeals
Case Nos. 06AP-870
06AP-899

Defendant-Appellee.

MEMORANDUM OF PLAINTIFF-APPELLANT SUPPORTING JURISDICTION

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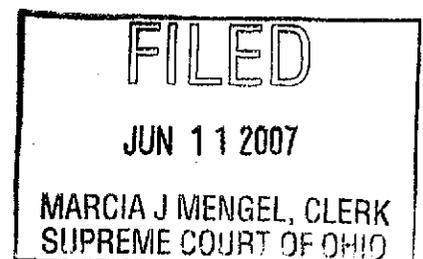


TABLE OF CONTENTS

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION...1

STATEMENT OF THE CASE AND FACTS.....5

ARGUMENT6

First Proposition of Law: The Federal Constitution does not prohibit a trial court from applying the “corroboration” requirement in Evid.R. 804(B)(3) to exclude hearsay testimony offered by a criminal defendant. [*Holmes v. South Carolina* (2006), 126 S.Ct. 1727, distinguished.]6

Second Proposition of Law: A trial court’s evidentiary rulings are subject to an abuse-of-discretion standard on appeal. Thus, a trial court’s application of the “corroboration” requirement in Evid.R. 804(B)(3) may not be reversed unless the trial court abused its discretion in addressing whether the “corroborating circumstances clearly indicate the truthworthiness of the statement.” [*State v. Landrum* (1990), 53 Ohio St.3d 107, 114, followed].....9

CONCLUSION.....13

CERTIFICATE OF SERVICE14

APPENDIX

Tenth District Judgment Entry (filed April 26, 2007).....A-1

Tenth District Decision (filed April 26, 2007, 2006)A-2

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

This felony case presents two issues of constitutional substance and statewide importance warranting this Court's review. The first is whether *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, prohibits a trial court from applying the "corroboration" requirement in Evid.R. 804(B)(3) to exclude hearsay testimony offered by a criminal defendant. The second is whether appellate review of a trial court's application of Evid.R. 804(B)(3) may ignore the well-settled abuse-of-discretion standard and ignore a key word in the rule.

At trial, defendant sought to present hearsay testimony under Evid.R. 804(B)(3). The trial court excluded the testimony, finding that defendant failed to show the necessary "corroborating circumstances" under the rule. The issue sharply divided the Tenth District panel, with each of the three judges writing an opinion. Judge Tyack, relying solely on constitutional grounds, found that *Holmes* required the admission of the evidence. Judge Brown disagreed with Judge Tyack's analysis under *Holmes* but concluded that she would find corroborating circumstances indicate the trustworthiness of the statements.¹ Judge Sadler voted to affirm the trial court's exclusion of the evidence.

Judge Tyack's constitutional analysis is seriously flawed. To start, Judge Tyack found it "[i]nteresting[]" that Evid.R. 804(B)(3) differs from Fed.R.Evid. 804(B)(3) "only insofar as it imposes this additional 'corroboration' requirement." Opinion, at ¶8, citing Weissenberger's *Ohio Evidence* (2005) 421. Apparently, Judge Tyack feels that

¹ Although Judge Brown concurred separately, there are portions of both Judge Tyack's and Judge Brown's opinions that mistakenly refer to Judge's Tyack's opinion as a majority opinion. For example, Judge Tyack incorrectly used the pronoun "we" in his opinion. Opinion, ¶12 ("We find"); *id.* at ¶13 ("we hold"). Also, Judge Brown erred in using the word "majority" four times when referring to Judge Tyack's singular opinion. *Id.* at ¶35.

the federal rule does not contain a “corroboration” requirement, thus making the Ohio rule more strict—and more vulnerable to constitutional attack—than the federal rule. But Judge Tyack’s reading of the federal rule is just plain wrong. The federal rule *does* impose a “corroboration” requirement. In fact, the only material difference between the two rules is that the Ohio rule imposes the “corroboration” requirement to evidence that exculpates *and* inculpates the accused, whereas the federal rule’s “corroboration” requirement applies only to exculpatory evidence. In this sense, the Ohio rule is *more* defense-friendly than the federal rule. Page 421 of the 2005 edition of Weissenberger’s Ohio Evidence actually makes this point perfectly clear.

Beyond this faulty comparison of the two rules, Judge Tyack also misread *Holmes*. Judge Tyack concluded that, after *Holmes*, “Evid.R. 804(B)(3) cannot be construed in a way that denies an accused a meaningful opportunity to present a complete defense.” Opinion, at ¶12. Apparently, in Judge Tyack’s view, the “corroboration” requirement in Evid.R. 804(B)(3) cannot be constitutionally applied to exclude hearsay evidence offered by a criminal defendant. According to Judge Tyack, *Holmes* requires that such evidence “be presented for the jury for its own consideration.” *Id.*

But the Federal Constitution does not require that Evid.R. 804(B)(3) be construed any differently than on its own plain terms. This Court has held that Evid.R. 804(B)(3) addresses one of the principle concerns of excluding hearsay statements against penal interest offered by a criminal defendant, “which is that a criminal defendant’s reliable evidence should not be excluded through application of hearsay rules that do not adequately protect due process rights.” *State v. Sumlin* (1994), 69 Ohio St.3d 105, 111, discussing *Chambers v. Mississippi* (1973), 410 U.S. 284. “Evid.R. 803(B)(3) strikes a

balance between hearsay statements against penal interest which are sufficiently trustworthy to be admissible and those which are not.” *Sumlin*, 69 Ohio St.3d at 111. Thus, when a criminal defendant fails to establish reliability under Evid.R. 804(B)(3), the exclusion of such statements does not violate the right to a fair trial. *Id.*; see, also, *State v. Caulley*, 10th Dist. No. 97AP-1590, 2002-Ohio-7039, ¶44 (“[I]f the trial court’s ruling complies with Evid.R. 804(B)(3), it presumably complies with *Chambers*.”).

Judge Tyack never concluded that Carlisle’s statements were reliable. Rather, he based his constitutional holding on the mere fact that Carlisle’s statements were relevant to defendant’s third-party-guilt defense. But the Federal Constitution does not give criminal defendants the right to present evidence merely because it is relevant. *Montana v. Egelhoff* (1996), 518 U.S. 37, 42 (plurality). A trial court may apply hearsay rules to exclude evidence that, “although unquestionably relevant, is deemed insufficiently reliable.” *Id.* *Holmes* does nothing to change this rule.

Judge Tyack’s opinion is also at odds with the Sixth Circuit’s recent post-*Holmes* decision in *Sinkfield v. Brigano* (C.A. 6, 2007), 2007 Ohio App. LEXIS 12343 (recommended for full-text publication). There, the Court addressed the constitutionality of an Ohio trial court’s exclusion of statements against penal interest offered by a criminal defendant. Although the Court’s review was limited under 28 U.S.C. 2254, the Court never once mentioned *Holmes*, let alone indicate that *Holmes* required the admission of the statements. Rather, the Court relied on *Chambers* and found that the defendant’s failure to establish the necessary corroboration justified the trial court’s exclusion of the hearsay statements.

Judge Brown's opinion is equally problematic. Judge Brown concluded that she "would find corroborating circumstances indicate the trustworthiness of the statement Carlisle made to the four witnesses." Opinion, at ¶35. But this Court has repeatedly stated that a trial court's evidentiary rulings are subject to an abuse-of-discretion standard of review on appeal. See, e.g., *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶62, citing *State v. Issa* (2001), 93 Ohio St.3d 49, 64; *State v. Landrum* (1990), 53 Ohio St.3d 107, 114 (trial court's application of "corroboration" requirement in Evid.R. 804(B)(3) subject to abuse-of-discretion standard). By basing her decision on what she "would find," Judge Brown improperly substituted her judgment for the trial court's.

Not only did Judge Brown engage in an improper de novo review, but her application of Evid.R. 804(B)(3) ignored a key word in the rule. It is not enough just to say that corroborating circumstances "indicate" the trustworthiness of the statements; rather, Evid.R. 804(B)(3) requires that corroborating circumstances "*clearly* indicate" the truthworthiness of the statement. By omitting the word "clearly," Judge Brown took what is supposed to be a "significant hurdle," *Sumlin*, 69 Ohio St.3d at 683-84, citing *United States v. Salvador* (C.A. 2, 1987), 820 F.2d 558, 561, and turned it into a minimal requirement that is easily satisfied. Indeed, in discussing Evid.R. 804(B)(3), this Court has gone so far as to italicize the word "clearly," thus showing the importance of that word. *Sumlin*, 69 Ohio St.3d at 684.

The bench and bar need guidance from this Court regarding whether *Holmes* affects the constitutionality of the "corroboration" requirement in Evid.R. 804(B)(3), and regarding the proper scope of appellate review of a trial court's application of this rule. Accordingly, the State respectfully requests this Court accept jurisdiction in this case.

STATEMENT OF THE CASE AND FACTS

Defendant was indicted on one count of felonious assault and one count of having a weapon while under disability (WUD). At trial, John Stith (also known as "Cash") testified that on June 25, 2005, he was in his grandmother's house when he heard gunfire coming from outside. Although he could not see the shooters from the window, Stith surmised that defendant and his associates were responsible for the gunfire because the shots were coming from defendant's yard. Stith yelled out the window, ordering that the gunfire stop.

Still angry, Stith then went outside and again yelled for the gunfire to stop. After yelling, Stith was walking back toward his grandmother's house when he heard defendant say, "Fuck you." Stith turned, saw defendant, and noticed "fire" come from an object in defendant's hand—defendant had shot Stith in the neck. Stith fell to the ground and saw "sparks" flying up around him—Stith was then shot in the leg. According to Stith, defendant was standing in front of his (defendant's) house near a bush when he fired the first shot at Stith. Stith saw no one else in the area when defendant shot him.

Kavar Thompson testified that he spoke with Stith in the street shortly before the shooting. After talking with Stith, Thompson walked to a nearby corner to talk with another friend. At this point, Thompson heard Stith yell at defendant, then saw defendant shoot Stith.

Stith was eventually transported to Grant Hospital, where he stayed for eight days and underwent two surgeries. As a result of his injuries, Stith has scars on his neck and leg, nerve damage causing loss of movement in his left hand, and a damaged left leg.

In addition to presenting alibi testimony, defendant sought to introduce testimony that Delmar Carlisle was the shooter. Because Carlisle was unavailable due to him

asserting his Fifth Amendment right against self-incrimination, defendant sought to present testimony of Carlisle's alleged out-of-court statements under Evid.R. 804(B)(3). Carlisle allegedly made these statements to Tia Holland (the mother of defendant's child) and Lisa Hughes (Holland's cousin). The trial court excluded the testimony, finding that defendant failed to establish the necessary "corroborating circumstances" under the rule.

The jury ultimately found defendant guilty of the felonious assault count, along with an accompanying firearm specification, and the WUD count. The trial court sentenced defendant to a total of nine years in prison.

On appeal, defendant challenged, inter alia, the trial court's exclusion of the testimony regarding Carlisle's out-of-court statements. The issue generated three separate opinions from the Tenth District panel. Judge Tyack, relying on *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, held that the Federal Constitution required the admission of the evidence. In a separate concurrence, Judge Brown disagreed with Judge Tyack's analysis under *Holmes*, but concluded that she would find corroborating circumstances indicate the trustworthiness of the statements. In dissent, Judge Sadler voted to affirm the trial court's exclusion of the evidence.

ARGUMENT

First Proposition of Law: The Federal Constitution does not prohibit a trial court from applying the "corroboration" requirement in Evid.R. 804(B)(3) to exclude hearsay testimony offered by a criminal defendant. [*Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, distinguished.]

In *Chambers v. Mississippi* (1973), 410 U.S. 284, the United States Supreme Court considered whether a defendant's right to a fair trial was violated by the trial

court's exclusion of hearsay statements made by a declarant admitting responsibility for the crime. Mississippi rules of evidence at the time did not allow a declarant's statement against penal interest to be admissible into evidence as an exception to the hearsay rule, regardless of the reliability of the statement. *Id.* at 299. The Court listed four reasons why the statements against penal interest at issue in that case were sufficiently reliable, such that the Federal Constitution required their admission into evidence: (1) the spontaneity of the statements, (2) the statements were corroborated by other evidence, (3) the statements were self-incriminating and against penal interest, and (4) the declarant was available for cross-examination. *Id.* at 300-01.

The Court later clarified that "*Chambers* was an exercise in highly case-specific error correction." *Montana v. Egelhoff* (1996), 518 U.S. 37, 52 (plurality). *Chambers* "established no new principles of constitutional law" but "held quite simply that *under the facts and circumstances of this case* the rulings of the trial court deprived Chambers of a fair trial." *Id.*, quoting *Chambers*, 410 U.S. at 302-03 (emphasis in *Egelhoff*).

In *State v. Sumlin* (1994), 69 Ohio St.3d 105, this Court discussed the relationship between Evid.R. 804(B)(3) and *Chambers*:

Through Evid.R. 804(B)(3), Ohio has addressed one of the principal concerns of cases such as *Chambers*, which is that a criminal defendant's reliable evidence should not be excluded through application of hearsay rules that do not adequately protect due process rights. Evid.R. 804(B)(3) strikes a balance between hearsay statements against penal interest which are sufficiently trustworthy to be admissible and those which are not.

Id. at 111. Thus, when a criminal defendant fails to establish reliability under Evid.R. 804(B)(3), the exclusion of statements against penal interest does not violate the right to a fair trial. *Id.*; see, also, *State v. Caulley*, 10th Dist. No. 97AP-1590, 2002-Ohio-7039, ¶44

(“[I]f the trial court’s ruling complies with Evid.R. 804(B)(3), it presumably complies with *Chambers*.”).

The United States Supreme Court’s recent decision in *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, does nothing to affect the constitutionality of the “corroboration” requirement in Evid.R. 804(B)(3). In *Holmes*, the Court struck down a South Carolina evidence rule stating that “‘where there is strong evidence of [a defendant’s] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party’s alleged guilt’ may (or perhaps must) be excluded.” *Id.* at 1734 (quoting lower court opinion). The Court noted that this rule focuses solely on the strength of the prosecution’s case and not on the probative value or potential adverse effects of the defendant’s evidence. *Id.* Further complicating the problem is that, under the South Carolina rule, no inquiry is made into the credibility of the prosecution’s witnesses or the reliability of its evidence. *Id.* “The point is that, by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or case doubt.” *Id.* at 1735.

The South Carolina rule at issue in *Holmes* is different than Evid.R. 804(B)(3). Whereas the South Carolina rule excludes a defendant’s evidence focused solely on the strength of the prosecution’s case, the “corroboration” requirement in Evid.R. 804(B)(3) excludes a defendant’s evidence because the evidence itself is *weak*. “The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Egelhoff*, 518 U.S. at 42, quoting *Taylor v. Illinois* (1988), 484 U.S. 400, 410. Thus, hearsay rules may “prohibit

the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable.” *Egelhoff*, 518 U.S. at 42.

In the present case, the trial court’s application of the “corroboration” requirement in Evid.R. 804(B)(3) to exclude testimony regarding Carlisle’s out-of-court statements complies with the Federal Constitution, as articulated in *Chambers*. As explained more fully in the State’s second proposition of law, defendant failed to establish that Carlisle’s statements were “highly reliable” such that they were admissible under *Chambers*. *State v. McGuire* (1997), 80 Ohio St.3d 390, 400. Also, unlike the declarant in *Chambers*, Carlisle was unavailable for cross-examination. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶68.

For the foregoing reasons, the State respectfully submits that this Court should grand further review of this proposition of law.

Second Proposition of Law: A trial court’s evidentiary rulings are subject to an abuse-of-discretion standard on appeal. Thus, a trial court’s application of the “corroboration” requirement in Evid.R. 804(B)(3) may not be reversed unless the trial court abused its discretion in addressing whether the “corroborating circumstances clearly indicate the truthworthiness of the statement.” [*State v. Landrum* (1990), 53 Ohio St.3d 107, 114, followed].

It is well-settled that “the admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice.” *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶62, citing *State v. Issa* (2001), 93 Ohio St.3d 49, 64. Specifically pertinent to the present case, this Court has held that “[t]he determination of whether corroborating circumstances are sufficient to admit statements

against penal interest, as a hearsay exception, generally rests within the discretion of the trial court.” *State v. Landrum* (1990), 53 Ohio St.3d 107, 114, citing *United States v. Guillette* (C.A. 2, 1976), 547 F.2d 743, 754.

“The term ‘abuse of discretion’ * * * implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157. “When applying this standard, an appellate court is not free to substitute its judgment for that of the trial judge.” *State v. Herring* (2002), 94 Ohio St.3d 246, 255, quoting *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

The “corroboration” requirement in Evid.R. 804(B)(3) poses “significant hurdles which must be overcome by the proponent of the statement. * * * The statement will *not* be admissible *unless* accompanied by ‘corroborating circumstances.’ The corroboration must ‘*clearly* indicate’ that the statement is ‘trustworthy.’” *Sumlin*, 69 Ohio St.3d at 108, citing *United States v. Salvador* (C.A. 2, 1987), 820 F.2d 558, 561 (emphasis in sic). “This is not an ‘insignificant hurdle.’” *Landrum*, 53 Ohio St.3d at 114, citing *United States v. Barrett* (C.A. 1, 1976), 539 F.2d 244, 253, and *State v. Saunders* (1984), 23 Ohio App.3d 69.

The trial court was well within its discretion in concluding that defendant failed to establish the “corroboration” requirement in Evid.R. 804(B)(3). Importantly, Carlisle had a close, personal relationship with defendant resembling a “father-son” relationship. *State v. Mengistu*, 10th Dist. No. 02AP-1425, 2003-Ohio-1452, ¶54 (declarant’s friendship with the defendant undermined a finding of trustworthiness). Moreover, Carlisle bragged to Hughes about the shooting, thus further undermining the trustworthiness of his statements. *United States v. Harty* (C.A. 7, 1991), 930 F.2d 1257,

1264 (distinguishing between a declarant having a “strong motivation to recount the events accurately” and a declarant “bragging to enhance his reputation”); c.f. *United States v. Seabolt* (C.A. 2, 1992), 958 F.2d 231, 233 (a jail inmate’s statement to another inmate that the first inmate committed a crime “is more apt to be jailhouse braggadocio than a statement against his criminal interest”). If there is ever a time to doubt the veracity of a statement, it is when the declarant is visibly bragging.

Although Carlisle made the statements to his friends, this Court has minimized the importance of this factor in establishing corroboration. *State v. Spirko* (1991), 59 Ohio St.3d 1, 28. Besides, the trial court reasonably found that Carlisle’s motive to exculpate defendant was more probative and deserving of more weight than any motive to be truthful to Hughes or Holland. *Sumlin*, 69 Ohio St.3d at 109 (while some of the circumstances surrounding the statement may appear to corroborate their trustworthiness, other circumstances provide reasons to doubt the statements’ trustworthiness). It bears repeating here that Evid.R. 804(B)(3) requires that the corroboration “*clearly* indicate the truthworthiness of the statement.” (Emphasis added).

That Carlisle spoke to Holland about the shooting on “many occasions” is also unavailing. Hughes testified that she told Holland about Carlisle’s statements, and Holland testified that “every” conversation she had with Carlisle about the shooting pertained to her asking him to “man up” so that defendant would not “hold the bag” for the crime. Thus, Carlisle apparently spoke to Holland about the shooting only because Holland already knew of Carlisle’s statement to Hughes and repeatedly confronted Carlisle to turn himself in. If anything, these circumstances make Carlisle’s statements to Holland *less* reliable.

Defendant's reliance on the investigating detectives' "Informational Summaries" of their interviews of Stith and Thompson was also misplaced. Although the summaries state that Carlisle was in the area at the time of the shooting, the summaries indicate that *defendant*, not Carlisle, shot Stith. It is not enough that the summaries state that Carlisle was present at the scene. The "statements against interest" at issue here are Carlisle's statements that he shot Stith. Since the summaries state that defendant shot Stith, they offer no corroboration to Carlisle's statement that he was the shooter. Also negating the corroborative value of these summaries are (1) Stith's and Thompson's testimony at trial that they did not see Carlisle at the scene, and (2) Detective Weis's testimony that the summary of his interview with Thompson was inaccurate to the extent that it referenced Carlisle.

Of course, Detective Weis's summary of his interview with Stith, in which Stith said that a "local crack head" named Nick told him that Carlisle confessed in the shooting, contains multiple layers of hearsay and thus has no corroborative value.

Defendant's reliance on his alibi witnesses was also misplaced. To start, each of these witnesses was closely aligned with defendant. Faye Glenn, Tony McGraph, and Kenny Green all referred to defendant as their "nephew," and Holland was the mother of defendant's child. Also detracting from these witnesses' credibility was their lack of cooperation with the police. Glenn and McGraph both knew that defendant was charged in the shooting, but neither spoke to the police. And while Green and Holland initially spoke with the police, they both later refused to cooperate with the police's investigation.

In the end, the trial court was within its discretion in concluding that defendant failed to overcome the "significant hurdle" of showing that corroborating circumstances

“clearly indicate” that Carlisle’s statements were trustworthy. *Sumlin*, 69 Ohio St.3d at 108, citing *Salvador*, 820 F.2d at 561.

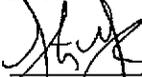
For the foregoing reasons, the State respectfully submits that this Court should grand further review of this proposition of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal presents questions of constitutional substance and of great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be accepted.

Respectfully submitted,

RON O’BRIEN 0017245
Prosecuting Attorney

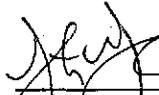


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, June 11, 2007, to DIANNE WORTHINGTON, P.O. Box 425, Galloway, Ohio 43119; Counsel for Defendant-Appellee.



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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	Nos. 06AP-870
	:	and 06AP-899
Christopher Swann,	:	(C.P.C. No. 05CR-09-6331)
	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 26, 2007, appellant's first assignment of error is sustained and appellant's second assignment of error is overruled in part and rendered moot in part. The third and fourth assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is vacated and this case is remanded for further appropriate proceedings in accordance with law and consistent with said opinion. Costs are assessed against appellee.

TYACK and BROWN, JJ., concur.
SADLER, J., concurs in part.

By *Gary Tyack*
Judge G. Gary Tyack

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellee, :
v. : Nos. 06AP-870
Christopher Swann, : and 06AP-899
(C.P.C. No. 05CR-09-6331)
Defendant-Appellant. : (REGULAR CALENDAR)

O P I N I O N

Rendered on April 26, 2007

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for
appellee.

Dianne Worthington, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

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TYACK, J.

{¶1} Christopher Swann ("appellant" or "Swann") appeals from his conviction of felonious assault with a firearm specification, and the resulting sentence of nine years incarceration. For the reasons set forth below, we reverse.

{¶2} On the evening of June 25, 2005, John "Cash" Stith ("Stith") was shot outside his grandmother's house on the south side of Columbus, Ohio. Stith, who was not fatally wounded, identified his assailant as Christopher Swann, whom Stith and others in the neighborhood refer to as "Kurt," or "C." (Tr. 185.) Stith and Swann had known

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A-2

each other for about seven years, and prior to the shooting, Stith considered Swann a friend.

{¶3} Swann maintained his innocence and, at his trial, he presented alibi testimony from four witnesses to demonstrate that he was not Stith's shooter. (Tr. 697-698, 714-715, 733, 745.) Additionally, Swann proffered testimony and other evidence that another neighborhood man, Delmar "Marty" Carlisle ("Carlisle"), confessed to the shooting. (Tr. 842-898.) Carlisle's purported confession was corroborated by at least four other nearby residents. The trial judge excluded Carlisle's statements from being admitted into evidence and from the hearing of the jury on the basis that the statements did not meet the requirements of the hearsay exception in Evid.R. 804(B)(3).

{¶4} In this appeal, Swann raises four assignments of error. The trial judge's exclusion of statements alleging third-party guilt is appellant's first assignment of error:

[I.] THE TRIAL COURT ERRED BY PREVENTING APPELLANT FROM INTRODUCING TESTIMONY CONCERNING DELMAR CARLISLE'S CONFESSIONS TO COMMITTING THE OFFENSE.

{¶5} Swann raises as error the trial judge's systematic exclusion of testimony and evidence relating to statements by Carlisle, who had purportedly confessed to the crime for which Swann was charged. (Tr. 126-127.) We review the record in accordance with Crim.R. 52(A), which governs criminal appeals of non-forfeited error. See, e.g., *Columbus v. Dials*, Franklin App. No. 04AP-1099, 2006-Ohio-227, at ¶19; *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, at ¶7. Crim.R. 52(A) provides a two-prong test that must be satisfied before we may correct an alleged error: first, we determine whether there was an "error"—i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770. Second, if we find error, we examine the error in

the context of the trial court record to determine whether the error affected a "substantial right" of the accused. A criminal defendant's substantial rights are affected when the occurring error was prejudicial to the extent the error altered the outcome of the trial court proceedings. *Id.* at 734.

{¶6} Evid.R. 804(B) provides, in pertinent part:

Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:¹

* * *

(3) *Statement against interest.* A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The Ohio Rules of Evidence are intended to foster a fair presentation of the evidence and to protect the right of an accused to due process of law under the Fourteenth Amendment to the United States Constitution. See, also, Section 5(B), Article IV, Ohio Constitution. The rules of evidence, whether state or federal, were not intended to deprive a criminal defendant of a fair opportunity to present a defense. See, e.g., *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, 1731; *Crane v. Kentucky* (1986), 476 U.S. 683, 690, 106 S.Ct. 2142; *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, at ¶69.

¹ Evid.R. 804(A) defines "unavailability" for the purposes of section B. The trial judge determined that the witness was unavailable for the purposes of the hearsay exception (Tr. 663), but excluded the testimony based on lack of corroboration. Thus, we do not need to address whether Carlisle was, in fact, unavailable.

{¶7} Shortly before Swann's trial, the United States Supreme Court decided *Holmes*, which underscored the trial court's paramount duty owed to a criminal defendant:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process[,] or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

Id. at 1728 (quoting *United States v. Scheffer* [1998], 523 U.S. 303, 118 S.Ct. 1261). In *Holmes*, the United States Supreme Court vacated a State Supreme Court interpretation of a state evidentiary rule that precluded the accused from offering statements alleging third-party guilt because the statements were contrary to the prosecution's forensic evidence, which implicated the defendant. *Id.* at 1730-1731. The *Holmes* court concluded that such a construction of the rule ignored the probative value of the proffered evidence, and discounted the fact-finder's role in weighing the credibility of witnesses. *Id.* at 1733-1734. Instead of performing an independent examination of all the evidence in the case, the *Holmes* court found that the lower court's inquiry focused only on the strength of the prosecution's case—if the prosecution's case is strong enough, evidence of third-party guilt is per se excluded, even if that evidence would have great probative value when viewed independently of the conflicting evidence, and even if it prevented the defendant from his constitutional right to present a fair defense. *Id.* at 1734. *Holmes* was on trial for rape and murder, which ultimately resulted in his conviction and sentence to death, despite the fact *Holmes* offered witnesses who would have testified that they saw another man in the area near the time of the attack and that this other man had made statements implicating himself in the murder.

{¶8} Fortunately, John Stith did not die from his wounds. Notwithstanding that fact, the similarities between this case and *Holmes* are striking. The trial judge excluded Carlisle's statements on the basis that the defense did not present sufficient corroboratory circumstances to indicate the trustworthiness of those statements under Evid.R. 804(B)(3). Interestingly, Ohio's Evid.R. 803(B)(3) differs from its federal rule counterpart only insofar as it imposes this additional "corroboration" requirement. Weissenberger's *Ohio Evidence* (2005) 421; cf. Federal Evid.R. 804(b)(3). Stith was always convinced that Swann was his assailant; however, Stith testified that he did not see a weapon in Swann's hand at the time of the shooting. (Tr. 223.) Stith and prosecution witness Kavar Thompson also stated that there were two men who perpetrated the attack. Stith testified that Swann was standing near a large bush when the shooting occurred, and that he heard a voice he recognized as Swann's shout an expletive at him. (Tr. 219.) It was dark when the shooting occurred, and Stith made his identification of Swann based solely on his recollection of Swann's voice. (Tr. 223, 224.)

{¶9} Thompson and Stith both testified that Carlisle and another man, Andre "Dre" Sharp, were frequently in Swann's company. Carlisle told others that he had been standing behind the bush and that he had done the actual shooting. Carlisle claimed that he was angry with Stith because Stith had had sexual intercourse with Carlisle's girlfriend when she was already pregnant with Carlisle's child.

{¶10} Swann also presented four witnesses who claimed that Swann was at a nearby house playing cards and socializing at the time the shooting took place. (Tr. 697-698, 714-715, 733, 745.)

{¶11} The defense subpoenaed Carlisle, but during voir dire of the witness, Carlisle's court-appointed attorney advised him not to answer any questions relating to Stith, Swann, the witnesses to whom he allegedly confessed to the shooting, or anything else tangential to the night of the shooting. (Tr. 648-661.) The trial judge, correctly, did not allow Carlisle to take the stand before the jury simply to have him invoke the Fifth Amendment each time he was asked questions relevant to the shooting. (Tr. 673.) The defense fully proffered the testimony of four witnesses who were prevented from testifying about the numerous statements Carlisle was claimed to have made about being the shooter, and the trial judge did permit cross-examination of the witnesses being proffered. (Tr. 842-898.) The proffered witnesses were friends of both Carlisle and Swann.

{¶12} We find that the trial court's exclusion of the defense's evidence essentially allowed them to present only half of their case—the alibi portion. The second half—that a third party, who had motive to shoot John Stith, made statements claiming responsibility for the shooting—was kept entirely from the jury. In light of *Holmes*, we hold that Evid.R. 804(B)(3) cannot be construed in a way that denies an accused a meaningful opportunity to present a complete defense. See *Holmes*, at 1733. "The accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged." *Id.* (citing 40A American Jurisprudence 2d [2007] 136-138 Homicide, Section 286, 136-138). The court further held that this evidence alleging third-party guilt was crucial to the defendant's constitutional right to a fair trial, and that it could only be excluded under circumstances where the evidence is "speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." *Ibid.* In this case, the trial court should have allowed the proffered testimony and

evidence to be presented to the jury for its own consideration. Thus, the trial court erred by denying Swann a meaningful opportunity to present a complete defense.

{¶13} Under Crim.R. 52(A), we find the trial court's error to have affected a substantial right of the accused. Appellant's first assignment of error is sustained.

{¶14} Appellant's second of assignment of error:

[II.] THE TRIAL COURT ERRED BY PREVENTING APPELLANT FROM CROSS-EXAMINING JOHN STITH ABOUT PENDING CRIMINAL CHARGES, AND KEVAR [sic] THOMPSON REGARDING POSSIBLE JUDICIAL RELEASE.

{¶15} In his second assignment of error, Swann argues that the trial court erred in limiting the cross-examination of the State's two principle witnesses—John Stith, the victim, and Kavar Thompson. We find that no error occurred with respect to Stith, and we do not rule on appellant's assignment of error with respect to the cross-examination of Kavar Thompson in light of our ruling on the first assignment of error.

{¶16} At the time of Swann's trial, Stith had felony charges pending against him. Defense counsel argued that the scope of Stith's cross-examination should include reference to the fact that charges were pending because those charges tended to show the witness's bias toward the State.

{¶17} Evid.R. 608 and 609, respectively, govern the admissibility of a witness's character as evidence, and impeachment of a witness using evidence of a prior conviction. Neither rule applies here, because with respect to Evid.R. 608, the witness's character may not be attacked on cross-examination unless first offered on direct; moreover, Evid.R. 609 only applies to prior convictions—i.e., not current or pending charges. See, generally, *State v. Brooks* (1996), 75 Ohio St.3d 148, 151; but cf. *State v. Hector* (1969), 19 Ohio St.2d 167, 178.

{¶18} Under Ohio law, a witness can ordinarily be impeached using "[b]ias, prejudice, interest, or any motive to misrepresent." See Evid.R. 616(A); *Brooks*, at 151-152; see, also, *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶¶107-108. In this case, however, the record demonstrates sufficient indicia of the truthfulness of Stith's trial testimony based on the fact that it was consistent with Stith's prior statements to the police immediately after the shooting. Coupled with the prosecution's vigorous assertions that they made no deals in exchange for Stith's testimony (Tr. 44), we are not persuaded that the defense was prejudiced by any alleged bias. Furthermore, if any bias were present as to the victim, the result would have been harmless error. See, e.g., *Drummond*; *State v. Durant*, 159 Ohio App.3d 208, 2004-Ohio-6224, at ¶¶34. Clearly, Stith was shot and seriously wounded. (Tr. 182-183, 322-324.) Stith maintained his belief that Swann was the man who shot him from the night of the shooting (Tr. 323) long before any deal could have been made with the State in exchange for testimony at Swann's trial.

{¶19} The circumstances surrounding Kavar Thompson's testimony, however, were entirely different. Thompson was arrested (on an unrelated matter) shortly after Stith's shooting. At the time of Swann's trial, Thompson was incarcerated at Southeastern Correctional Institution for, inter alia, aggravated burglary. (Tr. 344.) Thompson was to be considered for judicial release, and the Franklin County Prosecutor's Office had promised it would not oppose his placement on community control. The lead detective in Swann's investigation testified that he and one of the assistant prosecutors in the case traveled to the prison where Thompson was locked up, and that they interviewed him in preparation for Swann's trial. (Tr. 551.) Thompson

asked if his testimony would affect his early release from prison, to which the assistant prosecutor replied: "No," as long as Thompson told "the truth" on the witness stand. The problem this situation presents is that the assistant prosecutor's statement could be easily construed by Thompson to have meant: testify the way the State wants me to, and they won't oppose my early release from prison. But, if I say something different, they might think I am lying, and then things will be different.

{¶20} Under those circumstances, it is at least arguable that Thompson had a motive to testify in a manner that would please the prosecution. Under Evid.R. 616(A), defense counsel arguably should have been afforded the opportunity to explore the witness's potential bias during cross. (Tr. 392, 393); see, e.g., *Brooks*, at 151-153; see, also, *Drummond*, supra. Again, we do not reach the merits of this part of the assignment of error in light of our ruling on the first assignment of error.

{¶21} Appellant's second assignment of error is overruled in part and moot in part.

{¶22} Appellant's third assignment of error:

[III.] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN NOT MAKING A RECORD REGARDING THE EXISTENCE OF PENDING CHARGES OF WITNESS STITH, NOT REQUESTING THAT THE COURT CONDUCT AN IN CAMERA INSPECTION OF RULE 16(B)(1)(g) MATERIAL BEFORE FINISHING CROSS EXAMINATION OF KAVAR THOMPSON, AND IN NOT RAISING APPELLANT'S DUE PROCESS CLAUSE RIGHTS AS WELL AS A HEARSAY EXCEPTION REGARDING THE TESTIMONY OF A CONFESSION OF A THIRD PARTY, RESULTING IN THE DENIAL OF THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION.

{¶23} We review ineffectiveness of counsel in accordance with the Supreme Court's test in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. See, e.g., *State v. Lewis* (July 21, 1998), Franklin App. No. 97APA09-1263; *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶24} The *Strickland* test has two prongs: (1) appellant must demonstrate that counsel's failure was so serious that they ceased to serve as "counsel" under the Sixth Amendment; and (2) appellant must demonstrate that he was harmed by the error. See *State v. Farrah* (Apr. 18, 2002), Franklin App. No. 01AP-968. Any error, even if prejudicial, does not warrant reversal—counsel's error must have affected the outcome of the trial. See *Strickland*, at 691; see, also, *Farrah*, at *9-10 (Tyack, P.J., concurring).

{¶25} Appellate counsel for Swann asserts three failures of Swann's trial lawyer. First, the failure to proffer details of Stith's criminal charges into the record. Having previously found no error existed with respect to the trial court disallowing cross-examination of Stith about these charges, we cannot see how providing any additional details would have affected the court's ruling on the verdict below.

{¶26} Second, trial counsel was ineffective on the basis that he failed to review a tape recording of Kavar Thompson's prison interview conducted by the assistant prosecutor and homicide detective. Ordinarily, Crim.R. 16(B)(1)(g) dictates that the interview tape should have been reviewed in camera with trial counsel prior to cross-examination. In this case, however, the trial judge reviewed the tape and found no significant discrepancies between Thompson's trial testimony and what the witness said in the taped interview. (Tr. 284.) Again, counsel's failure to review the tape in strict accordance with Crim.R. 16 could not have affected the trial outcome given the trial

judge's determination that nothing in the tape could have been used for purposes of cross-examination.

{¶27} Third, trial counsel failed to develop fully theories on the trial judge's refusal to allow Carlisle's third-party guilt statements. After reviewing the entire record, we found the discussion of these issues in the trial court to have been extensively developed. Indeed, Swann's first assignment of error alleges 25 pages of discussion on the issue. The Supreme Court of the United States has indicated that a number of legal theories are involved in allowing such statements to be presented (due process, compulsory process, and confrontation). See, e.g., *Holmes*, supra. We have already sustained appellant's first assignment of error as to the exclusion of Carlisle's statements. Trial counsel for the defense cannot be said to have rendered ineffective assistance for failing to make the record even more detailed.

{¶28} The third assignment of error is overruled.

{¶29} Appellant's fourth assignment of error:

[IV.] THE TRIAL COURT ERRED BY NOT SENTENCING APPELLANT TO MINIMUM AND CONCURRENT TERMS OF IMPRISONMENT, THEREFORE DEPRIVING APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTION.

{¶30} In February 2006, the Supreme Court of Ohio announced its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶¶96-102, which severed large portions of Ohio's felony sentencing statutes involving judicial fact-finding from the other sentencing statutes. *Id.*, citing *Blakely v. Washington* [2004], 542 U.S. 296, at 308-309, 124 S.Ct. 2531; *Booker*, at 234, 125 S.Ct. 738. Like *Blakely* and *Booker*, *Foster* eliminated judicial fact-finding from the felony sentencing procedure. *Foster* invalidated

the statutory provisions allowing for increased prison terms based on judicially-found facts, but because Ohio's pre-*Foster* sentencing guidelines favored minimum sentences within the given statutory range, the practical effect of *Foster*, by contrast to *Blakely* and *Booker*, tends to increase prison terms. See Sentencing Law & Policy (Feb. 28, 2006) ("Eliminating guideline mandates in the federal system gives judges more leeway to be lenient, but eliminating structured sentencing rules in Ohio gives judges more leeway to be harsh").

{¶31} In his fourth assignment of error, Swann argues that the severance remedy in *Foster* violated his constitutional rights because the severance effectively raised the statutory presumptive minimum sentence, and because the alleged conduct for which he was convicted occurred while the pre-*Foster* sentencing guidelines were still intact; therefore, he should be sentenced in accordance therewith.

{¶32} In *Gibson*, we found the retroactive application of *Foster* did not violate appellant's right to due process of law or the ex post facto clause of the United States Constitution. *Id.* at ¶15. We determined that we were bound to follow *Foster* as written. See, also, *State v. Henderson*, Franklin App. No. 06AP-645, 2007-Ohio-382, at ¶7. Given that the Supreme Court invalidated portions of R.C. 2929.14 as unconstitutional under *Blakely*, the sentencing court must apply whatever portions of the statute remain in effect.

{¶33} We are similarly unpersuaded by appellant's argument that *Foster* violates the rule of lenity. See, e.g., *Chapman v. United States* (1991), 500 U.S. 453, 463-464, 111 S.Ct. 1919. The rule of lenity is a canon of statutory construction which, by its definition, applies only where a given statute is vague or ambiguous. See *id.* If a statute

is vague or ambiguous such that there could be two (or more) equally plausible meanings to the text, the rule of lenity provides that the ambiguity should be resolved in favor of the criminal defendant. We find nothing ambiguous in R.C. 2929.14. Therefore, we find appellant's reliance on the rule of lenity misplaced.

{¶34} In summary, we sustain appellant's first assignment of error. The second assignment of error is overruled in part and rendered moot in part. We overrule the third and fourth assignments of error. As a result, we vacate the judgment of the trial court and remand the case for further appropriate proceedings.

*Judgment vacated and case remanded
for further appropriate proceedings.*

BROWN, J., concurs separately.
SADLER, J., concurs in part and dissents in part.

BROWN, J., concurring separately.

{¶35} As I agree with the ultimate conclusion in assignment of error one, but disagree with portions of the majority's decision, I respectfully concur separately. With regard to the first assignment of error, the sole issue is whether the testimony of four witnesses, that a third party, Carlisle, confessed to shooting the victim, should have been admitted as an exception to the hearsay rule under Evid.R. 804(B)(3). Specifically at issue is whether corroborating circumstances clearly indicate the trustworthiness of Carlisle's statement. Although I agree there are useful similarities with *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, I disagree with the majority's analysis of *Holmes*. However, I do agree with the majority's ultimate conclusion that the trial court erred when it denied appellant the opportunity to present the testimony of the four witnesses. After a review of the evidence, I would find corroborating circumstances

indicate the trustworthiness of the statement Carlisle made to the four witnesses. Therefore, I would sustain appellant's first assignment of error, albeit for different reasons than those relied upon by the majority.

{¶36} Further, because we must remand the matter for a new trial based upon our disposition of appellant's first assignment of error, I would decline to address the remaining assignments of error. Therefore, I would find appellant's second, third, and fourth assignments of error moot.

SADLER, P.J., concurring in part and dissenting in part

{¶37} Being unable to agree with the majority's disposition of appellant's first assignment of error remanding this case for a new trial, I respectfully dissent.

{¶38} Initially, with respect to appellant's first assignment of error, I believe the lead opinion's focus on the decision rendered by the United States Supreme Court in *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503, is misplaced. Although *Holmes* and this case involve a defendant attempting to introduce evidence that a third party confessed to the crime of which the defendant was accused, the similarities end there. In focusing on *Holmes*, the lead opinion appears to be suggesting that the requirement in Evid.R. 804(B)(3) that evidence of a third party confession is not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement" is itself a violation of appellant's right to present a complete defense, an issue appellant has not raised either at the trial court or on appeal.

{¶39} *Holmes* involved consideration of a South Carolina evidentiary rule that excluded evidence of a third party confession where the trial court determined that the evidence of the defendant's guilt was so strong that the evidence of the third party's

confession was not sufficient to raise a reasonable inference of the defendant's own innocence. The court recognized that some evidentiary rules may properly limit evidence regarding third party guilt, stating that:

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. An application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. Such rules are widely accepted and are not challenged here.

Id. at syllabus. The court recognized that evidence that another person committed the crime may be excluded "where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." 126 S.Ct. at 1733, citing 40A American Jurisprudence 2d (1999) 136-138, Homicide, Section 286. The court found that South Carolina's rule violated this principle because it required the trial court to consider only the strength of the prosecution's case, rather than to engage in a separate evaluation of the evidence showing the third party's guilt. *Id.* at 1734-1735.

{¶40} Since Evid.R. 804(B)(3) requires the trial court to engage in an analysis of the evidence indicating the third party's guilt, it is not a rule of the sort that suffers from the constitutional infirmity discussed in *Holmes*. Furthermore, it is clear that in this case, the issue is not whether the trial court properly *construed* Evid.R. 804(B)(3), which was the issue with the evidentiary rule in *Holmes*. The issue is whether the trial court properly *applied* the rule.

{¶41} Generally, the decision to admit or refuse to admit evidence of a third party confession under Evid.R. 804(B)(3) is one reviewed under an abuse of discretion standard. *State v. Sumlin*, 69 Ohio St.3d 105, 1994-Ohio-508, 630 N.E.2d 681. Thus, as with the review of any evidentiary decision by a trial court, our review should be limited to whether the trial court acted unreasonably, arbitrarily, or unconscionably in deciding whether to exclude evidence of Carlisle's confessions. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810.

{¶42} Courts have generally recognized three requirements when considering whether hearsay evidence regarding a third party's confession should be admitted under Evid.R. 804(B)(3): (1) the declarant must be unavailable; (2) the declarant's statement must be of a nature that would subject the declarant to criminal liability such that a reasonable person in the declarant's position would not have made the statement if the declarant did not believe it to be true; and (3) corroborating circumstances must clearly indicate the trustworthiness of the confession. *State v. Durant*, 159 Ohio App.3d 208, 2004-Ohio-6224, 823 N.E.2d 506. In this case, Carlisle was unavailable by virtue of his invocation of his Fifth Amendment right against self-incrimination, and his confessions, if believed, could have subjected him to criminal liability. Consequently, the only issue is whether there were corroborating circumstances clearly demonstrating the trustworthiness of Carlisle's confessions.

{¶43} Courts have stressed that the hurdle of showing corroborating circumstances is not an insignificant one. *State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710. The concern underlying the requirement for corroborating circumstances for Evid.R. 804(B)(3) purposes is that it allows an individual to make

statements exculpating another, and then avoid cross-examination on the issue by claiming the privilege against self-incrimination. *State v. Mengistu*, Franklin App. No. 02AP-497, 2003-Ohio-1452, citing *United States v. Mackey* (C.A.1, 1997), 117 F.3d 24.

{¶44} A number of courts have discussed the question of what facts demonstrate sufficient corroborating circumstances for the purposes of admitting evidence of a third party confession. These courts have generally recognized that due process concerns require consideration not only of the circumstances surrounding the making of the statement, but of any other corroborating evidence as well. See *Sumlin*, *supra*; *Durant*, *supra*, citing *Chambers v. Mississippi* (1973), 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038.

{¶45} In this case, the corroborating circumstances do not clearly demonstrate the trustworthiness of Carlisle's confessions. Initially, I must disagree with the lead opinion's assertion that "Carlisle's purported confession was corroborated by at least four other nearby residents." *Infra*, at ¶3. In its literal sense, this statement suggests that the proffered witnesses were corroborating the substance of Carlisle's confessions, i.e. that Carlisle was the shooter. In actuality, the statements only serve to corroborate that Carlisle made the confession.

{¶46} Further, the circumstances surrounding Carlisle's purported confession do not indicate a degree of trustworthiness such that the trial court abused its discretion by declining to admit them under Evid.R. 804(B)(3). One of the witnesses who proffered testimony regarding Carlisle's confessions was Tia Holland, appellant's girlfriend and the mother of his child. The other three proffered witnesses were Lisa Hughes and her daughters, Ciera and Tiffany. Lisa Hughes is Holland's cousin. All of the proffered

testimony showed that Carlisle was extremely close with appellant; in fact, the testimony was that appellant was a father figure to Carlisle. (Tr. at 850). The closeness of the relationship between appellant and the witnesses to Carlisle's confession is a factor that undermines the trustworthiness of Carlisle's confession. See *Sumlin*, supra. The trustworthiness of Carlisle's purported confession is further undermined by the closeness between appellant and Carlisle. *Mengistu*, supra.

~~{¶47}~~ Furthermore, there is no evidence in the record that would support a conclusion that Carlisle was the shooter. The lead opinion relies to some extent on what it apparently deems to be weak testimony identifying appellant as the shooter, stating that, "[I]t was dark when the shooting occurred, and Stith made his identification of Swann based solely on his recollection of Swann's voice." (Infra, at ¶8.) This conclusion is contradicted by other testimony from John Stith, who testified:

I looked straight up and I seen Mr. Christopher Swann, I could not exactly see what he was holding in his hand. But I seen the fire come from him. He told me fuck me and shot me in my neck.

(Tr. at 155.) Thus, the identification of appellant as the shooter was not based solely on Stith's recognition of appellant's voice.

{¶48} The defense attempted to enter as evidence summaries prepared by Columbus Police Department detectives of statements made after the shooting by Stith and Kavar Thompson in which each allegedly stated that Carlisle had been seen with appellant and Andre Sharp shooting guns into the air, which was the cause of the confrontation that resulted in Stith being shot. However, these summaries were not entered into evidence. In their trial testimony, both Stith and Thompson denied having seen Carlisle at the scene either before or during the shooting and denied telling the

police that he was present. Detective John Weis, who had prepared the summary of Thompson's statement, testified that Thompson had not said Carlisle was at the scene, and that the reference to Carlisle in the summary of Thompson's statement was an error.

{¶49} Given these facts, I cannot agree with the conclusion that the trial court abused its discretion in the manner it applied Evid.R. 804(B)(3). Thus, I would overrule appellant's first assignment of error.

{¶50} Since I would overrule appellant's first assignment of error, I would proceed to consider appellant's remaining assignments of error. The lead opinion does, in fact, consider each of the remaining assignments of error, overruling appellant's third and fourth assignments on their merits, overruling appellant's second assignment on the merits as it relates to the trial court's decision not to admit evidence regarding pending criminal charges against John Stith, and finding the second assignment moot as it relates to the trial court's decision not to admit evidence regarding Kavar Thompson's pending motion for judicial release (although still including an extensive discussion of the assignment as it relates to Thompson's motion).

{¶51} To the extent that the lead opinion does address the merits of appellant's remaining three assignments of error, I concur, in judgment only, with the decision to overrule appellant's third and fourth assignments of error on their merits, and with the decision to overrule appellant's second assignment of error on its merits as it relates to Stith's pending criminal charge. I would also find that the trial court's failure to admit evidence regarding Thompson's pending motion for judicial release was harmless error, and would therefore affirm the judgment of the trial court.