

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Plaintiff-Appellee, :  
-vs- : Case No. 2005-2264  
NICOLE DIAR, :  
Defendant-Appellant. : **DEATH PENALTY CASE**

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ON APPEAL FROM THE COURT OF  
APPEALS OF LORAIN COUNTY, CASE NO. 04CR065248

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**REPLY BRIEF OF APPELLANT NICOLE DIAR**

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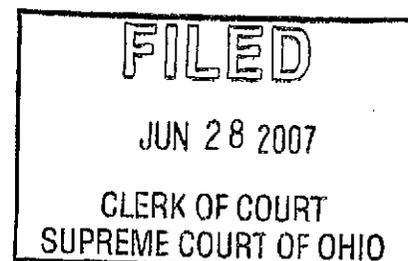
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## **PREFACE**

Appellant Nicole Diar now replies to the State's answer brief. Any absence of a specific reply by Diar is simply to avoid reargument of her merit brief. The absence of a reply to a particular argument raised by the State should not be construed as a concession by Diar. Diar stands on her merit brief when no specific reply is made.

## Proposition of Law No. II

The trial court's imposition of the death sentence failed to comply with the mandatory language of Ohio's death penalty statute, Revised Code Title 29, resulting in a death sentence imposed in an arbitrary and capricious manner and a constitutionally deficient sentencing opinion. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

### **Introduction**

Since filing her merit brief on January 16, 2007, Diar has since become aware of this Court's decision in State v. Buell, 22 Ohio St. 3d 124, 489 N.E.2d 795 (1986). In Buell, this Court concluded that pursuant to O.R.C. § 2929.03(D)(1), reports of mental examination and pre-sentence investigation are to be requested before the jury renders its decision during the mitigation phase, as both reports are to be submitted to the jury. Id. at 138. The Buell decision indicates the trial court may not have been in error for refusing to order a pre-sentence investigation after the jury's recommendation of death, pursuant to O.R.C. § 2929.03(D)(1). Despite this, other statutorily mandated duties were ignored by the trial court. The trial court's abandonment of these mandatory duties constituted such severe violations of Diar's constitutional rights that independent reweighing cannot serve as an adequate remedy. Diar's sentence of death was imposed without the "type of individualized consideration of mitigating factors...required by the Eighth and Fourteenth amendments in capital cases." Lockett v. Ohio, 438 U.S. 586, 606 (1978). Therefore, her sentence of death must be vacated.

### **No Independent Reweighing**

At the conclusion of the penalty phase in Diar's capital trial, the jury returned with a verdict of death. T.p. 3085. Within seconds after the jury's verdict of death, the trial court informed counsel that it "has its own mind made up as far as what it will do." T.p. 3088. Trial counsel for Diar was then given an opportunity to speak on her behalf.

Mr. Pyle: “And I’d ask you to continue this matter for further review by yourself, because the statute provides that at this point, as the prosecutors have told the jury many times, that their verdict is merely a recommendation to you, and that there is time allowed for you to do an independent weighing of whether the aggravating circumstance does, in fact, outweigh the mitigating circumstances which have been proven. And so we’d ask you to continue this matter for sentencing.

T.p. 3098.

The State urged the trial court to proceed with sentencing; “We’re asking to go forward today. I think the Court was able to weigh the factors in its own mind during the time the jury was deliberating as well, so that should not be a problem.” T.p. 3090. The trial court agreed with the State and proceeded to sentence Diar to death. T.p. 3092. No time was ever allocated by the trial court to conduct its own independent weighing of the aggravating circumstance against the mitigating circumstances.

The trial court’s immediate imposition of the recommended death sentence violated the “fundamental respect for humanity underlying the Eighth Amendment” which requires “consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

By immediately imposing a sentence of death upon Diar following the jury’s recommendation, the trial court also abandoned its duties mandated by O.R.C. § 2929.03(D)(3). O.R.C. § 2929.03(D)(3) dictates the procedure by which the trial court makes a separate determination, weighing the mitigating factors and aggravating circumstances, before imposing the death penalty recommended by the jury. The court, after such a recommendation, has the authority to make a different finding than the jury and impose one of the available life in prison

options. During this separate and independent review, trial courts are “required to consider all relevant mitigating evidence.” State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984).

The record makes clear that the trial court could not have conducted its own independent review. See T.p. 3088-3094. The trial court took what was supposed to be a recommendation subject to further review and analysis and immediately imposed it as its own judgment. Instead of following constitutionally indispensable procedures and the mandatory language of O.R.C. § 2929.03, the trial court bowed to requests from the State. The trial court never conducted its own independent weighing of aggravating and mitigating circumstances and failed to consider all relevant mitigating evidence. Based on this abdication alone, Diar is entitled to a new sentencing hearing.

#### **Sentencing Opinion Deficiencies**

The trial court’s O.R.C. § 2929.03(F) sentencing opinion is further evidence of the trial court’s failure to consider and give weight to the mitigation presented on Diar’s behalf. As previously laid out in Diar’s merit brief, mitigating evidence was presented. Defense counsel opened by discussing a 1995 psychiatric admission report which stated Diar suffered from “anger, frustration, and impulsivity.” A clinical/forensic psychologist also testified for the defense. T.p. 2990-3042. Marilyn Diar also testified to her love and continued support for her daughter.

The trial court’s O.R.C. § 2929.03(F) sentencing opinion made no mention of the aforementioned mitigating evidence offered on Diar’s behalf. To the contrary, the only mitigating factors the trial court referred to were written in a two sentence paragraph that mentioned the youth of Diar and her lack of any prior criminal convictions. The complete absence of any finding in regards to the mitigation witnesses who testified at the penalty phase

would logically indicate that the trial court failed to weigh, or even acknowledge, the most important and powerful evidence presented at the sentencing phase.

The Eighth Amendment mandates individualized assessment of the appropriateness of the death penalty. See Penry v. Lynaugh, 492 U.S. 302 (1989); Lockett v. Ohio, 438 U.S. 586 (1978). The trial court's O.R.C. § 2929.03(F) opinion makes clear Diar never received the individualized assessment she is guaranteed under the United States and Ohio constitutions.

O.R.C. § 2929.03(F) states:

“The Court or the panel of three judges, when it imposes sentence of death, **shall** state in a separate opinion its **specific findings** as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.”

This Court has stated that “... **the word ‘shall’ is a mandatory one**, whereas ‘may’ denotes the granting of discretion.” Dorrian v. Scioto Conservancy Dist., 27 Ohio St. 2d 102, 108, 271 N.E.2d 834, 838 (1971). Based on the clear language of the statute, and this Court’s conclusion that the use of the word “shall” is mandatory, the trial court failed to comply with the required duties imposed on it by statute. Further, this Court has stressed the “crucial role of the trial court’s sentencing opinion in evaluating all of the evidence, including mitigation evidence, and in carefully weighing the specified aggravating circumstances against the mitigating evidence in determining the appropriateness of the death penalty.” State v. Roberts, 110 Ohio St. 3d 71, 850 N.E.2d 1168 (2006). Review of the trial court’s O.R.C. § 2929.03(F) sentencing opinion makes it clear that the trial court abandoned its “crucial role” and thereby created an unacceptable risk that the death sentence was imposed in an unreliable and arbitrary manner.

## **Conclusion**

The means by which arbitrariness in capital sentencing proceedings is eliminated is through the enactment and strict enforcement of a valid capital sentencing scheme, devised by the legislature. See generally Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976). Ohio has attempted to eliminate arbitrary sentences through the enactment of O.R.C. § 2929.03 and the mandatory duties it imposes on a trial court. These constitutionally indispensable duties were abandoned by Diar's sentencing court. The trial court failed to conduct its own independent review prior, ignored mitigating evidence, and wrote a constitutionally deficient sentencing opinion. The trial court's abandonment of these duties constituted such severe violations of Diar's constitutional rights that independent reweighing cannot serve as an adequate remedy.

Therefore, Diar's death sentence must be vacated.

### Proposition of Law No. IV

A capital defendant is denied her substantive and procedural due process rights to a fair trial when a prosecutor commits acts of misconduct during the trial and the sentencing phases of her capital trial. She is also denied her right to reliable sentencing. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

The prosecutor must ensure guilt is punished, but also that justice is done. State v. Lott, 51 Ohio St. 3d 160, 165, 555 N.E.2d 293, 300 (1990) (citing Berger v. United States, 295 U.S. 78, 88 (1935)). Thus, “he may strike hard blows, [but] he is not at liberty to strike foul ones.” Id. In Diar’s case, the prosecutor crossed an impermissible line in order to ensure a conviction and death sentence.

In analyzing prosecutorial misconduct under the Due Process Clause, the “touchstone” is “the fairness of the trial.” Lott, 51 Ohio St. 3d at 166, 555 N.E.2d at 301 (citing Smith v. Phillips, 455 U.S. 209, 219 (1982)). Claims of prosecutorial misconduct are considered for their cumulative effect on the defendant’s trial. See Darden v. Wainwright, 477 U.S. 168, 181 (1986). See also Berger, 295 U.S. at 89 (“we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”).

Appellee dismisses instances of misconduct either because they were not objected to or because they were. Appellee’s Brief, pp. 85-88. However, it is crucial in this case to recognize the flagrant, repeated, and deliberate nature of the prosecutor’s misconduct. Appellee argues that the prosecutor is allowed in opening statement to foreshadow what the evidence might be. Appellee’s Brief, p. 87. However, the prosecutor is not permitted to fabricate evidence or to inflame the passions of the jury in the guise of describing “evidence.” Appellee also argues that

leading questions may be allowed where they help to develop a witnesses's testimony or the answers concern matters easily proved by other testimony. Appellee's Brief, pp. 87-89. These were not the circumstances in this case. Rather, the prosecutor put words into witnesses' mouths, expressed prejudicial opinions about Diar, advanced "evidence" not actually proven by any permissible means, and sought to demonize Diar in the eyes of the jurors. The prosecutor's improper arguments as to Diar's guilt culminated in the closing argument, where the prosecutor invented facts by speculating about smothering and drowning. T.p. 2793, 2796. Nevertheless, Appellee justifies the improper arguments as "latitude" and "reasonable inferences." Ironically, the prosecutor in closing argument implied that defense counsel had "exaggerated things to the point of being ridiculous" when in actuality it was the prosecutor who totally failed to remain within the boundaries of fairness. The fact remains that the State did not prove any of the speculation about cause of death with one iota of actual evidence.

During Diar's trial, the prosecutor repeatedly and deliberately bolstered the weak evidence of his case by improperly engaging in the very type of misconduct which courts have long condemned. As outlined in Diar's merit brief, the misconduct occurred and persisted throughout Diar's trial, and cannot be viewed as isolated. From his opening statement to the jury, telling jurors that Diar learned how to set fires at burn camp, to his egregious use of leading questions, the prosecutor repeatedly interjected inflammatory and improper considerations to sway jurors to his personal point of view of Diar.

The prosecutors' actions in this case must be examined in totality, which reveals a pattern of deliberate, flagrant misconduct. The prosecutorial misconduct in this case was designed to inflame the passions of the jury, to induce the jury to render a decision based on considerations other than proper law and evidence, and to tip the scale in favor of death. While the trial court

did sustain some of counsels' objections, the misconduct was so pervasive this did little to thwart the prejudicial effects of the prosecutor's actions. See Berger, 295 U.S. at 85. In fact, the prosecutor merely continued with the improper behavior even after several objections by defense counsel were sustained. This illustrates the flagrant and deliberate nature of the misconduct in this case.

The prosecutor used leading questions to supply "evidence" that was not supported by any other means. He invoked unnamed "other" experts who apparently agreed with the coroner's vague conclusions. T.p. 1687-88. He repeatedly led witnesses to agree with the prosecutor's conclusions, for example that Nicole Diar was a "bad mother" who failed to show the appropriate emotions upon the death and funeral of her son, that she had moved her car, her "prized possession," to protect it from the fire she was going to set, and that she got gas out of her own car to set the fire. T.p. 1931, 1983, 2068, 2088-90, 2147, 2149, 2148, 2160.

The prosecutor interjected his own opinions in the words he chose for his leading questions: "prized possession," "so very conveniently," no "real tears." Over and over again, he continued with improper questions even when the court sustained objections by defense counsel. T.p. 2147, 2148, 2150, 2169, 2170-71, 2195, 2221-23, 2224-5, 2225-6, 2226-7, 2227-9, 2243, 2258 Defense counsel's objections were rendered meaningless to correct the improper behavior because the trial court made ineffectual rulings which did nothing to stop the unacceptable behavior.

These errors must be considered for their cumulative effect. This includes errors to which defense counsel did not object. Berger, 295 U.S. at 85. The mere sustaining of objections may not be sufficient to cure such pervasive misconduct. Id. Each individual act of misconduct, or type of misconduct, is not separated out for consideration. The alleged misconduct in its

entirety should be reviewed to determine whether it “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” See Darden v. Wainwright, 477 U.S. at 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)) (internal quotations omitted); see also United States v. Francis, 170 F.3d 546, 556 (6th Cir. 1999). Under the proper analysis, the totality of these circumstances, the prosecutorial misconduct at Diar’s trial rendered those proceedings unfair and denied her due process.

Appellee does not address the issue of prosecutorial misconduct in the penalty phase. Diar stands upon the arguments made in her merit brief.

## Proposition of Law No. V

The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to limit the use of the other acts evidence denied Diar her rights to a fair trial, due process and a reliable determination of her guilt and sentence as guaranteed by U.S. Const. amends. V, VI, VIII and XIV; Ohio Const. art. I, §§ 10 and 16.

### **Introduction**

The character evidence admitted during Diar's trial had virtually no probative value and was highly prejudicial. The prejudicial impact of making Diar's character a central issue at trial deprived her of a fair trial, due process, a reliable determination of guilt, and a reliable sentencing determination.

### **Law**

When evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne v. Tennessee, 501 U.S. 808, 825 (1991). Moreover, when an individual's life is at stake, the Supreme Court has repeatedly insisted upon higher standards of reliability and fairness. See Beck v. Alabama, 447 U.S. 625 (1980) (need for heightened reliability); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (the death penalty is qualitatively different from any other sentence and requires a heightened degree of reliability).

Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. State v. Crotts, 104 Ohio St. 3d 432, 437, 820 N.E.2d 302, 308 (2004). If the evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." Id. In other words, if the evidence appeals to the jury's emotions rather than its intellect, it is usually prejudicial. Id.

Further, a Ohio Evid. R. 403 objection requires heightened scrutiny in capital cases. State v. Morales, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987). Whereas exclusion under Ohio R. Evid. 403 generally requires that the probative value of the evidence be minimal and the prejudice great, in capital cases, the probative value of each piece of evidence must outweigh any potential danger of prejudice to the defendant. Id. at 258, 513 N.E.2d at 274. If the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. Id.

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 26 (1967). When the record on direct appeal establishes constitutional error, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. Id. “The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial. ‘the question...is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” State v. Fears, 86 Ohio St. 3d 329, 354, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (quoting Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988)).

### **Argument**

The State’s assertion that Diar “never challenged the admissibility of the evidence during the trial phase” is incorrect. The following colloquy took place between defense counsel and the trial court:

THE COURT: What is the nature of what you want to put on the record, Mr. Bradley?

MR. BRADLEY: I’m just objecting, your Honor, again, because we had filed for a motion in limine, and I think that the - - again, that we had asked that the Court not allow

testimony regarding her going to a bar after Jacob's funeral. I know the Court denied that, but I wanted to preserve that objection on the record.

THE COURT: Okay. The Court previously has denied that. And you are to preserve your position. So ordered.

MR. BRADLEY: Thank you very much, your Honor. Tr. 1988.

Further, counsel for Diar objected to the testimony from baby-sitters who indicated they were paid for their services with cigarettes, Tr. 1877, evidence relating to the unsanitary conditions at Diar's home, Tr. 2225-2226, and to evidence regarding Diar's alleged problems with her landlord, Tr. 2229, 2230. These issues are therefore preserved.

The State maintains that this evidence, including the excessive partying, was "inextricably related to the crime charged and intertwined to such an extent that it was necessary to give a complete picture of what occurred." Citing State v. Wilkinson, 64 Ohio St. 2d 308, 415 N.E.2d 261 (1980). However, the Wilkinson opinion makes clear there is a limit as to what shall be considered "inextricably related." As is the case with Diar's assignment of error, the Wilkinson decision addressed the admission of character acts committed subsequent to the alleged underlying crime charged. Although this type of evidence can be permitted, subsequent acts evidence can also be "too remote to be probative of the charged offense" and therefore irrelevant. Id. at 320.

The Wilkinson opinion made clear that the erroneous admission of such other acts evidence is not harmless error. "The tapes were an integral part of the prosecution's case" and the "inadmissible statements within them were prominent and may have influenced the jury's verdict." Id. Like Wilkinson, character attacks on the Diar were "integral" to the prosecution's case and were "too remote to be probative of the charged offense." Id.

The prejudice produced by this irrelevant evidence was substantial. Diar came across as uncaring and unremorseful. The evidence helped the State obtain convictions on all charges by playing upon the passions and prejudices of the jury. There was a very real danger that this evidence inflamed the jurors' emotions and thus prejudiced Diar. The unfair prejudice generated by the character evidence substantially outweighed whatever minimal probative value the evidence possessed.

Exacerbating this problem is the fact that the trial court never provided the jury with a definition of the aggravating circumstance they were to weigh at the sentencing phase. See Proposition of Law I. Without any instruction defining aggravating circumstances, the jury was left "with untrammelled discretion to impose or withhold the death penalty." Gregg v. Georgia, 428 U.S. 153, 196 (1976). The prejudicial impact of this evidence violated the Eighth and Fourteenth Amendment guarantees "that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

### **Conclusion**

The prejudicial impact of the jury's exposure to this inflammatory character and other acts evidence deprived Diar of her right to a fair trial, due process, and a reliable determination of her guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution. For these reasons, Diar's convictions should be overturned, or at a minimum, her death sentence vacated.

### Proposition of Law No. VI

Appellant Diar's conviction and death sentence based on insufficient evidence of aggravated murder is a violation of due process and her right to be free from cruel and unusual punishment. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9 and 16.

In its brief, Appellee focuses on motive, lack of remorse, and opportunity. Appellee's Brief, pp. 96-100. Appellee's assertions do not provide proof of every element of aggravated murder beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). As outlined in Diar's merit brief, much of the State's "evidence" against Diar consisted of improper character and other acts evidence. Proposition of Law V. While she may have engaged in careless, thoughtless, self-centered behavior, this is not proof of murder. None of this evidence demonstrates any intention by Diar to kill Jacob, or any plan to do so. In addition, evidence that Diar showed no distress or sorrow over the death of her son was refuted on cross-examination of witnesses. T.p. 1437, 1463. Appellee's assertions as to motive or opportunity are simply inapplicable if the State cannot prove each and every element of aggravated murder beyond a reasonable doubt. Even if this court were to accept the conclusion of "homicidal violence of an unknown origin," that does not prove purpose, specific intent, or prior calculation and design. Indeed, "unknown origin" could as easily disprove the elements of aggravated murder. Nor can the State prove murder or felonious assault, without any evidence of how Jacob died.

Contrary to Appellee's assertions, the coroner's testimony did not rule out scenarios that are *not* aggravated murder, for instance an accidental death, voluntary manslaughter or involuntary manslaughter, or some negligent act, which a panic-stricken perpetrator might try to hide with a fire. Also much of Appellee's arguments discuss the fire. The coroner testified that Jacob was already dead when the fire began, so the fire does not prove what caused his death.

Prosecutors must not be allowed to wildly speculate to the jury in order to prove their cases. A capital case requires more than a “mere modicum” of evidence. If the Fourteenth Amendment is to have any meaning, it must protect defendants such as Nicole Diar from convictions based on proof which does not meet the reasonable doubt standard. This means that every element of the charges must be proven. Jackson v. Virginia, 443 U.S. 307, 315 (1979), citing In re Winship, 397 U.S. at 364. In Nicole Diar’s case it cannot be said that her guilt of aggravated murder was proved beyond a reasonable doubt. Her convictions and sentence must be reversed.

## Proposition of Law No. VII

Diar's right to effective assistance of counsel was violated when counsel's performance failed to meet the prevailing standards of practice, thus prejudicing Diar. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 10, 16.

Trial counsel's performance failed to meet the prevailing standards of practice. As a result, Diar's rights guaranteed by the Sixth and Fourteenth Amendments and Article I, §§ 10 and 16 of the Ohio Constitution were violated.

### **Failure to Object**

In her brief, Diar raised counsel's ineffectiveness for counsel's failure to object to the: prosecutor's misstatement of the law (Diar's Merit Brief, pp. 96-98); numerous instances of prosecutorial misconduct (Diar's Merit Brief, p. 98); graphic photographs that were gruesome, cumulative, repetitive, and prejudicial (Diar's Merit Brief, pp. 98-103); state introducing bad character and bad acts evidence (Diar's Merit Brief, p. 104); comments made by the State during closing arguments that mislead the jury (Diar's Merit Brief, p. 114-116); trial court's imposition of death because it failed to comply with O.R.C. § 2929.03 (Diar's Merit Brief, p. 1160; and the improper jury instructions (Diar's Merit Brief, p. 116). In addition, Diar raised the substantive claims underlying each of these claims of counsel's failure to object. See Diar's Merit Brief, Propositions of Law: I, II, III, IV, V, VIII, XIII, XIV. The State counters by arguing "the failure to object is not enough" for this Court to find ineffective assistance of counsel. Appellee's Brief, pp. 105, 106-108. The State then directs this Court to the underlying merits argument, where the State's response is based on counsel's failure to object. Appellee's Brief, pp. 85, 96.

The State cannot have it both ways. Either the State has to concede its failure to object argument in its response to the Fourth and Fifth Propositions of Law or it has to concede that this issue can be raised in an ineffective assistance of counsel claim based on counsel's failure to

object. Further, under the State's theory there would be no need for Strickland, since counsel could never be ineffective for failing to object. See Strickland v. Washington, 466 U.S. 668 (1984).

**A. Standard Of Review For Ineffective Assistance Of Counsel Claims.**

In its brief, the State "disagree[d] that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases is the appropriate standard of review in which to assess trial counsel's performance in the instant matter." Appellee's Merit Brief, p. 101. Contrary to the State's position, "death is different" and requires a higher standard of care and practice than those afforded to Diar by her trial attorneys. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also California v. Ramos, 463 U.S. 992, 998-999 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny"); Lockett v. Ohio, 438 U.S.586, 605 (1978) ("[The] imposition of death by public authority is...profoundly different from all other penalties").

In Williams v. Taylor, 529 U.S. 362, 396 (2000), the United States Supreme Court recognized that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are the appropriate standards to assess counsel's performance in a death penalty trial. The Court in Williams addressed a claim of defense counsel's ineffectiveness for failing to investigate and present mitigating evidence. The Court specifically found:

... the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980).

Id. at 396.

Three years later in Wiggins v. Smith, 539 U.S. 510, 524 (2003), the Court reiterated that the appropriate standards to review capital counsel's performance were those enunciated in the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. In Wiggins, the Court found counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), "when Counsel's conduct ... fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which [the Court has] long ... referred [to] as guides to determining what is reasonable." Wiggins, 539 U.S. at 524.

This Court should follow the United States Supreme Court and adopt the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in determining ineffective assistance of counsel claims under Strickland in death penalty cases.

**B. Ineffective Assistance Of Counsel During Pre-Trial: Gag Order.**

In response to this claim, the State's argument is twofold: (1) that it was a matter of trial strategy not to oppose the gag order because it afforded counsel the "opportunity" to make public comment about the case (Appellee's Merit Brief, p. 102); and (2) that it is "unclear how trial counsel was ineffective for failing to renew [Diar's] Motion for Change of Venue after jury selection. (Appellee's Merit Brief, p. 103). The State, however, misses the point.

Defense counsel filed a motion for a change of venue on May 26, 2004, due to the enormous pretrial publicity in this case. The strategy in filing such a motion was to have Diar tried in a venue free of the extensive and prejudicial publicity. See T.p. 131, 223, 316, 388, 480, 887. However, when the State requested a gag order to limit publicity, defense counsel objected to it. Pretrial, June 2, 2004, pp. 13-18. This is not strategy. The sole reason for filing the change of venue motion in this case was because of the extensive and overwhelming pretrial publicity. Defense counsel's position on the gag order undercut his motion for change of venue. In

essence, it is nonsensical for counsel to argue that there was too much publicity, and then argue that he needed to add to the publicity by allowing further public comment on the case. Appellee's Merit Brief, p. 102. Further, the State's argument that it afforded defense counsel an opportunity to make public comment is contrary to the premise that the case be decided solely on the evidence adduced at trial. See Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print").

Contrary to the State's second position, which the State does not support with any pinpoint cites to the record, it is "clear" why trial counsel was ineffective for failing to renew Diar's Motion for Change of Venue.<sup>1</sup>

The right to a "jury trial guarantees...the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). This right was violated because those in the jury pool were bombarded with extensive pre-trial publicity. (e.g. T.p. 83, 93-94, 109-110, 156, 163-164, 171-172, 241, 352-353, 386-387, 451-453, 539, 600-601, 724-725, 762). This publicity was so prejudicial that seven members of the venire had already judged Diar to be guilty (T.p. 61, 96-98, 102, 112, 120, 167, 171-172, 363-364, 602). The fact that many of this individuals stated they could be fair and impartial is of no importance as recognized by the United States Supreme Court.

In Irvin v. Dowd, 366 U.S. 717 (1961), the United States Supreme Court found the trial judge erred in only changing venue to an adjoining county when adverse publicity in the six to

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<sup>1</sup> The State does "Id." cites in this section. However, the "Id." would refer to the immediately preceding authority; in this case an unreported case out of the Washington County Court of Appeals. See The BlueBook, A Uniform System of Citation, p. 64, R.4.1 (18th ed. 2005).

seven months preceding a well-known murder trial was overwhelming. The Court opined that while jurors need not be totally ignorant of facts or issues, they cannot be expected to forget media reports that have saturated their minds. The Court also held that juror assurances of impartiality should not be considered dispositive. Id. at 728.

In Rideau v. State of Louisiana, 373 U.S. 723 (1963), the Supreme Court did not find the actual voir dire that occurred prior to trial was relevant to the Court's decision that the pretrial publicity had tainted the jury pool. Id. at 727. As in Dowd, all the jurors declared they would accord the defendant the presumption of innocence and set aside anything they might have seen or heard about the case. This was not satisfactory to the Supreme Court because the damage had already been done prior to trial. Id.

In Sheppard v. Maxwell, the Supreme Court set forth principles still applicable today:

Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that prescribes the press from reporting events that transpire in the courtroom. **But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity..., But we must remember that reversals are but palliatives: the cure lies in those remedial measures that will prevent the prejudice at its inception.**

Sheppard, 384 U.S. 333, 362 -363 (1966) (emphasis added).

Further, in Patton v. Yount, 467 U.S. 1025, 1031 (1984), the Court held: "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial **should not be believed.**" (Emphasis added).

In Diar's case, several disqualified jurors admitted that they could not ignore the impact of the pretrial publicity. Following the decisions in Irvin, Rideau, Sheppard, and Yount it is likely that the jurors who were seated were not as candid about their prejudices. Seven of the jurors who convicted Diar and sentenced her to death were exposed to the same prejudicial pretrial publicity. Because these individuals were allowed to sit on Diar's jury her Sixth and Fourteenth Amendment rights to a fair trial and due process were violated. T.p. 226, 242, 316, 387-388, 405, 480, 887.

The United States Constitution's Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. Strickland, 466 U.S. 668. Diar's attorney were ineffective when they failed to renew the change of venue motion after learning of how extensive the negative pre-trial publicity was.

**C. Ineffective Assistance Of Counsel During Voir Dire.**

**C.1 Counsel failed to challenge for cause Juror #14 - Mark Takacs and Prospective-Juror – Rose Yarber Hogan.**

In response to this claim, the State argues that "counsel carefully questioned Juror Takacs and Prospective-Juror Hogan. Appellee's Brief, p. 104. Further, the State argues that both Takacs and Hogan assured the parties that they would be able to set their views aside and follow the trial court's instructions. (Appellee's Brief, p. 104-105). The State's arguments are meritless.

**Juror Takacs:**

The adequacy of defense counsel's questioning of Juror Takacs is not an issue. Appellee's Brief, p. 104. The issue, is whether Juror Takacs should have been challenged for cause because his voir dire responses indicated that he would automatically impose death. During questioning of Juror Takacs, defense counsel discovered that Juror Takacs was

predisposed to vote for the death penalty. Upon learning of his predisposition to impose death, defense counsel failed to challenge Juror Takacs for cause. T.p. 232.

Juror Takacs, who ultimately sat on Diar's jury, indicated that he was predisposed to impose a death sentence. Juror Takacs stated:

- ▶ “if [murder] was intentional...[and] no good motive, then I would have to sway my vote towards the death penalty...”; T.p. 229
- ▶ “this is my personal opinion.... There was a case or two in Florida recently where a man had kidnapped a child and I guess assaulted the child, and murdered the child, that kind of situation. You'd had to -- for me to impose a death penalty ...; T.p. 230-231
- ▶ he would impose death on a “really violent, ugly crimes where innocent life is taken for no reason.” T.p. 231.

Based on Juror Takacs' answers, upon finding Diar guilty of the aggravated murder of her four-year-old son, he would automatically vote for death for two reasons. First, because Diar's four-year-old son would be by definition an “innocent life;” and second, because his murder would have been an “intentional act.” See O.R.C. §§ 2903.01 (“Purposefully cause”) and 2901.22(A) (“A person acts purposefully when it is his specific intention to cause a certain result...”). As such, Juror Takacs was an automatic death juror.

The State hopes to ignore this fact by relying on State v. McGraw, Ross County Court of Appeals No. 1726 (June 2, 1992), unreported, 1992 Ohio App. LEXIS 2895. However, the State's reliance on McGraw is misplaced for three reasons.

First, McGraw is an appeal from a jury verdict of the Chillicothe Municipal Court for Operating a Motor Vehicle While Under the Influence. McGraw, 1992 Ohio App. LEXIS 2895, p. \*1. Diar's appeal is a death penalty appeal. As the United States Supreme Court has noted on numerous occasions “death is different.” Woodson, 428 U.S. at 305. See also Ramos, 436 U.S. at 998-999 (“[T]he qualitative difference of death from all other punishments requires a

correspondingly greater degree of scrutiny”); Lockett, 438 U.S. at 605 (“[The] imposition of death by public authority is...profoundly different from all other penalties”). Second, the State’s reliance on McGraw for the proposition that the juror’s assurance that he could follow the instructions of the trial court directly conflicts with the United States Supreme Court’s decision in Morgan v. Illinois, 504 U.S. 719 (1992). In Morgan, the Court found:

A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.

Id. at 729.

Finally, unlike Diar, in McGraw there was no prejudicial pretrial publicity that would so infect the jurors as to deprive McGraw of his right to a fair and impartial jury. McGraw, 1992 Ohio App. LEXIS 2895, p. \*7-\*8 .

Counsel’s failure to challenge Juror Takacs for cause was prejudicial because it denied Diar her right to a fair trial by allowing a juror predisposed to death to sit on the jury. See United States v. Martinez-Salazar, 528 U.S. 304, 314 (2000) (Defendant is not required to use a peremptory challenge to strike a juror who should have been removed for cause in order to preserve claim that the for-cause ruling impaired right to a fair trial); Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (“So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the [right to an impartial jury] was violated”).

**Prospective-Juror Hogan:**

The adequacy of defense counsel’s questioning of Juror Takacs is not an issue. (Appellee’s Brief, p. 104). The issue, is whether Prospective-Juror Hogan should have been challenged for cause because she was an automatic death juror. During voir dire, Prospective-

Juror Hogan's responses to defense counsel's questions revealed that she was predisposed to impose the death penalty. Upon learning of her predisposition to impose death defense counsel failed to challenge her for cause. T.p. 347.

Prospective-Juror Hogan indicated that she was predisposed to impose a death sentence. She stated

... if a mother intentionally killed her child, then [she] would seek the death penalty ... [and if the death were the result of] maybe an accidental overdose, or something like that, [and] they try to still cover up the fact they accidentally did that, [she] would still seek [] death [].

T.p. 344. In other words, in a case where a mother killed her child she would vote to impose the death penalty. T.p. 344. While Prospective-Juror Hogan indicated that she could be fair, impartial, follow the instructions of the court, and could consider other sentences; she also indicated that death would be the only option unless it was proven that there was no premeditation. T.p. 336, 339-341, 343. Prospective-Juror Hogan's answers demonstrated that she could not follow the law, and Diar's attorneys should have challenged her for cause.

As argued above, the State hopes to ignore these fact by relying on State v. McGraw, Ross County Court of Appeals No. 1726 (June 2, 1992), unreported, 1992 Ohio App. LEXIS 2895. However, the State's reliance on McGraw is misplaced for three reasons.

First, McGraw is an appeal from a jury verdict of the Chillicothe Municipal Court for Operating a Motor Vehicle While Under the Influence. McGraw, 1992 Ohio App. LEXIS 2895, p. \*1. Diar's appeal is a death penalty appeal. As the United States Supreme Court has noted on numerous occasions "death is different." Woodson, 428 U.S. at 305. See also Ramos, 436 U.S. at 998-999 ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny"); Lockett, 438 U.S. at 605 ("[The] imposition of death by public authority is...profoundly different from all other penalties"). Second, the State's

reliance on McGraw for the proposition that the juror's assurance that he could follow the instructions of the trial court directly conflicts with the United States Supreme Court's decision in Morgan v. Illinois, 504 U.S. 719 (1992). In Morgan, the Court found:

A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.

Id. at 729.

Finally, unlike Diar, in McGraw there was no prejudicial pretrial publicity that would so infect the jurors as to deprive McGraw of his right to a fair and impartial jury. McGraw, 1992 Ohio App. LEXIS 2895, p. \*7-\*8 .

Counsel's performance in voir dire was deficient, and prejudicial to Diar because counsel allowed a biased juror who would automatically impose the death penalty to sit as a juror in Diar's capital trial.

**C.2 Counsel failed to correct members of the venire and Juror Takacs' misperception of what constitutes mitigation.**

The State did not respond to this claim. Diar incorporates, fully herein, the argument in her merit brief. See Section C.2 in Diar's Merit Brief, pp. 93-95.

**C.3 Counsel had no understanding of what constitutes mitigation.**

In addressing this claim, the State presents a two-fold argument: first, "the presentation of [a] mitigating theory and evidence is a matter of trial strategy and does not constitute ineffective assistance of counsel;" and second, "statements made during voir dire cannot be reasonably thought to affect sentencing verdicts." Appellee's Brief, p. 105. The State's arguments are erroneous because the State misinterprets the cases it relies on.

In arguing that "the presentation of [a] mitigating theory and evidence is a matter of trial strategy and does not constitute ineffective assistance of counsel," the State relies on State v.

Hand, 107 Ohio St. 3d 378, 411, 840 N.E.2d 151, 188, 2006-Ohio-18, ¶233. However, the State's reliance on Hand is misplaced.

In Hand, Hand's attorney focused on Hand's "value behind bars." Hand, 107 Ohio St. 3d at 412; 840 N.E.2d at 188, 2006-Ohio-18 at ¶230. The strategy was to convince the jury that Hand "should receive a life sentence by showing [Hand] would be a model prisoner and would have value in prison society." Id. at 412; 840 N.E.2d at 189; 2006-Ohio-18 at ¶232. This Court found:

The defense theory, although unsuccessful, was coherent and fit into the testimony of the witnesses. Thus, counsel made a "strategic trial decision" in presenting the defense theory of mitigation, and such decision "cannot be the basis for an ineffectiveness claim."

Id. at 413; 840 N.E.2d at 189; 2006-Ohio-18 at ¶233.

Here, defense counsel tried to present a "mitigation theory" that this Court has recognized as not being a mitigating factor.

Defense counsels' "theory" of mitigation for the first forty members of the venire, most of whom ended up serving as jurors, was residual doubt. Counsel had no idea that residual doubt was not even a mitigating factor in Ohio. T.p. 558-559. See State v. McGuire, 80 Ohio St. 3d 390, 403, 686 N.E.2d 1112, 1123, 1997-Ohio-335 (Residual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender). See also Joseph v. Coyle, 469 F.3d 441 (6th Cir. 2006) (Defense attorneys must investigate and understand the law). See also T.p. 559 – counsel's feeble attempt to cover up their mistake.

Counsels' failure to understand mitigation is unlike the situation in Hand, where counsel at least advocated a recognized mitigating factor. Counsels' failure to understand the law left

the jury without any clear concept of mitigation and it left jurors on the panel who would vote for death no matter what. See, Joseph, 469 F.3d 441.

Second, the State argues that “statements made during voir dire cannot be reasonably thought to affect sentencing verdicts.” Appellee’s Brief, p. 105. The State supports this argument by relying on State v. Jones, 91 Ohio St. 3d 335, 337-338, 740 N.E.2d 1163, 1171, 2001-Ohio-57. However, the State’s reliance on Jones is misplaced.

In Jones, the issue was whether Jones “should have been allowed to question prospective jurors about their views of specific mitigating factors.” Jones, 91 Ohio St. 3d at 337; 740 N.E.2d at 1171; 2001-Ohio-57 at ¶\_\_. In deciding this issue this Court held, “[d]uring voir dire, a trial court is under no obligation to discuss, or to permit the attorneys to discuss, specific mitigating factors.” Id. at 338; 740 N.E.2d at 1171; 2001-Ohio-57 at ¶\_\_. This is not the question Diar presents.

The question here was whether counsel understood what mitigation is. The answer is no. Counsel’s misunderstanding of what actually constitutes mitigation is shown not only by counsel’s desire to present “residual doubt” as its mitigation theory, but more importantly the fact that counsel failed to correct the venire’s misperception of what mitigation is. See Section C.2 in Diar’s Merit Brief, pp. 93-95, fully incorporated herein. See, e.g., (Juror #14, Mark Takacs, defined mitigation as having a really good motive to commit the crime and/or remorse (T.p. 229, 231); Prospective-Juror Rose Yarber Hogan, defined mitigation as a lack of premeditation (T.p. 344); Prospective-Juror Douglas Haessig, a recent law school graduate, stated that mitigation would be something done accidentally (T.p. 629); Prospective-Juror Diane Bozik, stated that mitigation would be some sort of justification (T.p. 744)).

Further, contrary to the State's assertion, "[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). It is during this critical stage that unqualified jurors are removed and Diar's constitutional right to a fair and impartial jury is enforced. See Morgan v. Illinois, 504 U.S. 719, 729 (1992); Dennis v. United States, 339 U.S. 162, 171-172 (1950); State v. Jackson, 107 Ohio St. 3d 53, 64, 836 N.E.2d 1173 (2005); State v. Wilson, 74 Ohio St. 3d 381, 386, 659 N.E.2d 292 (1996).

**C.4 Counsel failure to object to the prosecutor's misstatement of the law.**

The State did not respond to this claim, other than arguing counsels' failure to object, which Diar has addressed above, and fully incorporates herein. Appellee's Merit Brief, p. 106. Diar also incorporates, fully herein, the argument in her merit brief. See Section C.2 in Diar's Merit Brief, pp. 93-95.

**D. Ineffective Assistance Of Counsel During Trial Phase.**

**D.1. Counsel failed to object to numerous instances of prosecutorial misconduct.**

Diar incorporates, fully herein, the argument in her Fourth Proposition of Law.

**D.2. Counsel failed to object to the admission of graphic photographs into evidence at the trial because the photographs are cumulative, repetitive and prejudicial to Diar's right to Due Process.**

In response to this claim, the State argues: (1) that "... the photographs, some of which could be considered gruesome, were highly relevant and nonrepetitive [sic.] in nature" (Appellee's Brief, p. 106); and (2) "mere testimony was insufficient to convey to the jury what investigators saw in the residence that led them to believe that the fire was intentionally set and that an accelerant was utilized." Appellee's Brief, p. 107. The State's arguments fail.

**Gruesome Photographs:**

Diar would agree with the State that some of the photographs were gruesome. It is because these photographs were gruesome that their admission was not harmless. See D.2.2. in Diar’s Merit Brief, p. 103, fully incorporated herein.<sup>2</sup>

**Highly Relevant:**

The State argues that these photographs were relevant because they show the extensive damage done to the house as a result of the arson and because the jury needed to “consider[] [them] in making their determination that Diar murdered her son and then set fire to her ... residence to conceal her actions.” Appellee’s Brief, p. 107. The State’s argument fails for two reasons.

First, the defense never denied that the house suffered extensive damage as a result of the fire. In fact, six witnesses for the State discussed in great deal the extent of the damage. T.p. 1366, 1386-1388, 1562, 1588, 1590-1592, 1635-1636, 1790, 1819, 1838. Second, the State’s assertion that the photographs were necessary to the jury to determine Diar murdered her son and then set fire to cover up her crime, is without support. Appellee’s Brief, p. 107. At no time, in its brief does the State establish how the jury made this determination based on these pictures. See State v. Morales, 32 Ohio St. 3d 252, 258, 513 N.E.2d 267, 274 (1987) (The burden shifts to the proponent of the evidence to demonstrate that the probative value of “each photograph” outweighs the “danger of prejudice” to the defendant).

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<sup>2</sup> Diar would note that the State did not respond to her D.2.2. claim.

**Non-repetitive Photographs:**

The State's argument that the photographs were "nonrepetitive" [sic.] is contrary to the facts. Appellee's Brief, p. 106. As the following chart of the crime scene photographs demonstrates there were numerous photographs that were repetitive.

<b>PHOTOGRAPH</b>	<b>EXHIBIT 8 Series</b>	<b>EXHIBIT 15 Series</b>
Front side of house	A	D, E
Westside of house	B, QQ	F
Rear of the house	C, RR	G
Living room	D	N, O, P, Q, VVV
Living room: from the front door	E	L, M
Living room floor & couch	F, BB, CC, EE	
Dining room	G, FF	W, Z, AA, BB, CC, WWW, EEEE, FFFF, GGGG, HHHH
Dining room and living room: floor area	H, AA, LL, OO, PP	Y, DD, QQQ, RRR, SSS, TTT, XXX, YYY
First floor bedroom: shows victim's body	I, Y	
First floor bedroom: bed	J, Y	NNNN, DDDDD, EEEEE, FFFFF
First floor bedroom: bed, wall, numerous objects, and floor	K, HH, NN	FF, GG, BBBB, GGGG, HHHH
Dining room: showing kitchen door open	L	
Kitchen	M	
Kitchen: cabinets, stove, countertops	N	TT
Hallway: stairs going to basement	O	PP, ZZ, AAAA
First floor bathroom	P	
Front of House: living room, south wall, and the couch	Q	
Kitchen: door to back of house	R	VV, WW, XX, YY
Kitchen: floor, refrigerator, and plastic table	S	SS
Dining room: burn patterns	T, AA	AA, DD, EE
Bathroom: bathtub three-quarters full of water	U	QQ
Stairs: going to second floor	V	JJJ, KKK
Stairs: midway up stairs to second floor	W	KKK

Second floor: top of stairs looking towards second bedroom	X	LLL
Dining room: near register by north wall	Z	
First floor bedroom: mattress on west side of room & debris under bed, including dead puppy	II, JJ	HH, II, JJ, KK, LLLL, MMMM, QQQQ, RRRR, SSSS
First floor bedroom: floor after cleaning	MM	TTTT, UUUU, YYYY, ZZZZ
Basement: floor, furnace, hot water tank, miscellaneous debris, washer and dryer	SS, TT	AAA, BBB, CCC, DDD, EEE, FFF

T.p. 1595-1619; 1749-1807.

Not only does the chart above demonstrate the extent of the duplicate nature of many of these photographs, but the State admits the same in its brief. See Appellee’s Brief, p. 107, “multiple pictures were taken of certain areas ... .”

The State’s next argument that “mere testimony was insufficient to convey to the jury what investigators saw in the residence that led them to believe that the fire was intentionally set and that an accelerant was utilized,” is wrong for the simple fact that the defense never challenged that an accelerant was used. Appellee’s Brief, p. 107. The central issue at trial was whether Diar committed the arson and the photographs do not prove that she is the guilty party. Further, at no time, does the State establish how these photographs establish that Diar was the person responsible for setting the fire to her residence. See Morales, 32 Ohio St. 3d at 258, 513 N.E.2d at 274 (The burden shifts to the proponent of the evidence to demonstrate that the probative value of “each photograph” outweighs the “danger of prejudice” to the defendant).

**D.2.1 The crime scene photographs were inadmissible because many were repetitive of other photographs.**

Diar rests on the arguments contained in her merit brief and the above section. See also Diar's Merit Brief, Section D.2.1, pp. 102-103, fully incorporated herein.

**D.2.2 The photographs created an unacceptable danger of prejudice to Nicole Diar. Their admission into evidence during trial phase was not harmless error.**

The State in its brief, does not respond to this section. Diar rests on the argument contained in her merit brief. See Diar's Merit Brief, Section D.2.2, p. 103, fully incorporated herein.

**D.2.3. Remedy and conclusion.**

Exhibits 8-A through 8-TT, and 15-D through 15-KKKKK. were irrelevant, unnecessary, cumulative, repetitive, and they created a danger of prejudice to Diar. Their admission at the trial phases violated Diar's right to due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16. Diar is therefore entitled to a new trial.

**D.3. Counsel failed to object to every instance where the State sought to introduce bad character and bad acts evidence.**

Diar incorporates, fully herein, the argument in her Fifth Proposition of Law.

**D.4. Counsel failed to adequately cross-examine Leroma Penn.**

In response to this claim, the State argues: (1) that this was "trial strategy (Appellee's Brief, p. 108); and (2) "[s]imply because trial counsel did not cross examine [] Penn concerning matters appellate counsel deems vital, does not mean that trial counsel [was ineffective]." Appellee's Brief, p. 108. The State's arguments fails for two reasons.

First, contrary to the State's argument it was not trial strategy.<sup>3</sup> defense counsel knew before trial that the State was going to call Penn to testify, yet counsel failed to seek information that called her credibility into issue until ten days after Diar's trial began. Hrg. on Motion for New Trial, Oct. 27, 2005, p. 29. It is nonsensical to believe that it can be deemed trial strategy to wait until after trial began to begin investigating the State's witness. See Bigelow v. Williams, 367 F.3d 562 (6th Cir. 2004)

Second, contrary to the State's argument, trial counsel argued that it was important to impeach her credibility. Had counsel thought it not important, there would have been no Motion for New Trial or a hearing on that motion. Hrg. on Motion for New Trial, Oct. 27, 2005, p. 11, 13, 23, 29, 34-35, 38.

The Sixth Amendment guarantees to the criminal defendant the right to the effective assistance of counsel. Strickland, 466 U.S. 668. Counsel violated this duty when he waited to obtain key information that would challenge the credibility of Penn.

**E. Ineffective Assistance Of Counsel During the Mitigation Phase.**

The State has urged this Court to remand Diar's case for a new mitigation hearing based on the trial court's failure to give a Brooks instruction and the trial court's failure to comply with O.R.C. § 2929.03. See State v. Brooks, 75 Ohio St. 3d 148, 661 N.E.2d 1030 (1996). Appellee's Merit Brief, pp. 83-84, 108.

Diar, however, would also point out that she has raised five other areas where counsel was ineffective during the mitigation phase. Diar's Merit Brief, pp. 106-116, incorporated fully herein. For example:

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<sup>3</sup> The State once again, does not cite to any portion of the record for support.

- trial counsel's failure to take the time necessary to prepare and present a case sufficient to convince the jury that the aggravating circumstance did not outweigh the mitigation (Diar's Merit Brief, pp. 106-110);
- trial counsel presenting an inaccurate and incomplete picture of Diar's background to the jury (Diar's Merit Brief, pp. 110-113);
- trial counsel's failure to call a burn expert to discuss the severe burns Diar received as a child (Diar's Merit Brief, pp. 113-114);
- trial counsel's failure to object to the State's comments during closing argument that mislead the jury as to the statutory weighing process (Diar's Merit Brief, pp. 114-116); and
- trial counsel's failure to object to improper jury instructions. (Diar's Merit Brief, p. 116; see also, Propositions of Law XIII and XIV).

Each of these areas of ineffectiveness alone and cumulatively would also warrant granting her a new mitigation hearing.

### **Proposition of Law No. X**

The trial court erred when it failed to grant defense counsel's motion to sever the charges of corrupting another with drugs from the other counts in the indictment, in violation of appellant's rights under the United States and Ohio Constitutions. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

As noted in Diar's merit brief, the testimony about Diar's use of codeine to calm Jacob and make him sleepy was unrelated to the charge of aggravated murder, as codeine was in no way connected to Jacob's death. Testimony at trial was unable to establish an actual cause of death for Jacob, but it did specifically rule out poisoning. Dr. Matus testified that he reviewed past medical records of Jacob, including past stomach problems, and concluded that it in no way contributed to his death. T.p. 1683. He also looked at the toxicology report, which showed that no toxic drugs were present. T.p. 1684. No drugs of any kind were found in Jacob's system, either over the counter or prescription drugs. T.p. 1715. Matus looked at Jacob's internal organs and found nothing that would cause his death. T.p. 1690. There was no testimony that Diar gave Jacob medicine in order to intentionally harm him.

The benefit in the economy of a single trial must be considered against the disadvantages to the defendant. Drew v. United States, 331 F.2d 85, 88 (C.A.D.C. 1964). In this case, Diar may have been prevented from presenting a defense to the Corrupting Another With Drugs charge because of the presentation of the evidence at the same trial for which she was being charged with aggravated murder. In addition, the lengthy indictment against Diar only served to magnify her guilt in the eyes of the jury. See id.

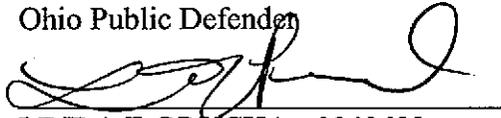
Appellee also argues that this evidence was admissible under Ohio R. Evid. 404(B). Appellee's Brief, p. 118. The improper use of "other acts" evidence is discussed in Proposition of Law V of Appellant's merit brief.

**CONCLUSION**

For the reasons set forth in her merit brief and for each of the foregoing reasons in this reply brief, Appellant Diar's convictions and death sentence should be reversed.

Respectfully submitted,

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COUNSEL FOR NICOLE DIAR

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT NICOLE DIAR was forwarded by regular U.S. Mail to Dennis P. Will, Prosecuting Attorney, and Anthony Cillo, Assistant Prosecuting Attorney, Lorain County, 3rd Floor, Justice Center, 225 Court Street, Elyria, Ohio 44035, on this 28<sup>th</sup> day of June, 2007.



LINDA E. PRUCHA

COUNSEL FOR NICOLE DIAR

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 :  
 -vs- : Case No. 2005-2264  
 :  
 NICOLE DIAR, :  
 :  
 Defendant-Appellant. : **DEATH PENALTY CASE**

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ON APPEAL FROM THE COURT OF  
APPEALS OF LORAIN COUNTY, CASE NO. 04CR065248

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**APPENDIX TO REPLY BRIEF OF APPELLANT NICOLE DIAR**

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LEXSEE 1992 OHIO APP. LEXIS 2895

State of Ohio, Plaintiff-Appellee, vs. Tommy M. McGraw, Defendant-Appellant.

No. 1726

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, ROSS  
COUNTY*1992 Ohio App. LEXIS 2895*

June 2, 1992, Entered

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed from the judgment of the Chillicothe Municipal Court (Ohio), which convicted defendant after a jury found him guilty of operating a motor vehicle while under the influence of alcohol in violation of *Ohio Rev. Code Ann. § 4511.19(A)(3)*.

**OVERVIEW:** A police sergeant stopped at a drive-through after his shift ended. A car pulled in behind him and he saw the man in the driver's seat give him "the finger." He asked the clerk to call for assistance and approached the car, where he saw several cans of beer. When he ordered the person out of the car he smelled a strong odor of alcohol, administered field sobriety tests, and arrested defendant for driving while intoxicated. Counsel stipulated the elements of a violation of § 4511.19(A)(3) and left for the jury the issue of whether defendant was driving the vehicle. The jury found defendant guilty, and he appealed. The court affirmed the judgment. Defendant failed to establish that trial counsel's performance was so inadequate as to amount to ineffective assistance. Failure to file a motion to suppress was consistent with a strategy of denying that defendant was driving, as a defense witness testified. The trial court properly determined that jurors with preconceived notions would follow instructions, and failure to challenge them for cause was not prejudicial. There was probable cause for the arrest. There was substantial evidence that supported the conviction.

**OUTCOME:** The court affirmed the judgment of the trial court.

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Counsel > Effective Assistance > Tests*

*Criminal Law & Procedure > Counsel > Effective Assistance > Trials*

*Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Effective Assistance*

[HN1] The controlling United States Supreme Court case on effective assistance of counsel is *Strickland v. Washington*. It holds that every person charged with a criminal offense shall be afforded effective assistance of counsel for his defense. Whether counsel is considered effective comes down to a two-step analysis set out in *Strickland*, and adopted by the Ohio Supreme Court most recently in *State v. Bradley*. In *Bradley*, the court held: Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial court would have been different.

*Criminal Law & Procedure > Counsel > Effective Assistance > Trials*

*Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Effective Assistance*

[HN2] Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney per-

formance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Driving Under the Influence > General Overview***

***Criminal Law & Procedure > Arrests > Probable Cause Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge***

[HN3] An officer has probable cause to arrest an individual for a violation of *Ohio Rev. Code Ann. § 4511.19* when at the time of the arrest the officer's knowledge of the facts combined with the totality of the circumstances is sufficient to warrant a prudent person to believe that the individual had violated § 4511.19.

***Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > General Overview***

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Witnesses Evidence > Procedural Considerations > Judicial Intervention in Trials > Interrogation of Witnesses***

[HN4] *Ohio R. Crim. P. 24* requires a trial court to examine a juror who may have a preconceived opinion but allows the juror to be seated if after examination the trial court determines the juror can render an impartial verdict. Once such determination is made, it will not be disturbed on appeal absent a showing of an abuse of discretion.

***Criminal Law & Procedure > Jury Instructions > Objections***

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object***

[HN5] *Ohio R. Crim. P. 30(A)* states that a party waives error in jury instructions if he does not object at the time the instructions are given.

***Criminal Law & Procedure > Witnesses > Credibility Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN6] In reviewing a claim that a jury verdict was against the manifest weight of the evidence, or that the evidence was insufficient, a reviewing court's duty is to review the record to determine whether there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt. It is fundamental that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts. Thus, in reviewing the legal sufficiency of evidence to support a jury verdict, it is the minds of the jurors rather than a reviewing court which must be convinced.

**COUNSEL:** [\*1] COUNSEL FOR APPELLANT: James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113.

COUNSEL FOR APPELLEE: William J. Corzine, CHILLICOTHE CITY LAW DIRECTOR, 38 South Paint Street, Chillicothe, Ohio 45601.

**JUDGES:** Grey, Stephenson, Abele

**OPINION BY:** FOR THE COURT; LAWRENCE GREY

**OPINION**

DECISION AND JUDGMENT ENTRY

GREY, J.:

This is an appeal from a jury verdict of the Chillicothe Municipal Court finding Tommy McGraw guilty of Operating a Motor Vehicle While under the Influence of Alcohol in violation of *R.C. 4511.19(A)(3)*. We affirm.

On May 9, 1990, Sgt. Stansberry stopped at Chip's Drive-Thru in Chillicothe after his three to eleven shift ended. Stansberry pulled into the Drive-Thru and McGraw's car pulled in behind him. McGraw's car stopped short, about two feet from Stansberry's rear bumper. Stansberry looked in his rear view mirror and saw McGraw give him "the finger."

Stansberry got out of his truck and told the Drive-Thru clerk to call 911 for assistance. When Stansberry approached McGraw's car he saw several cans of beer. He ordered McGraw out of the car and when McGraw emerged Stansberry smelled a strong odor of alcohol. Stansberry administered field sobriety tests to [\*2] McGraw and then arrested him for DWI.

McGraw was charged with OMVI in violation of *R.C. 4511.19(A)(3)*. McGraw's trial counsel failed to file a motion to suppress evidence prior to trial. The matter

proceeded to jury trial on September 13, 1990. Counsel for both parties stipulated to all of the elements of the crime leaving only the issue of whether McGraw was driving the vehicle to be resolved by the jury. During voir dire prospective jury members were extensively questioned concerning their views on the use of alcohol and their respective abilities to be fair to McGraw.

John Sanders, the clerk at the drive-thru, testified that he did not hear McGraw or anyone else tell Stansberry that McGraw was not driving the car, that actually Gary Detty was driving McGraw's car. Sanders further testified that Detty did not ask for the restroom key until after Stansberry began talking to McGraw.

Detty testified that he had been driving McGraw's car when it pulled into the drive-thru. He said McGraw was in the passenger seat and that a girl named Becky was in the back seat. Detty stated that he parked the car and got out to use the restroom.

McGraw stated that he slid over into the driver's [\*3] seat to fix a loose wire. McGraw and Detty both testified that they told Stansberry Detty had been driving the car when it came through the drive-thru and that Stansberry called them liars. They further testified that when Becky told Stansberry the same thing, he threatened her with arrest.

McGraw was found guilty and sentenced to ninety days in jail, a three hundred and fifty dollar fine and a twenty-four month license suspension. McGraw appeals and assigns six errors. We shall treat the four assignments of error on incompetency of counsel jointly.

#### FIRST ASSIGNMENT OF ERROR

"Defendant suffered from prejudicial error by incompetent counsel because there was no motion to suppress his illegal arrest made without probable cause which, if filed, would have been successful."

#### SECOND ASSIGNMENT OF ERROR

"Defendant suffered from prejudicial error by incompetent counsel in seating the jury, to wit: he did not properly challenge juror, Mary Blair, for cause resulting in a needless use of a peremptory challenge which should have been used against juror, William Cox, a biased juror. Mr. Cox also was not properly challenged for cause."

#### THIRD ASSIGNMENT OF ERROR

"Defendant suffered [\*4] prejudicial error by incompetent counsel because he did not subpoena Becky (last name unknown) as a material witness for the defense."

#### FOURTH ASSIGNMENT OF ERROR

"Defendant suffered prejudicial error by incompetent counsel because counsel failed to object to improper jury charges as follows:

A. The trial court did not adequately charge on the credibility of witnesses.

B. The trial court did not charge on the unreliability of eyewitness testimony.

C. The trial court did not properly charge on all the elements of the offense."

[HN1] The controlling United States Supreme Court case on effective assistance of counsel is *Strickland v. Washington* (1984), 466 U.S. 668. It holds that every person charged with a criminal offense shall be afforded effective assistance of counsel for his defense. Whether counsel is considered effective comes down to a two-step analysis set out in *Strickland, supra*, and adopted by the Ohio Supreme Court most recently in *State v. Bradley* (1989), 42 Ohio St.3d 136.

In *Bradley*, the court held:

"Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below [\*5] an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance."

The court further held:

"To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial court would have been different."

In applying the first prong of the two prong *Strickland/Bradley* test we must determine if McGraw's counsel's performance fell below an objective standard of reasonableness. A review of the record below indicates that it did not.

The *Strickland* court held in part:

[HN2] "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable \* \* \*. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances [\*6] of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a

*strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.*" (Emphasis added.)

McGraw's counsel's defense strategy was that McGraw was not the person operating the vehicle the night he was arrested.

McGraw first asserts that his counsel should have filed a motion to suppress prior to trial, even though this was not consistent with the defense that he was not the driver.

Even so, the motion was not likely to be granted. In order to stop and arrest an individual an officer must have probable cause. [HN3] An officer has probable cause to arrest an individual for a violation of *R.C. 4511.19* when at the time of the arrest the officer's knowledge of the facts combined with the totality of the circumstances is sufficient to warrant a prudent person to believe that the individual had violated *R.C. 4511.19*. [\*7] *State v. McCaig (1988)*, 51 Ohio App. 3d 94. See also, *Delaware v. Prouse (1979)*, 440 U.S. 648; *Beck v. Ohio (1964)*, 379 U.S. 89.

Stansberry saw McGraw's vehicle pulling into the drive-thru line at a high rate of speed and slamming on the brakes very close to the rear bumper of Stansberry's truck. Stansberry saw McGraw give him "the finger" and, when he approached the vehicle he noticed several open beer cans in the vehicle. Employing the *Beck* "totality of the circumstances" test, Stansberry had probable cause to request McGraw to exit his vehicle and perform various field sobriety tests. We cannot find that McGraw's counsel's failure to file a motion to suppress on these facts falls below an objective standard of competence.

We now turn to McGraw's assertion that his counsel's failure to challenge certain jurors for cause during voir dire was incompetent and deprived him from effective representation of counsel.

A review of the voir dire portion of the transcript indicates that the jurors whom McGraw asserts should have been challenged for cause had assured the court that they would be able to be impartial jurors and follow the instructions of the court [\*8] despite their personal beliefs.

*Crim. R. 24* [HN4] requires a trial court to examine a juror who may have a preconceived opinion but allows the juror to be seated if after examination the trial court determines the juror can render an impartial verdict. *State v. Grubb (1988)*, 44 Ohio App. 3d 94. Once such determination is made, it will not be disturbed on appeal

absent a showing of an abuse of discretion. *Id.* Below, the trial court carefully questioned all witnesses who expressed preconceived views of alcohol use. Each juror assured both the trial judge and counsel that he or she would be able to set aside those views and follow the instructions of the court. Trial counsel's failure to challenge some of the jurors for cause was not incompetence.

McGraw also asserts that trial counsel should have subpoenaed his former girlfriend Becky who was a passenger in McGraw's car the night he was arrested. McGraw asserts that Becky would have testified that Gary Detty, not he, was driving the vehicle when it pulled into the drive-thru.

Pursuant to *Strickland, supra*, an appellate court must indulge the presumption that trial counsel's conduct falls within the realm of reasonable [\*9] professional assistance and sound trial strategy. We cannot know what Becky would have said, but we do know that as a passenger she would have corroborated one of the two versions of events. Trial counsel may have had a good reason for not calling her.

It is interesting, almost amusing, to note that counsel on appeal is using in this court the very same tactic that trial counsel used on the jury. Appellate counsel points out that Becky was not called and would have us infer that her testimony would be beneficial to the defendant and that therefore trial counsel was incompetent. Trial counsel pointed out to the jury that the state did not call Becky and would have had them infer that her testimony would have been beneficial to the defendant and therefore he was innocent. We do not fault appellate counsel for using this tactic, any more than we can fault trial counsel for using it. While that strategy did not work, it was not incompetence on the part of McGraw's trial counsel, and surely not incompetence necessary to support McGraw's claim of ineffective assistance of counsel.

Lastly, McGraw asserts that the incompetence of his counsel permitted the trial court to improperly instruct [\*10] and charge the jury. We disagree.

McGraw relies on *State v. Comen (1990)*, 50 Ohio St. 3d 206 to support his assertion that the trial court should have repeated its preliminary instructions concerning the credibility of witnesses at the close of all of the evidence. We find McGraw's reliance to be misplaced. The trial court in *Comen* instructed the jury on the credibility of the witnesses prior to opening statements and refused to reinstruct the jury on credibility of witnesses and the weight of the evidence after the evidence was presented. In reviewing circumstances similar to ones presently before this court, the Ohio Supreme Court held:

"\* \* \* we find appellant presents no evidence that he was prejudiced by the trial court's refusal to repeat all instructions. Additionally, appellant presents no evidence that the absence of instructions on credibility and weighing of the evidence at the completion of counsel's arguments was prejudicial."

Here, McGraw presented no evidence that the trial court's failure to repeat its instructions on the credibility of the witnesses or trial counsel's failure to object to the trial court's failure to repeat that instruction was [\*11] prejudicial.

McGraw also asserts that the trial court erred in failing to charge the jury on the unreliability of eyewitness testimony. The trial court did indeed fail to charge the jury on that issue but McGraw's trial counsel failed to object to that failure.

*Crim. R. 30(A)* states that [HN5] a party waives error in jury instructions if he does not object at the time the instructions are given. In reviewing the record below, trial counsel failed to raise objections to the instructions as given and thus, waived that claim of error. We will not find error therefore unless the outcome of the trial would clearly have been otherwise if the instruction had been given. See, *State v. Underwood (1983)*, 3 Ohio St. 3d 12. We cannot hold that the trial's outcome would have been otherwise had trial counsel raised objection to the trial court's instructions. Thus, pursuant to both *Underwood* and *Bradley, supra*, trial counsel was not incompetent in his failure to object to the trial court's failure to instruct on the reliability of eyewitness testimony.

Lastly, McGraw asserts that the trial court erred in failing to properly charge on all the elements of the offense and that he was [\*12] deprived of effective assistance of counsel because his trial counsel failed to object to that failure.

It is clear from the record that counsel for both the plaintiff and defendant stipulated to most issues of the offense. The only issue was whether McGraw was the driver. The court fully instructed the jury on this issue and therefore, there was no error. McGraw's first, second, third, and fourth assignments of error are not well-taken and are overruled.

#### FIFTH ASSIGNMENT OF ERROR

"The trial court committed prejudicial error when it misinformed the jury as to the effect of Defendant's plea of not guilty."

The trial judge instructed the jury that McGraw's plea of not guilty meant he denied that he was operating the motor vehicle at the time of his arrest. The court told the jury that this precise issue was what they were to determine. McGraw asserts that a not guilty plea places

all elements in issue, which is true, but most of the elements of the offense had been stipulated. Thus, the trial court did not err in narrowing the jury's decision to the single issue of who was operating the motor vehicle at the time of the arrest. McGraw's fifth assignment of error is not well-taken [\*13] and is overruled.

#### SIXTH ASSIGNMENT OF ERROR

"The verdict was against the manifest weight of the evidence."

[HN6] In reviewing a claim that a jury verdict was against the manifest weight of the evidence, or that the evidence was insufficient, a reviewing court's duty is to review the record to determine whether there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt. *State v. Brown (1988)*, 38 Ohio St. 3d 305. It is fundamental that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts. *State v. Thomas (1982)*, 70 Ohio St. 2d 79. Thus, in reviewing the legal sufficiency of evidence to support a jury verdict, it is the minds of the jurors rather than a reviewing court which must be convinced. *Id.* There was more than enough evidence to convict if, as apparently happened, the jury believed Sgt. Stansberry.

Based on *Brown and Thomas, supra*, we may not and will not disturb the jury's verdict. McGraw's sixth assignment of error is not well-taken and is overruled. The judgment of the trial court is affirmed.

Stephenson, P.J. & Abele, J. Concur in Judgment Only

#### [\*14] JUDGMENT ENTRY

It is ordered that the judgment of the Chillicothe Municipal court is affirmed. Appellee shall recover of appellant its 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 Chillicothe Municipal Court to carry this judgment into execution subject to the limited stay hereinafter granted.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of thirty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court a memorandum in support of jurisdiction accompanied by a motion for a further stay from that court during the pendency of proceedings in that court. The stay as herein continued will terminate at the expiration of the thirty day period. The stay will also terminate if the Supreme

Court refuses to hear the appeal prior to the expiration of the thirty days. This stay is conditioned upon the filing of a notice of appeal to the Supreme Court within seven days of entry of this judgment.

A certified copy [\*15] of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. Exceptions.

FOR THE COURT

By: Lawrence Grey, Judge

*NOTICE TO COUNSEL*

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.