

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, )  
 )  
 Plaintiff-Appellant )  
 )  
 v. )  
 )  
 ANDREW W. FULMER, )  
 )  
 Defendant-Appellee )

Case No. 07-0265  
On Appeal from the  
Lake County Court of Appeals  
Eleventh Appellate District  
Court of Appeals Case No. 2005-L-137CA

---

**MERIT BRIEF OF APPELLEE ANDREW W. FULMER**

---

R. PAUL LaPLANTE (0015684)  
Lake County Public Defender

MANDY J. GWIRTZ (0078819)  
Assistant Lake County Public Defender

125 East Erie Street  
Painesville, Ohio 44077  
440-350-3200

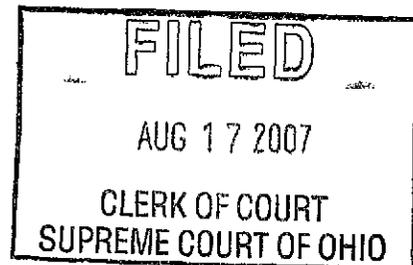
COUNSEL FOR APPELLEE, ANDREW W. FULMER

CHARLES COULSON (0008667)  
Lake County Prosecutor

KAREN A. SHEPPERT (0042500)  
Assistant Lake County Prosecuting Attorney

105 Main Street  
Painesville, Ohio 44077  
440-350-2683

COUNSEL FOR APPELLANT, STATE OF OHIO



**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF FACTS .....	1
ARGUMENT .....	1
<b><u>Proposition of Law:</u> A trial court errs when it limits a jury’s consideration of relevant and probative evidence related to a temporary medical condition which may have impacted the defendant’s ability to form the requisite intent at the time the offense occurred.</b> .....	1
CONCLUSION .....	5
CERTIFICATE OF SERVICE.....	6

**TABLE OF AUTHORITIES**

*State v. Fulmer*, Lake App. No. 2005-L-137, 2006-Ohio-7015 .....1

*State v. Kincaid*, 9<sup>th</sup> Dist. App. No. 01CA007947, 2002-Ohio-6116.....3

*State v. Wilcox* (1982), 70 Ohio St.2d 182, 436 N.E.2d 523 .....3

## STATEMENT OF FACTS

The defendant-appellee, Andrew Fulmer, concurs in the Statement of Facts outlined in the appellant's merit brief, although he does not agree with the "arguments" the State included in its facts.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law: A trial court errs when it limits a jury's consideration of relevant and probative evidence related to a temporary medical condition which may have impacted the defendant's ability to form the requisite intent at the time the offense occurred.**

At Mr. Fulmer's trial, the court gave the jury the standard instruction on "knowingly," followed by this limiting instruction:

You have heard evidence regarding the Defendant's mental state prior to and at the time of the alleged offenses. You are hereby instructed that the Defendant has not raised the defense of not guilty by reason of insanity, and as the State of Ohio does not recognize the partial defense of diminished capacity, **you are not to consider any evidence** as to low intelligence or the **Defendant's medical condition** in determining whether the Defendant possessed the requisite mental state, i.e., knowingly, during the commission of the alleged offenses.

(Emphasis added)

On appeal, the Eleventh District Court of Appeals found error in the trial court instructing the jury that it could not consider Mr. Fulmer's medical condition. It found such evidence to be relevant to his defense and probative of whether he could formulate the requisite intent to "knowingly" assault the officers. *State v. Fulmer*, Lake App. No. 2005-L-137, 2006-Ohio-7015 at ¶24. The State of Ohio asserts in its Brief that the appellate court's ruling opens the door to improper diminished capacity defenses. In

presenting this argument, it complicates a simple issue and sends a false alarm to this Court that its holdings regarding the defense of diminished capacity are at risk.

The Eleventh District found that the trial court “overstepped the boundaries of its role by removing uncontested, relevant and probative evidence from the jury’s consideration.” *Id.* at ¶30. It noted that evidence regarding whether Mr. Fulmer was “metabolically deranged” was relevant to his ability to form the requisite intent. *Id.* It further noted that “at no point did appellee object to this evidence, and, perhaps more importantly, at no point did appellant’s counsel assert a defense of diminished capacity.” *Id.*

The appellate court clearly distinguished this case from diminished capacity cases when it emphasized that its holding “should not be construed as a judicial resurrection of the defense of diminished capacity.” *Id.* at ¶31. “However, because diminished capacity was neither explicitly asserted nor implicitly argued, the trial court curbed the consideration of relevant, probative evidence based upon the speculative possibility that the jury might use the evidence to draw a legal conclusion that had not been argued.” *Id.* The appellate court went on to find that the ever-present possibility of nullification does not give the trial court “license to block consideration of relevant evidence to which the state never objected.” *Id.*

The appellate court was correct. Mr. Fulmer’s counsel did not argue a “thinly veiled diminished capacity defense” nor was he attempting to resurrect voluntary intoxication as a defense. Defense counsel was trying to convey to the jury that Mr. Fulmer suffered from a temporary medical condition and because of that medical condition he could not act “knowingly.”

The appellate court also discussed this Court's holding in *State v. Wilcox* (1982), 70 Ohio St.2d 182, that the partial defense of diminished capacity is not viable in Ohio. *Fulmer* at Footnote 3. It noted this Court's concern regarding the "blurry lines" diminished capacity posits with juries. *Id.* It then noted that this Court had discussed in *Wilcox* that the effects of medication upon state of mind is part of common human experience which "in varying degrees [are] susceptible to quantification or objective demonstration, and to lay understanding." *Id.*, citing *Wilcox* at 194.

The appellate court clearly saw that this case was not about a diminished capacity defense. Rather, Mr. Fulmer's defense related to his temporary medical condition at that point in time on that day that may have impacted his ability to form the requisite intent. It was not about his overall psychological capacity to form intent, which is the usual focus of diminished capacity. It is about Mr. Fulmer's right to present the defense that he did not have the requisite mens rea at the time of the offense. The reason behind his inability to form the requisite intent also is not so complicated or "blurry" under *Wilcox* that it creates a problem for a jury. It does not involve the "finely differentiated psychiatric concepts" referenced in *Wilcox* as applying to diminished capacity. *Id.* Rather, Mr. Fulmer's defense dealt with "the effect of medication upon state of mind" and, as such, was "part of common human experience" which juries can easily understand. *Wilcox* at 194.

As the court noted in *State v. Kincaid*, 9<sup>th</sup> Dist. App. No. 01CA007947, 2002-Ohio-6116, which contained a similar limiting instruction, such an instruction "would require the jury to dismiss any evidence related to Appellant's ability to understand or appreciate that his action would result in the proscribed conduct." Such an instruction goes beyond the restrictions of *Wilcox*.

By instructing the jury to ignore that evidence, the trial court was instructing the jury to ignore the “knowingly” element of the crimes charged. The trial court instructed the jury that “knowledge is determined from all the facts and circumstances,” but did not allow them to consider all the facts and circumstances. Thus, by instructing the jury to disregard the medical condition evidence, the trial court violated Mr. Fulmer’s constitutional right to have the State prove beyond a reasonable doubt every element of the crimes he was accused of committing. As such, the appellate court decision should be upheld.

Simply put, this case is not about diminished capacity, and just because the State says it is does not make it so. It is not about an attempt to present an intoxication defense, and the State’s saying it is does not make it so. Rather, as the appellate court correctly held, it is about Mr. Fulmer’s right to present his defense as to whether he could formulate the requisite intent to knowingly assault the police officers. It is about his right to have the jury consider uncontested, relevant and probative evidence. It is about the trial court instructing the jury that “knowledge is determined from all the facts and circumstances,” but then not allowing the jury to consider all the facts and circumstances. The appellate court was correct in holding that the trial court erred in instructing the jury to disregard evidence related to Mr. Fulmer’s medical condition when such evidence was relevant and probative to his defense.

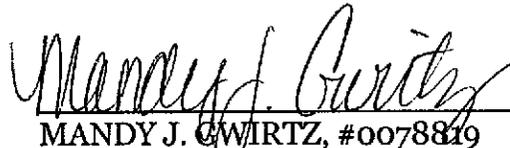
**CONCLUSION**

Based upon the foregoing, Mr. Fulmer requests this Court to affirm the judgment of the Eleventh District Court of Appeals finding that the trial court erred when it instructed the jury to ignore evidence as to whether Mr. Fulmer could for the requisite intent to commit that charged crimes.

Respectfully submitted,



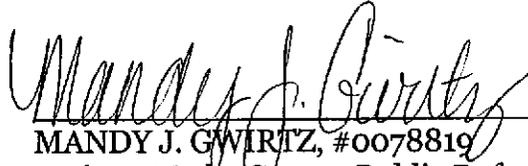
R. PAUL LaPLANTE, #0015684  
Lake County Public Defender



MANDY J. GWIRTZ, #0078819  
Assistant Lake County Public Defender  
125 East Erie Street  
Painesville, Ohio 44077  
(440) 350-3200

**CERTIFICATE OF SERVICE**

A copy of the foregoing Brief is on this 17<sup>th</sup> day of August, 2007, mailed by inter-office mail to Charles Coulson, Lake County Prosecutor, and Karen A. Sheppert, Assistant Prosecuting Attorney, at 105 Main Street, Painesville, Ohio 44077.



MANDY J. GWIRTZ, #0078819  
Assistant Lake County Public Defender  
125 East Erie Street  
Painesville, Ohio 44077  
(440) 350-3200