

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, \*  
Appellee, \* Case No. 05-0192  
- vs - \* Appeal taken from Noble County  
Court of Common Pleas  
FREDERICK ALLAN MUNDT, \* Case No. 204-2002  
Appellant. \* **This is a death penalty case**

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REOPENING RESPONSE BRIEF  
OF APPELLEE STATE OF OHIO

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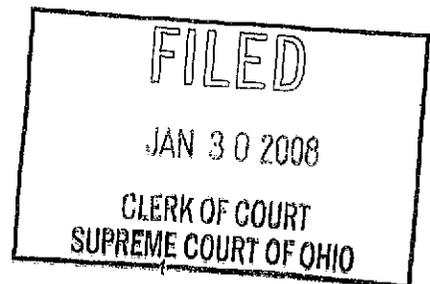
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**Response to Reopening Proposition 1: The Claim of Violation of Evid. R. 403(A) in the Admission of Injury Photos and Testimony is Repetitive of Propositions 1 and 6 from Mundt's Direct Appeal that have Already Been Rejected by this Court.**

Mundt offers nothing new in his Reopening Proposition 1, where this Court has already decided as follows:

In his sixth proposition of law, Mundt contends that the testimony regarding the injuries inflicted on Brittany should have been excluded as inflammatory and repetitive. Again, Mundt did not object to this evidence at trial, so his proposition is waived. The admission of the evidence in question does not amount to plain error. We overrule Mundt's sixth proposition of law.

*State v. Mundt* (2007), 115 Ohio St. 3d 22, ¶171. In similar fashion, this Court has also rejected Mundt's claims on direct appeal that his trial counsel were ineffective for not moving, pursuant to Evidence Rule 403(A), to exclude the injury evidence. *State v. Mundt* (2007), 115 Ohio St. 3d 22, ¶¶105-115.

In his action to reopen his appeal, Mundt does no more than shift the blame for the unchallenged admission of the injury testimony from his attorneys to the trial court. Reopening the appeal is not warranted where Mundt simply shifts the blame on a claim already reviewed and rejected by this Court.

**Response to Reopening Proposition 2: Invited but Exceedingly Brief Testimony by Deputy Hannum that He "Heard that Misty had been given a Polygraph Test" did Not Warrant a Mistrial, Especially in Light of the Immediate Curative Instructions that the Testimony was to be Disregarded and Not Considered for any purpose**

While on cross examination by Mundt's counsel, Deputy Hannum was pressed with a series of open ended questions beginning with "Now, were you aware, during the course of your investigation, that Misty Hendrickson [the victim's mother] had been interviewed by different law enforcement officers?" Tr. Vol. 14, pgs. 4686-4687. During

the next few minutes, Mundt's counsel asked Deputy Hannum six more open-ended questions about statements Misty Hendrickson had made to police agencies. After the defense counsel asked a total of seven different open-ended questions about Misty's statements to police, Deputy Hannum said, "... I had heard that Misty had been given a polygraph test." Tr. Vol. 14, pg. 4690.

Mundt's counsel immediately requested adjournment, and the trial court excused the jury. Mundt's defense counsel moved for a mistrial based on "the case of *State v. Smith*, decided in 1960 ... [where] admission of testimony at trial of a criminal case relating to submission of the accused to a lie detector test, even though the results thereof are not disclosed, constitutes prejudicial error." Tr. Vol. 14, pg. 4692. (Referring to *State v. Smith* (6<sup>th</sup> Dist. 1960), 113 Ohio App. 461). The trial Court remarked that defense counsel seemed surprisingly prepared to argue for a mistrial, almost that defense counsel had a "premonition" this event would take place. Mundt's counsel responded that he had done research before the trial started "in case somebody made the mistake and said the word." Tr. Vol. 14, pg. 4698.

Upon reconvening the next day, the mistrial motion was denied. Tr. Vol. 15, pgs. 4754-4757. The jury was brought in, and the trial court gave the following curative instruction:

I believe at the time we recessed, Deputy Hannum was on the stand. Now, in his last response, Deputy Hannum had referred to something he had heard. That's hearsay. It may not be considered for the truth of the matter asserted. Therefore, you will disregard any mention of a polygraph examination. You will treat those words as though you never heard them. They cannot be considered for any purpose. With that, I'm going to ask Deputy Hannum to resume the stand.

Tr. Vol. 15, pg. 4759.

Whether the record shows Deputy Hannum was baited into the polygraph reference is of no import, given that the trial court's response to deny a mistrial was the most appropriate response. The polygraph reference was fleeting, isolated, and made in reference to an event in which Deputy Hannum was not involved. These factors, in conjunction with common experience that police would routinely polygraph family members in a family homicide, suggest that Deputy Hannum's testimony had no impact on a jury, let alone a prejudicial impact. Moreover, the subject of the polygraph test; i.e., the victim's mother, was not an accused defendant, and therefore there were no issues implicating the right against self incrimination. Finally, Deputy Hannum's testimony said nothing about outcome of polygraph testing. Consequently, Deputy Hannum's statement neither enhanced nor detracted from perceived credibility of the victim's mother.

Only by sheer speculation can Mundt concoct a scenario of prejudice to the words of Deputy Hannum. Any speculation by Mundt is premised upon a false notion that Misty, not Fred, was Brittany's killer. Brittany was in fine condition, at home with Fred Mundt, when Misty and her family left for bingo. Misty was at a crowded bingo hall with her family members when Fred arrived and announced that Brittany was missing. When Misty and her family members returned to the house, all agree that Brittany was nowhere to be found. *State v. Mundt* (2007), 115 Ohio St. 3d 22, ¶¶4-9 When harmful events occurred to Brittany, Misty was elsewhere, surrounded by friends and family.

These unchallenged and unquestioned facts readily show, to even the most unsophisticated observer, that Misty had nothing to do with the death of Brittany. Consequently, at the time when Deputy Hannum testified he "heard that Misty had been given a polygraph," no rational person would have suspected Misty to be Brittany's

killer. Thus, the testimony of Deputy Hannum do not imply that Misty was exonerated as the killer of Brittany, as is required by Mundt's scenario of prejudice. Instead, if the words of Deputy Hannum imply anything, the implication is the police investigation was thorough.

There is no quarrel with the rule enunciated in *State v. Franklin* that "Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St. 3d 118, 127. That rule was not breached in this case, and Mundt's bare contention to the contrary does not make it so. This matter of the polygraph comment does not warrant the reopening of the appeal.

**Response to Reopening Proposition 3: Ordinary Commentary by the Prosecutors do not Amount to Misconduct**

This Court has already rejected Mundt's contention in the initial appeal that a litany of comments made by the prosecution amounted to misconduct. *State v. Mundt* (2007), 115 Ohio St. 3d 22, ¶¶168-169. Nothing new is presented in Mundt's application to reopen, except a different litany of comments that neither the trial court nor Mundt's counsel took issue with during the trial. Instances raised this time, being comments such as to Misty's burden in living with the tragedy, comments on the definition of mitigation, and comments that Mundt has not proven his case for mitigation, represent ordinary prosecution commentary. Because Mundt has done nothing more than place the label of "misconduct" on this ordinary commentary, as he did in the initial appeal, reopening is not warranted.

**Response to Reopening Proposition 4: The Factual Premise of Mundt's Claim of Improper Argument is False, Where Prosecution Argument that Fleeman "Saw [Mundt's] Car" at the Well Site is Identical to Fleeman's Testimony**

State's witness Joann Fleeman had lived her whole life by the well site where Brittany's body was recovered. Fleeman testified that Fred Mundt was familiar with the area, where he had spent childhood time on the "Cantwell property" where the well site was located. Tr. Vol. 12, pgs. 4124-4132. Fleeman testified that a year or so before the crime, "[Mundt's] car was down there [the Cantwell property well site area], but I never seen him." She testified the vehicle was "A little red car. Had Monroe county plates on it." Tr. Vol. 12, pg. 4136. Fleeman testified she "... seen [the car] two or three times setting there." Although she never saw Fred, she wasn't worried because "... [W]e knew whose car it was, so we didn't pay any more attention because Fred goes there. It wasn't no big deal." Fleeman acknowledged she didn't know whether the car "belonged to" Misty. Tr. Vol. 12, pg. 4137. Fleeman testified she saw the same little red car from the Cantwell property well site parked at Fred's house, and she had verified identity of the little red car by matching the license plate number she took when the car had been parked at the well site. Tr. Vol. 12, pgs. 4141-4143.

In his application to reopen the appeal, Mundt claims impropriety in prosecution closing argument, where Mundt falsely contends the prosecution told the jury that Joann Fleeman saw Mundt driving the red Cavalier. The complete dialogue follows, and shows the prosecution said no such thing.

**Heather Gosselin: [Special Prosecutor]** Now, Joann Fleeman saw his car, that red Cavalier you heard a lot about, parked at the driveway or entranceway to the property two or three times as recently as 2003. And recall that Ms. Fleeman was very certain about that. She was certain that it was Fred Mundt's car. And she was certain because she had written the license plate down and compared that license plate to the red Cavalier that was parked at Fred Mundt's house. And she knew where Fred Mundt's house was up in Lebanon because one of her family members had previously lived in that house.

**Andrew Warhola: [Defense Counsel]** Your Honor, I apologize for interrupting. I'll object to the statement that it was Fred Mundt's car. The evidence and testimony was that the car was owned by Misty Hendrickson.

**The Court:** Okay. So noted.

**Heather Gosselin:** The car that was driven by Fred Mundt.

**Andrew Warhola:** I'll object to that. There was no testimony from Mrs. Fleeman that she saw Fred Mundt driving that –

**The Court:** This is argument, Mr. Warhola. That part's overruled. You may continue.

**Heather Gosselin:** I feel the need to clarify that a little bit now, even though the objection was overruled, if I may, Your Honor. We did have testimony that the Defendant had driven the car. If you recall, on March 9<sup>th</sup> when he went to his sister's house and dropped Lindsay and Shay off, he was driving the red Cavalier. So we know that Fred drove that car.

Tr. Vol. 16, pgs. 5441-5043. This commentary shows Mundt is misrepresenting the record with his contention that the prosecution argued to the jury that Joann Fleeman saw Fred Mundt driving the car. In contrast to Mundt's misrepresentation, the record shows the prosecution accurately argued that Fleeman "saw [Mundt's] car", and that Fred was seen driving the red Cavalier on March 9<sup>th</sup>, although not by Fleeman. Since the factual premise of Mundt's Reopening Proposition 4 is false, he fails to offer viable grounds to reopen his appeal.

**Response to Reopening Proposition 5: Another Litany of Claimed Failings of Defense Counsel do not Warrant Reopening, Where the Matters Were Either Raised on Direct Appeal or do not Constitute Ineffective Assistance.**

Mundt again claims his attorneys should have objected to testimony explaining Brittany's injuries (Reopening Proposition 5, subparts 2 and 3), but those claims have already been raised and rejected on direct appeal. See, *State v. Mundt* (2007), 115 Ohio St.3d 22, ¶¶105-115, ¶171. In similar fashion, Mundt should have objected to the so-

called improper prosecution commentary during guilt and penalty phase arguments (Reopening Proposition 5, subparts 6 and 8), but those claims also have been raised and rejected on direct appeal. *Id.*, ¶¶168-169.

The remaining subclaims of ineffective assistance fail to show wrongdoing by counsel. Mundt's claim that juror Archer refused to consider life sentencing options (Reopening Proposition 5, subpart 1) is false, where in follow up questioning by the prosecution, Archer repeatedly said she could consider all life sentencing options. Tr. Vol. 5, pgs. 2022-2027. Mundt's claim that the jury instructions regarding the kidnapping count were flawed (Reopening Proposition 5, subpart 4) is false, where identical instructions were found to be acceptable in *State v. McKnight* (2005), 107 Ohio St.3d 101, ¶¶230-234. Mundt's claim that jury instructions regarding the definition of "cause" were flawed (Reopening Proposition 5, subpart 5) is false, where nearly identical language is given as the recommended form in Ohio Jury Instructions. See Guilt Phase Instructions, Tr. Vol. 16, pg. 5155; Ohio Jury Instructions, Section 409.55. Mundt's claim that the penalty phase instructions that permits consideration of arguments by counsel were flawed (Reopening Proposition 5, subpart 7) is false, where the identical instructions are given as the recommended form in Ohio Jury Instructions. See Penalty Phase Instructions, Tr. Vol. 20, pg. 6264; Ohio Jury Instructions, Section 503.011, paragraph number 16. Where Mundt takes counsel to task for failure to raise objections that would have lacked a proper legal foundation, reopening is not warranted.

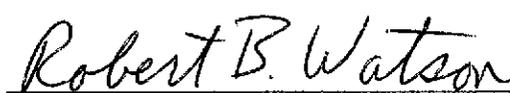
**Response to Reopening Proposition 6: Lack of Error in the First Instance Means Cumulative Error was not Present.**

Mundt's contentions of error that supposedly warrant reopening of his appeal fail to state viable legal grounds, and in most instances simply misrepresent the record. Cumulative error is not present where there is no error in the first instance.

**CONCLUSION**

For the reasons expressed, this Court should deny Mundt's application to reopen his appeal.

Respectfully submitted,

 <sup>By S.</sup>  
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Per authorization on 01/30/08

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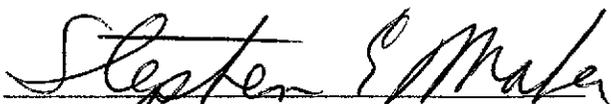
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Reopening Response Brief of Appellee State of Ohio* has been hand-delivered to Jennifer Prillo, Assistant State Public Defender, Office of the Ohio Public Defender, 8 East Long Street, 11<sup>th</sup> Floor, Columbus, Ohio 43215-2998, this 30<sup>th</sup> day of January, 2008.



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