

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 :
 -vs- : Case No. 08-1012
 :
 DAVID B. CLINKSCALE, : On Appeal from the Franklin County
 : Court of Appeals, Tenth Appellate
 Defendant-Appellant. : District

MERIT BRIEF OF APPELLANT OF DAVID B. CLINKSCALE

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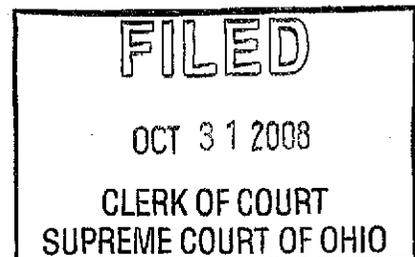


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STATEMENT OF FACTS

A. STATEMENT OF THE CASE.

In the early morning hours of September 8, 1997, drug dealer Kenneth Coleman and his wife, Todne Williams, were shot multiple times at their residence in Columbus, Ohio. Coleman died from his injuries, but Williams survived the attack. Williams later identified David B. Clinkscale as the person who shot her and her husband.

Clinkscale was subsequently indicted by the Franklin County Grand Jury on three counts of aggravated murder, one count of attempted aggravated murder, one count of aggravated burglary, two counts of aggravated robbery, and one count of kidnapping. Each count of the indictment included an associated firearm specification, and each of the aggravated murder counts included death penalty specifications. A jury found Clinkscale guilty of each of the counts and specifications, and the trial court subsequently accepted the jury's recommendation and sentenced defendant to a single merged life term without the possibility of parole.

Clinkscale's conviction was affirmed by the court of appeals, *State v. Clinkscale* (Dec. 23, 1999), Franklin App. No. 98AP-1586, and this Court denied review. *State v. Clinkscale* (2000), 88 Ohio St.3d 1482. The United States Court of Appeals for the Sixth Circuit granted Clinkscale a conditional writ of habeas corpus based upon ineffective assistance of counsel in failing to file a timely notice of alibi which prevented the admission of evidence tending to support Clinkscale's alibi defense. *Clinkscale v. Carter* (C.A. 6, 2004), 375 F.3d 430, 443-445.

On retrial Williams again testified that Clinkscale was the man who shot her and her husband. Alibi evidence and rebuttal evidence was presented by the parties.

Clinkscale was again convicted of all counts and specifications, and thereafter sentenced to a term of fifty-three years to life. Clinkscale appealed his conviction to the Franklin County Court of Appeal which, in a two to one decision, affirmed the decision of the trial court.

Clinkscale then filed a Memorandum in Support of Jurisdiction in this Court setting forth three propositions of law. On September 10, 2008 this Court issued an Entry accepting Clinkscale's appeal on Propositions of Law Nos. I and II. Clinkscale is now before this Court seeking reversal of the decision of the Franklin County Court of Appeals.

B. STATEMENT OF FACTS.

The relevant facts are succinctly set forth in the dissent of Judge Whiteside who would have sustained all six assignments of error and remanded the case to the trial court for a new trial:

{¶63} [The third, fourth and fifth assignments of error] relate to the unusual proceedings of the trial judge. The original trial judge presided through Friday, September 8, 2006 and submitted the case to the jury. After considerable deliberations, the jury sent a note inquiring what would constitute a hung jury and the judge returned a reply that "many more hours of deliberations" would be required. The jury then requested advice indicating that one juror was having difficulty basing a guilty verdict upon the testimony of one of the witnesses, but this difficulty or "inability was not specific to just that one witness." The trial court did not respond to the question but instead sent the jury home for the weekend to reconvene Monday morning.

{¶64} However, on Monday morning, the trial judge was not there. Instead, a different judge of the trial court appeared to preside. However, the new judge, when she entered the courtroom, advised the parties by stating in the record that she had sua sponte excused one of the jurors due to a medical issue. This new trial judge then replaced the sua sponte excused juror with an alternate juror. The new judge then addressed the note left unanswered by the original trial judge even though the excused juror was the juror referred to in the note. The state has conceded error by

the new trial judge's ex parte excusing a deliberating juror. An after the fact objection was futile. The juror was excused and no longer available. In light of the state's concession of error, assignment of error four should be sustained since the prejudicial nature of the error is obvious. The new trial judge excused the one juror who was known to be questioning the prosecution's case because of the "inability" to believe the testimony of more than one of the state's witnesses.

State v. David B. Clinkscale, No. 06AP-1109, Opinion (10th Dist. Ct. App. Apr. 8, 2008) (hereafter "Opinion"), at ¶¶ 63 and 64.

Judge Tyack, though concurring in the court's majority decision denying Clinkscale relief, also expressed discomfort with the substitute trial judge's ex parte actions:

The better procedure would have been to dismiss the juror with heart palpitations in open court with counsel present and the defendant present. Other options could have been considered by all, including allowing a jury of 11 to conclude the case and declaring a mistrial. Excusing the juror from the judge's chambers with no contemporaneous discussion on the record and no requirement for defense counsel to express agreement or disagreement on the record before the juror was excused is not a good way to handle the case.

Opinion, at ¶58.

In the majority opinion, Judge Klatt acknowledges that "[t]he State concedes that the trial court violated [Crim.R.24(G)(2)] when it substituted an alternate juror during the jury's deliberation." Opinion, at ¶35. He then goes on to find that Clinkscale was not prejudiced because "Appellant's only claim of prejudice is based on the assumption that if his counsel had objected, the trial court would have declared a mistrial. We will not make that assumption."¹ Opinion, at ¶39.

¹ This is more than an "assumption." This Court has mandated that "[i]f a juror becomes ill or is otherwise disqualified after the jury has begun its deliberations on guilt or innocence, a mistrial results." *State v. Hutton*, 53 Ohio St.3d 36, 47 (1990).

What the majority overlooks is the fact that there were multiple levels of prejudice at play in Clinkscale's case. One level, recognized by the majority, was the failure to grant a mistrial. Much more significant was a second level recognized by Judge Whiteside in his dissent, namely that the substitute trial judge dismissed the sole dissenting juror. After the dissenting juror was dismissed, the case was all but over. The return of the guilty verdicts shortly thereafter was nothing more than a formality.

ARGUMENT

PROPOSITION OF LAW NO. I

IT IS IMPROPER FOR A SUBSTITUTE TRIAL JUDGE TO PRIVATELY MEET WITH AND DISMISS A DELIBERATING JUROR WITHOUT NOTIFYING THE PARTIES AND PROVIDING THEM AN OPPORTUNITY TO QUESTION THE JUROR, SUGGEST ALTERNATIVES TO DISMISSAL, OR OTHERWISE OBJECT, PARTICULARLY WHEN THE DISMISSED JUROR IS THE SOLE DISSENTER AT THE TIME OF HER DISMISSAL. U.S. CONST., 5th, 6TH & 14TH AMENDS.; OHIO CONST., ART. I, § 2, 10, & 16.

When the jurors resumed their places in the jury box following the weekend recess, the following proceedings took place:

THE COURT: Good morning. Please be seated. I am just going to resume - - first, I want to address one issue. And, Karen, we will need the oath for the alternate juror who's going to step in as a regular juror, please.

We have had a juror that has a medical issue who has been excused. So, at this time we are going to swear in the first alternate, and I believe that is Mr. Thaler.

[Thereafter Alternate Juror One was sworn as a regular juror.]

(Vol. VI, pp. 1493-94).

No objection to the trial court's *ex parte* excusal and replacement of Juror Number Three was made at that time, however at a subsequent hearing the following transpired:

MR. SIMMONS: Before we call in the jury, Your Honor, there's one more thing we need to put on the record.

At the time - - when we recessed that Friday that the jury was out and they asked us those series of questions, then they came - - the jury came back Monday morning. Then Judge Lynch presided from there on.

I simply want to put on the record what happened Monday morning was that when we came in, Karen, your bailiff, told us that Juror Number Three, I think it was, indicated that she was having heart palpitations; and she told us earlier, as I recall, during jury selection, that she had had some sort of heart condition previous, and that what we were told is that she didn't want to remain on the jury any longer. She wanted to be excused.

At that time - - and I don't recall who I said it to, but I said to somebody, that I wondered if Juror Number Three was the one that the last two questions related to. The Court may recall what those last two questions were.

At that point, Judge Lynch came through - - as I understand it, that Juror Number Three was in your office with the doors closed. Judge Lynch came in and gave us this additional jury instruction, which is the one she eventually gave. We objected to that and put all that on the record.

Essentially what happened is when she walked through, she handed us this jury instruction - - and when we started to look at it, she went into your office and presumably talked to Juror Number Three about her condition. And she was in there for some period of time and came out and said something to the effect that she had excused Juror Number Three. She didn't believe that someone should lose their life, have a heart attack or something like that, because they were seated on a jury.

We wanted to object to that process, but we were still arguing about the additional jury instruction. So, we never did actually put an objection on the record concerning the excusal of Juror Number Three.

So, essentially, that's what I wanted to say.

Dennis has left. I want to make sure I didn't leave anything out.

THE COURT: Okay. And I understood that she then replaced Juror Number Three with Alternate Number One and further instructed the jury that they were to disregard and prior answers to questions that the Court may have given and to start all over with their deliberations since they essentially had a new group of 12. And that was all put on the record.

MR. SIMMONS: Yeah, I think what she said, if my recollection is correct, that because the alternate juror was now being seated in Seat Number 3, that they should begin their deliberations all over again because he did not participate in that.

THE COURT: Yes.

MR. SIMMONS: And I believe she said that on the record.

MS. REULBACH: In addition - - are you finished, Jerry?

MR. SIMMONS: Yeah, I want to - - I don't know where Dennis went. Did you see him? I want to make sure I didn't leave anything out. Go ahead.

MS. REULBACH: My recollection is quite different.

When we came in, Karen made us aware that there was a juror who was having heart palpitations, that we were even considering calling the squad. The woman didn't think she needed that, but she did want to get to her doctor, that she had had a heart attack before, and we pretty much figured out pretty quickly that this was the woman who was upset about the mitigation phase and the date of it because she had this ongoing doctor's appointment that was part of a series of four appointments.

We as a group discussed what to do with it. Jerry said, "I wonder if she's the one that they are talking about in these questions."

And I said, "Do you want to ask her that question?"

You said, "No, I don't."

MR. SIMMONS: That's true.

MS. REULBACH: Then we decided, what are we going to do? Do we want to let her go to the doctor and come back? And everyone agreed as a group that we would let her go and seat the alternate.

There was never an objection. And I think we can bring the judge in and put her under oath, because had there been, number one, we would have had a hearing. Number two, we could have seen - - you know, we could have sent her to her doctor and had her tell us what the doctor had to say. But that was never discussed.

There was a discussion then in the courtroom about - - that we needed to admonish the jury that they should disregard all their other deliberations. The judge even went so far as to say this juror needed to take time and look at all the evidence on his own, that they should start over from the get-go.

So, that is my recollection. I suppose we could put Karen on the stand and the judge on the stand, but there was never an objection from the defense about seating the alternate juror.

MR. SIMMONS: My only disagreement about that is Ms. Reulbach does correctly state the conversation we had back there, but at no point did we agree to let her go.

THE COURT: Well, the record is what it is. I mean, we have a record, I assume, what happened on September the 11th; and that record is not going to be changed.

MR. SIMMONS: I just wanted to fill out the record, because none of that was put on. Our concentration at that point was on the jury instruction that she had presented to us before she went back to talk to Juror Number Three. Then when she came out, she said she had already excused her. That's my recollection of what happened.

(Vol. VII, pp. 1522-27).

As stated by the Supreme Court in *Illinois v. Allen*, 397 U.S. 337 (1970), "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." It is equally well established that communications between a judge and a member of the jury in the absence of the defendant and his counsel are improper. *Shields v. United States*, 273 U.S. 583 (1927).

Under Federal R. Crim. P. 43(a), a communication between a judge and a juror or jurors after the commencement of deliberations is error. *Rogers v. United States*, 422

U.S. 35 (1975); *United States v. Reynolds*, 489 F.2d 4 (6th Cir. 1973). Even communications regarding requests by jurors for excuse prior to the actual commencement of trial but after the jury is impaneled are improper, at least where a record sufficient for appellate review is not made. *United States v. Gay*, 522 F.2d 429 (6th Cir. 1975).

The Due Process Clause of the Fourteenth Amendment also requires that every defendant in a criminal case be given a fair trial. *Estelle v. Williams*, 425 U.S. 501 (1976). It is clear that “the orderly conduct of a trial by jury, [which is] essential to the proper protection of the right to be heard,” entitles a defendant to receive notice of and be present at all proceedings after a jury is impaneled until the verdict is rendered. *Filippone v. Albion Vein Slate Co.*, 250 U.S. 76 (1919); *Shields v. United States*, 273 U.S. 583 (1927). The importance of the integrity of the jury system, and particularly the potentially devastating impact of a suggestion, conscious or unconscious, by the trial judge to a juror regarding the court’s view of the case, clearly justifies the fundamental character of this well established rule. In fact, the rule against communication between judge and jury in the absence of a defendant and his counsel may well also be grounded in the Confrontation Clause of the Sixth Amendment. *Jackson v. Hutto*, 508 F.2d 890 (8th Cir. 1975); *United States v. Treatman*, 524 F.2d 320 (8th Cir. 1975).²

² In *Burson v. Engle*, 432 F.Supp. 929 (N.D. Ohio 1977), *aff’d* 595 F.2d 1222, *cert. den.* 442 U.S. 944, the court held that an allegation that during the course of a trial one of the jurors informed the trial judge that she had a vacation planned and requested to be replaced by an alternate, and that such conversation took place outside the presence of the accused and his attorney, was sufficient to state a claim of constitutional magnitude for habeas corpus purposes, even without allegations of fact sufficient to demonstrate prejudice.

Here it is undisputed that Judge Lynch had an *ex parte* meeting in Judge Cain's chambers with a deliberating juror on Monday morning, and that neither the defendant nor his counsel were present at the meeting. It is also undisputed that the deliberating jury had submitted three questions before their release Friday evening, the final two indicating that there was a significant split between the majority and minority jurors and that the jury might be deadlocked. And, as noted by Judge Whiteside in his dissent, the dismissed juror was the sole dissenter at the time of her dismissal, resulting in the jury returning guilty verdicts to all charges and specifications shortly after the dissenting juror was replaced by an alternate.

PROPOSITION OF LAW NO. II

IT IS IMPROPER FOR A SUBSTITUTE TRIAL JUDGE TO DISMISS A DELIBERATING JUROR AND THEN REPLACE HER WITH AN ALTERNATE IN DIRECT CONTRAVENTION OF CRIM. R. 24(G)(2) WHICH PROHIBITS THE SUBSTITUTION OF ALTERNATE JURORS DURING DELIBERATION, PARTICULARLY WHEN THE DISMISSED JUROR IS THE SOLE DISSENTER AT THE TIME OF HER DISMISSAL. U.S. CONST., 5th, 6TH & 14TH AMENDS.; OHIO CONST., ART. I, § 2, 10, & 16.

The State concedes that the substitute trial judge committed error when, during the trial-phase of Mr. Clinkscale's capital case, she replaced a deliberating juror with an alternate after communicating *ex parte* and *sua sponte* dismissing the deliberating juror. Opinion, at ¶35. Criminal Rule 24(G) (2) specifically provides:

(G) Alternate jurors.

(2) Capital cases—The procedure designated in division (F)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct

the alternate juror that the juror is bound by that verdict. *No alternate juror shall be substituted during any deliberation.* Any alternate juror shall be discharged after the trial jury retires to consider the penalty.

(Emphasis added).

In cases such as Mr. Clinkscale's that may require two deliberation phases, alternate jurors continue to serve in the event that a substitution is required. Crim.R. 24(G) (2). An alternate juror may be substituted for an original juror *after* the trial phase and *before* deliberations in the penalty phase begins. However, no alternate is permitted to be substituted during any deliberation. The trial court violated this Rule when, after deliberations began in the trial-phase of Clinkscale's trial, the court *sua sponte* dismissed a juror after an *ex parte* discussion. Moreover, the trial court improperly permitted an alternate juror to replace the dismissed juror and continue the trial-phase deliberations.

This Court has mandated that "[i]f a juror becomes ill or is otherwise disqualified after the jury has begun its deliberations on guilt or innocence, a mistrial results." *State v. Hutton*, 53 Ohio St.3d 36, 47 (1990), citing *Pfeffer v. State*, 683 S.W. 2d 64 (Tex. App. 1984); *People v. Loving*, 67 Cal. App. 3d Supp. 12 (1977). The Court noted that one of the rationales advanced by other courts in support of a rule prohibiting mid-deliberation substitution of jurors is that:

[If] alternates were allowed to replace regular jurors after the jury retired to deliberate, jurors in the minority might fake illness in order to be replaced and thereby escape the emotional pressures of holding out against the majority.

Hutton, 53 Ohio St.3d 47, citing *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir., 1975). *See, also, State v. Bowling*, Franklin App. No. 95APA05-599, 1996 WL 52892

(seating an alternate juror once deliberations begin and without notifying counsel constitutes error).

The trial court's error violated Mr. Clinkscale's right to due process and prejudiced the outcome of his trial. At the time that the trial court *sua sponte* dismissed Juror Number Three, the jury was deadlocked. (Vol. VI, pp. 1477-80). Out of the twelve jurors, at least one was "not comfortable making a guilty verdict based on the testimony of one person." *Id.* Had Mr. Clinkscale's trial attorneys been able to voir dire the juror before the dismissal occurred, a mistrial would likely have been requested. And, because of the rule forbidding the substitution of jurors during deliberations, the trial court would have had no choice but to grant defense counsel's request.

The fact that Judge Lynch brought the "new" panel back into the courtroom and directed them to begin their deliberations anew did not cure the error. (Vol. VI, pp. 1496-97). In Clinkscale's case, the jury had "progressed to a stage where the original eleven jurors were in substantial agreement and, as such, were in a position to present a formidable obstacle to any attempt that the alternate juror might make to persuade and convince the original jurors." *State v. Miley*, 77 Ohio App.3d 786, 792 (1991), citing *People v. Ryan*, 19 N.Y.2d 100 (1966). The alternate juror, being a newcomer to the proceedings, could likely have been coerced or intimidated by the other eleven jury members who likely had already formulated positions, viewpoints, or opinions.

In order to have ensured that Mr. Clinkscale's rights were protected, defense counsel should have been permitted to voir dire Juror Number Three. Had voir dire been allowed, defense counsel would have been able to question Juror Number Three as to whether she felt an undue amount of pressure regarding her opinions of the issues in the

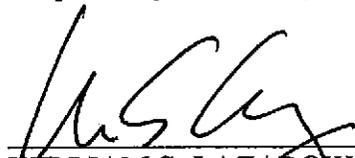
case. And counsel would have had the opportunity to object to the dismissal of Juror Number Three or alternatively to have moved for a mistrial. Instead, the trial court erred by *sua sponte* dismissing the juror during the trial-phase deliberations and allowing an alternate juror to continue in place of the original juror. Not surprisingly, the jury announced a short time later that it had found Mr. Clinkscale guilty of all charges and specifications. (Vol. VI, pp. 1504-11).

As a result of the trial court's prejudicial error, Mr. Clinkscale's constitutional rights were violated. Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution; Crim.R. 24(G)(2).

CONCLUSION

The trial court's actions improperly deprived Clinkscale of his right to be tried by an impartial jury of his peers. As such, this Court should reverse Clinkscale's convictions and remand his case for a new trial.

Respectfully submitted,

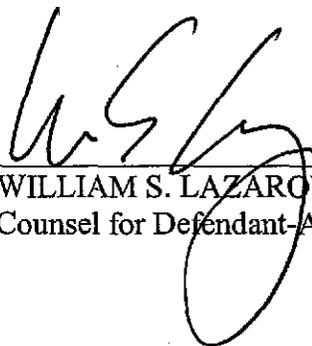


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT DAVID B. CLINKSCALE was forwarded by regular U.S. mail to Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, 373 S. High Street, 13th Floor, Columbus, Ohio 43215, on the 31st day of October, 2008.



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Counsel for Defendant-Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 Plaintiff-Appellee, :
 -vs- : Case No. **08-1012**
 DAVID B. CLINKSCALE, :
 Defendant-Appellant :

APPEAL FROM THE COURT OF APPEALS
 FRANKLIN COUNTY, CASE NO. 06AP-1109

DAVID B. CLINKSCALE'S NOTICE OF APPEAL

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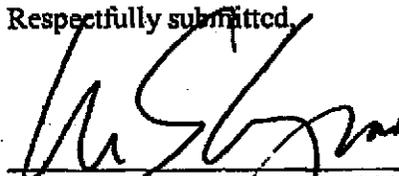
MAY 27 2008
 CLERK OF COURT
 SUPREME COURT OF OHIO

NOTICE OF APPEAL

Appellant David B. Clinkscale hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No 06AP-1109 on April 8, 2008.

This case raises a substantial constitutional question, involves a felony, and is one of public or great general interest. *See* S. Ct. Prac. R. II, §§ (A)(2) and (3).

Respectfully submitted,

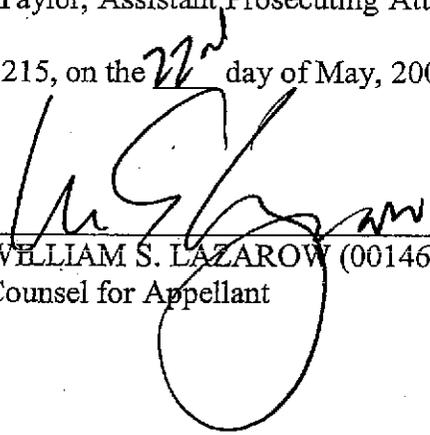


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I hereby certify that a true copy of the foregoing DAVID B. CLINKSCALE'S NOTICE OF APPEAL was forwarded by regular U.S. mail to Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, 373 S. High Street, 13th Floor, Columbus, Ohio 43215, on the 22nd day of May, 2008.


WILLIAM S. LAZAROW (0014625)
Counsel for Appellant

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 06AP-1109
v.	:	(C P C No 97CR09-5339)
	:	
David B. Clinkscale,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on April 8, 2008

Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellee.

William S. Lazarow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, David B. Clinkscale, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} Early in the morning of September 8, 1997, Kenneth Coleman and his wife, Todne Williams, were shot multiple times. Coleman died from his injuries, but Williams survived the attack. Williams later identified appellant as the person who shot her and her husband.

{¶3} Appellant was indicted on three counts of aggravated murder, one count of attempted aggravated murder, one count of aggravated burglary, two counts of aggravated robbery, and one count of kidnapping. Each count also contained a firearm specification. In 1998, a jury convicted appellant of all counts. This court affirmed those convictions. *State v. Clinkscale* (Dec. 23, 1999), Franklin App. No. 98AP-1586. The Supreme Court of Ohio denied review. *State v. Clinkscale* (2000), 88 Ohio St.3d 1482.

{¶4} Subsequently, the United States Sixth Circuit Court of Appeals overturned the convictions and ordered the State to retry appellant because his trial counsel provided ineffective assistance when he failed to timely file a notice of alibi which prevented the admission of evidence tending to support appellant's alibi defense. *Clinkscale v. Carter* (C.A.6, 2004), 375 F.3d 430, 443-445.

{¶5} At his retrial, Williams again testified that appellant was the man who shot her and her husband. Appellant's father testified that appellant was in Youngstown, Ohio on the morning of the attack. The State presented rebuttal testimony from Rhonda Parker, who testified that appellant asked her to lie about his whereabouts on the morning of the attack. The jury rejected appellant's alibi defense and convicted him of all counts. The trial court sentenced him accordingly.

{¶6} Appellant appeals and assigns the following errors:

ASSIGNMENT OF ERROR NO. I.

PROSECUTORIAL MISCONDUCT DEPRIVED DAVID CLINKSCALE OF HIS RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. FEDERAL CONSTITUTION AND ARTICLE I, § 2, 10, AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. II:

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE IMPROPER AND PREJUDICIAL TESTIMONY, AND IN REVOKING CLINKSCALE'S BOND IN THE MIDDLE OF TRIAL WHEN HE HAD APPEARED AT ALL HEARINGS AND ACTED IN ACCORDANCE WITH THE ADVICE GIVEN BY HIS ATTORNEYS AS A RESULT, THE TRIAL COURT VIOLATED DAVID CLINKSCALE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. FEDERAL CONSTITUTION AND ARTICLE I, § 2, 10, AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO III:

THE TRIAL COURT ERRED IN ISSUING AN *EX PARTE* COERCIVE INSTRUCTION TO THE DELIBERATING JURY IN RESPONSE TO A QUESTION IMPLYING THAT THEY MIGHT BE HUNG, THEREBY VIOLATING DAVID CLINKSCALE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. FEDERAL CONSTITUTION AND ARTICLE I, § 2, 10, AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. IV:

THE TRIAL COURT ERRED IN ITS *EX PARTE* MEETING AND EXCUSAL OF A DELIBERATING JUROR THEREBY VIOLATING DAVID CLINKSCALE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. FEDERAL CONSTITUTION AND ARTICLE I, § 2, 10, AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO V:

THE TRIAL COURT ERRED IN ISSUING A COERCIVE INSTRUCTION TO THE DELIBERATING JURY IN RESPONSE TO A QUESTION IMPLYING THAT THERE WAS A SINGLE HOLD OUT JUROR, THEREBY VIOLATING DAVID CLINKSCALE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. FEDERAL CONSTITUTION AND ARTICLE I, § 2, 10, AND 16 OF THE OHIO CONSTITUTION

ASSIGNMENT OF ERROR NO. VI

THE REPRESENTATION PROVIDED TO DAVID CLINKSCALE FELL FAR BELOW THE PREVAILING NORMS FOR COUNSEL IN A CRIMINAL CASE, WAS UNREASONABLE, AND AFFECTED THE OUTCOME IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ART. 1, § 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION

{17} After oral argument, this court requested that counsel for both parties brief issues raised during oral argument concerning Crm.R 24. Accordingly, appellant supplemented his fourth assignment of error with the following.

THE TRIAL COURT ERRED WHEN IT * * * DIRECTED AN ALTERNATE JUROR TO BE SWORN IN TO CONTINUE DELIBERATIONS. * * *

Appellant also claimed that trial counsel's failure to object to the trial court's dismissal of the deliberating juror or to request a mistrial constituted ineffective assistance of counsel as alleged in his sixth assignment of error.

{18} We address appellant's second assignment of error first. Appellant contends that the trial court erred when it. (1) admitted Peter Davis' testimony, and (2) revoked appellant's bond in the middle of trial. We disagree.

{19} The State presented testimony from Peter Davis, who traveled with appellant and Coleman to a dog fight in Kentucky the day before Coleman was murdered. Over appellant's objection, Davis testified that he had a bad feeling about appellant and on the drive home told Coleman to "be careful and watch himself" with appellant. Appellant argues that Davis' testimony was improperly admitted because the probative value of the testimony was substantially outweighed by the danger of unfairly prejudicing

or misleading the jury. See Evid.R. 403(A) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice * * * or of misleading the jury.").

{¶10} Appellant's counsel did not object to Davis' testimony on these grounds at trial.¹ Thus, appellant has waived this argument absent plain error. *State v. Johnson*, Franklin App. No. 05AP-12, 2006-Ohio-209, at ¶17; *State v. Tolliver*, Franklin App. No. 02AP-811, 2004-Ohio-1603, at ¶98. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Crim.R. 52(B). For there to be plain error, a reviewing court must find: (1) an error; (2) the error was an obvious defect in the trial proceedings; and (3) the error affected substantial rights, that is, the trial court's error must have affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Stated differently, the defendant must show that "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 97.

{¶11} Even if error is plain, an appellate court is not required to correct it. *State v. Cunningham*, Franklin App. No. 01AP-1375, 2002-Ohio-4312, at ¶26. The Supreme Court of Ohio has noted this discretionary aspect of the rule by stating that notice of plain error should be taken " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id* , quoting *Barnes*.

{¶12} Exclusion of evidence on the basis of unfair prejudice involves more than a balance of mere prejudice, and emphasis must be placed on the word unfair. *Oberlin v. Akron General Medical Ctr.* (2001), 91 Ohio St.3d 169, 172, citing *Ede v. Atrium S. OB-*

¹ Appellant's trial counsel objected to the testimony as improper character evidence

GYN, Inc. (1994), 71 Ohio St.3d 124. Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. *Id.* Evidence that arouses emotions, evokes a sense of horror, or appeals to an instinct to punish may be unfairly prejudicial. *State v. Cooper*, 147 Ohio App.3d 116, 2002-Ohio-617, at ¶57; *Oberlin* (unfairly prejudicial evidence appeals to emotions rather than intellect).

¶13 The trial court did not plainly err when it admitted Davis' testimony. The testimony was not unfairly prejudicial, as it did not appeal to the jury's emotions or instinct to punish but rather described Davis' observations and concerns about appellant. Nor can we say that but for the admission of the testimony, the outcome would clearly have been different. Appellant's conviction resulted primarily from Williams' identification of appellant as the shooter. Davis' testimony did not impact the credibility of that identification.

¶14 Moreover, the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Thus, an appellate court will only reverse the trial court's decision to admit testimony if the court abused its discretion. *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, at ¶80; *State v. Cunningham*, Franklin App. No 06AP-145, 2006-Ohio-6373, at ¶33. An abuse of discretion connotes more than an error of law, it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Widder*, 146 Ohio App.3d 445, 2001-Ohio-1521, at ¶6. The trial court did not abuse its discretion by admitting Davis' testimony under these circumstances.

¶15 Next, appellant contends the trial court erred when it revoked his bond during trial. We disagree.

{¶16} After his convictions were overturned by the federal court, appellant was released from custody on bond and placed under house arrest. He was monitored through the use of an ankle bracelet. During this trial, appellant was housed at a local hotel. On Tuesday, September 5, 2006, after the long Labor Day weekend, the prosecutor asked the trial court, outside the presence of the jury, to revoke appellant's bond. According to the prosecutor, she received a phone call on Saturday, September 2, from Mark Gains, who works for the house-arrest program. He informed the prosecutor that appellant had unplugged his monitoring device and left his hotel room without notifying anyone. Apparently, appellant went to his home in Youngstown, Ohio. Later in the afternoon, he was hooked up to a monitoring device in Youngstown.

{¶17} Appellant's counsel admitted that they told appellant he could go home to Youngstown over the long weekend. Counsel told the court that they assumed appellant would be allowed to go to Youngstown for the long weekend because that is where appellant lived, and it would be ludicrous to require appellant to spend the long weekend in a hotel room in Columbus, Ohio. Nevertheless, the trial court revoked appellant's bond.

{¶18} We review a trial court's actions regarding bond under an abuse of discretion standard. See *In re Scherer* (Oct. 1, 2001), Mahoning App. No. 01 C.A. 167. When an accused is free on bail, and the court determines that the accused violated the conditions of bail, whether express or implied, the accused is subject to the trial court's sanctioning authority for violating a condition, including revocation of bail. *In re Mason* (1996), 116 Ohio App.3d 451, 454.

{¶19} Appellant was placed under house arrest as a condition of his bond. During his trial, his "house" was a local hotel. However, without getting the trial court's permission, appellant unplugged his monitoring device and went to Youngstown, Ohio. Appellant was not monitored during his trip from Columbus to Youngstown. This conduct violated the condition of bond that appellant remain under house arrest, notwithstanding his counsel's belief that appellant could go home for the long weekend. The trial court did not abuse its discretion by revoking appellant's bond after learning of appellant's violation.

{¶20} Additionally, appellant cannot show that he was prejudiced by his bond revocation. *State v. Monzo* (Mar. 14, 1995), Franklin App. No. 94APA06-867. His only allegation of prejudice is speculation that the jury "had to realize something had changed." Such speculation is insufficient to show that appellant was prejudiced by the trial court's revocation of his bond.

{¶21} Appellant's second assignment of error is overruled.

{¶22} In his first assignment of error, appellant contends that prosecutorial misconduct deprived him of a fair trial. Specifically, appellant contends the prosecutor improperly presented Davis' unreliable and circumstantial testimony to appeal to the passions of the jury and improperly sought to revoke appellant's bond in the middle of trial. Again, we disagree.

{¶23} The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15; *State v. Thompson*, 161 Ohio App.3d 334, 2005-Ohio-2508, at ¶30. Generally, prosecutorial misconduct is not a basis for overturning a criminal conviction, unless, on the record as a whole, the misconduct can

be said to have deprived the defendant of a fair trial. *State v. Lott* (1990), 51 Ohio St.3d 160, 166. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *State v. Bey* (1999), 85 Ohio St.3d 487, 495.

{¶24} As previously discussed, Davis' testimony was not unfairly prejudicial. Nor did the trial court abuse its discretion by admitting Davis' testimony. Therefore, the prosecutor did not engage in misconduct by offering Davis' testimony regarding concerns Davis had about appellant. In addition, given appellant's violation of a condition of his bond, the prosecutor did not engage in misconduct by seeking the revocation of appellant's bond. Because appellant has not demonstrated prosecutorial misconduct, we overrule his first assignment of error.

{¶25} Appellant's third, fourth, and fifth assignments of error challenge the procedures utilized by the trial court in dealing with the jury, and therefore, we will address them together.

{¶26} Shortly after the jury began its deliberations on the afternoon of Friday, September 8, 2006, the jury wrote a note asking the trial court "[w]hat would require declaration of hung jury?" The trial court wrote back "[m]any more hours of deliberations." Within ten minutes of that reply, the jury sent another note to the trial court which read:

We have one member who is not comfortable making a guilty verdict based on the testimony of one person (in this case Todne Williams). This inability is not specific to this witness. The juror does not believe a guilty verdict could ever be declared without more evidence. This issue appears to not be resolvable with more time and discussion. Any advice would be appreciated.

{¶27} After receiving that note, the trial court adjourned the proceedings until the following Monday morning. The following Monday, a new trial judge was sitting in for the

original trial judge. Before addressing the jury, the new trial judge stated on the record that she had excused one of the deliberating jurors due to a medical issue. Neither party objected to the trial court's action. The new trial judge then swore in an alternate juror to replace the deliberating juror.

{¶28} The new trial judge then addressed the jury's note. The new trial judge instructed the jury, in part, that "[t]he testimony of one witness that is believed by you is sufficient to prove any fact." The new trial judge also instructed the jury that, due to the addition of an alternate juror to the jury, it should "go through all of the evidence again as if you're just starting your deliberations so that he [the alternate juror] has the benefit of seeing all of the evidence, and any discussions you may have, he may be part of." Before the morning was done, the jury returned its guilty verdicts.

{¶29} Appellant first directs our attention to the trial court's response that "many more hours of deliberations" would be required before it would declare a hung jury. Appellant contends the trial court responded to the question without consulting with his counsel and in his absence, and that the response was incorrect and coercive. We disagree.

{¶30} According to the trial transcript, the jury submitted the written question to the trial court at 4:40 p.m. The transcript states that "[t]he Court returned the following answer: Many more hours of deliberations." The written answer itself indicates that it was written by the trial court at 4:40 p.m. There is no indication that the trial court consulted with appellant or his counsel before answering the jury's question. Nor does it appear that counsel were present when the trial court answered the jury's first question.

Appellant's counsel objected to the trial court's answer after the fact, claiming that he had not been consulted before the trial judge responded to the question.

{¶31} A trial court errs when it does not provide a defendant with an opportunity to be heard before it responds to a jury question. *State v. Thomas*, Cuyahoga App No. 81393, 2003-Ohio-2648, at ¶27, citing *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 149. Additionally, an ex parte communication between a judge and a jury is also error which may warrant the ordering of a new trial. *Bostic*; *State v. Cook*, Franklin App. No. 05AP-515, 2006-Ohio-3443, at ¶35.

{¶32} Although the trial court erred when it answered a jury question without first consulting with counsel for appellant and the State, the error was harmless. *Bostic*, at 149-150 (applying harmless error analysis); *State v. Hill* (1995), 73 Ohio St.3d 433, 444 (noting that trial court's ex parte communication was not necessarily prejudicial error); *Cook*, at ¶36. Such error is harmless if the communication is not substantive or where there is " 'no possibility that the jury's conclusion was influenced by the court's reply.' " *State v. Allen* (1995), 73 Ohio St.3d 626, 630, quoting *Bostic*, at 150.

{¶33} Shortly after beginning deliberations, the jury asked: "what would require declaration of a hung jury"? The trial court responded: "many more hours of deliberation." This response must be viewed in the context of when the question was asked. Essentially, the answer the trial court gave was that it was far too early for the jury to worry about reaching an impasse in deliberations. The trial court's answer was not substantive in nature. See *Allen*, at 630 (noting that any error involved in ex parte communication was harmless because communication was not substantive); *State v. Tate* (Dec. 11, 1985), Summit App. No. 12111 (trial court's response to jury question that

it should continue deliberations, given without notifying counsel, was innocuous and not prejudicial); *Cook*, at ¶38 (trial court response was not substantive where court did not address facts in controversy or law applicable to the case). Given the nature and timing of the jury's question, and the trial court's response, the trial court's failure to consult with appellant's counsel prior to providing the answer was harmless error. Moreover, the jury's follow-up question further illustrates the insignificance of the trial court's response to the jury's first question.

(¶34) Appellant also claims that the trial court's response was coercive. We disagree. The jury had been deliberating for only a short time when it asked about a hung jury. The trial court told the jury, in essence, to continue deliberating. Given the short period of time the jury had been deliberating, such a response was reasonable and not inherently coercive. *State v. Bedford* (1988), 39 Ohio St.3d 122, 126 (noting that judge's response to question about possible deadlock situation that instructed the jury to continue deliberating was a "reasonable response"); see, also *State v. Gulertekin* (Dec. 3, 1998), Franklin App. No. 97APA12-1607 (instruction to "go back there and deliberate on this case" not reversible error), *State v. Long* (Oct. 12, 2000), Cuyahoga App. No. 77272 (response that jury should "continue to deliberate" after only a few hours of deliberations was not coercive), *State v. Boose* (Mar 25, 1994), Lucas App. No. L-93-095 (same); *United States v. Kramer* (C.A.7, 1992), 955 F.2d 479, 489 (instruction to continue to deliberate content neutral and not in error). Therefore, we overrule appellant's third assignment of error

{¶35} Appellant next directs our attention to the manner in which the trial court dismissed a deliberating juror and replaced that juror with an alternate juror.² Crim.R. 24(G)(2), which governs alternate jurors in capital cases, provides in part that "[n]o alternate juror shall be substituted during any deliberation." The State concedes that the trial court violated this rule when it substituted an alternate juror during the jury's deliberations.

{¶36} Notwithstanding the trial court's error, the State makes two arguments in support of an affirmance. First, the State contends that the rule is unconstitutional because it conflicts with two statutes dealing with the substitution of jurors. The State also argues that appellant did not object to the substitution and that the error does not rise to the level of plain error. Constitutional questions will not be decided until the necessity for a decision arises on the record before the court. *State v. Spikes* (1998), 129 Ohio App.3d 142, 145, citing *Christensen v. Bd. of Commrs. on Grievances & Discipline of the Supreme Court of Ohio* (1991), 61 Ohio St.3d 534, 535. Therefore, we first address whether the trial court committed plain error when it substituted a juror during the jury's deliberations.

{¶37} The trial court stated on the record that it had dismissed a juror and was going to swear in an alternate juror. Appellant's counsel did not object to the trial court's replacement of the original juror at that time, even though given the opportunity.³ Thus,

² The trial court held an ex-parte meeting with the deliberating juror before it dismissed the juror. Although appellant claims this as error, he does not allege how he was prejudiced by this meeting. *Bostic*, supra (ex-parte meeting with juror reviewed under harmless error analysis). However, any prejudicial error that may have occurred would result from the trial court's decision to dismiss the juror, not the process used to dismiss that juror. That alleged error is fully addressed in this assignment of error.

³ Trial counsel objected to the process three weeks later at appellant's sentencing hearing.

appellant must demonstrate plain error. See *State v. Fisher* (Mar. 12, 1996), Franklin App. No. 95APA04-437 (considering former Crim.R. 24(F) governing alternate jurors and noting that failure to object to error requires plain error analysis); *State v. Bowling* (Feb. 8, 1996), Franklin App. No. 95APA05-599 (finding plain error when trial court replaced juror with alternate juror after deliberations began, without instructing jury to begin deliberations anew); *State v. Ramjit* (Feb. 15, 2001), Cuyahoga App. No. 77337 (applying plain error analysis to trial court's replacement of juror with alternate juror after deliberations began); *State v. Armstrong*, Cuyahoga App. No. 81114, 2002-Ohio-6053, at ¶29 (same).

{¶38} In determining whether plain error has occurred when a trial court has improperly substituted a juror, the Eighth District Court of Appeals has looked to a number of factors: (1) was the substitution done in open court in the presence of counsel; (2) did counsel agree to the substitution; (3) did counsel object; (4) was the jury instructed to begin deliberations anew; (5) the length of time the jury had been deliberating prior to the substitution; and, (6) any prejudice shown by the defendant. *Id.* This court has also considered whether the trial court instructed the new jury to deliberate anew. *Bowling; Fisher.*

{¶39} Applying these factors to the present case, we find no plain error. While the trial court did remove the deliberating juror off the record, the judge informed counsel on the record of its action before it swore in the alternate juror. At that point, appellant's trial counsel had an opportunity to object to the trial court's dismissal of the deliberating juror but failed to do so. The jury had only been deliberating for a few hours when the deliberating juror was replaced with the alternate juror, and the trial court instructed the jury that it should go over all of the evidence again as if they had started deliberations

over Appellant's only claim of prejudice is based on the assumption that if his counsel had objected, the trial court would have declared a mistrial. We will not make that assumption. Having found no plain error in the trial court's replacement of a deliberating juror with an alternate juror, we overrule his fourth assignment of error.

{¶40} Lastly, appellant challenges the trial court's response to the jury's second question on Friday, September 8, 2006. That question indicated that one juror was uncomfortable finding any defendant guilty based solely on the testimony of a single witness. Therefore, the jury sought advice from the trial court. When the trial resumed on Monday morning, appellant's counsel proposed additional jury instructions for the trial court to give the jury. These included instructing the jury that they each have a right and responsibility to make their own determinations about weight and credibility; they each must make their individual judgments; they should consult with the other jurors and consider one another's views in order to reach an agreement without disturbing their individual judgment, and they should not surrender honest convictions or principles. The trial court noted that its original jury instructions already contained all of the language proposed by appellant.

{¶41} The trial court then instructed the jury, in part, that it should "not decide any issue of fact merely on the basis of the number of witnesses who testified on that side of the issue. Rather, the final test in judging evidence should be the force and the weight of the evidence regardless of the number of witnesses on each side of the issue. The testimony of one witness that is believed by you is sufficient to prove any fact." The trial court additionally provided some guidance for resolution of discrepancies in a witness's testimony.

{¶42} Appellant claims the trial court's additional instruction lacked balance, was coercive, and was directed only to the minority jurors.⁴ We disagree.

{¶43} It is within the sound discretion of the trial court to provide supplemental instructions in response to a question from the jury. *State v. Thompson* (Nov. 10, 1997), Franklin App. No. 97APA04-489, citing *State v. Maupin* (1975), 42 Ohio St.2d 473, 486. The trial court's response, when viewed in its entirety, must constitute a correct statement of the law and be consistent with or properly supplement the jury instructions that have already been given. *State v. Hull*, Mahoning App. No. 04 MA 2, 2005-Ohio-1659, at ¶45; *Sabina v. Kress*, Clinton App. No. CA2006-01-001, 2007-Ohio-1224, at ¶15; *State v. Letner* (Feb. 23, 2001), Greene App. No. 2000-CA-58 " 'A reversal of a conviction based upon a trial court's response to such a request requires a showing that the trial court abused its discretion.' " *State v. Young*, Franklin App. No. 04AP-797, 2005-Ohio-5489, at ¶35, quoting *State v. Carter* (1995), 72 Ohio St.3d 545, 553.

{¶44} The jury asked whether a guilty finding could be based on one witness's testimony. The trial court correctly instructed the jury that the testimony of any witness is sufficient, if believed, to prove any fact. This statement of law was not in the trial court's original instructions. The additional instruction was a correct statement of law and properly supplemented the original instructions to address the jury's question and to aid the jury in its deliberations. We fail to see how this supplemental instruction was coercive, lacked balance or was addressed only to minority jurors. The trial court did not

⁴ We note that the factors appellant highlights apply to a *Howard* charge, which a trial court gives when it believes a jury is deadlocked. *State v. Howard* (1989), 42 Ohio St 3d 18. Appellant does not contend that the trial erred by failing to give a *Howard* charge.

abuse its discretion by providing the jury with this supplemental instruction. Appellant's fifth assignment of error is overruled

{¶45} In his sixth assignment of error, appellant contends that he received ineffective assistance of counsel. Specifically, he points out that his trial counsel failed to timely and adequately object to the alleged errors raised in the preceding assignments of error. He claims that there is a reasonable probability that but for counsel's failures, the result of the trial would have been different. We disagree.

{¶46} In order to prevail on an ineffective assistance of counsel claim, appellant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 486 U.S. 668; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, certiorari denied (1990), 497 U.S. 1011. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland* at 690. In analyzing the first prong of *Strickland*, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101.

{¶47} If appellant successfully proves that counsel's assistance was deficient, the second prong of the *Strickland* test requires appellant to prove prejudice in order to

prevail. *Id.* at 692. To meet that prong, appellant must show counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. *Id.* at 687. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

{¶48} We have already found no prosecutorial misconduct as alleged in assignment of error one and no error in the trial court's admission of Davis' testimony and decision to revoke appellant's bond as alleged in assignment of error two. Thus, trial counsel's failure to object to these errors is neither deficient conduct nor prejudicial. Additionally, because we have also determined that the substance of the trial court's instructions to the jury were not erroneous, as alleged in assignments of error three and five, trial counsel's failure to object to those instructions is also not deficient or prejudicial. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, at ¶¶216-221 (finding no ineffective assistance of counsel where no prejudice demonstrated); *State v. Gales* (1999), 131 Ohio App.3d 56, 65.

{¶49} Trial counsel did not timely object to the trial court's failure to provide him with an opportunity to be heard before it responded to the jury's question about what it would take to declare a hung jury. Assuming that such a failure constituted deficient performance, we have already determined that these errors were not prejudicial to appellant, given the innocuous and non-substantive content of the trial court's response. Thus, appellant cannot demonstrate prejudice as a result of any alleged deficient performance. *Hand*.

{¶50} Finally, trial counsel failed to object to the trial court's improper substitution of a deliberating juror. Having found no plain error in the trial court's replacement of a deliberating juror, it is clear that appellant cannot establish actual prejudice as required by *Strickland*. See *State v. Mosley*, Franklin App. No. 05AP-701, 2006-Ohio-3102, at ¶37; *State v. Woodson*, Franklin App. No. 03AP-736, 2004-Ohio-5713, at ¶20-22; *State v. Myers*, Fayette App. No. CA2005-12-035, 2007-Ohio-915, at ¶35.

{¶51} Therefore, we overrule appellant's sixth assignment of error.

{¶52} Having overruled appellant's six assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, J., concurs separately.

WHITESIDE, J., dissents

WHITESIDE, J., retired, of the Tenth Appellate District,
Assigned to active duty under authority of Section 6(C), Article
IV. Ohio Constitution.

TYACK, J., concurring separately in part.

{¶53} The fourth assignment of error presents a particularly difficult problem. The jury on this capital case could not consider a death sentence because a death sentence had been rejected in an earlier trial. The jury began deliberations on a Friday afternoon and deliberated for over three hours before recessing until the following Monday.

{¶54} On Monday morning, one of the jurors complained of heart palpitations and asked to be excused from further involvement. Counsel for both parties were advised of the situation and expressed no disagreement with the juror being excused. Counsel were more concerned about the content of a charge which was to be given to the jury in

response to a jury question from the preceding Friday. Counsel for the defense did not express disagreement with the juror being excused either to counsel for the State of Ohio or to the judge who was handling the case that day for the original trial judge.

{¶55} Later, the trial judge handling the case that day announced in open court that the alternate was to be seated and had the oath administered to the alternate in open court with counsel for the parties and the defendant present. Shortly thereafter, the judge instructed the jury to begin its deliberations over since the alternate had not participated in the first three hours of deliberations. Neither counsel nor the appellant objected to this procedure.

{¶56} Crim.R. 24(G)(2) states.

Capital cases. The procedure designated in division (F)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict. No alternate juror shall be substituted during any deliberation. Any alternate juror shall be discharged after the trial jury retires to consider the penalty

{¶57} Because deliberations began anew, both counsel and the trial judge could have interpreted this case as a situation where the juror was not substituted during deliberations. No one discussed Crim.R. 24(G)(2) at the time of the substitution.

{¶58} The better procedure would have been to dismiss the juror with heart palpitations in open court with counsel present and with the defendant present. Other options could have been considered by all, including allowing a jury of 11 to conclude the case and declaring a mistrial. Excusing the juror from the judge's chambers with no contemporaneous discussion on the record and no requirement for defense counsel to

express agreement or disagreement on the record before the juror was excused is not a good way to handle the case.

{¶59} Based on the record before us, we can only infer that counsel and the defendant did not disagree with the fact of the necessity to excuse the juror. Neither did counsel or the defendant express any dissatisfaction with seating the alternate and beginning deliberations anew. Under the circumstances, I cannot view the case as presenting reversible error.

WHITESIDE, J., dissenting.

{¶60} Being unable to concur with the majority or concurring opinions, I must respectfully dissent and would sustain all six assignments of error and remand the case to the trial court for a new trial for the reasons that follow.

{¶61} The majority overrules the second assignment of error because trial counsel failed to object upon the grounds reached on appeal. However, trial counsel did object to the admissions of the prejudicial evidence which was obviously inappropriate evidence of comments made by the witness not to defendant but to a companion during a trip to Kentucky because he had a "bad feeling" about appellant. The objection made by counsel should have been maintained and it was plain error to admit such testimony which was not relevant to the issues.

{¶62} The first assignment of error raises the issue of prosecutorial misconduct depriving defendant fundamental constitutional rights. The witness in question was the same witness involved in the second assignment of error. For the same reasons, this assignment of error is well-taken because the admittance of this evidence which was not

relevant and was based upon the witness's feelings and beliefs about appellant not actual knowledge of relevant facts.

{¶63} The third, fourth and fifth assignments of error are considered together by the majority. They will also be so discussed in this dissent. They relate to the unusual proceedings of the trial judge. The original trial judge presided through Friday, September 8, 2006 and submitted the case to the jury. After considerable deliberations, the jury sent a note inquiring as to what would constitute a hung jury and the judge returned a reply that "many more hours of deliberations" would be required. The jury then requested advice indicating that one juror was having difficulty basing a guilty verdict upon the testimony of one of the witnesses, but this difficulty or "inability was not specific to just that one witness." The trial court did not respond to the question but instead sent the jury home for the weekend to reconvene Monday morning.

{¶64} However, on Monday morning, the trial judge was not there. Instead, a different judge of the trial court appeared to preside. However, the new judge, when she entered the courtroom, advised the parties by stating in the record that she had sua sponte excused one of the deliberating jurors due to a medical issue. This new trial judge then replaced the sua sponte excused juror with an alternate juror. The new judge then addressed the note left unanswered by the original trial judge even though the excused juror was the juror referred to in the note. The State has conceded error by the new trial judge's ex parte excusing a deliberating juror. An after the fact objection was futile. The juror was excused and no longer available. In light of the State's concession of error, assignment of error four should be sustained since the prejudicial nature of the error is obvious. The new trial judge excused the one juror who was known to be questioning the



prosecution's case because of "inability" to believe the testimony of more than one of the state's witnesses.

{¶65} Assignment of error six should be sustained because the affirmance by the majority is predicated in large part to the failure of trial counsel to object to various other matters raised by the other five assignments of error. Had the trial counsel made the timely and correct objection, presumably the trial court would not have committed the error.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v :
 :
 David B. Clinkscale, :
 :
 Defendant-Appellant. :

No. 06AP-1109
(C P C No 97CR09-5339)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 8, 2008, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed against appellant.

KLATT & TYACK, JJ.

By William A. Klatt
Judge William A. Klatt

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION
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STATE OF OHIO,

TERMINATED: NO. 5 BY km

Plaintiff,

-v-

Case No. 97CR-09-5339

DAVID B. CLINKSCALE,

JUDGE CAIN

Defendant.

JUDGMENT ENTRY

(Prison Imposed)

On September 11, 2006, the State of Ohio was represented by Assistant Prosecuting Attorneys Sue Ann Reulbach and Scott Kirschman and the Defendant was represented by Attorneys Gerald Simmons and Dennis Dimartino. The case was tried by a jury which returned a verdict finding the Defendant **GUILTY** of the following offenses:

Counts One and Two, Aggravated Murder with specifications, in violation of Section 2903.01 of the Ohio Revised Code, both are unclassified felonies; **Count Three, Attempted Aggravated Murder with specification**, in violation of Section 2923.02 as it relates to Section 2903.01 of the Ohio Revised Code, a felony of the first degree; **Count Four, Aggravated Burglary with specification**, in violation of Section 2911.11 of the Ohio Revised Code, a felony of the first degree; **Counts Five and Six, Aggravated Robbery with specifications**, in violation of Section 2911.01 of the Ohio Revised Code, a felony of the first degree; and further, to **Count Seven, Kidnapping with specification**, in violation of Section 2905.01 of the Ohio Revised Code, a felony of the first degree.

On October 2, 2006, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Assistant Prosecuting Attorneys Sue Ann Reulbach and Scott Kirschman and the Defendant was represented by Attorneys Gerald Simmons and Dennis Dimartino.

The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information

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regarding the existence or non-existence of the factors the Court has considered and weighed.

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The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the facts set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term is mandatory pursuant to R.C. 2929.13(F).

The Court hereby imposes the following sentence, for sentencing purposes Count One and Count Two will merge: Thirty (30) years to LIFE with an additional Three (3) years for the use of a firearm as to Count One, Thirty (30) years to LIFE with an additional Three (3) years for the use of a firearm as to Count Two, Ten (10) years with an additional Three (3) years for the use of a firearm as to Count Three, Ten (10) years with an additional Three (3) years for the use of a firearm as to Count Four, Ten (10) years with an additional Three (3) years for the use of a firearm as to Count Five, Ten (10) years with an additional Three (3) years for the use of a firearm as to Count Six, and Ten (10) years with an additional Three (3) years for the use of a firearm as to Count Seven at the Ohio Department of Rehabilitation and Correction. Counts Four, Five and Seven are to run concurrently and Count One with the three years for firearm spec, Count Three and Count Six are to run consecutively and all other firearm specs merge for sentencing for a total 53 years to Life. No court costs or fines imposed.

After imposing sentence, the Court stated its reasons as required by R.C. 2929.19 and consistent with State v. Foster, 2006-Ohio-856. The Court finds that prison is consistent with the purposes and principles of sentencing, and that the Defendant is not amenable to community control. The Court also notified the defendant of the applicable period of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e).

The Court, having considered the Defendant's present and future ability to pay a fine and financial sanctions, and, pursuant to R.C. 2929.18, hereby renders judgment for the following fine and/or financial sanctions: **No fines imposed.**

After the imposition of sentence, the Court notified the Defendant orally and in writing, pursuant to R.C. 2929(B)(3) the applicable period of post-release control is five (5) years mandatory.

The Court finds that the Defendant has **2,681 days** of jail credit and hereby certifies the time to the Ohio Department of Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.



David E. Cain, Judge

Case No. 97CR-09-5339

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CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

Thomas R. BOWLING, Defendant-Appellant.

No. 95APA05-599.

Feb. 8, 1996.

APPEAL from the Franklin County Court of Com-
 mon Pleas.

Michael Miller, Prosecuting Attorney, and Katherine Press, for appellee.

Richard F. Swope and Robert W. Suhr, for appel-
 lant.

OPINION

BRYANT, J.

*1 Defendant-appellant, Thomas R. Bowling, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of felonious assault in violation of R.C. 2903.11, with specifications.

According to the state's evidence, on October 26, 1994, defendant became involved in a dispute with his neighbor and co-worker, Donald Johnson, Jr.; defendant pulled out his pocketknife and Johnson threatened to beat him with a stick. Because defendant's mother asked Johnson not to hit defendant, Johnson retreated without further incident.

The next day, October 27, 1994, while defendant and Johnson were moving their cars at their place

of employment in Columbus, Ohio, they exchanged vituperative remarks. Later, as Johnson was carrying six-by-six blocks of wood used to block off semi-trucks, he encountered defendant wielding a pocketknife. In the ensuing scuffle, Johnson at some time grabbed large pallets and brandished them towards defendant; defendant used his pocketknife to cut Johnson's arm and chest.

On November 16, 1994, defendant was indicted for attempted murder in violation of R.C. 2923.02 and 2903.02, and felonious assault in violation of R.C. 2903.11, with specifications. As a result of a jury trial, defendant was convicted of felonious assault and sentenced accordingly. Defendant appeals to this court, assigning the following errors:

"I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REPLACING A JUROR AFTER DELIBERATIONS HAD BEGUN WITHOUT EVER INFORMING COUNSEL.

"II. THE TRIAL COURT COMMITS PREJUDICIAL ERROR WHERE IT DENIES GIVING A SELF-DEFENSE INSTRUCTION WHERE THE EVIDENCE WARRANTS SUCH AN INSTRUCTION.

"III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING DEFENDANT-APPELLANT'S REQUEST FOR A MISTRIAL.

"IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING STATE'S TRIAL EXHIBIT NUMBER FOUR TO BE USED IN THE TRIAL OVER OBJECTION AND BE ADMITTED INTO EVIDENCE.

"V. THE JURY VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE PROSECUTION FAILED TO PROVE VENUE.

"VI. THE DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND

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ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION BECAUSE TRIAL COUNSEL DID NOT THOROUGHLY INVESTIGATE THE CRIME OR INTERROGATE WITNESSES WHICH WERE READILY AVAILABLE.

"VII. THE DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE 5TH, 6TH AND 14TH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION BECAUSE HE FAILED TO FILE A MOTION TO SUPPRESS A STATEMENT TAKEN BY OFFICER MEEKS WITHOUT ADVISING DEFENDANT OF HIS CONSTITUTIONAL RIGHTS CONTRARY TO THE 5TH, 6TH AND 14TH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AS WELL AS NOT OBJECTING TO THE INTRODUCTION OF THE HOSPITAL RECORDS.

"VIII. THE DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE 5TH, 6TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION BECAUSE DEFENSE COUNSEL FAILED TO OBJECT TO THE ASSISTANT PROSECUTOR'S IMPROPER ATTEMPT TO IMPEACH DEFENDANT-APPELLANT BY ASKING QUESTION WHICH IMPLIED HE MADE SUCH STATEMENTS TO DETECTIVE REESE AND THEN FAILING TO CALL THE WITNESSES TO DEMONSTRATE SUCH STATEMENTS WERE MADE."

*2 Defendant's first assignment of error contends the trial court improperly seated an alternate juror after deliberations began. At 3:20 p.m. on May 10, 1995, the jury retired to deliberate the case. The trial court did not dismiss the alternate jurors; rather, they were instructed "to go back into the jury deliberation room but not participate in the deliberations." (Tr. Vol.2, 126.) The trial court ad-

vised the alternate jurors they would be excused when the jury was discharged. *Id.* At 5:00 p.m. the same day, in the presence of all counsel and defendant, the jury was dismissed for the evening. The next day at 9:00 a.m., the transcript reflects the following entry:

"Thereupon, the following proceedings were had out of the presence and hearing of the jury:

"The Court: Let the record reflect that juror 5, Sandra Hankin, did not appear, and I seated the alternate. (Jury deliberating)" (Tr. Vol.III, 2.)

The record provides no indication the jury was given any additional instructions or was directed to begin their deliberations anew.

Defendant contends the trial court further erred in replacing the juror in his absence: he asserts he and his trial counsel did not know juror number five had been replaced until the jury returned its verdict sometime after 2:15 p.m. on May 11.

Crim.R. 24(F) governs the procedures concerning alternate jurors:

"Alternate Jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. * * * An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. * * *"

A trial court hearing a criminal matter may not substitute an excused alternate juror after the jury retires to consider its verdict. *State v. Locklear* (1978), 61 Ohio App.2d 231. Although here the alternate juror was not yet excused, *Locklear* instructs that Crim.R. 24 controls. Because Crim.R. 24 contains "no provision for the substitution of a juror by the alternate during the course of deliberations," an alternate juror properly may replace a regular juror only before the time the jury commences deliberations and prior to the discharge of

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the alternate juror. *Id.* at 233. See, also, *State v. Miley* (1991), 77 Ohio App.3d 786 (trial court improperly substituted unexcused alternate once deliberations had begun and once the original jury had rendered a verdict on one charge).

Moreover, as defendant contends, the record does not indicate the above entry replacing juror number five occurred in "open court" or "in the presence of counsel and the defendant." See *State v. James* (Aug. 22, 1994), Stark App. No. 94-CA-0046, unreported (record devoid of any reference to defendant or his counsel when trial judge sent written communications to the deliberating jury; defendant's absence constituted error). The trial court's improper substitution of an alternate juror in defendant's absence is reversible error warranting a new trial. *State v. Stone* (Oct. 4, 1989), Lorain App. No. 89CA004522, unreported (juror replaced with alternate once deliberations began and outside the presence of defendant constitutes reversible error as violations of Crim.R. 24(F) and 43(A)); *Locklear, supra*, at 234.

*3 In response, the state stresses that defendant failed to object, even after the jury, which included the alternate, returned with the verdict. Clearly, defense counsel could not have objected at the time the juror was substituted because the record does not reflect his presence. Moreover, we question the effectiveness of an objection lodged at the time the verdict was returned.

Nonetheless, to address the state's argument, *Locklear* suggests that seating the alternate juror once deliberations begin constitutes *per se* reversible error. However, even if defense counsel's failure to object constitutes waiver, the trial court committed plain error when it seated the alternate juror after deliberations began but failed to instruct the jurors to begin their deliberations anew. *Miley, supra*, at 791-792 (defendant demonstrated "a manifest miscarriage of justice resulted from the trial court's decision not to begin deliberations anew"); see, also, *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 124 ("[a]rguably, a suggestion

of prejudice arises when an alternate is substituted without any precautionary instructions by the trial judge"). The prejudice arises because the trial court's substitution of jurors without additional instructions deprives the jury of its "essential feature": the "interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Miley, supra*, at 792, quoting *Williams v. Florida* (1970), 399 U.S. 78, 101.

Here, as in *Miley*, the trial court's failure to instruct the new panel to begin deliberations anew denied defendant the right to a trial where the alternate juror " * * * fully participates in all the deliberations which lead to a verdict." *Id.* at 792, quoting *People v. Collins* (1976), 17 Cal.3d 687, 693. Moreover, as in *Miley*, the trial court failed to inquire whether the alternate juror could consider the evidence and deliberate fully and fairly, an inquiry which remained necessary because the alternate juror had listened to jury deliberations but had been instructed not to participate in any way in those deliberations. *Id.* at 792.

In the final analysis, because the trial court seated the alternate juror after deliberations began without notice to counsel and without any additional instruction to begin deliberations anew, defendant's first assignment of error is sustained.

Our disposition of defendant's first assignment of error renders his other assignments moot. App.R. 12(A). However, having sustained defendant's first assignment of error, we reverse the judgment of the trial court and remand this case to the trial court for further proceedings consistent with this opinion.

Judgment reversed and case remanded.

YOUNG and LAZARUS, JJ., concur.

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**CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.**

Court of Appeals of Ohio, Tenth District, Franklin
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

David B. CLINKSCALE, Defendant-Appellant.
 No. 98AP-1586.

Dec. 23, 1999.

Ron O'Brien, Prosecuting Attorney, and Daniel S.
 Dice, for appellee.

Dennis C. Belli, for appellant.

OPINION

PETREE.

*1 Defendant, David B. **Clinkscale**, testified that he was in his hometown of Youngstown, Ohio, when his childhood friend, Kenneth Coleman, was shot and killed. That same morning, Coleman's wife, Todne Williams, was shot three times in the head and arms. Williams subsequently identified **Clinkscale** as her assailant.

On September 29, 1997, the Franklin County Grand Jury returned an indictment charging defendant with three counts of aggravated murder, one count of attempted aggravated murder, one count of aggravated burglary relating to the Coleman/Williams' residence, separate counts of aggravated robbery relating to Coleman and Williams, and one count of kidnapping relating to Williams. Each count of the indictment included an associated firearm specification. Additionally, each of the aggravated murder counts included death penalty specifications.

On October 16, 1998, a jury found defendant guilty

of each of the counts and specifications contained in the September 29, 1997 indictment. The trial court subsequently accepted the jury's recommendation and sentenced defendant to a single merged life term of imprisonment without the possibility of parole. Defendant now appeals, asserting the following four assignments of error:

[1.] The court of common pleas erred and denied Defendant-Appellant his rights to the effective assistance of counsel and to due process and a fair trial guaranteed to him under U.S. Const. amend. V, VI, and XIV and Ohio Const. art. 1, § 10 and 16 when it denied his motion to discharge his appointed counsel on the ground that counsel negligently failed to timely file a notice of alibi and a disclosure of alibi witnesses. Alternatively, the failure of the court of common pleas to conduct an adequate investigation into the basis of Defendant-Appellant's dissatisfaction with the representation provided by his appointed counsel prior to ruling on his motion to discharge them was error and denied him his constitutional rights.

[2.] The court of common pleas erred and denied Defendant-Appellant his right to due process and a fair trial guaranteed to him under U.S. Const. amend. V, and XIV and Ohio Const. art. 1, § 16 when it granted the State of Ohio's motion to exclude the testimony of his alibi witnesses due to defense counsel's negligent failure to file a notice of alibi within the time requirements of Crim.R. 12.1.

[3.] The improper and highly misleading remarks made by the prosecuting attorney during closing argument concerning the latent fingerprint evidence, which remarks were not based upon testimony in the record and served to undermine a key theory of defense, rose to the level of plain error and violated Defendant-Appellant's right to due process and a fair trial guaranteed to him under U.S. Const. amend. V and XIV and Ohio Const. art. 1, § 16.

[4.] Defendant-Appellant was denied his right to

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the effective assistance of counsel guaranteed to him under U.S. Const. amend. VI and XIV and Ohio Const. art. 1, § 10 based upon the following: (a) during the prosecution case, defense counsel failed to object to "other acts" evidence of Defendant-Appellant's possession of numerous firearms, and during the defense case, defense counsel actually elicited such evidence from Defendant-Appellant and thereby opened the door to damaging cross-examination on the same subject; (b) defense counsel failed to object to the improper and misleading comments made during the State's closing argument; (c) defense counsel failed to file a timely notice of alibi resulting in the exclusion of the third party corroborating alibi testimony; and (d) defense counsel failed to object to inadmissible hearsay testimony which improperly bolstered the in-court identification made by the sole eyewitness to the charged crimes.

Defendant and Kenneth Coleman were childhood friends who grew up together in Youngstown, Ohio. Coleman eventually left Youngstown and moved to Columbus. After relocating to Columbus, however, Coleman became heavily involved in gambling and the sale of illegal narcotics. Coleman operated at least two "crack houses" in the city and was known to carry firearms and large amounts of cash.

*2 The events leading up to Coleman's murder began when Coleman invited defendant to join him at a dogfight on Saturday, September 6, 1997. Defendant accepted Coleman's invitation and arrived from Youngstown with his cousin, Jerome Woods, on the afternoon of Wednesday, September 3. Defendant and Woods checked into a hotel room that evening and met Coleman and one of his drug dealers, Pete Davis, at a nearby tavern. All four men met at another tavern the following evening, but did not meet again until the afternoon of Saturday, September 6.

At approximately 12:30 p.m., Saturday afternoon, defendant and Woods met Coleman, Davis, and an-

other of Coleman's drug dealers, Gerry Joseph, at Coleman's home. Thereafter, the five joined four or five carloads of people and left for Cincinnati, Ohio. Upon arrival in Cincinnati, defendant, Woods, Coleman, Davis, and Joseph rented a single room at a hotel close to the location of the dogfight.

After dark, the five men left their hotel room for a barn located in rural Kentucky. The main event scheduled that evening was a fight in which Coleman had entered his dog. Soon after the fight began, Coleman accused the owner of the other dog of a rule infraction. Coleman's accusation apparently led to a heated argument between many of the individuals who had placed bets on the outcome of the fight. Ultimately, the dispute was resolved by a "gentlemen's agreement" between Coleman and the owner of the other dog, whereby the fight was cancelled, and all bets were refunded.

Apparently, Gerry Joseph was less than satisfied with the manner in which Coleman chose to settle his dispute with the owner of the other dog. He and Coleman subsequently became involved in their own argument, which ultimately prompted Coleman to refuse to allow Joseph to ride back to Columbus in his vehicle. As a result, Coleman and Davis drove back to Columbus while the other three men drove back in defendant's vehicle.

According to the defendant, he, Woods, and Joseph returned to Columbus at approximately 4 a.m. on Sunday, September 7, 1997. Defendant testified that after dropping Joseph off, he and Woods returned to their hotel and went to sleep for a short while. Defendant claims that at about 9 a.m., he and Woods checked out of their hotel room, went shopping, and then ate lunch. Thereafter, defendant and Woods left for Youngstown. Upon arriving in Youngstown, defendant claims to have met with his cousin, Brian Fortner, to watch an 8 p.m. football game. After the game, defendant testified that he spent the night with his girlfriend, Rhonda Clark. In short, defendant claims to have been in Youngstown, and not in Columbus, on the night Coleman was murdered.

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The testimony of Coleman's wife, Todne Williams, directly contradicted defendant's testimony as to his whereabouts at the time of Coleman's murder. According to Williams, Coleman returned home early on the morning of Sunday, September 7, 1997. Upon his arrival, the two spoke briefly, and Coleman mentioned that defendant and Woods had planned to come over later that day to play a new video game defendant had purchased.

*3 According to Williams, defendant and a friend, presumably Woods, did come over to meet Coleman later that Sunday. Williams testified that she recognized defendant from seeing him on numerous occasions when he had visited her husband. Soon after their arrival, defendant, Coleman, and the third man, began playing and placing bets on defendant's new video game. This continued well into the night and the next morning. Early that next morning, Williams awoke at approximately 1 a.m. and came down from her bedroom to get a bottle for her baby. When she did, Williams noticed that the defendant and his friend were still playing defendant's video game with her husband.

A short while after returning to her bedroom, Coleman came upstairs to retrieve money from a safe he kept in the bedroom closet. Coleman then went back downstairs, and Williams soon fell back to sleep. However, at about 3:45 a.m., Williams was awakened by the sound of gunfire. Williams testified that after hearing the first gunshot, defendant burst into her bedroom. According to Williams, defendant was armed with a pistol, was sweating profusely, and demanded that Williams show him where Coleman kept his money. Williams responded that he should ask her husband. However, defendant purportedly responded that it would not be possible to ask Coleman, and then yelled down for the third man to come upstairs. When the third man entered the room, defendant handed him the pistol and told him to watch Williams while he looked for the money.

Defendant eventually located Coleman's safe at which time he directed his partner to get the keys to

his truck. Defendant then loaded the safe into the truck while his partner watched Williams. After loading the safe, defendant returned to the home and took back his pistol. As he did, he told the third man to get in the truck and that he would "take care of" Williams. After the third man left the house, defendant wiped off the front door handle and ordered Williams to lie on the kitchen floor next to Coleman's body. At that moment, Williams began to run for the backdoor and a scuffle ensued. During the struggle, defendant shot Williams in the face. Williams fell to the ground but managed to get up again. Defendant then shot Williams two additional times and then fled the residence.

After defendant left, Williams managed to place an emergency call to 911. Both the police and paramedics responded. Williams, who was bleeding profusely from her head and arms, was rushed to the hospital. During the process of securing the crime scene, the police found Coleman's body on the kitchen floor. The subsequent autopsy revealed that Coleman had died as a result of a single gunshot wound to the back of his head.

The core of defendant's appeal rests upon defendant's claim that he received ineffective assistance of trial counsel. In turn, this claim rests upon defense counsels' failure to timely file a notice of alibi and failure to object to the introduction of certain testimony. Although not in chronological order, each of defendant's assignments of error will be addressed below.

*4 In his second assignment of error, defendant asserts that the trial court erred when it enforced Crim.R. 12.1 holding that defendant's notice of alibi had been untimely filed and, therefore, that testimony from defendant's proposed alibi witnesses was inadmissible.

Defendant filed a disclosure of his intent to present an alibi defense on October 6, 1998, after the jury had been selected and sworn, after jeopardy had attached, and immediately before the plaintiff began the presentation of its case. The Ohio Rules of

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Criminal Procedure require a written notice of alibi not less than seven days before trial. Crim.R. 12.1 provides that:

Whenever a defendant in a criminal case proposes to offer testimony to establish an alibi on his behalf, he shall, not less than seven days before trial, file and serve upon the prosecuting attorney a notice in writing of his intention to claim alibi. The notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of proving such alibi, unless the court determines that in the interest of justice such evidence should be admitted.

It has been recognized for decades that the alibi notice requirement is meant to protect the prosecution from false and fraudulent claims of alibi, often presented by the accused so near the date of the trial as to make it nearly impossible for the prosecution to ascertain any facts as to the credibility of the witnesses called by the accused. *State v. Thayer* (1931), 124 Ohio St. 1, 4, 176 N.E. 656. Sound reasons exist for the notice requirement. In *Williams v. Florida* (1970), 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446, the United States Supreme Court acknowledged:

* * * Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. * * * [*Id.* 81-82;1896.]

The Ohio Supreme Court has held that a refusal to enforce the alibi notice requirement, even in cases which include death penalty specifications, amounts to a tacit rejection of the concept of fairness for which the alibi notice requirement stands.

See *State v. Nooks* (1930), 123 Ohio St. 190, 174 N.E. 743; and *State v. Focht* (1974), 37 Ohio St.2d 173, 309 N.E.2d 922. However, because the notice requirement is based upon the fundamental concept of fairness, in some cases the interests of justice are served, and the trial court acts within the bounds of its discretion, when it admits alibi evidence despite the lack of timely notice.

The three-part test generally applied when faced with a request to exempt a defendant from the requirements of Crim.R. 12.1 consists of the following: (1) was the notice of alibi withheld by the defendant from the prosecution in bad faith; (2) does the newly asserted alibi evidence constitute a surprise or prejudice the prosecution; and (3) is the alibi evidence necessary to insure a fair trial? *State v. Smith* (1977), 50 Ohio St.2d 51, 362 N.E.2d 988. Stated alternatively, when the alibi evidence does not surprise or otherwise prejudice the prosecution's case, and when it is apparent that the defense acted in good faith, the exclusion of alibi evidence can constitute an abuse of discretion. *Id.*

*5 The term "abuse of discretion" connotes more than an error of law or judgment; rather, a finding of abuse of discretion is tantamount to a finding that the court's attitude or decision making was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140; *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

In this case, the trial court did not act arbitrarily or unreasonably when it enforced Crim.R. 12.1 and excluded testimony from defendant's proposed alibi witnesses. On two occasions the trial court thoroughly discussed with counsel the implications of defendant's failure to file a timely notice of alibi. The court began by noting that it had allocated funds well in advance of trial to enable counsel to conduct the investigation necessary to carry out the

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defendant's defense. Continuing, the court noted that defendant's case had been continued on a number of occasions, and that between four and six status conferences had been conducted. In its own words, the court stated:

* * * I have continued this case a number of times, and as I indicated yesterday, I've had 4 or 5 or 6 status conferences, pretrials, and I think it's fair to say I have given everything to the defense that they have asked. * * * I'm at a loss, complete loss to know why this investigator comes up with this alibi on the 3 rd of October, after the trial has begun, when I authorized money for investigation in this case in March, during which time the defendant's [sic] been in the Franklin County Jail available to you to speak to on a daily basis if you so desired. And between March and now the defendant has been in open court 5 or 6 times on different motions and hearings. And again, I reiterate what I said yesterday, when your are talking about an alibi, that couldn't be more unsophisticated. The alibi is simply that: I, the defendant, stayed overnight with a friend in Youngstown on the date in question. I have no information that indicates this friend has been difficult to locate. * * * This alibi, I reiterate, did not require any sophisticated testing with regard to blood, DNA, or anything like that * * *. So I have to question it being withheld in bad faith. I can't - I have been given no reason whatsoever, nor do I know of one why this couldn't have been verbally given by the defendant to counsel a long time ago. * * *

* * * I am not talking about an alibi that was filed a little late, I'm talking about an alibi, as far as I know, is still not in my file. I'm talking about an alibi that I first got notice of the same day we impaneled the jury and jeopardy attached. I'm talking about a totally unsophisticated alibi that requires no particular investigation beyond a phone call to Youngstown, Ohio, no test, no scientific evidence, [and] no investigation * * *. [Tr. Vol. II, at 54-57.]

On the record, defense counsel stated only that the

notice of alibi had been untimely filed due to the fact that their investigator had forwarded a report concerning his activities to counsel only three days prior to trial. We too have to question then, at a minimum, why counsel failed to file the notice of alibi that day or request an extension before jury selection began, and before jeopardy attached. Moreover, given the nature of his defense, it would seem almost impossible for defense counsel to conclude even their first meeting with the defendant without discussing defendant's claim that he was in Youngstown on the night that Coleman was murdered. Indeed, although defense counsel did not reveal to the court exactly when they became aware of defendant's alibi witnesses, counsel did state on the record that they had knowledge of the witnesses before the report of the investigator was ever concluded.

THE COURT: Why didn't you file a Notice of Alibi when you found out about it? * * *

[COUNSEL]: Your Honor, I don't recall the exact date, but in all candor to the court, I'm not going to sit here and suggest I just found out yesterday.

THE COURT: I'm sorry?

[COUNSEL]: I don't recall the exact date, but I'm not going to sit here and suggest to the court in all candor that I just found out yesterday. That would not be the case. [Tr. Vol. II, at 61-62.]

Given the foregoing, we are unable to agree with defendant's claim that the trial court erred when it found strong evidence suggesting that the notice of alibi had been withheld at least knowingly and perhaps in bad faith.

As for the second prong of the test, we believe that the last minute request to allow the testimony of defendant's friend and girlfriend both surprised and prejudiced the prosecution. As set forth by counsel for the state, the prosecution had no notice of alibi, no opportunity to interview or investigate defendant's proposed alibi witnesses, and was prejudiced by the apparent tactics of defense counsel as to the alibi defense. Specifically, counsel had fully prepared the state's case and trial strategy while under

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the impression that defendant did not plan on calling alibi witnesses. Thus, at an absolute minimum, the prosecution would have required a significant continuance in order to conduct last minute investigation and discovery pertaining to the defendant's alleged alibi witnesses.

However, prior to defendant's disclosure, the parties and the court had completed the arduous process of empanelling a jury in a capital murder case. Because defendant waited until after jeopardy attached, the court was unable to postpone jury selection in order to grant the prosecution a continuance without unduly burdening the members of the jury. Moreover, having readied defendant's case for trial, the court had cleared its calendar of other matters which could have received its attention and, thus, would have unnecessarily delayed justice to other litigants who were ready to proceed to trial.

We find the facts presented in this case parallel those in *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128, wherein the Ohio Supreme Court upheld rejection of alibi evidence in an aggravated robbery prosecution. In *Smith*, the Supreme Court found that the prosecution was unaware of the identity of the alibi witness and had no opportunity or motive to question those witnesses such that it would have suffered prejudice by the introduction of the defendant's alibi testimony. *Id.* at 104, 477 N.E.2d 1128.

*7 Although no formal hearing to establish counsel's reasons for noncompliance with Crim.R. 12.1 was held in *Smith*, in this case the court allowed counsel on two different occasions to argue the matter. Therefore, the facts of this case are more compelling than those in *Smith* where the court disposed of the defendant's claim noting that:

Counsel is required to consult with his client on important trial decisions. The record is devoid of any suggestion that counsel failed to communicate this tactic to the appellee. Thus, we assume that the appellee chose to disregard the notice-of-alibi rule, having the potential concomitant effect of depriving the state of a fair trial. If indeed

the appellee's choice was based upon the advice of counsel, his claim must be directed to the advisability of the strategy. We are ever-mindful of the great latitude given counsel in matters of trial strategy. We are also cognizant of the possibility, however remote, that the appellee was not informed of this strategy. In either event, the appellee is entitled to pursue the matter by means of postconviction relief pursuant to R.C. 2953.21, *et seq.* [*Id.* at 101, fn. 1, 477 N.E.2d 1128.]

Although given ample opportunity to do so, defense counsel offered no explanation for why defendant's notice of alibi had not been filed within the minimum requirements of Crim.R. 12.1. Again, although noting that counsel had been aware of these witnesses, counsel did not state that their failure to disclose those witnesses had been a tactical decision, had been a result of circumstances outside their control, or had constituted mere oversight or neglect. As the prosecution had no notice of defendant's intent to present an alibi defense, no opportunity or reason to conduct an investigation and discovery in regard to defendant's proposed witnesses, and in light of the fact that defendant waited until jeopardy attached, we are unable to conclude that the trial court erred when it enforced the rules of criminal procedure. Defendant's second assignment of error is, accordingly, overruled.

In his first assignment of error, defendant claims the trial court erred when it denied his motion to discharge his court-appointed counsel. The Ohio Supreme Court has ruled that "[t]o discharge a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." *State v. Henness* (1997), 79 Ohio St.3d 53, 65, 679 N.E.2d 686, quoting *State v. Coleman* (1988), 37 Ohio St.3d 286, 525 N.E.2d 792.

Immediately after the trial court made its final ruling excluding defendant's alibi witnesses, defendant stood and addressed the court saying:

*8 * * * I'm questioning that my witnesses and

the preparation of my case was not properly submitted at the right time. And I feel that being that it was not presented at that right time, that I should be able to be allowed to get proper counsel that can get all my paperwork and all the things that my defense should be properly stated. [Tr. Vol. II, at 73.]

In *Heness, supra*, the Supreme Court noted marked "personal differences" between the defendant and one of his appointed attorneys. Specifically, the court record reflected that the defendant had claimed that counsel had pursued strategies against his wishes, lied to him, given bad advice, and violated the attorney-client privilege. The defendant referred to his attorneys as "clowns," and appointed counsel acknowledged that a great deal of hostility and tension existed between counsel and client. Although the court stated that it was "clear" that hostility existed between counsel and client, it went on to find that neither the personality conflict nor the attorney's representation had been eroded to the point of rendering the attorney's representation ineffective.

There is no indication in this case that the attorney-client relationship between defendant and his appointed counsel had deteriorated or become compromised. Defendant did not allege that he had been unable to communicate with appointed counsel, nor did defendant indicate that any conflict of interest existed with counsel. Rather, defendant voiced his dissatisfaction with the court's ruling in regard to his alibi defense. Defendant's dissatisfaction with the court's ruling, however, is insufficient to obtain relief under *Heness*. Accordingly, the trial court correctly denied defendant's motion to discharge counsel. The first assignment of error is, accordingly, overruled.

In his third assignment of error, defendant claims that remarks made by the prosecution during closing argument amounted to plain error. Specifically, defendant cites the following portion of the transcript taken during the course of the prosecution's closing argument:

You heard defense cross-examine detectives and the print people, the latent lift people that there were prints of value that they didn't check. Did you specifically check Pete Davis' or G-man's? Came in here, they are trying to insinuate Pete Davis and G-man were in there, that they perhaps killed him.

You heard the latent lift examiner testify about a machine called AFIS. It's an automated fingerprint system. And that machine, she said people in Franklin County, Pete Davis, G-man are from, G-Money are from, takes all the prints of all those people in that computer in Franklin County and runs them automatically. Nothing hit. Pete Davis' prints didn't come up and G-man's didn't come up. G-Money's prints didn't come up. So through AFIS their prints were crossed and they didn't come up. [Tr. Vol. VI, at 960-961.]

The test for prosecutorial misconduct during the course of closing argument is whether the remarks were improper, and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. As defense counsel failed to object to the foregoing argument, the comments made must amount to plain error. *State v. White* (1998), 82 Ohio St.3d 16, 22, 693 N.E.2d 772.

*9 In order to determine whether a prosecutor's remarks are prejudicial to the accused, the entire closing argument must be reviewed. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203. Keeping in mind that both the prosecution and defense have wide latitude in closing arguments as to what the evidence has shown and what inferences may be drawn therefrom, under a plain error analysis we are unable to agree that the foregoing remarks are of such a magnitude as to require reversal. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293. Stated alternatively, when reviewed in context, the prosecutor's remarks, even if improper, do not rise to the level at which we could find that the defendant would not have been convicted in the absence of those remarks. See *State v.*

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Tumbleson (1995), 105 Ohio App.3d 693, 700, 664 N.E.2d 1318. Accordingly, defendant's third assignment of error is overruled.

In his fourth and final assignment of error, defendant maintains that he received ineffective assistance of trial counsel in violation of his rights under the Ohio and United States Constitutions.

In order to succeed upon his claim of ineffective assistance of counsel, defendant must show both that his counsel's representation was flawed and that he suffered material prejudice as a result thereof. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674. We note the presumption echoed by the United States Supreme Court in *Strickland*, that a properly licensed attorney is presumed competent. As such, judicial scrutiny of a trial attorney's performance is appropriately deferential. *Id.*

As the United States Supreme Court noted in *Strickland*, "[t]here are countless ways to provide effective assistance in any given case." *Id.* at 689; 2065. As such, the essential question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690; 2065. Thus, the defendant's burden when asserting a claim of ineffective assistance is to show that "there exists a reasonable probability that, were it not for counsel's errors, the result of trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Stated differently, the crux of a claim of ineffective assistance of counsel is not to improve the quality of otherwise adequate legal representation. *Strickland*, at 689; 2065.

Defendant's first claim of ineffective assistance relates to the failure of trial counsel to object to testimony that two handguns had been confiscated from defendant's Youngstown residence at the time of his arrest, and testimony that defendant had been stopped in his vehicle while out on bond at which time another handgun was confiscated.

*10 In this case, defendant took the witness stand

and testified in his own defense. In the course of doing so, defendant was forthcoming about the details of his arrest and subsequent traffic stop. Given the fact that defendant testified and was thereby subject to examination by the prosecution, it would seem prudent trial strategy to directly and openly address the fact that handguns were confiscated from his possession in order to dispel or prevent the prejudicial impact which would occur if that information were elicited on cross-examination. Additionally, part of the defense strategy in this case was geared toward demonstrating the violent nature of Coleman and his associates, and that defendant had armed himself against possible retaliation by Coleman's friends. Significantly, counsel clearly demonstrated that none of the weapons found in the defendant's home or vehicle fired the shots which killed Coleman and injured Williams. Moreover, defendant testified that he feared retaliation from Coleman's associates.

Under the circumstances of this case, we are unable to find that a reasonable possibility exists that the result of defendant's trial would have been different if counsel had attempted to suppress this information. We again repeat the court's finding in *Strickland* that "[t]here are countless ways to provide effective assistance in any given case." *Id.* at 689; 2065. In this case we find counsel's strategy to be one of many sound approaches given the nature of this case.

In his second claim, defendant argues that counsel was ineffective because counsel did not object to the above-cited portion of the prosecutor's closing argument. Applying the applicable standard, we are also unable to find that a reasonable probability exists that the result of this trial would have been different had defense counsel lodged an appropriate objection. Stated alternatively, although we can think of no strategic reason behind failing to object to portions of the prosecutor's closing argument, which are not fairly based upon the evidence introduced at trial, here it does not appear reasonable, or even probable, that the result of this trial would

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have been different had the appropriate objection been lodged.

In his third claim, defendant maintains that counsel were ineffective for not timely filing defendant's notice of alibi. As noted, counsel did clearly indicate that they were aware of the alibi witnesses before the disclosure deadline set forth in Crim.R. 12.1; however, the record contains no explanation of the reason behind the late disclosure. For example, the record does not disclose whether trial counsel failed to investigate or to interview defendant's alleged alibi witnesses. As a result, we are unable to reach a determination as to whether the delay was the result of trial strategy or was due to counsel's ineffectiveness as alleged. As the reason for the late disclosure is not a part of the record before this court, defendant must pursue his claim of ineffective assistance based upon the late disclosure by way of a motion for postconviction relief.

In his fourth and final claim, defendant asserts that defense counsel were ineffective because they failed to object to hearsay testimony. Specifically, defendant points to counsel's failure to object to testimony given by Coleman's mother regarding a telephone call made by Todne Williams from the hospital emergency room immediately after the shooting. Defendant also points to counsel's failure to object to testimony that the Youngstown Police Department purportedly identified Jerome Woods as a "known associate" of the defendant.

*11 Having considered defendant's arguments, we are unable to find that there exists a reasonable probability that, were it not for counsel's decision not to object to those portions of the testimony, the result of this trial would have been different. Accordingly, defendant's fourth assignment of error is overruled.

For the foregoing reasons, all four of defendant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and DESHLER, JJ., concur.

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END OF DOCUMENT

OHIO CONSTITUTION, ART. I, §2

**§ 1.02 Right to alter, reform, or abolish government, and repeal special privileges
(1851)**

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

OHIO CONSTITUTION, ART. I, §10

§ 1.10 Trial for crimes; witness (1851; amended 1912)

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 3, 1912.)

OHIO CONSTITUTION, ART. I, §16

§ 1.16 Redress in courts (1851, amended 1912)

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(As amended September 3, 1912.)

U.S. CONSTITUTION, 5th AMENDMENT

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION, 6th AMENDMENT

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONSTITUTION, 14th AMENDMENT

Amendment XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FEDERAL RULE OF CRIMINAL PROCEDURE 43

Rule 43. Defendant's Presence

(a) **When Required.** Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

(b) **When Not Required.** A defendant need not be present under any of the following circumstances:

(1) **Organizational Defendant.** The defendant is an organization represented by counsel who is present.

(2) **Misdemeanor Offense.** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

(3) **Conference or Hearing on a Legal Question.** The proceeding involves only a conference or hearing on a question of law.

(4) **Sentence Correction.** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) **Waiving Continued Presence.**

(1) **In General.** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

- (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
- (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
- (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) **Waiver's Effect.** If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

RULE 24 Trial Jurors

(A) Brief introduction of case. To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) Examination of prospective jurors. Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry.

(C) Challenge for cause. A person called as a juror may be challenged for the following causes:

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury that found the indictment in the case.

(4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (B)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (B) of this rule shall be determined by the court.

(D) Peremptory challenges. In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the Rules of Criminal Procedure has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another prospective juror shall be called who shall take the place of the prospective juror excused and be sworn and examined as other prospective jurors. The other party, if that party has peremptory challenges remaining, shall be entitled to challenge any prospective juror then seated on the panel.

(F) Challenge to array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (A) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) Alternate jurors.

(1) Non-capital cases. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. Except in capital cases, an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases. The procedure designated in division (F)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict. No alternate juror shall be substituted during any deliberation. Any alternate juror shall be discharged after the trial jury retires to consider the penalty.

(H) Control of juries.

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(a) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases. After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases. After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer. Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) Taking of notes by jurors. The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) Juror questions to witnesses. The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

(1) Require jurors to propose any questions to the court in writing;

(2) Retain a copy of each proposed question for the record;

(3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;