

IN THE SUPREME COURT OF OHIO

09-0091

STATE OF OHIO,  
Appellee

: Case No. C-070653  
: Trial Nos. B-0100608, B-0402869 &  
: B-0606586

vs.

RALPH CARUSONE,  
Appellant

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APPEAL FROM THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT  
HAMILTON COUNTY, OHIO

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MEMORANDUM OF APPELLANT  
IN SUPPORT OF JURISDICTION

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ISSUES OF THIS CASE RAISE SUBSTANTIAL CONSTITUTIONAL  
QUESTIONS AND ARE OF GREAT PUBLIC INTEREST

This matter raises constitutional questions and questions of great public interest concerning due process rights, "other acts" evidence, ineffective assistance of counsel, prosecutorial and judicial misconduct, the evidence needed for a conviction, sentencing, and structural errors in indictments.

STATEMENT OF THE CASE AND PROCEDURAL POSTURE

In Case No. B-0100608, on December 27, 2000 in Hamilton County, Ohio, Ralph Carusone recklessly caused the death of Gerald Hacker.

In Case No. B-0402869, on March 20, 2004 in Hamilton County, Ohio, Mr. Carusone possessed cocaine.

In Case No. B-0606586, on July 23, 2006 in Hamilton County, Ohio, an incident occurred which resulted in Mr. Carusone being arrested and indicted for the murder of Derek Rininger. In the early morning hours of July 23, Mr. Rininger died of stab wounds to the arm and chest. Village of Addyston Police and the Hamilton County Sheriff's Department responded to the scene where Mr. Rininger was still alive. A short time later, Mr. Rininger died.

Two eyewitnesses were identified by police, Jennifer Kron and Melinda Scalf. Jennifer was the mother of Mr. Rininger's children; Melinda was her roommate. Both testified that Mr. Rininger had called in the early morning of July 23 and argued with Melinda over money he had stolen. Both testified that they left to meet him, accompanied by Mr. Carusone who had just met Jennifer a few days before. Both testified that when they arrived at the apartment where Mr. Rininger lived, he ran out to the car. Melinda stated that he was screaming and cussing. Both testified he went to the passenger window where Mr. Carusone sat. Melinda testified that he

attacked Mr. Carusone, whom then exited the vehicle. Both witnesses testified the two men fought, but neither could give any details. Mr. Carusone then got back into the car; according to the two women, Mr. Rininger then came around to the driver side. Depending on the witnesses' viewpoint, he either begin fighting with Jennifer, Mr. Carusone, or attempted to take the keys. Jennifer then drove off.

Jacob Carroll then testified he had seen Mr. Carusone the night or two before with a knife; however, no knife was ever found on Mr. Carusone or at the scene of the fight. Mr. Rininger, however, was found to be in possession of a knife when he died. It was also discovered that Mr. Rininger had several types of drugs and alcohol in his system at the time of his death. Harry Plotnick, a defense witness, testified that these drugs and alcohol could have made Mr. Rininger violent.

On August 30, the jury found Mr. Carusone guilty of 1 count of murder; he was acquitted of the remaining charge.

Based on this evidence, Mr. Carusone was indicted for 2 counts of murder on July 28, 2007. The case was continued for several months, with defense counsel filing a Motion for Disclosure of Favorable Evidence on November 7, 2006 and a Demand for Disclosure of Favorable Evidence on May 3, 2007. The State did not respond to that motion until June 8, 2007. Defense counsel then filed a Motion to Dismiss on July 13, 2007 which was denied by the trial court. On August 20, 2007, a jury trial begin. The trial continued until August 30, when the jury returned a verdict of guilty for Count 2, but not guilty to Count 1. Mr. Carusone was sentenced to 15 years to life on Count 2.

On February 20, 2001, Defendant-Appellant Ralph Carusone, was indicted for 2 counts of

murder and 1 count of felonious assault in Case No. B-0100608. After a jury trial, he was convicted of 1 count of involuntary manslaughter and 1 count of reckless homicide and sentenced to a total of 7 years. That conviction was overturned by the First District Court of Appeals in State v. Carusone (March 7, 2003), Hamilton Cty. App. No. C-010681, 2003 Ohio 1018, unreported. Mr. Carusone then pled guilty to one count of reckless homicide on September 18, 2003. He was sentenced to community control and given credit for 825 days served. He violated that community control and was restored and continued, but sentenced to River City Correctional Facility on January 28, 2004. After he was convicted of murder in Case No. B-0606586, his community control was revoked and he was sentenced to prison for a total of 6 years, consecutive.

In Case No. B-0402869, Mr. Carusone was indicted for 1 count of possession of cocaine on April 5, 2004. He pled guilty and was placed on community control, but also sentenced to River City Correctional Facility. After he was convicted of murder in Case No. B-0606586, his community control was revoked and he was sentenced to prison for 12 months, consecutive.

An appeal was timely filed in all 3 cases on September 6, 2007 in the First District Court of Appeals. Except for small portions of the Fourth and Tenth Assignments of Error and the Eleventh Assignment of Error, that appeal primarily dealt with Case No. B-0606586. A Decision affirming the judgment of the trial court was entered on December 10, 2008 by the First District Court of Appeals; it is from that Decision which Appellant appeals.

#### FIRST ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of the Appellant by finding him guilty of murder, as those findings were not supported by sufficient evidence, and the State failed to meet its burden of proof.

An appeal challenging the sufficiency of the evidence tests whether or not the evidence introduced at trial is legally sufficient to support a verdict. State v. Thompkins (Ohio 1997), 78 Ohio St.3d 380, 678 N.E.2d 541. Evidence is insufficient to support a conviction if, “after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could [not] have found all the essential elements of the offense beyond a reasonable doubt.” State v. Martin (Ohio App. Ct. 1983), 20 Ohio App.3d 172, 485 N.E.2d 717. A claim of insufficient evidence, being about due process, raises a question of law, and does not allow a court to weigh the evidence. See Jackson v. Virginia (1979), 443 U.S. 307.

In the case at bar, the jury found Mr. Carusone guilty of murder, despite the fact that it was clear he acted in self defense. All witnesses stated that Mr. Rininger appeared to be the aggressor; at least one witness at the scene testified that Mr. Rininger had actually attacked Mr. Carusone. There was also ample evidence that Mr. Rininger was under the influence of alcohol and numerous drugs which clearly could have been the reason he was violent and aggressive. No one actually saw the stabbing; no knife was ever discovered on Mr. Carusone. In fact, the only knife found was on Mr. Rininger who very well could have threatened Mr. Carusone with it.

No reasonable trier of fact could find beyond a reasonable doubt that Mr. Carusone was guilty of murder. The conviction was not sustained by sufficient evidence, and such conviction should be overturned.

#### SECOND ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of the Appellant by finding him guilty of murder, as those findings were contrary to law, and were against the manifest weight of the evidence.

In examining a claim that the judgment was against the manifest weight of the evidence, the test is much broader than the test involved with the claim of insufficient evidence. The court reviews "the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." State v. Martin (Ohio App. Ct. 1983), 20 Ohio App.3d 172, 485 N.E.2d 717. This power to order a new trial should be exercised in the case in which the evidence weighs heavily against the conviction, see Tibbs v. Florida (1982), 457 U.S. 31; and if the court determines that a reasonable trier of fact could not have concluded, from the evidence presented, that the defendant was guilty, a new trial can be ordered. Martin at 175, 485 N.E.2d at 720-21.

In the case at bar, the jury clearly "lost its way" in concluding that Mr. Carusone was guilty of murder. If this court reviews the entire record, including the transcripts of the trial, and weighs all the evidence, there can only be one conclusion. The jury clearly lost their way and created a manifest miscarriage of justice. Therefore, a new trial should be ordered, as Mr. Carusone was convicted against the manifest weight of the evidence.

### THIRD ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of the Appellant by overruling his Motion for Acquittal under Ohio Criminal Procedure Rule 29, as the State failed to meet its burden of proving that Appellant was guilty of murder.

In determining whether a trial court erred in overruling a motion for acquittal under Rule 29, the question is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proven

beyond a reasonable doubt. State v. Williams (Ohio 1996), 74 Ohio St.3d 569, 660 N.E.2d 724, cert. denied, 117 S. Ct. 109; State v. Bay (Ohio App. Ct. 1998), 130 Ohio App.3d 772, 721 N.E.2d 421; State v. Echols (Ohio App. Ct. 1998), 128 Ohio App. 3d 677, 716 N.E.2d 728. A motion for acquittal should be granted if evidence is so slight or of so little probative value that reasonable minds must have reasonable doubts as to guilt. State v. Gaul (Ohio App. Ct. 1997), 117 Ohio App.3d 839, 691 N.E.2d 760, dismissed, appeal not allowed, 70 Ohio St.3d 1457, 681 N.E.2d 440.

The evidence presented in this case was so slight that, as a matter of law, it was insufficient to support the jury's decision. No reasonable trier of fact could find beyond a reasonable doubt that Mr. Carusone murdered Mr. Rininger. Therefore, the trial court erred in overruling Mr. Carusone's Motion for Acquittal, and his conviction should be overturned.

#### FOURTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of Appellant by imposing a sentence that is contrary to law because it was excessive.

Ohio courts are now required to comply with the guidelines and procedures set forth under R.C. Sections 2929.11 through 2929.14. Under Section 2929.12, a trial court initially considers the seriousness of the crime and the likelihood of recidivism. The court then considers and is guided by the degree of the felony in determining whether to impose a prison term under Section 2929.13. Mr. Carusone was convicted of murder, carrying a mandatory 15 years to life; he had also been convicted of a felony of the third degree with a gun specification, carrying 1 to 5 years incarceration plus 1 year on the gun specification and a felony of the fifth degree, carrying 6-12 months incarceration.

Finally, under Section 2929.14, the court is guided by the basic range of prison terms, as

well as various criteria for imposing both the maximum sentence and consecutive sentences for multiple offenses.

In the case at bar, the trial court sentenced Mr. Carusone to maximum, consecutive sentences, for a total of 22 years to life. This sentence, although within the sentencing range and not contrary to law, was an abuse of the trial court's discretion, as it was erroneous and excessive. See State v. Kalish (Ohio 2008), 120 Ohio St.3d 23, \_\_\_ N.E.2d \_\_\_, 2008 Ohio 4912. The trial court erred in sentencing Mr. Carusone. Therefore, Mr. Carusone's sentence should be vacated or modified.

#### FIFTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

Appellant was prejudiced by the structural defect in his indictment, where the indictment omits the *mens rea*, a necessary element of the offense.

On April 9, 2008, this Court held that an indictment that fails to charge a *mens rea* element of a crime is so defective that it resulted in structural error which need not be raised at trial. Further, this Court found that structural errors are "constitutional defects" which deprive a defendant of a constitutional right. As the defective indictment was a structural error that "permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence," the defendant's conviction had to be reversed. State v. Colon (Ohio 2008), 118 Ohio St.3d. 26, 885 N.E.2d 917, 2008 Ohio 1624 (Colon I); see also State v. Perry (Ohio 2004), 101 Ohio St.3d 118, 802 N.E.2d 643, 2004 Ohio 297. This Court found support for its position in Art. I, Section 10 of the Ohio Constitution which states that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." It also stated that the defendant's due process rights were violated because he had no notice of what *mens rea* the State

was required to prove.

In the case at bar, Mr. Carusone was convicted of the charge of murder in Count 2 of the indictment; he was acquitted of the charge of murder in Count 1. No where in Count 2 of the indictment is a culpable mental state mentioned. It only states that Mr. Carusone “caused the death of Derek Rininger as a proximate result of the defendant committing or attempting to commit an offense of violence. . . “ This indictment was defective and resulted in a structural error that permeated the proceedings. Therefore, Mr. Carusone was prejudiced by this error; his conviction must be vacated.

#### SIXTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of the Appellant by not dismissing the charges against him, as his due process rights were violated by the state’s failure to timely produce favorable evidence, causing a nine- month delay in bringing him to trial

In Brady v. Maryland (1963), 373 U.S. 83, the United States Supreme Court held that the prosecution’s suppression of evidence favorable to a defendant violated due process, regardless of the state’s good or bad faith.

In the case at bar, the State failed to respond to Mr. Carusone’s request for favorable evidence for 9 months. This resulted in a substantial delay which violated Mr. Carusone’s due process rights, as well as his rights to a speedy trial under R.C. Section 2945.71. Therefore, the trial court erred when it failed to grant Mr. Carusone’s Motion to Dismiss. His conviction should be vacated.

#### SEVENTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of the Defendant-Appellant by allowing “other acts” evidence.

Evid. R. 404(B) provides for that “[e]vidence of other crimes, wrongs, or acts is not

admissible to prove the character of a person in order to show that he acted in conformity therewith.”

In the First District Court of Appeal’s decision of Mr. Carusone’s previous appeal of his convictions in Case No. B-0100608, the Court found the trial court committed reversible error by admitting improper “other acts” evidence that Mr. Carusone carried a gun. State v. Carusone (March 7, 2003), Hamilton Cty. App. No. C-010681, 2003 Ohio 1018, unreported. In Case No. B-0606586, it appears the trial court committed the same reversible error by allowing a witness to testify regarding the fact that Mr. Carusone carried a knife. Therefore, Mr. Carusone’s conviction for murder should be reversed.

#### EIGHTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

Appellant was denied his rights of due process and of assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution because his trial counsel provided ineffective assistance.

The primacy of the right to counsel has been recognized by the United States Supreme Court. In United States v. Cronin (1984), 466 U.S. 648, 654, the Supreme Court stated that “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”

The test for determining whether counsel has been effective in her representation is whether there has been a substantial violation of any of defense counsel’s essential duties to the client, and whether the defense was prejudiced by counsel’s ineffectiveness. Strickland v. Washington (1984), 466 U.S. 668; State v. Bradley (Ohio 1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. den., (1990), 497 U.S. 1011; State v. Hester (Ohio 1976), 45 Ohio St.2d 71, 341 N.E.2d 304; State v. Yarber (Ohio App. Ct. 1995), 102 Ohio App.3d 185, 656 N.E.2d 1322.

Trial counsel's deficiencies in performance must fall below the objective standard of reasonableness, and there must be a reasonable probability that, were it not for trial counsel's errors, the result of the trial would have been different.

In the case at bar, counsel for Mr. Carusone never objected to the "other acts" evidence presented by the prosecutor. He also did not ask for a lesser-included instruction on voluntary manslaughter, should the self defense claim not be accepted by the jury. Finally, he did not insure that Mr. Carusone was given the proper days credit for time served at the sentencing on Case No. B-0100608. Therefore, Mr. Carusone was prejudiced by defense counsel's ineffectiveness; his convictions should be vacated.

#### NINTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

Appellant was prejudiced by the prosecutor's misconduct.

The test for prosecutorial misconduct is whether remarks are improper and, if so, whether they prejudicially affect substantial rights of the defendant. State v. Smith (Ohio 1984), 14 Ohio St.3d 13, 14-15, 470 N.E.2d 883, 885-886; see also State v. Lott (Ohio 1990), 51 Ohio St.3d 160, 555 N.E.2d 193. "It is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution's improper remarks. Instead, it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty." Smith, syllabus by the court, head note 3.

In the case at bar, the prosecutor's committed several instances of misconduct. Initially, as stated previously, the prosecutor did not comply with Mr. Carusone's request and demand for disclosure of favorable evidence on a timely basis. Next, in closing argument, the prosecutor urged the jury to consider the improper "other acts" evidence which was the testimony of Mr.

Carroll regarding the fact that Mr. Carusone may have carried a knife in the past. She also argued facts not in evidence or the wrong facts: there was no evidence presented that Mr. Carusone left the altercation with a knife or later got rid of a knife, as the prosecutor stated; nor was she correct when she stated that Mr. Rininger came unarmed. It was apparent that he had a pocket knife on his person when he died. All of this was improper and highly prejudicial to Mr. Carusone. Therefore, the prosecutorial misconduct in this case amounted to plain error, and Mr. Carusone's conviction should be reversed.

#### TENTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

Appellant was prejudiced by the trial court's *ex parte* communication with the jury.

During the jury's deliberations, it appears from the transcripts that there was communication between the trial judge and the jury. On one occasion, the record appears clear that the defense counsel and prosecutor were present. However, on the second occasion, the record is void as to anyone else being present besides the judge and the court reporter. Also disturbing is the fact that it appears the trial judge answered a question the jury had presented with no input or introduction of the question to defense counsel or the prosecutor. The answer to this question was vital, as it appeared to go to the heart of the self defense claim of Mr. Carusone. Because of these irregularities, Mr. Carusone was prejudiced; his conviction should be overturned.

#### ELEVENTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of Appellant by finding him guilty of community control sanction violations, his conviction should be reversed, leaving no basis for the violations.

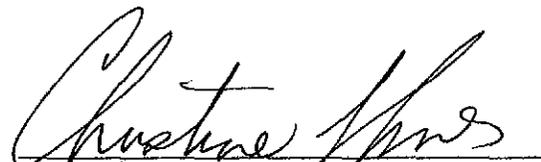
In Case Nos. B-0100608 and B-0402869, it appears in the transcript of the community

control violations hearing that the only fact proven which was the basis of the violations was Mr. Carusone's conviction for murder in Case No. B-0606586. Therefore, as it is Mr. Carusone's contention that the conviction should be reversed, it is also his contention that there was no basis for the violations. The trial court erred by finding him guilty of the violations and those findings should be overturned.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court take jurisdiction of this matter.

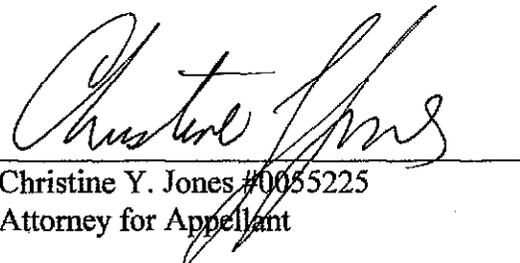
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was personally served upon Phillip R. Cummings, Hamilton County Assistant Prosecutor, this 9<sup>th</sup> day of January, 2009.

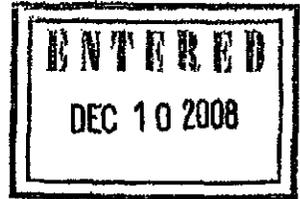


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**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**



STATE OF OHIO,	:	APPEAL NO. C-070653
	:	TRIAL NO. B-0100608
Plaintiff-Appellee,	:	B-0402869
	:	B-0606586
vs.	:	
	:	<i>JUDGMENT ENTRY.</i>
RALPH CARUSONE,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant Ralph Carusone was indicted for two counts of murder. Count one alleged that Carusone had purposefully caused the death of Derek Rininger. Count two alleged that Carusone had caused Rininger's death while committing or attempting to commit felonious assault.

On the night of the murder, Carusone was with Jennifer Kron, the mother of Rininger's children. Rininger had stolen money from Kron's roommate Melinda Scalf. Several telephone calls were made between Kron's house and Rininger. Scalf was angry over the theft and she wanted her money back. At one point, Carusone got on the telephone and taunted Rininger. Rininger told Scalf that he would return what was left of the money. Some women got on the telephone with Scalf and threatened to harm her if she came after the money.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Carusone, Kron, and Scalf got into Kron's car and drove to Rininger's house. Kron was driving. Scalf carried a bottle. Rininger came running down the steps toward the passenger side of the car where Carusone was sitting. There was conflicting testimony about whether Rininger was angry and cursing. There was also conflicting testimony about whether Rininger swung at Carusone. Carusone exited from the car and the two men fought. Carusone stabbed Rininger. Rininger then came around to the driver's side of the car and tried to take Kron's keys. Kron drove away. Rininger later died. Jacob Carroll testified that Carusone had said that he had "shanked" someone. Carroll also testified that on the night before the murder Carusone had carried a knife. Carusone argued that he had stabbed Rininger in self-defense.

The jury acquitted Carusone of count one, but found him guilty of count two. The trial court sentenced Carusone to 15 years to life in prison. When Carusone had committed the murder, he had been on community control for reckless homicide and possessing cocaine. His community control was terminated in both cases, and he was given consecutive sentences of six years and twelve months respectively.

Carusone's first assignment of error alleges that count two of the indictment contained a structural error because it did not include a required mens rea element for felony murder. The predicate offense for felony murder in count two was felonious assault, which required a mental state of knowingly.

In *State v. Buehner*,<sup>2</sup> the Supreme Court stated that "[a]n indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the

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<sup>2</sup> 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162.

indictment.” “It is the predicate offense itself and not the elements of the predicate offense that is an essential element of the charged offense.”<sup>3</sup>

In this case, as in *State v. Salaam*<sup>4</sup> and *State v. Dubose*,<sup>5</sup> the indictment indicated the predicate offense, “felonious assault,” by name and not by statute number. We held in *Salaam* and *Dubose* that a reference in the indictment to the predicate offense by name rather than by statute number was “sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged” as required by *Buehner*.<sup>6</sup> “While it would have been better either to have listed the section number for felonious assault in the indictment, bringing this case into literal compliance with *Buehner*, or to have charged felonious assault separately, the failure to do either did not render the indictment invalid.”<sup>7</sup> The assignment of error is overruled.

The second assignment of error, alleging that the trial court erred in refusing to dismiss the charges after the state had failed to timely produce favorable evidence and caused a nine-month delay, is overruled. The record shows that Carusone’s previous defense counsel had waived time and Carusone was bound by the waivers.<sup>8</sup>

The third assignment of error alleges that the trial court erred in admitting “other acts” testimony in violation of Evid.R. 404(B). Specifically, Carusone argues that the court erred in admitting testimony that he had brandished a pocketknife when out with friends at a bar the night before the murder. Because defense counsel did not object to the testimony, except to question the relevance of the prosecutor’s inquiry

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<sup>3</sup> Id. at ¶12.

<sup>4</sup> 1st Dist. Nos. C-070385 and C-070413, 2008-Ohio-4982.

<sup>5</sup> 1st Dist. No. C-070397, 2008-Ohio-4983.

<sup>6</sup> See *State v. Salaam*, supra at ¶30; *State v. Dubose*, supra at ¶31.

<sup>7</sup> See *State v. Salaam*, supra at ¶31; *State v. Dubose*, supra at ¶32.

<sup>8</sup> See *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72; *State v. McBreen* (1978), 54 Ohio St.2d 315, 376 N.E.2d 593; *State v. Matthews*, 1st Dist. Nos. C-060669 and C-060692, 2007-Ohio-4881.

about where Carusone had obtained the pocketknife, we review the admission of the evidence for plain error. On this record, we cannot conclude that the outcome of the trial would have been different if the testimony had been excluded.<sup>9</sup> The third assignment of error is overruled.

Carusone's fourth assignment of error alleges that he was denied the effective assistance of counsel. To prevail, Carusone must show deficient performance by counsel and prejudice.<sup>10</sup> To establish prejudice, Carusone must show "that there was a reasonable probability that, but for the errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."<sup>11</sup> There is a strong presumption that counsel's representation fell within the wide range of reasonable professional assistance.<sup>12</sup> Trial counsel is presumed competent and cannot be second-guessed as to debatable trial-strategy decisions.<sup>13</sup> A less than perfect performance does not necessarily result in ineffective assistance.<sup>14</sup>

We have reviewed the record, and we hold that it does not demonstrate either deficient performance or prejudice to Carusone. To the contrary, the record shows that counsel was extremely competent and presented a good defense on Carusone's behalf. The fourth assignment of error is overruled.

The fifth assignment of error alleges that Carusone was prejudiced by prosecutorial misconduct. Carusone's first argument, that the prosecutor committed misconduct by failing to timely respond to Carusone's demand for disclosure of

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<sup>9</sup> See *State v. Salaam*, supra; *State v. Dubose*, supra.

<sup>10</sup> See *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

<sup>11</sup> See *Strickland v. Washington*, supra.

<sup>12</sup> See id.

<sup>13</sup> See id.; *State v. Ushry*, 1st Dist. No. C-050740, 2006-Ohio-6287.

<sup>14</sup> See *State v. Patchell*, 1st Dist. No. C-050185, 2005-Ohio-6822.

favorable evidence, is overruled. Carusone cannot show that he was prejudiced because there is no reasonable probability that an earlier disclosure of the evidence would have changed the outcome of the trial.<sup>15</sup>

Carusone also argues that prosecutorial misconduct in the closing argument denied his rights to due process and a fair trial. Prosecutors are normally entitled to a certain degree of latitude in closing argument.<sup>16</sup> A defendant must support a claim of prosecutorial misconduct in closing argument by showing that the prosecutor's remarks were improper and that they prejudicially affected the defendant's substantial rights.<sup>17</sup> The remarks must not be viewed in isolation, but in light of the entire closing argument.<sup>18</sup> "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."<sup>19</sup> The prosecutor's conduct cannot be grounds for error unless the conduct deprives the defendant of a fair trial.<sup>20</sup> Following a review of the record, we hold that none of the instances of alleged prosecutorial misconduct in this case was so egregious as to affect Carusone's substantial rights or to deny him a fair trial. The fifth assignment of error is overruled.

The sixth assignment of error, which alleges that the trial court erred in communicating with the jury outside of Carusone's presence, is overruled. The record shows that the jury asked the court a question about self-defense. The court told the

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<sup>15</sup> See *State v. Bettis*, 1st Dist. No. C-060202, 2007-Ohio-1724.

<sup>16</sup> See *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883.

<sup>17</sup> See *id.*; *State v. Hessler*, 90 Ohio St.3d 108, 2000-Ohio-30, 734 N.E.2d 1237.

<sup>18</sup> See *State v. Keenan* (1993), 66 Ohio St.3d 402, 613 N.E.2d 203.

<sup>19</sup> See *Smith v. Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940.

<sup>20</sup> See *State v. Keenan*, *supra*; *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577.

jury to refer to the instructions. There is no prejudicial error where the trial court merely restates or offers to restate the jury instructions.<sup>21</sup>

Carusone's seventh, eighth, and ninth assignments of error allege that the trial court erred in overruling his Crim.R. 29 motion for an acquittal and that his conviction was based upon insufficient evidence and was against the manifest weight of the evidence.

Following a review of the record, we hold that the evidence was such that reasonable minds could have reached different conclusions as to whether each material element of the crime had been proved beyond a reasonable doubt.<sup>22</sup> Further, after viewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could have found that all the material elements of the crime had been proved beyond a reasonable doubt.<sup>23</sup> We also determine that the trier of fact, in resolving conflicts in the evidence, did not clearly lose its way and create such a manifest miscarriage of justice that Carusone's conviction must be reversed and a new trial ordered.<sup>24</sup> The seventh, eighth, and ninth assignments of error are overruled.

Carusone's tenth assignment of error alleges that his sentence for the murder and his sentences for the community-control violations were contrary to law because they were excessive. Under *State v. Foster*,<sup>25</sup> the trial court had the discretion to impose any sentences that were within the statutory range.<sup>26</sup> Carusone's sentences fell

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<sup>21</sup> See *State v. Abrams* (1974), 39 Ohio St.2d 53, 313 N.E.2d 823; *State v. Jones*, 8th Dist. No. 88203, 2007-Ohio-1717.

<sup>22</sup> See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

<sup>23</sup> See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Roberts*, 1st Dist. No. C-040547, 2005-Ohio-6391.

<sup>24</sup> See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

<sup>25</sup> 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

<sup>26</sup> See *State v. Hart*, 1st Dist. No. C-060686, 2007-Ohio-5740, at ¶65; *State v. Jones*, 1st Dist. No. C-060512, 2007-Ohio-5458, at ¶50.

within the applicable statutory range of prison terms, and the trial court had the discretion to impose them. For this reason, Carusone's sentences were not contrary to law.

Carusone also argues that the trial court erred in failing to correctly calculate his jail-time credit. The prosecutor agrees that the correct amount of credit cannot be determined from the record before this court and joins with defense counsel in requesting that this court remand the case for a proper calculation of jail-time credit.

A sentencing court has the duty to calculate and to journalize the amount of jail-time credit to which the defendant is entitled.<sup>27</sup> If the trial court fails in its duty, the case must be remanded to the trial court for proper calculation and journalization of the defendant's jail-time credit.<sup>28</sup>

The tenth assignment of error is overruled to the extent that it challenges Carusone's sentences and sustained to the extent that it challenges the trial court's failure to properly calculate his jail-time credit.

The eleventh assignment of error, alleging that the trial court erred in finding Carusone guilty of violating the conditions of his community control, is overruled. Carusone was properly convicted of murder, and that conviction was sufficient to support the revocation of community control.

This case is remanded to the trial court with instructions to properly calculate and journalize Carusone's jail-time credit. The judgment of the trial court is affirmed in all other respects.

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<sup>27</sup> See *State v. Weaver*, 1st Dist. No. C-050923, 2006-Ohio-5072.

<sup>28</sup> See *id.*

**OHIO FIRST DISTRICT COURT OF APPEALS**

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Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**CUNNINGHAM, P.J., DINKLACKER and WINKLER, JJ.**

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

*To the Clerk:*

Enter upon the Journal of the Court on December 10, 2008  
per order of the Court \_\_\_\_\_  
Presiding Judge