

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

Timothy J. Howard

Defendant-Appellant.

Case No. 2009-1490

On Appeal from the Franklin
County Court of Appeals
Tenth Appellate District

C.A. Case No. 08 AP 177

C.P.C. No. 06 CR 129525

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT Timothy J. Howard

Timothy J. Howard
NAME AND NUMBER

Ross Correctional Institute
INSTITUTION

P.O. Box 7010
ADDRESS

Chillicothe Ohio 45601
CITY, STATE & ZIP

PHONE

RECEIVED
OCT 28 2009
CLERK OF COURT
SUPREME COURT OF OHIO

DEFENDANT-APPELLANT, PRO SE

Ron O'Brien (0017245) Franklin County Prosecutor

Seth Gilbert (0072929) Counsel of Record
PROSECUTOR NAME

Franklin County prosecutor office 369 So High St 12th fl.
ADDRESS

Columbus Ohio 43215
CITY, STATE & ZIP

614-462-3555
PHONE

COUNSEL FOR APPELLEE, STATE OF OHIO

FILED
OCT 28 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

Pg No

Explanation of why this case is a case
of Public or Great General Interest
AND involves a substantial constitutional question 1

Statement of The Case 2

Statement of Facts 3

Proposition of Law No 1

Prosecution MISCONDUCT CAUSED & DEPRIVED
THE DEFENDANT OF A FAIR TRIAL AND DUE
PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH
AND SIXTH AMENDMENT TO THE US CONSTITUTION 7

(A) THE PROSECUTOR MISCONSTRUCTED THE EVIDENCE
TO ALIGN WITH THE THEORY OF THE STATES CASE. 8

(B) THE STATE IMPROPERLY INSINUATED APPELLANT'S
ACCOUNT AT TRIAL WAS A RECENT FABRICATION 9

Proposition of Law No 2

THE TRIAL COURT ERRORED BY REFUSING TO ALLOW THE DEFENSE
TO OFFER TESTIMONY REGARDING PREVIOUS SUICIDE ATTEMPTS BY DEFENDANT . . . 10

Proposition of Law No 3.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT . . . 12

Proposition of Law No 4.

THE VERDICT WAS AGAINST MANIFEST WEIGHT OF THE EVIDENCE . . . 13

CONCLUSION

CERTIFICATE OF SERVICE 15

APPENDIX
JUDGMENT ENTRY AND OPINION COURT OF APPEALS
FRANKLIN COUNTY ON JUNE 9 2009 A 2

SUPREME COURT ENTRY GRANTING DELAYED APPEAL A 20

Explanation of why this case is of Public or Great General Interest and involves a Substantial Constitutional Question

The Quintessential Issue Before the Court in this case is whether the death of Delbert Howard is that of a suicidal hanging or if the defendant, the husband of Delbert for 25 years is guilty beyond a reasonable doubt of aggravated murder and tampering with evidence. The defendant sought to but was denied the right to enter into evidence, evidence of prior suicide attempts by Mrs. Howard. This evidence and medical records and testimony and direct knowledge from the couple's two daughters was disallowed at trial. There was no evidence that the defendant ever committed a crime and no evidence of prior calculation and design. The prosecutor never argued this issue at anytime at trial. Suicide letters were written and left by Mrs. Howard to family members explaining her intentions which sadly she followed through with.

This case presents a question of whether a defendant which by law is presumed innocent is permitted by law in presenting a complete defence to counter the charges issued against him. Whether by law misconduct by the prosecution can be ignored when defendant is restrained from including exculpatory evidence and testimony that goes to the heart of the trial issue of this case to provide the defendant a complete defence.

Whether a conviction can be sustained with insufficient and misleading evidence. And whether by law a conviction can be sustained when the manifest weight of the evidence favours the defendant. A summary is evidence that the defendant told police officers that his wife was hanging by more than 1 point of suspension but that evidence was not allowed at trial.

This court should accept jurisdiction because this case is a felony and is of great public and general interest and involves a substantial constitutional question.

STATEMENT OF THE CASE

Appellant Timothy J. Howard was indicted by the Franklin County Grand Jury in case 06 CR 9525 on one count of aggravated murder in violation of R.C. Section 2903.01 and one count of tampering with evidence, in violation of R.C. Section 2921.12. a felony of the third degree. The offense was located in Franklin County, Ohio.

Count one alleged the appellant, with prior calculation and design, purposely caused the death of his wife, Delilah Howard. Count two alleged the defendant tampered with evidence by altering the scene to appear as though his wife committed suicide by hanging. The prosecution theory was Delilah Howard's death was not the result of a suicide hanging, but rather by ligature strangulation at the hands of her husband Timothy Howard.

A jury trial commence on January 22, 2008 before the Honorable Judge David W. Fais of the Franklin County Court of Common Pleas. On January 31, 2008 the jury returned guilty verdicts on both the aggravated murder and the tampering with evidence counts.

A sentencing hearing was conducted pursuant to R.C. Section 2929.19 on February 5, 2008. At the hearing the court proceeded to sentence the appellant to life inprison with eligibility of parole after 20 years on the aggravated murder count, consecutive to a three year term of imprisonment on the tampering with evidence count.

The total sentence imposed was twenty-three yars to life.

Appellant appeals the judgement of the Franklin County Court of Common Pleas. And the defendant-apellants breif was filed with the tenth appellate District Court of Appeals of Ohio on Dec. 1st 2008.

On June 9th 2009 The Court of Appeals of Ohio 08 AP 177 tenth Appellant District rendered a dicision affirming the judgement of the lower court. Appellant Appeals the Judgement of the Tenth Appealant District Court. To The Ohio Supreme Court.

on september 30 2009 The supreme court granted a delayed Appeal.

*THE FACTS OF THIS CASE WERE DISCUSSED
IN DETAIL IN THE BRIEF FILED BY COUNSEL IN
CASE NO. 08 AP 177*

STATEMENT OF EVIDENCE

Chris Hite a paramedic was dispatched on April 1st 2006 to the Home of Timothy and Delilah Howard on a possible suicide by hanging (TR I 162 163 173) ON ARRIVAL AT 9:51 AM Hite was met and ESCORTED BY MR HOWARD TO THE BASEMENT WHERE HITE OBSERVED MRS. HOWARD ON HER BACK (TR 164) DELILAH HOWARD WAS FOUND WITH MARKS AROUND HER NECK AND AN ELECTRICAL EKG SHOWED NO ELECTRICAL OR MECHANICAL IMPULSES (TR I 164) SHE WAS DECLARED DEAD AT 9:54 AM. (TR I 175-176). Hite testified appellant went to look for his wife noticed her in the basement. when he proceeded to check on her he observed she was hanging by a robe belt, cut her down and sat her on a chair (TR 168).

Hite did not notice any wounds on appellant appellant was upset and crying (TR I 175, 176) Jacques Whittenburger assisted Hite on the call (TR I 181 188) Whittenburger was aware appellant had called 911 and was instructed to commence CPR (TR I 191 192) HOWARD informed Whittenburger he found his wife, called 911 and placed her on the floor and started CPR (TR 188).

Whittenburger stated appellant pointed to a nail, where he found her hanging (TR I 189) NO MARKS OR SCRATHES WERE OBSERVED BY Whittenburger on appellant (TR 194).

Deputy Byrd with the Franklin County Sheriff's office was the first deputy on the scene at 9:52 AM. Byrd stated Tim Howard pointed out what appeared to be a finish nail (TR I 209-211). Byrd testified there were several nails in the vicinity at trial Byrd could not recollect the location of the alleged nail (TR I 210 218, 224)

Byrd later collected suicide letters left and addressed to family members from Delilah, that family members were found reading (TR I 215 216) Byrd testified appellant seemed upset and crying Byrd did not observe any marks on appellant (TR I 215 225).

Gary Wilgus an investigator with Ohio B.C.F. arrived at 2:34 pm on April 1st 2006 to assist in collecting evidence (TR I 9, 11, 12)

Processing the scene Wilgus removed a section of floor joist that contained a nail pointed to him by Detective Munny (TR I 34).

Wilgus also took two other samples. He later forwarded 3 nail and section of floor joist to a Canadian lab for testing (TR I 57).

Of the two additional nail sections (TR I 34) one section included a Biggen nail to the right of the one reportedly pointed out by appellant which Wilgus removed in case in the stress of the situation resulted in the wrong nail being marked (TR I 34 40 41 75).

The other nail section removed was clean of any dust or cobwebs and looked like it could have been used. Wilgus did not observe any broken nails, injuries cuts or scratches on Delilah Howard (TR 49, 50, 9, 80) Wilgus removed a chair located near the area where Delilah was found hanging (TR I 72).

John MUSTARD a forensic ENGINEER at a Lab in Ontario Canada testified for the State on the load bearing capability of the Nails AND Belt that were SUBMITTED (TR II 92, 94-117). IN EXAMINING THE 3 NAIL SECTION WILGUS CONCLUDED THE BLOCKS OF WOOD ATTACHED TO THE NAILS HAD NOT BEEN SUBJECT TO A DOWNWARD LOAD EQUAL TO THAT OF THE DECEASED WEIGHT OF 135 LBS. (TR II 101-133).

MUSTARD'S TEST WERE STRICTLY LIMITED TO ASCERTAIN IF ONE NAIL COULD SUPPORT THE WEIGHT AND NOT IF ~~more~~ ^{more} THAN ONE WERE UTILIZED. (TR II 153-154)

IN EXAMINING THE ROBE BELT MUSTARD DETERMINED THAT THE BELT WOULD LIKELY SUPPORT THE WEIGHT OF THE DECEASED. (TR 138-148)

DETECTIVE DON MURPHY TESTIFIED THAT HE WAS PRESENT BUT ASK NO QUESTION WHEN TIM HOWARD WAS INTERVIEWED AT HIS KITCHEN TABLE BY DETECTIVE BARNETTE OF THE SHERIFFS OFFICE. (TR II 158, 163, 165-170)

THE APPELLANT WROTE A WRITTEN STATEMENT THAT AFTER SEARCHING FOR HIS WIFE HE FOUND HER HANGING IN THE BASEMENT BY A ROBE BELT (TR II 165-166)

HE PROCEEDED TO GET HER DOWN, SAT HER IN A CHAIR AND CALLED 911 (30) AFTER CALLING 911 HE WAS INSTRUCTED TO PLACE HIS WIFE ON THE FLOOR AND ATTEMPTED CPR UNTIL HE WAS INSTRUCTED TO OPEN DOOR FOR MEDICS (911 200-201 TR I 200-201)

DAVID HALL A HANDWRITING EXPERT FOR THE STATE TESTIFIED THE FOUR SUICIDE NOTES WRITTEN TO FAMILY MEMBERS AND RECOVERED ON 4-1-06 WERE ALL WRITTEN BY THE SAME PERSON AND PROBABLY BY DELILAH HOWARD. TR 186-188 DUE TO LACK OF SAMPLES HE COULD NOT MAKE A DEFINATE FINDING (JE)

MICHELLE YEZZO FOR THE BC I LAB EXAMINED TAPE LIFTS OF NAILS SUBMITTED BY WILGUS AND TESTIFIED THESE NAILS DID NOT CONTAIN ANY FIBERS CONSISTENT WITH THE ROBE BELT (TR II 190-196-202) YEZZO COULD NOT TESTIFY THAT BELT DID NOT COME IN CONTACT WITH THE NAILS ONLY THAT THERE WERE NO FIBERS ON TESTED MATERIAL (TR II 203) HER ANALYSIS WERE LIMITED TO THE THREE NAILS SUBMITTED (TR # 201).

ROBIN ROGGENBECK A FORENSIC SCIENTIST FOR THE OHIO BC I LAB EXAMINED THE SUICIDE LETTERS LEFT FOR FAMILY MEMBERS BY DELILAH AND FOUND ONE INDEX FINGERPRINT THAT CAME BACK TO APPELLANT (TR II 207-216-219) NINETEEN ADDITIONAL PRINTS ON THE LETTERS WERE NOT IDENTIFIED (TR II 219).

THE PARTIES STIPULATED THERE WAS NO D.M.A. FOREIGN TO DELILAH UNDER HER RIGHT OR LEFT FINGERNAILS (TR II 225).

DETECTIVE CLARK OF THE SHERIFFS OFFICE TOOK A STATEMENT FROM APPELLANT ON 4-11-06 AT THE DETECTIVE BUREAU. APPELLANT INFORMED CLARK HE AWOKE IN THE MORNING FROM A PHONE CALL FROM HIS DAUGHTER ANBIE AND WAS LOOKING FOR DELILAH WHEN HE FOUND HER HANGING IN THE BASEMENT (TR II 245) HE EXPLAINED THAT HE HAD NO IDEA WHAT NAIL SHE WAS HANGING FROM AND THAT HE DID NOT LOOK UP TO SEE HOW IT WAS CONFIGURED (TR II 247)

DR. WARD A PARTIME DEPUTY CORONER A FELLOW IN FORENSIC PATHOLOGY CONDUCTED AN AUTOPSY ON DELILAH ON APRIL 2, 2006. (TR III 9-16)

DR. WARD HAD NEVER PREVIOUSLY PERFORMED A LIGATURE STANGULATION AUTOPSY CONCLUDED THE CAUSE OF DEATH LIGATURE STANGULATION AND RULED THE DEATH A HOMICIDE (TR III 54). (4)

DR WARD testified there was no petechial Hemorrhages which would be present in eighty seven percent of ligature strangulations (TR III 76-77) WARD did not rule out possible Hanging After conducting Her autopsy (TR III 183)

Toxicology reports came back positive for Therapeutic Levels of Wellbutrin an anti depressive medication (TR III 60).

Brenda Watson was a family friend for twenty five years (TR III 89) testified while she was separated from Her Husband and assumed Appellant was separated from His wife she had a brief affair with the Appellant in March 2006 (TR III 94 97). After seeing each other a couple of occasions and learning Appellant wasn't separated, they agreed it would be a good idea not to see each other again (TRANS III 112) & He was not interviewed by Detectives until a year after Delilah's Death. (TR III 108).

Tim Howard took the stand in His own Defense and was the first witness called by the Defense (TR III 117) He testified He was awoken by His Daughter calling His cell phone (TR III 133) In trying to locate His wife for His Daughter, Angie He found Her in The Basement Hanging By a Robe Belt (TR III 139 172). He denied ever stating to Deputy or medics that His wife was hanging only by one nail. (TR III 153, 162, 164 175). He testified that His wife was hanging by two suspension points in the ceiling. When He cut the first one her Body shifted He placed His arm around Her and unwrapped the other side (TR III 174) He did not untie any knots (TR III 175).

Howard testified there was no serious talk of Divorce that Delilah was a loving mother. (TR III 156-159) She had been in serious physical pain from a work injury since 1999. He testified that He read and touched the letters left by Delilah with His children prior to Detective taking them (TR III 147-148)

DR DANA a Board certified Forensic Pathologist testified for the defense after reviewing Autopsy & Medical Records of Delilah (TR IV 8, 13, 18).

DR DANA concluded the evidence showed that this was not a ligature strangulation by rather a suicidal Hanging (TR IV 56).

DR DANA found no evidence of petechial Hemorrhages which would be present in 86% of ligature strangulation. Further in ligature strangulation the lips and gums would not be pale rather they would be congested and purplish (TR IV 26 37 45 49) Here the face was uncongested no petechia present and no blood present in the nostrils and mouth which ~~was~~ would be indicative of a Hanging (TR IV 37 45). She found the Hyoid bone intact consistent with Hanging (TR IV 48).

DANA stated it was clear the furrow marks angled upward into an inverted V indicating a Hanging (TR IV 32).

ANGIE HOWARD TESTIFIED FOR THE DEFENSE THAT SHE WAS THE DAUGHTER OF TIM AND DELILAH HOWARD AND WOULD TALK TO HER MOTHER ALMOST EVERY DAY (TR IV 91) SHE STATED SHE ARGUED WITH HER MOTHER ABOUT THE NUMBER OF PILLS DELILAH WOULD TAKE AND DIDN'T REALIZE HOW MUCH PAIN HER MOTHER WAS IN (TR IV 88 91-92)

IN THE LAST WEEK OF HER MOTHER'S LIFE DELILAH APPEARED SAD, DRAINED, STRESSED OUT UPSET AND WAS NOT TAKING HER MEDICINE (TR IV 98 99). THE WEEK PRECEDING HER DEATH SHE WAS CONTINUALLY TRYING ON NEW OUT FITS AND DOING HER HAIR AND MAKEUP. (TR IV 99)

ANGIE PROCEEDED TO READ TO THE COURT ONE OF THE SUICIDE LETTERS LEFT BY HER MOTHER APOLOGIZING FOR WHAT SHE HAD DONE (TR IV 108).

AMANDA HOWARD TESTIFIED FOR THE DEFENSE THAT SHE WAS THE DAUGHTER OF TIM AND DELILAH AND THAT HER MOTHER WAS ABUSING PRESCRIPTION MEDICATION (TR IV 135-137) AMANDA HAD PREVIOUSLY DISCOVERED DEE PASSED OUT WHILE WATCHING AMANDA'S CHILD (TR IV 35) HER MOTHER WAS NOT HAPPY WITH HERSELF (TR IV 140) AMANDA DISCOVERED THE SUICIDE LETTERS WRITTEN TO THE FAMILY FROM HER MOTHER TO FAMILY MEMBERS ON 4-1-06 (TR IV 146 147).

RAY FARLEY A RETIRED COLUMBUS POLICE FORENSIC EXAMINER IN DOCUMENTS TESTIFIED THE LETTERS IN HIS EXPERT OPINION WERE WRITTEN BY DELILAH HOWARD (TR IV 130).

ATTY TERRY STEPHENS TESTIFIED FOR THE DEFENSE THAT HE CONSULTED WITH THE APPELLANT PRIOR TO MEETING WITH DETECTIVES ON 4-11-06 AND MADE NOTES THAT TIM HOWARD REFERENCED TWO POINTS OF SUSPICION WHEN HE FOUND HIS WIFE HANGING (TR V 22).

DENNIS MCGARRY A METALLURGICAL ENGINEER TESTIFIED FOR THE DEFENSE AS AN EXPERT. HE INSPECTED THE STATES EVIDENCE AND CONDUCTED TEST ON A SIMILAR NAIL IN APPELLANT'S BASEMENT. HE DETERMINED A COMMON NAIL DID NOT BEND AT 100 LBS BUT THERE WAS SLIGHT DOWNWARD MOVEMENT AT 150 LBS (TR IV 14)

MCGARRY CONCLUDED TWO NAILS COULD HAVE SUPPORTED 140 LBS. (TR V 44, 45) THERE ARE VARIOUS CONFIGURATIONS WHERE A FINISH NAIL AND A COMMON NAIL COULD HAVE SUPPORTED HEAVIER WEIGHT THAN JUST ONE ON THEIR OWN (TR V 45)

MCGARRY OBSERVE A COMMON NAIL TWENTY FIVE INCHES BESIDE FROM THE CUT OUT JOIST IN APPELLANT'S HOUSE THAT WAS BENT SLIGHTLY DOWNWARD.

MCGARRY TESTIFIED THE DEFENSE EXPERIMENTS TOOK AN AVERAGE INDICATION WHEREAS HE BELIEVES THE STATES EXPERT HAD THE LOAD BEARING WEIGHT OUT FROM THE WOOD ALLOWING IT TO BEND EASIER (TR V 50).

MCGARRY TESTIFIED THE ROBE BELT COULD BE TIED IN A LOOSE LOOP WITHOUT CREATING A KNOT AND THE FRICTION APPLIED BY THE WEIGHT WOULD KEEP IT FROM UNRAVELING (TR V 48, 51).

PROPOSITION OF LAW No. 1

PROSECUTORIAL MISCONDUCT DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AND SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

Timothy Howard was deprived of his due process right to a fair trial under the Fourteenth Amendment of the United States Constitution and Article 1, Section 10 of the Ohio Constitution by the improper conduct of the Prosecuting Attorney. A prosecutor has a constitutional obligation in a criminal trial to assure that the defendant receives a fair and impartial trial. See Mooney V. Holohan (1935), 294 U.S. 103; see also State V. Staten (1984), 14 Ohio App. 3d 78, paragraph one of the syllabus. That duty requires the prosecutor to adhere to accepted rules restricting the methods he uses to conduct a criminal trial. Misconduct by the prosecutor results in an unfair trial in violation of the defendant's sixth Amendment rights if there is any reasonable likelihood that the incorrect misleading testimony could have affected the judgement of the jury. Staten supra; paragraph three of the syllabus.

This case involves two forms of prosecutorial misconduct. First, the State argued in opening statement and throughout the theory of its entire case that the appellant stated Delilah Howard was found hanging by one nail, when it had in its possession a summary by Detective Barnett of the Franklin County Sheriffs Department that the appellant stated on the morning his wife was found that she ~~was~~ was hanging from one or more nails. The State clearly misconstrued the evidence to fit its theory of the case. The second misconduct occurred when the State improperly insinuated the appellant's account of two points of suspension was a recent fabrication.

The prosecution's paramount aim and interest "ina criminal prosecution is not that it shall win a case, but that justice shall be done... [A prosecutor] may strike hard blows. [but] he is not at liberty to strike foul ones." United States V. Berger (1935). 295 U.S. 78, 88, 55 S.Ct. 629, 633. Prosecutorial misconduct is not grounds for reversal unless a reveiw of the entire record demonstrates that the prosecutor's entire conduct at trial was improper and so taints the proceedings that the defendant has been denied a fair trial. State V. Lott (1990). 51 Ohio St.3d 160. 166. 555 N.E. 2d 293. Important considerations are whether the misconduct was an isolated incident or a protracted series of improper arguments, whether the defendant objected, whether curative instructions were given and whether the evidence of guilt was overwhelming.

State v. Keenan (1993). 66 Ohio St.3d 402, 410, 613 N.E.2d 203. In the present case, the misconduct was not isolated, nor was the evidence of guilt overwhelming. Instead, the record reflects-a persistent effort to bolster a less than compelling case through improper means.

A. The prosecutors misconstrued the evidence to align with the theory of the States case.

Timothy Howard was interviewed by Detective Barnett of the Franklin County Sheriffs Department on the morning his wife was discovered. (Tr.II. 171)(Tr.IV. 160, 166) In a summary of that interview provided to the defense in discovery Detective Barnett wrote that the appellant stated one or more nails was the point of suspension (Tr.IV. 76,160) (Tr.III.192) The State of Ohio had this information in its possession from day one of the investigation yet proceeded in opening statements and contended throughout the trial that the appellant only stated there was one nail when he spoke with the detectives on the morning she was found dead. (Tr.I. 151, 189, 209) No mention was introduced that the defendant indicated one or more nails was used as suspension points.

Objections by the State were sustained when the defense attempted to introduce these statements through Detective Murray. (Tr.II. 172) During the trial it was ascertained by the defense that Detective Barnett left the sheriffs Office and no forwarding address could be locate (Tr.III. 192) Throughout the trial the state relied on the theory that one nail would not have supported the weight of Delilah Howard and reiterated that position in calling the forensic engineer, questioning witnesses, and arguing in closing statements.

In opening statements the State argued that the appellants plan to commit the perfect murder had a problem in that it required a little bit of intelligence to carry it out effectively. (Tr.I. 150) They continue to state they had a crack team of CSI type detectives who cracked the case and would tell you that common sense would state the nail would not support a one-hundred and forty pound woman. (Tr.I. 151, 153) At no point in the trial did the State call Detective Barnett whose summary indicated the appellant informed her there was one or more points of suspension on the morning his wife was found (Tr.IV. 160) (Tr.III. 192) (Tr.IV. 76) The Defense ^{Defense} ~~was~~ was unable to overcome the hearsay rules in introduction this statement at trial. (Tr.II. 172)

The whole testimony of the States forensic engineer who examined the nail and the robe belt was premised on only one point of suspension. (Tr.II. 153) No test was ever conducted for multiple points of suspension. The State repeatedly called into question the credibility in the Appellants testimony, as will be referanced below, that he did not inform anyone until trial that more than one point of suspension was utilized.

B. The State improperly insinuated Appellants account at Trial was a recent Fabrication.

Throughout the cross-examination of the appellant, the state accused him of tailoring his testimony to explain away the most damaging aspects of the testimony of the Prosecuting Witness. Repeated referances were made that the appellant had copies of the discovery as well as the expert reports for the last year and a half, listened to the States Witnesses, and only recently came up with the theory of the multiple points. (Tr.III. 160-162,175-177,182) (Tr.V.88,112,114,119-120) In cross examination the appellant, the state questioned him that he did not write two points of suspension in his written report and that it was not important enough to tell the detective back in April of 2006. (Tr.III.175,177) The State even went as far to state that the appellant's failure to contact the detective in the summer after retaining counsel to inform them they had the wrong beam cut out was indicated that this was a recent fabrication. (Tr.III.182)

In closing, the state repeatedly told the jury that the defendant's statement only referanced one nail. (Tr.V.79,80,88,112,114,119,120) The States argued that the theory of the multiple suspensions came up with the last couple of weeks and that it was a recent fabrication. (Tr.V. 120) In closing the State argued "...When asked when did you do these calculations, that was recntly, within the last couple of weeks. That is very telling. It tells you when this whole theory of multiple suspensions comes up, just because in July '07 he's testing one nail." (Tr.V. 120,88) The State had in its possession a report by Detective Barnett that the appellant stated one or more points on the day in his wife was found dead. (Tr.II. 171) (Tr.IV. 160-166)

Prosecutorial misconduct warrants a mistrial and Constitutes Reversible Error when the Prosecutor's Conduct, "deprives the defendant of a Fair Trial." State V. Keenan (1993), 66 Ohio St. 3d. 402, 405. As explained by Ohio Supreme Court, the Prosecutor, by virtue of his position, has a special responsibility to ensure the ^{FAIRNESS} families of the proceedings:

[T]he Prosecutor carries into court the prestige of the representative... whose intrest ... is not that it shall win a case, but that Justice shall be done ... Consequently, improper suggestions, insinuations and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Keenan, 66 Ohio St. 3d at 406 (Quoting Berger V. United States (1935). 295 U.S. 78,88).

"The prosecutor is a servant of the law whose interest in a prosecution is not merely to emerge victorious but to see that justice shall be done." State V. Smith (1984). 14 Ohio St. 3d 13,14.

It is the Prosecutor's duty "to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." State v. Smith (1984) 14 Ohio St. 3d 14. A prosecutor may not misstate the facts or offer improper insinuations calculated to mislead the jury. Berger. 295 U.S. at 85-86. To warrant a mistrial and/or reversal, the prosecutor's remarks must both be improper and prejudicially affect the substantial rights of the defendant. Smith. 14 Ohio St. 3d at 14.

The prosecutor's improper reference to Mr. Howard's recent fabrication prejudiced his substantial right to a fair trial, was improper, and misled the jury. The evidence in this case was primary circumstantial, often tenuous, and, as discussed in the third and fourth assignments of error, legally insufficient. The improper remarks by the prosecution involved facts of significant consequence which were design to bolster a weak case. There was a reasonable likelihood that the incorrect and misleading testimony affected the judgement of the jury.

PROPOSITION OF LAW No.2
A Plaintiff
~~THE TRIAL~~ COURT ERRED BY REFUSING TO ALLOW THE
DEFENSE TO OFFER TESTIMONY REGARDING PREVIOUS SUICIDE
ATTEMPTS BY THE DECEDENT

The quintessential issue before the jury in this case was whether Delilah Howard committed suicide or died by ligature strangulation at the hands of Timothy Howard. In the States opening statement the prosecutor informed the jury "You will hear testimony about Delilah's battle with depression. Yeah, you're going to hear about past suicide attempts from Delilah." (Tr.I. 153) This door was left wide open by the State in its opening. However the defense attempted to introduce evidence vital to illustrate the deceased battled with depression and prior suicide attempts; they were handcuffed by the court from illustrating such to the jury. Angela Howard was asked on direct if she could relate what happened in 2004 when her mother was taken to the emergency room.

Q. Okay. Back in 1994, you indicated you talked to your mother on the phone every day or two or three times a week visited?

A. Right.

Q. Do you recall an incident in 2004 where your mother was taken to the emergency room?

A. Yes.

Q. Can you tell the jury what happened on that date?

State: Objection.

Court: Sustained

(Tr. IV. 93)

Angela Howard was not allowed to answer concerning her direct knowledge over relevant information that went to the heart of the defense case. (Tr. IV. 93-95)

Further, in referance to how her mother appeared the week prior to her death. Angela was not allowed by the Court to answer.

Q. Did she seem upset about anything to you?

State: Objection

Court: Overruled

Witness: She seem upset about anything?

Defense counsel: Right

Witness: Yeah

Defense Counsel: What did seem upset about?

State: Objection

Court: Sustained

(Tr. IV. 99)

The defense proffered to the court at the conclusion of the testimony that "Angie Howard took the stand and she was going to testify as to a prior suicide attempt by her mother of neurotin overdose back in 2004." (Tr. V. 69)

After a foundation was laid, Amanda Howard ^{W 45} also refrained from testifying to her mother's medication and addiction on several occasions.

Q. In your opinion, do you beleive she had a problem with medication?

State: Objection

Court: Sustained.

(Tr. IV. 136)

Q. Did this cause problems between you and your mom?

A. It did

Q. Explain

A. I--Just I was against the medicine that she was on. I knew she needed it, but she took more than what she needed because she wanted to get high off it.

State: Objection

Court: Sustained, the jury will disregard that last responce. (Tr. IV. 137)

Q. What else did you observe closer to her death?

A. She was trying to get into Netcare. They wouldn't accept her.

State: Objection to all of this.

Court: Sustained.

(Tr. IV. 140-141)

The state objected to the line of questioning and the defense was prohibited

from proceeding. (Tr.IV. 135,141) Amanda Howard was further prohibited in answering if her mother had problems with medications. (Tr.IV 135)

The Dr. Ward testified that when the body was transported to the county morgue, a multiple empty pill bottles arrived with the deceased. (Tr.III. 41) Further, toxicology reports indicate therapeutic levels of wellbutrin, an anti-depressant. (Tr.III. 60) Dr. Ward was prohibited by the Court on cross-examination from testifying that marks on the front of Delilah's forearms would be indicative of a previous cut. (Tr.IV. 38) Dr, Dana was likewise prohibited by the Court on direct from ttestifying the scars could be indicative of a prior attempt. (Tr.IV. 38)

The exclusion of testimony regarding prior suicide attempts by the deceased and to her state of mind materially prejudiced the appellant by precluding his preservation of a valid ^{complete} defense to the charge against him: that the decedent, Delilah Howard, took her own life by suicide.

Evidence Rule 401 defines relevant evidence: "Relevant evidence means evidence having tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." This evidence was vital to afford the appellant a fair trial.

Evidence Rule 803 states in relevant part: The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (3) a statement of the declarant's then existing state of mind, emotion, sensation, or physical ~~condition~~ ^{condition} (such as intent, plan, motive, ~~design~~, ~~mental~~, feeling, pain, and bodily health).

By prohibiting this line of questioning by the defense, which goes to the heart of the trial issue, the defense was denied his right to a fair trial.

PROPOSITION OF LAW No.3

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT.

The evidence in this case was insufficient as a matter of law to support a finding of guilt on the charge of aggravated murder and tampering with evidence. Specifically, there was insufficient evidence presented that appellant purposely, with prior calculation and design caused the death of Delilah Howard. Accordingly, the trial court denied appellant due process under both the State and Federal Constitutions when it did not dismiss those charges. Crim. R. 29.

The Fifth Amendment to the United States Constitution provides that no person shall...be deprived of ...liberty without Due Process of the Law." The

United States Supreme Court has held that a criminal defendant is denied Due Process of Law when his conviction is not supported by sufficient evidence to prove his guilt of every element of the crime charged beyond a reasonable doubt. In such a case, Due Process requires that the defendant's conviction be reversed. Jackson V. Virginia, (1979), 443 U.S. 307. See also State V. Thompkins (1997), 78 Ohio St.3d 380.

A criminal conviction is not supported by sufficient evidence when the Prosecution ~~Has~~ failed to "prove beyond a reasonable doubt every fact necessary to constitute any crime for which it prosecutes a defendant." State V. Robinson (1976), 47 Ohio St.2d 103, 108. citing In Re Winship (1970), 397 U.S. 358. In such a situation, Due Process demands are great and "neither a trial court nor an appellate court may abdicate its responsibility to enter a judgement of acquittal when the evidence is legally insufficient to support a conviction." State V. Goodin (1979), 56 Ohio St.2d 438, 442.

Under Crim. R. 29, a trial court is empowered to grant a motion for acquittal upon finding that the evidence was insufficient to support the conviction. Thompkins, Supra. Indeed, the accused must be acquitted in such a situation because "a conviction based on legally insufficient evidence constitutes a denial of Due Process." Id., citing Tibbs V. Florida (1982), 457 U.S. 31, 45, citing Jackson V. Virginia (1979), 443 U.S. 307.

There was insufficient evidence presented to support a conviction on the charge of aggravated murder and tampering with evidence. Aggravated murder, R.C. 2903.01 states, in part, that no person shall purposely, and with prior calculation and design, cause the death of another. In this case, the evidence presented of the required mental state, "purposely" was absent. R.C. 2901.22 (A) defines the culpable mental state of purposely:

"A person acts purposely when it is his specific intention to cause a certain result, or when the gist of the offense in a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

There was not sufficient evidence that appellant had purposely, with prior calculation and design, caused the death of Delilah Howard. The States foundation was premised on the theory that one nail would not have supported the weight of the deceased. The State then proceeded to present the testimony of Deputy Byrd and Medic Whittenberger who represented that the appellant pointed to a nail indicating that was the suspension point. (Tr.I. 89,209,211,).
At Trial both Medic Whittenberger and Deputy Byrd could not and did not identify, the location of the alledged single nail.

my Howard testified that in the week leading up to her mother's death she appeared sad, stressed out, upset, and not taking her medications. (Tr.IV.88,91-92,98,99) She was constantly trying on new outfits and doing her hair and makeup. (Tr.IV.99)

The State failed to prove that the appellant purposely attempted to cause the death Delilah Howard. No direct evidence placed him as the perpetrator of a crime. He was at home with his children the night before his wife died and fell asleep on the couch after a late dinner. (Tr.III.132) He was awoken by a phone call from his daughter and proceeded to search for his wife and discovered her hanging in the basement and called 911. (Tr.III. 132,142) Suicide at times is not a rational act, the evidence was clearly insufficient and therefore the conviction in this case should therefore be reversed.

PROPOSITION OF LAW No.4
THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE
EVIDENCE.

The verdict in this case was against the manifest weight of the evidence. Unlike sufficiency, "manifest weight" does not involve looking at the evidence in the light most favorable to the State or deferring to the trier of fact. "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." State V. Thompkins, supra, at paragraph two of the syllabus. "Although a court of appeals may determine that a judgement of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgement is against the weight of the evidence. Id at 387 citing State V. Robinson (1955), 162 Ohio St. 486, 487. "Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered at trial, to support one side of the issue rather than the other." Thompkins, supra, at 387 (emphasis in Thompkins). The court reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of JUSTICE THAT THE CONVICTION must be reversed and a new trial ordered." Id. at 387, quoting State V. Martin (1983), 20 Ohio App.3d 172.

The verdict in this case represents such a manifest miscarriage of Justice. Without repeating arguments made above, Appellant submits that the weight of the evidence and the credibility of the State's Key Witness in the case at bar were such that this jury clearly lost its way in rendering the verdict it did. ~~Again,~~ 11-20-09

14
Conclusions to this case ~~is~~ DUE TO ERRORS.
From the inception an innocent man is suffering a
mis career of Justice - for each of the foregoing reasons
and for all of them Defendant Appellant REQUEST this Court
to accept jurisdiction and admit to ~~proceed~~ for decise on merit.
Timothy J Howard
Timothy J Howard pro se
569 390
Rt. P.O. Box 7010
Columbus OH 43261

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail to ^{Now advised by} Geth Gilbert, Prosecuting Attorney, Franklin County, 369 South High St. 12th Fl., Columbus, Ohio 43215, this 20th day of OCTOBER, 2009

Timothy J. Howard
SIGNATURE

Timothy J. Howard 569 390
NAME AND NUMBER

DEFENDANT-APPELLANT, PRO SE

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO OHIO
2009 JUN -9 PM 3:38
CLERK OF COURTS

State of Ohio, :
Plaintiff-Appellee, :
v. : No. 08AP-177
Timothy J. Howard, : (C.P.C. No. 06CR12-9525)
Defendant-Appellant. : (REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 9, 2009, 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 shall be assessed against appellant.

FRENCH, P.J., BRYANT and TYACK, JJ.

By Judith French
Judge Judith L. French, P.J.

ERB

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2009 JUN -9 PM 1:36
CLERK OF COURTS

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 08AP-177
 : (C.P.C. No. 06CR12-9525)
 :
 Timothy J. Howard, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 9, 2009

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Law Offices of Thomas F. Hayes, LLC, and *Thomas F. Hayes*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, Timothy J. Howard ("appellant"), appeals his conviction for aggravated murder and tampering with evidence in the Franklin County Court of Common Pleas. For the following reasons, we affirm.

{¶2} On the morning of April 1, 2006, appellant called 911 and reported that his wife, Delilah, hanged herself in their home. When medics arrived, appellant escorted

them to the basement, where Delilah lay dead on her back. Across Delilah's chest was a portion of a pink bathrobe belt. Appellant was charged in Delilah's death and pleaded not guilty. A jury trial ensued, and plaintiff-appellee, the state of Ohio ("appellee"), presented the following evidence.

{¶3} According to medic Jacque Whittenberger, appellant said that Delilah "was hanging from the nail" and that she "used her bath robe to hang from the nail." (Vol. I Tr. 188.) Appellant identified this nail to Whittenberger; it was small and covered with cobwebs and dust.

{¶4} Franklin County Sheriff Deputy Samuel Byrd arrived at the scene shortly after the medics, and he testified as follows. Appellant said that he "saw his wife hanging on the nail." (Vol. I Tr. 208.) Appellant identified the nail "several times." (Vol. I Tr. 210.) The nail was thin and had "dust and cobwebs on it." (Vol. I Tr. 210.)

{¶5} Franklin County Sheriff Detective Don Murray interviewed appellant with Detective Debra Barnett on the day appellant found Delilah dead. Murray testified as follows. Appellant said that he found Delilah "hanging from a nail" with a robe belt. (Vol. II Tr. 163.) Appellant said that he cut the robe belt to get her down and did not untie any knots in the belt. Appellant gave a written statement, which made no reference to which nail or how many nails Delilah used for the hanging.

{¶6} Appellant revealed Delilah's death to her biological mother, Nancy Thomas, who testified that there was "no emotion" in appellant's voice—it "just was straight on." (Vol. II Tr. 267.) Whittenberger testified that appellant was "very blunt and

seemed very cold" when he told one of his daughters that Delilah was dead. (Vol. I Tr. 185.)

{¶7} Franklin County Sheriff Detective James Clark testified as follows. Clark and Detective Jack Burns interviewed appellant on April 11, 2006. The detectives asked which nail Delilah was hanging from, and appellant answered, "I have no idea, I didn't look up at anything at all to see how it was configured or anything like that." (Vol. II Tr. 247.)

{¶8} Law enforcement collected four undated suicide notes. Each note was separately addressed to appellant and their three children. Appellee's handwriting expert concluded that Delilah "probably" wrote the notes. (Vol. II Tr. 186-87.)

{¶9} Dr. Bonita Ward performed the autopsy on Delilah and testified as follows. Delilah did not die by hanging, but by a ligature strangulation homicide. Her eyes and face had congestion, which occurs when the blood vessels become engorged with blood. Delilah's eyes showed no signs of petechiae, which are caused when blood vessels burst due to the blood's inability to escape. Although common in ligature strangulations, petechiae are not a definitive finding. Delilah's lips were bluish-purple, indicating a lack of oxygen. Delilah weighed 135 pounds. A toxicology report revealed that Delilah had in her system therapeutic levels of a depression medication.

{¶10} Delilah's neck had a furrow, which is a mark left by a ligature. The furrow around Delilah's neck "went straight back" and nearly encircled her neck. In a typical hanging, the furrow appears as an "incomplete upside down V." (Vol. III Tr. 26.) In other words, the furrow casts upward and, depending on the location of the suspension

point in relation to the head, follows the jaw line behind the ears. Comparing photographs of Delilah's neck with photographs of confirmed hangings illustrated the difference between Delilah's furrow and the shape of the furrow in a typical hanging.

{¶11} At the back of Delilah's neck was a "jagged, abraded perpendicular line" connecting the two points of the furrow. (Vol. III Tr. 26.) This abrasion indicates that a piece of skin got caught in the ligature when someone twisted the ligature from behind. A loop-shaped mark underneath Delilah's chin indicates that in a struggle, Delilah ducked her chin and her skin got caught in the ligature. Delilah's neck had scratch marks consistent with her trying to grab at the ligature.

{¶12} Delilah had a fracture to the greater cornua, which are projections in the thyroid cartilage. The hyoid bone, which is near the base of the tongue, was not broken. Although the hyoid bone is typically broken in a strangulation case, it is not unusual for the hyoid bone to be intact in a strangulation case. The trial court did not allow Ward to testify whether scars on Delilah's arms were located in "a classic place for someone [who] would want to cut their wrists." (Vol. III Tr. 80.)

{¶13} Special Agent Gary Wilgus of the Ohio Bureau of Criminal Investigation collected evidence from appellant's home and testified as follows. Wilgus cut out portions of the floor joist that contained the nail that appellant identified to Byrd and Whittenberger. The nail was referred to at trial as the west nail. Wilgus thought that this nail was "questionable" because of the amount of debris on it and because of its apparent inability to sustain Delilah's weight. (Vol. II Tr. 47.) Concerned that appellant may have identified the wrong nail, Wilgus collected two other nails and surrounding

wood. In particular, Wilgus collected a "bigger and much more substantial" nail to the east of the one that appellant identified. (Vol. II Tr. 47.) This east nail also had dust and lint on it. Additionally, Wilgus collected a nail on the south beam because it had no visible lint or dust on it. Wilgus collected the bathrobe belt. The belt was in two pieces and showed no signs of having been in a knot. Wilgus did not observe any broken nails, injuries, cuts or scratches on Delilah's hands, and the parties stipulated that "no DNA profile foreign to Delilah Howard was detected on" her fingernails. (Vol. II Tr. 225.)

{¶14} A forensic scientist testified that fibers on the nails and wood that Wilgus collected did not match fibers from Delilah's robe belt. The scientist could not say that the robe belt never came into contact with the nails.

{¶15} John Mustard, a forensic engineer, tested for appellee the nails that Wilgus collected, and he testified as follows. The west and south nails were "finishing nail[s]," meaning that they were thin and designed to be invisible when nailed into the wood. (Vol. II Tr. 107.) The east nail was a "common nail," which is thicker and heavier than a finishing nail. (Vol. II Tr. 107.) When Mustard tested the west nail, it started to bend at 25 pounds, and at 45 pounds Mustard stopped the test because the nail was severely bending. The wood holding the nail splintered, and a gap formed between the nail and surrounding wood. At 124 pounds, the wood holding the east nail cracked and bulged, and a gap formed between the nail and surrounding wood. Thus, although the nail could support the weight, the wood surrounding the nail could not support the weight without showing signs of damage. The south nail bent at 46 pounds, and Mustard stopped the test on that nail. The wood holding the nail splintered, and a gap

formed between the nail and surrounding wood. Mustard concluded that none of the three nails had been subjected to Delilah's weight.

{¶16} Mustard tested the robe belt. Before the test, Mustard noticed that the belt showed no indication of having been tied into a knot. The belt was in two pieces, and Mustard tied the shorter piece into two knots in order to attach it to the testing device. Mustard applied 127 pounds to the belt and determined that it could support the weight. Mustard opined that the belt also could have supported 140 pounds. After the test was complete, the knots on the belt were tight and difficult to unfasten. Mustard was eventually able to untie one knot, but only with assistance. Afterward, the belt fabric was "compressed and crumpled and showed clear signs it had been a knot." (Vol. II Tr. 140.)

{¶17} Appellant's friend, Brenda Watson, testified as follows. In October 2005, appellant told Watson that he and Delilah had separated. In March 2006, appellant saw Watson at a party. After the party, Watson invited appellant to her apartment, and the two had sex. The next day, appellant had drinks with Watson and spent the night at her apartment. A few days later, appellant asked Watson if she wanted to go to Texas to watch a football game. Later that week, Watson left a message on appellant's cell phone asking to "hookup together." (Vol. III Tr. 100.) A day or two later, appellant called Watson and told her that Delilah heard the message. Appellant confessed that he and Delilah were still living together, albeit sleeping in separate bedrooms. Appellant and Watson agreed not to see each other anymore. A few days later, appellant went to Watson's apartment. Appellant apologized for not telling her that he was still living with

Delilah, but told her that Delilah was looking for her own place. Watson responded that they should not see each other anymore. Appellant agreed, although he reiterated his Texas trip invitation. A couple months after Delilah's death, appellant and Watson met for drinks, and appellant gave Watson a gift. Watson told appellant that she was dating another man.

{¶18} Counsel for appellee rested, and appellant raised a Crim.R. 29 acquittal motion. The trial court denied the motion. Appellant presented the following evidence.

{¶19} Appellant testified that, on the evening of March 31, 2006, he, Delilah, and their son Brandon went to the grocery store. They returned around 11:30 p.m. Delilah cooked dinner, and appellant fell asleep on the couch afterward. Later, Delilah woke appellant and said that she was going to bed. She told appellant that she loved him, and appellant responded that he loved her. Around 1:30 a.m., appellant joined Delilah in bed.

{¶20} The next morning, appellant was awakened by the house phone ringing. He did not answer the phone, but shortly thereafter his daughter Angela called his cell phone, which he did answer. Appellant noticed that Delilah was not in bed, and he searched the house for her. Appellant saw Delilah in the basement. Appellant initially thought Delilah was standing, but he discovered that she was hanging by a robe belt. When asked how Delilah was hanging, appellant testified, "[t]here was a point on one side, and then it was wrapped around her neck and then a point on the other side." (Vol. III Tr. 142.) Appellant did not untie any knots in the robe belt and did not know whether it was tied. Appellant used a utility knife to cut the left side of the belt.

Appellant unwrapped the other side of the belt and placed Delilah on a chair. Appellant called 911, and the medics arrived.

{¶21} Appellant admitted to dating Watson, and he admitted that he gave Watson perfume after Delilah died. Appellant said the perfume reminded him of Watson. Appellant said that he was "interested" in Watson, but did not want to have a relationship with her. (Vol. III Tr. 158.) Appellant admitted that, after Delilah died, he again asked Watson to go to Texas with him. Appellant admitted that his relationship with Delilah had deteriorated. Appellant said that Delilah took medication after she injured her back in 1999.

{¶22} On cross-examination, the prosecution challenged appellant's testimony that he found Delilah hanging on two nails. The prosecution questioned appellant about not mentioning the two nails in his written statement or during his interview with Clark and Burns. The prosecution confronted appellant with Byrd and Whittenberger's testimonies that he said that Delilah was hanging from one nail. Appellant denied telling Whittenberger or Byrd that he found Delilah hanging from a single nail.

{¶23} Appellant's daughter Angela testified as follows. Appellant argued with Delilah over the amount of medications she used. Angela read the suicide note to Brandon, and the note referred to Brandon making honor roll. Angela thought that Brandon made honor roll within two weeks before Delilah's death. In the last week of her life, Delilah appeared sad, drained, stressed, and upset. The trial court would not let Angela testify why Delilah was upset. On an unspecified date in 2004, Delilah went to the emergency room, and medical personnel collected drugs from her home.

Because the trial court would not allow it, the defense proffered that Angela "was going to testify as to a prior suicide attempt by her mother of a Neurontin overdose back in 2004." (Vol. V Tr. 69.)

{¶24} Appellant's daughter Amanda testified as follows. Although not sure, Amanda thought that Brandon made honor roll around Christmas. In March 2006, Delilah heard on appellant's cell phone a message from "Brenda" wanting to get together with appellant. (Vol. IV Tr. 150.) Although she did not exactly remember, Amanda thought that Delilah was upset about the message. Likewise, Delilah was not happy about herself. Amanda disapproved of Delilah's drug use, and, in Amanda's opinion, Delilah abused her pain medications. Amanda thought that the drugs affected Delilah's ability to care for Amanda's young son, and Delilah would be "out of it" after obtaining drugs from a friend. (Vol. IV Tr. 139.) At one point, Delilah wanted Amanda's pain medication. The trial court instructed the jury to disregard Amanda's testimony that Delilah wanted "to get high" from her medication. (Vol. IV Tr. 137.) The trial court sustained a prosecution objection when Amanda sought to testify that Delilah was unsuccessful in getting into Netcare shortly before her death.

{¶25} Attorney Larry Stephens was present during appellant's April 11, 2006 interview with detectives. Stephens testified as follows, after appellant waived his attorney-client privilege. Before the interview, appellant told Stephens that, when he discovered Delilah hanging, he cut down one side of the robe belt, but could not remember whether he cut down the second side of the belt. Stephens interpreted this to mean that there were possibly two points of suspension.

{¶26} A handwriting expert for the defense concluded that Delilah wrote the suicide notes. Dr. Dennis McGarry, an engineer, examined nails in appellant's basement and also testified as follows for the defense. McGarry tested a nail still in one of the floor joists in the basement. McGarry wrapped a robe belt around the nail and loaded 100 pounds, but the nail did not bend. At 150 pounds, the nail bent and created a gap between the nail and the surrounding wood. McGarry stated that he wrapped the robe belt around the nail in "loose fashion," meaning he did not "pull a tight knot." (Vol. V Tr. 40.) To attach the weight to the bottom of the belt, McGarry used a square knot. After the test, the belt showed signs of compression, but there was no "long-term physical damage" to the belt. (Vol. V Tr. 43.) McGarry testified that there was a bent common nail about 25 inches from where the south nail was cut out from the floor joist. McGarry did not test this nail. McGarry calculated that a common and finishing nail together could support 140 pounds under several, but not all, configurations.

{¶27} Forensic pathologist Dr. Suzanna Dana testified as follows. Delilah committed suicide by hanging. Dana observed no petechiae in Delilah's face and eyes. Petechiae are not as commonly seen in hangings as they are in ligature strangulations. Occasionally, petechiae do not occur in ligature strangulations. Dana described Delilah's lips and face as pale. In ligature strangulation, the lips, gums, and face will be congested and purple. Dana opined that the furrow in Delilah's neck angled upward in an "inverted V" and signified a hanging. (Vol. IV Tr. 44-45.) Dana initially said that the hyoid bone not being broken was unimportant, but she later said that it is rare for the hyoid bone or the thyroid cartilage to break in ligature strangulations. Dana found no

signs that Delilah was engaged in a struggle before her death. The trial court sustained the prosecution's objection when Dana sought to testify that if Delilah had scars on the front of the forearm, especially near the wrist, "it could indicate some previous cut." (Vol. IV Tr. 38.) On cross-examination, Dana confirmed that she based her opinion on looking at the autopsy report and photographs of Delilah's body. Dana said that she saw enough of Delilah's furrow to "get a good idea of what was going on." (Vol. IV Tr. 58.)

{¶28} The defense rested and renewed the Crim.R. 29 motion for acquittal. The trial court denied the motion. During closing arguments, the prosecution challenged appellant's testimony that he found Delilah hanging on two nails, and the prosecution suggested that this claim was a recent fabrication. The jury found appellant guilty of the charges, and the trial court sentenced him.

{¶29} Appellant appeals asserting the following assignments of error:

I. Prosecutorial Misconduct Deprived the Defendant of a Fair Trial and Due Process of Law in Violation of the Fourteenth Amendment to the U.S. Constitution.

II. The Trial Court Erred by Refusing to Allow the Defense to Offer Testimony Regarding Previous Suicide Attempts by The Decedent.

III. The Evidence was Insufficient to Support a Finding of Guilt.

IV. The Verdict was Against the Manifest Weight of the Evidence.

{¶30} In his first assignment of error, appellant argues that the prosecution committed misconduct. We disagree.

A B

{¶31} The test for prosecutorial misconduct is, first, whether the conduct is improper and, second, whether the conduct prejudicially affected the substantial rights of the accused. *State v. White*, 82 Ohio St.3d 16, 22, 1998-Ohio-363; *Columbus v. Rano*, 10th Dist. No. 08AP-30, 2009-Ohio-578, ¶21. The prosecutor's conduct cannot be grounds for a new trial unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 405. In considering prejudice, we must consider the following factors: (1) the nature of the conduct; (2) whether counsel objected; (3) whether the court gave corrective instructions; and (4) the strength of the evidence against the defendant. *State v. Tyler*, 10th Dist. No. 05AP-989, 2006-Ohio-6896, ¶20.

{¶32} According to a detective's summary of appellant's April 1, 2006 interview, appellant claimed that Delilah was suspended from "one or more nails." (Vol. IV Tr. 160.) Appellant asserts that the prosecution committed misconduct by (1) failing to provide this information to the jury, (2) presenting evidence that appellant initially claimed that Delilah was hanging from a single nail, (3) presenting evidence that Delilah could not have hung from a single nail, and (4) objecting when the defense asked Murray whether he would be surprised to know that a summary of the April 1, 2006 interview indicated that appellant referred to Delilah hanging from one or more nails.

{¶33} It is unclear from the record precisely when the defense received the detective's summary. The record suggests that the defense received the summary before trial. However, it was not until after the prosecution rested its case and well into appellant's case that the defense raised the misconduct claim. A party must

contemporaneously object to any possible error at trial to preserve that error for appeal. *State v. Lortz*, 9th Dist. No. 23762, 2008-Ohio-3108, ¶13. Untimely objections are reviewed using a plain-error analysis pursuant to Crim.R. 52(B). *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶100, citing *State v. Johnson* (1989), 46 Ohio St.3d 96, 102. This plain error standard applies to prosecutorial misconduct claims. *State v. Williams*, 79 Ohio St.3d 1, 12, 1997-Ohio-407. Appellant's misconduct claim arose during the prosecution's case-in-chief. Therefore, appellant forfeited all but plain error by not raising the misconduct claim until after the prosecution rested its case.

{¶34} Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.* Prosecutorial misconduct allows for a reversal under the plain error standard if it is clear that the defendant would not have been convicted in the absence of the improper conduct. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶68.

{¶35} Whittenberger, Byrd, and Murray observed appellant say that Delilah was hanging from a single nail. Therefore, these witnesses gave the prosecution grounds to present the single nail claim, and the prosecution did not commit misconduct in presenting the single nail claim to the jury. Nor did the prosecution commit misconduct in presenting its evidence that discredited the single nail claim.

{¶36} Additionally, under plain error, we find no misconduct from the prosecution not presenting the jury with the detective's summary. Appellant provides no case law requiring prosecutors to present exculpatory evidence in their case-in-chief. See also *United States v. Holt* (C.A.7, 2007), 486 F.3d 997, 1003 (rejecting the argument that the prosecution is required to present exculpatory evidence at trial). Moreover, the summary is ambiguous and does not clearly support appellant's defense that Delilah was hanging from two nails instead of one. Likewise, the validity of the summary is uncertain. The authorship is unclear, and the summary is unsigned and "not adopted by anybody." (Vol. IV Tr. 163.)

{¶37} Next, under plain error, we find no misconduct from the prosecution objecting when the defense questioned Murray about the summary of the April 1, 2006 interview. The objection was appropriate, given the uncertain validity of the summary and given that the defense sought a comment on inadmissible hearsay.

{¶38} Appellant argues that the prosecution committed misconduct when it challenged the credibility of his testimony that Delilah was hanging from two nails. Appellant is incorrect. Because the defense did not challenge the prosecution's good faith while cross-examining appellant, good faith is presumed. See *State v. Gillard* (1988), 40 Ohio St.3d 226, 231, abrogated on other grounds in *State v. McGuire*, 80 Ohio St.3d 390, 1997-Ohio-335; *State v. Lowe*, 164 Ohio App.3d 726, 2005-Ohio-6614, ¶¶11-12. Additionally, the record supports the prosecution's credibility challenge to appellant's testimony. Appellant gave conflicting accounts about how Delilah was hanging. On the date that Delilah was discovered dead, appellant told a medic and law

enforcement that Delilah was hanging from a single nail. Appellant's written statement made no reference to which nail or how many nails Delilah used. When asked during the interview with Burns and Clark which nail Delilah was hanging from, appellant answered, "I have no idea, I didn't look up at anything at all to see how it was configured or anything like that." (Vol. II Tr. 247.)

{¶39} Appellant argues that the prosecution committed misconduct by challenging his credibility during closing arguments. Appellant did not raise this issue during closing arguments and forfeited all but plain error. *Williams* at 12. Courts afford prosecutors latitude in making closing arguments. *State v. Benge*, 75 Ohio St.3d 136, 141, 1996-Ohio-227. Because of appellant's conflicting accounts on how he found Delilah hanging, the prosecution fairly argued that appellant's testimony was not credible. Therefore, under plain error, we discern no prosecutorial misconduct. Having also rejected appellant's other prosecutorial misconduct claims, we overrule appellant's first assignment of error.

{¶40} In his second assignment of error, appellant asserts that the trial court hindered his ability to present a defense when it (1) prohibited Amanda from testifying that Delilah attempted suicide in 2004, (2) limited testimony about Delilah's drug abuse, (3) disallowed testimony that Delilah was unsuccessful in getting into Netcare shortly before her death, and (4) disallowed testimony that scars on Delilah's forearms could signify previous cuts. "[T]he admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v.*

Conway, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶¶62, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290. See also Evid. R. 103(A) (stating that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected").

{¶41} We find no material prejudice here. When Angela testified that Delilah went to the emergency room in 2004, the jury could have inferred that this was due to a drug overdose because (1) Angela said that, after this incident, medical personnel collected drugs from her home, (2) Angela testified that appellant argued with Delilah over the amount of medications she used, and (3) Amanda indicated that Delilah abused drugs. The jury also had the means to infer, if it wanted to, that Delilah died from a suicidal hanging. Angela testified that Delilah appeared sad, drained, stressed, and upset the week before she died. Amanda said that Delilah was not happy about herself. Amanda indicated that, shortly before her death, Delilah was upset about hearing on appellant's cell phone Watson's date invitation, and appellant admitted that his relationship with Delilah deteriorated. Although the suicide notes were not dated, the jury could have concluded that Delilah wrote them near the date of her death. In one of the notes, Delilah mentioned Brandon making honor roll. At a minimum, according to Angela, Brandon made honor roll a few weeks prior to Delilah's death. At most, according to Amanda, Brandon made honor roll the Christmas before Delilah's death. Accordingly, we overrule appellant's second assignment of error.

{¶42} We address together appellant's third and fourth assignments of error. First, appellant argues that his convictions are based on insufficient evidence. We disagree.

{¶43} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶44} Appellant was convicted of aggravated murder pursuant to R.C. 2903.01(A), which states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Ward testified that Delilah was strangled to death, and sufficient evidence allowed the jury to infer that appellant committed the homicide. Appellant's inconsistent statements about Delilah's death are reflective of a consciousness of guilt. See *State v. Henry*, 10th Dist. No. 04AP-1061, 2005-Ohio-3931,

¶41. Further implicating appellant in the homicide is the lack of emotion he portrayed when he revealed Delilah's death to Thomas and one of his daughters.

{¶45} Appellant's deteriorating marriage, his relationship with Watson, and his pursuit of her after Delilah's death show a possible motive to kill Delilah. "Motive, being the mental state that induces one to act, is relevant to most criminal trials in that it helps corroborate that certain acts took place because a person had a reason to act in a certain manner." *State v. Gonzalez*, 7th Dist. No. 06 MA 58, 2008-Ohio-2749, ¶71, citing *State v. Nichols* (1996), 116 Ohio App.3d 759, 764.

{¶46} Sufficient evidence proved that appellant acted purposely, given the vital nature of the neck area where the strangulation occurred. Sufficient evidence also proved that appellant acted with prior calculation and design. "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph three of the syllabus. Appellant had the opportunity to plan Delilah's homicide in the midst of his deteriorating marriage. The evidence of a ligature being placed around her neck and twisted indicates a crime committed with prior calculation and design. Accordingly, we conclude that sufficient evidence supports appellant's aggravated murder conviction.

{¶47} Appellant argues that his tampering with evidence conviction is based on insufficient evidence. R.C. 2921.12(A)(1) prohibits tampering with evidence and states

that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." The charge pertained to Delilah's body. A body constitutes a "thing" under R.C. 2921.12. *Saleh* at ¶90. Medics and police found Delilah lying on the ground with a belt across her chest. The jury could have reasonably inferred that appellant sought to hinder a criminal investigation by removing the ligature from Delilah's neck and staging her body to reflect a suicide. Accordingly, sufficient evidence supports appellant's tampering with evidence conviction.

{¶48} Next, appellant argues that his convictions are against the manifest weight of the evidence because he presented evidence that Delilah committed suicide. We disagree.

{¶49} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *Thompkins* at 387. We review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Additionally, we determine "'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.'" *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *Martin* at 175. Moreover, "'it is inappropriate for a reviewing court to interfere with factual findings of the trier of

fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶50} Appellant told Whittenberger and Byrd that Delilah was hanging from a single nail. The nail appellant identified was covered with dust and other debris, belying his claim that Delilah hanged herself from that nail. Mustard tested the nail, and it started to bend at 25 pounds and was severely bent after 45 pounds. The surrounding wood was not damaged before the test, but became damaged from the test weight. This test established that the 135-pound Delilah could not have hanged herself from this nail.

{¶51} The evidence also established that Delilah could not have hanged herself from the other two nails that Wilgus collected. The east nail was a common nail that could support more weight, but it was covered in dust and debris. The south nail had no visible dust on it, but could support no more than 46 pounds. The wood around the south and east nails was not damaged before the test, but became damaged from the test weight.

{¶52} Defense expert McGarry also corroborates appellee's theory that Delilah could not have hanged herself from a single nail. McGarry tested a common nail in appellant's basement. The nail could support 150 pounds. However, the wood around the nail was not damaged before the test, but became damaged from the test weight.

{¶53} Appellant's prior inconsistent statements allowed the jury to properly reject appellant's trial testimony that Delilah was hanging by two nails. Stephens made appellant's testimony no more credible. According to Stephens, appellant stated that he cut one side of the bathrobe belt, but could not remember whether he cut down the second side of the belt. Although Stephens interpreted this statement to mean that there were possibly two points of suspension, the statement itself was vague. In any event, appellant later gave a different account to Burns and Clark when he said that he did not know the nail from which Delilah was hanging.

{¶54} The condition of the robe belt also gave the jury reason to reject the suicide claim. Appellant admitted that he did not untie any knots in the belt, and Wilgus said that, when he collected the belt, it showed no signs of having been tied into any knots. It was within the province of the jury to conclude that Delilah could not have hung herself without tying the robe belt into any knots. The jury also reasonably rejected the suicide defense because a forensic scientist testified that fibers on the nails and wood that Wilgus collected did not match fibers from the belt.

{¶55} It was within the jury's province to believe Ward's testimony that Delilah died from a ligature strangulation and to reject Dana's opinion that Delilah committed suicide. Ward formed her opinions after examining Delilah's body. Dana did not examine Delilah's body, but had to rely on photographs and the autopsy report. Additionally, the furrow around Delilah's neck bears no resemblance to the photographs of furrows in confirmed hangings, and the jury could have reasonably concluded that the furrow on Delilah's neck did not form the "inverted V" reflective of a typical hanging.

{¶56} The jury could have found the absence of any petechiae insignificant, given that both Ward and Dana testified that petechiae occasionally do not appear in ligature strangulations. The jury could have placed no significance on Delilah's hyoid bone being unbroken, given Ward's testimony that it is not unusual for the hyoid bone to be intact in a strangulation case and Dana's initial statement that this fact was unimportant.

{¶57} The evidence of Delilah's mental state does not undermine the jury's conclusions. Although Delilah had a history of abusing her medications, the toxicology report showed only therapeutic levels of depression medication in her system when she died. The jury also could have discounted the suicide notes because they were undated and other sufficient evidence established that Delilah did not hang herself. The jury also could have reasonably concluded that appellant exploited Delilah's fragile mental state to stage the homicide as a suicide.

{¶58} In the final analysis, the trier of fact is in the best position to determine witness credibility. *State v. Carson*, 10th Dist. No. 05AP-13, 2006-Ohio-2440, ¶15. The trial court accepted evidence that appellant killed Delilah through ligature strangulation, and appellant has not demonstrated our need to disturb the court's conclusions. See *Brown* at ¶10. Accordingly, we hold that appellant's aggravated murder conviction is not against the manifest weight of the evidence. We also find that it was reasonable for the jury to have determined that appellant, seeking to hinder a criminal investigation, staged Delilah's body to reflect a suicide. Therefore, we also hold that appellant's tampering

with evidence conviction is not against the manifest weight of the evidence. We overrule appellant's third and fourth assignments of error.

{¶59} In summary, we overrule appellant's four assignments of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.

The Supreme Court of Ohio

FILED

SEP 30 2009

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2009-1490

v.

ENTRY

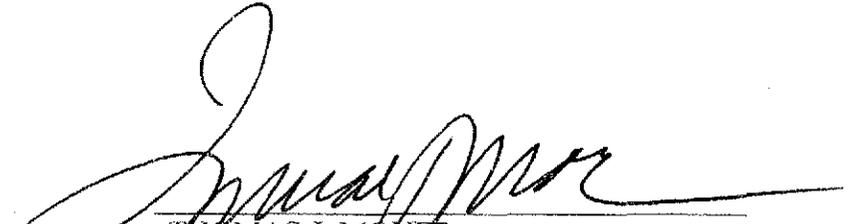
Timothy J. Howard

Upon consideration of appellant's motion for a delayed appeal,

It is ordered by the Court that the motion is granted.

It is further ordered by the Court that appellant shall file a memorandum in support of jurisdiction within thirty days from the date of this entry.

(Franklin County Court of Appeals; No. 08AP177)



THOMAS J. MOYER
Chief Justice