

ORIGINAL

NO. 2009-2208

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 91324

STATE OF OHIO,  
Plaintiff-Appellant

-vs-

WILLIAM DAVIS,  
Defendant-Appellee

**MERIT BRIEF OF APPELLANT**

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## **I. Introduction to the Case and Issues**

Appellee William Davis was convicted of multiple sexual crimes against two young girls. He is serving a life sentence. At trial, the State called Appellee's wife to testify as to the content of taped conversations she had with Appellee while he was detained in the county jail. She testified as to those conversations, but did not testify that Appellee committed the crimes; on the contrary, she testified Appellee did not commit the crimes. Because the trial court did not determine her competency to testify under Evid.R. 601(B), and where Appellee did not object to the trial court's error, the appellate court found the error to be plain error and reversed Appellee's convictions. The appellate opinion does not perform any analysis as to the impact Appellee's spouse's testimony had on the proceedings nor does it determine whether the testimony changed the outcome at trial.

By failing to engage in any analysis of the testimony, the Eighth District Court of Appeals determined that a trial court's failure to inform a witness that she could assert spousal privilege in lieu of testifying is per se reversible error. By doing so, the appellate court created a new standard of law, one not recognized by this or any other appellate court that now equates error in informing a spouse as to testimonial privilege under Evid.R. 601(B) to structural error that warrants automatic reversal. This Court, and others, have applied a plain error analysis where a court fails to determine the competency of a testifying spouse under Evid.R. 601(B).

Not only did the appellate court create a new rule of law in opposition to this Court's clear precedent, it changed the standard of plain error review under Crim.R. 52. This is troublesome to litigants where Crim.R. 52's requirements have long been interpreted to

require a two-part analysis, first, error is noticed, and second, the effect of the error upon the outcome is to be determined. However, the Eighth District has employed a per se rule of reversal upon noticing plain error, truncating longstanding precedent from this Court that a reversal based upon plain error is done only where the error affected substantial rights and where that error affected the outcome of the proceedings.

The State asks that this Court adopt its Propositions of Law, which read:

#### Proposition of Law I

Where no objection is made to spousal testimony, a court's failure to inform the spouse of competency under Evid.R. 601 is not structural error requiring reversal but may be noticed as plain error.

#### Proposition of Law II

The plain error standard of review requires a reviewing court to 1) notice unobjected to and unrecognized error at trial, and 2) determine that, but for the error the outcome at trial would be different.

The State asks that this Court adopt these Propositions of Law in order to instruct appellate courts in Ohio that a trial court's failure to determine spousal competency to testify under Evid.R. 601(B) and where no objection is lodged, such error is not structural error requiring immediate reversal but is to be analyzed under the plain error standard of review. Further, pursuant to Crim.R. 52, such error never requires per se reversal.

## **II. Statement of the Case and Facts**

Appellee was found guilty of 8 counts of rape of child under the age of thirteen in violation of R.C. 2907.02(A)(1)(b), nineteen counts of rape with force in violation of R.C. 2907.02(A)(2), one count of rape under age of ten with force in violation of R.C. 2907.02(A)(2), and three counts of Gross Sexual Imposition in violation of R.C.

2907.05(A)(4). He was sentenced to life imprisonment for the prolonged period of sexual abuse of his victims, identified herein as D.S. and D.T.

According to Appellee's victim, herein D.S., Appellee began penetrating her vagina at age 9. (Tr. 304) Her mother noticed blood in the child's underwear at that time. (Tr. 554) Appellee engaged in vaginal intercourse with his niece from that time until she was in her teens. (Tr. 366-432) D.S. testified to specific sexual acts performed on her by Appellee when she would stay at his and his wife's home. (Id.) She testified as to the location and manner of the rapes she endured, giving detail as to events, noting several instances where Appellee would ejaculate on her and then tell her to clean it up. (Tr. 373, 383, 393, 397) At trial, D.S. itemized the rapes in excruciating detail; noting eighteen separate vaginal rapes. (Tr. 304-426) While Appellee was molesting D.S., Appellee began grooming his younger niece, hereinafter referred to as D.T., by feeling D.T.'s chest. (Tr. 506-28)

In addition to the direct evidence from D.S. and the corroborating evidence from her family members, the State presented the testimony of Appellee's spouse, Alberta Davis. Mrs. Davis was on both the State's and Defense's witness lists. The trial court did not advise Mrs. Davis as to any privilege that she had as to her testimony.

Mrs. Davis testimony consisted of her address, her familial relationship with Appellee and the victims, and her feelings for her family. (Tr. 579-81) She testified she became aware of the rape allegations on September 29<sup>th</sup>, 2006, learning from her sister Shelia. (Tr. 582) Mrs. Davis stated that she was devastated, that she was hurt, and that she didn't believe the allegations. (Tr. 584-85) She spoke with Appellee and he denied the allegations. (Tr. 588) Mrs. Davis stated that she learned more of the allegations before she

moved to Columbus, Ohio. (Tr. 589-90) She stated that Appellee left his job in Cleveland and was unemployed in Columbus. (Tr. 597)

Mrs. Davis testified that she wanted to discuss the allegations of abuse with D.S. and D.T., but decided not to. (Tr. 608-09) She stated that she wanted to ask D.S. why she didn't come forward to her about the allegations. (Tr. 609) She identified a letter that D.S. had written her. (Tr. 610-12) Mrs. Davis was then asked about phone conversations she had with Appellee while Appellee was in county jail. (Tr. 615-29) There was no objection to this line of questioning. (Tr. 621) Portions of the taped conversations were played, specifically as to conversation about Mrs. Davis trying to tape record D.S. at the suggestion of Appellee. (Tr. 615, 618) Mrs. Davis also testified to a recorded conversation that she told Appellee that they could live together and never be around children and that he could get a job where he wouldn't have to be around children. (Tr. 623-25) Mrs. Davis admitted that in one of the conversations Appellee stated that someone should "whip D.S.'s ass." (Tr. 628-29) Mrs. Davis was given the chance to explain the statements from the phone conversations. (TR. 615-29, passim)

When questioned by Appellee's counsel, Mrs. Davis explained that there was always more than one child in the house when they stayed over. (Tr. 634-36) She denied ever seeing Appellee act in a sexually inappropriate manner with any family member. (Tr. 630-33, 636)

In its opinion reversing the case, the Eighth District Court of Appeals noted that the trial court did not determine whether Mrs. Davis was competent to testify under Evid.R. 601(B). *State v. Davis*, Cuyahoga App. No. 91324, 2009-Ohio-5217, at ¶28. The State does not dispute this error. Although the appellate court noted in its opinion that Mrs. Davis,

"[T]estified that she had no direct knowledge of the allegations and made several inconsistent statements about whether she believed defendant committed the offenses," it failed to state the effect this testimony had on the outcome at trial. *Id.*, at ¶ 29. The appellate court simply found that the failure to advise Mrs. Davis under Evid.R. 601(B) of privilege amounted to plain error. In doing so, the appellate court simply cited this Court's opinions in *State v. Brown*, 115 Ohio St.3d 55, 67, 2007-Ohio-4837 and *State v. Adamson* (1995), 72 Ohio St.3d 431 and declared that, "where a trial court fails to instruct a witness as to spousal competency the trial court has committed reversible error." *Davis*, 2009-Ohio-5217, at ¶28. The appellate court determined that it had no choice but to reverse the judgment of conviction in this case based upon its reading of this Court's precedent. *Id.*, at ¶ 30.

### III. Law and Argument

#### A. The Failure Of A Trial Court To Determine A Spouse's Competency To Testify Under Evid.R. 601(B) Is Not Structural Error Warranting Automatic Reversal.

##### Proposition of Law I:

Where no objection is made to spousal testimony, a court's failure to inform the spouse of competency under Evid.R. 601 is not structural error requiring reversal but may be noticed as plain error.

The appellate court sua sponte raised the issue of whether the testimony of the Appellee's spouse resulted in error where the trial court did not advise her of a potential spousal privilege. First, the opinion identifies an error where the trial court did not inform Appellee's spouse that she may elect to testify or not pursuant to Evid.R. 601(B). It cited this Court's opinions, *State v. Brown*, 115 Ohio St.3d 55, 67, 2007-Ohio-4837 and *State v. Adamson*, 72 Ohio St.3d 431, 1995-Ohio-199, to determine the failure to advise the witness was error. *Davis*, 2009-Ohio-5217, at ¶28.

The appellate court's analysis of the effect of the error under Crim.R. 52 ends there; the Court does not analyze the impact the testimony had on the outcome of trial or the outcome of the proceedings. As such, the court did not conduct an analysis of the error under Crim.R. 52; rather, it equated the error to structural error that required reversal of the convictions. This holding would apply to each and every case in which a witness was not advised of privilege under Evid.R. 601(B). This finding of structural error is in direct opposition to the precedents of this Court in which it has determined that where a trial court fails to determine the competency of a spouse under Evid.R. 601(B), the error *may* be noticed as plain error.

Evid.R. 601(A) provides that every person is competent to be a witness, subject to certain exceptions. Evid.R. 601(B) details one of those exceptions as being:

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

- (1) a crime against the testifying spouse or a child of either spouse is charged;
- (2) the testifying spouse elects to testify.

This Court has held that pursuant to this rule a trial court “ \*\*\* must make an affirmative determination on the record that the spouse has elected to testify.” *State v. Adamson* (1995), 72 Ohio St.3d 431, 650 N.E.2d 875, syllabus. However, this Court did not mandate that where no objection is made to the testimony or procedure when a trial court fails to determine a spouse's competency, such error would mandate reversal of a trial by a reviewing court. Rather, this court applied the plain error standard of review.

The plain error standard of review was applied to an Evid.R. 601(B) error first in *Adamson* and then more recently in *Brown*. In *Adamson*, this Court applied plain error

analysis to determine the effect of the spouse's testimony on the outcome of the proceedings. Specifically, this Court quoted *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899, "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *Adamson*, 71 Ohio St.3d, at 434-45.

In *Adamson*, this Court determined that under the facts of the case, the testimony of the spouse negated *Adamson's* defense in material respect and found that because of the import of the spousal testimony, reversal was warranted. *Id.* Unlike that decision in which an analysis and review of the effect of the witnesses testimony was conducted, the Eighth District Court of Appeals created a rule of law that mandates per se, automatic reversal.

When later confronted with a trial court's failure to advise a testifying spouse of privilege in *Brown, supra*, this Court again performed a plain error analysis. In *Brown*, the defendant alleged he suffered ineffective assistance of counsel, arguing counsel did not ascertain whether or not a witness was married to the defendant, preventing the witness from having the option to testify. After noting error, this Court analyzed the importance and impact of the alleged spouse's testimony and reasoned that:

The importance of Wright's [the alleged spouse] testimony to the case against Brown cannot be overstated. Wright is the only one who observed the events of that night. Without her testimony, there would be no firsthand account of Brown's role in the deaths of Toeran and Roan. **The fact that she was not properly found competent to testify severely undermines confidence in the jury's verdict because it calls into question whether, in the absence of her testimony, the jury still would have found Brown guilty of the aggravated-murder charge and thus death-eligible.**"

*Id.*, at ¶ 64. (Emphasis added.)

In reviewing the respective spouses's testimony in *Adamson* and *Brown*, it is readily apparent that the testimony was used to prove an element of the case against the defendant or to negate the proposed defense. It is apparent that this Court was concerned with the validity of the verdicts in the absence of the spousal testimony that was critical to the verdicts in those cases. But, when reviewing Mrs. Davis's testimony in this case, it is not apparent that the testimony was critical to the jury's verdict, especially when it is apparent that Mrs. Davis's testimony that was damaging to Appellee, the recorded jail conversations, would have been brought before the jury by the State through other witnesses.

In this case, the opinion reversing Appellee's convictions is void of analysis of Mrs. Davis's testimony in relation to the effect it had on his convictions. The opinion fails to make any connection between Mrs. Davis' testimony and the verdicts. Although the opinion details some of the testimony presented, it does not address the importance or impact of the testimony on the verdict. The taped conversations of Appellee and his wife that contain the evidence the prosecution relied upon to support Appellee's guilt, e.g., his attempt to manipulate victims's testimony would be admissible regardless of whether or not Mrs. Davis testified. The remainder of her testimony should not be considered crucial or material to the determination of guilt eventually made by the jury. Significantly, the appellate court noted that Mrs. Davis, "testified that she had no direct knowledge of the allegations and made several inconsistent statements about whether she believed defendant committed the offenses." *Davis*, 2009-Ohio-91324, at ¶ 29. Moreover, her testimony refuted the victims's testimony where Mrs. Davis denied that Appellee ever

acted in any sexually inappropriate ways and where Mrs. Davis detailed that when D.S. was sleeping over her home, she was never there without other children present.

Unlike the spousal testimony at issue in *Adamson* and *Brown* relied upon by the State in presenting its cases, the proverbial “smoking gun” evidence; Mrs. Davis’s testimony was of no such character. In this case, that type of evidence came directly from the victim. An examination of the entire record disregarding those portions of Mrs. Davis’s testimony that would not have otherwise been admitted had she exercised her privilege not to testify, reveals that the victims’s testimony was sufficient to sustain the conviction, especially where the testimony was corroborated by others. Further the taped conversations that went to Appellee’s actions after the case had been brought would have been admissible. Mrs. Davis’ testimony in this matter was simply not critical to the verdicts as found by the jury. It was not eyewitness testimony to any of the crimes; it was not the only evidence presented of Appellee’s guilt; and it did not serve to negate Appellee’s defense. If anything, Mrs. Davis’ testimony aided Appellee’s defense in this case where she denied the rapes occurred, provided testimony that D.S. was never alone with Appellee, and stated that she had never witnessed Appellee act in a sexually inappropriate matter with any member of her family.

In examining other courts’ treatment of this Court’s holdings in *Brown* and *Adamson*, it is clear that no other appellate district has created a per se rule of reversal where a spouse’s competency to testify was not properly determined by the trial court. Rather, a full and complete plain error analysis has been conducted. In *City of Mason v. Molinari*, Warren App. No. 06-TRC-00104, 2007-Ohio-5395, the court held that plain error only occurred if the spousal testimony would have changed the outcome of the case. *Id.*, at ¶ 4.

That court recognized that an application of the plain error doctrine did not end after finding error, but continued in order to determine whether or not an analysis of whether the error was harmless must be taken. In *State v. Knox* (Jun. 24, 1997), Franklin App. No. 96APA09-1265, the court found that, “Even assuming, however, that the references to defendant's wife were improper, such error was harmless where it is highly probable that the evidence did not contribute to defendant's conviction.” The Tenth District Court of Appeals also found in *State v. Hodge*, Franklin App. No. 04AP-294, 2004-Ohio-6980, at ¶s 8-9, that regardless of whether the spouse was competent to testify, the testimony did not affect the outcome at trial and was not plain error.

The Eight District Court of Appeals is unique in its treatment of this Court's precedent in *Adamson* and *Brown*, as it did not conduct a plain error analysis to determine the effect of the spousal testimony upon the verdict. When the record at trial is examined without Mrs. Davis's trial testimony, confidence in the verdict in this case is in no way compromised or undermined. Accordingly, had the appellate court not created a per se rule of reversal, but employed the plain error analysis in accord with this Court's precedent and the practice of other appellate districts, it would not have grounds to reverse this matter. Because of this, the State asks that this Court adopt its first proposition of law, reverse the Court of Appeals, and remand for consider the remaining assignments of error.

B. The Appellate Decision Truncates Longstanding Precedent and Creates a New Standard of Review of Plain Error Under Crim.R. 52

Proposition of Law II:

The plain error standard requires a reviewing court to 1) notice unrecognized error, and 2) determine that, but for the error, the outcome at trial would be different.

In this case, the appellate court truncated the plain error rule, finding that because this Court has held that the testimony of a spouse given without a trial court determining the spouse's competency could be reversible error, any such error becomes structural error. This Court has not so held and the appellate court has misread both Crim.R. 52 and this Court's precedent in order to create a new, truncated plain error analysis under Crim.R. 52. In the Eight District, plain error has now become structural error. Crim.R. 52 defines unobjected to error as being:

A) Harmless error

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

This Court explained Crim.R. 52 and the procedure an appellate court is to take when noticing error:

Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error" i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508. Second, the reviewing court must engage in a specific analysis of the trial court record—a so-called "harmless error" inquiry—to determine whether the error "affect[ed] substantial rights" of the criminal defendant. This language has been interpreted to "mean[ ] that the error must have been *prejudicial*: It must have affected the outcome of the [trial] court proceedings." (Emphasis added.) *Id.* at 734, 113 S.Ct. 1770, 123 L.Ed.2d 508.

*State v. Fisher*, 99 Ohio St.3d 127, 789 N.E.2d 222, 2003-Ohio-2761, at ¶7.

In implementing plain error analysis, this Court has stated:

Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.

*State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899 (Citing, *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus; *State v. Greer* (1988), 39 Ohio St.3d 236, 252, 530 N.E.2d 382, 401.)

The appellate court sua sponte identified unobjected to and unnoticed error in this case where Mrs. Davis was not advised of privilege in accord with Evid.R. 601. After noting the error, the court's analysis under Crim.R. 52 ends. It did not analyze the impact the testimony had on the outcome of trial or determine whether or not Appellee was prejudiced by the error. It simply reversed the matter and has thus changed the standard of review of plain error. This change stands in direct opposition to the analysis employed by this Court in both *Adamson* and *Brown*, cases directly cited as authority in the appellate court's opinion in this case. In contrast to the opinion in this case, such truncation of the plain error analysis has not been made by other courts following *Adamson* or *Brown*. The law from this Court is clear; under Crim.R. 52, a reversal for plain error requires both a finding of unnoticed and unobjected to error and a finding that the error affected the outcome of trial.

In this matter, the appellate opinion rejected that analysis and truncated the rule, eliminating harmless error. This error is multiplied, especially where the testimony that was not admissible is not direct evidence of the crime, nor was it the only evidence negating a defense. Rather, the testimony from Mrs. Davis that was admitted in error was favorable to Appellee. Because plain error can now be found in the Eighth Appellate

District without regard to the impact the error had on a trial's outcome, the State asks that this Court reverse the appellate decision in this matter and remand for consideration for Appellee's remaining assignments of error.

#### **IV. Conclusion**

At trial in this matter, the Court failed to advise Appellee's spouse of testimonial privilege. Appellee did not object to the Court's failure to notify the witness of privilege. By reversing the verdicts in this case and by declaring the error to be plain error, the appellate court has created a new rule of law that such error under Evid.R. 601(B) is per se reversible error. This rule of law is in contravention of this Court's precedent that applies a plain error analysis. Moreover, the appellate court, by simply declaring the error to be plain error without any analysis under Crim.R. 52 as to the materiality of the errant testimony upon the verdicts, has created a second precedential rule, truncating the plain error standard and finding plain error without any finding that the error effected a substantial right or that it affected the outcome at trial. Because the opinion in this matter has set forth two aberrant standards of law, both in contrast to established precedent from this Court, the State asks that this Court adopt its Propositions of Law, reverse the appellate court's opinion, and remand for consideration of Appellee's remaining assignments of error.

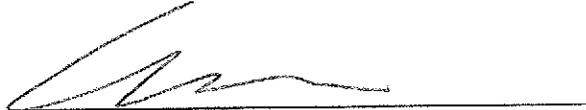
Respectfully submitted,  
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**Service**

A copy of the foregoing Merit Brief of Appellant has been mailed this 14<sup>th</sup> day of May, 2010, to Katherine Szudy, 250 East Broad Street #1400, Columbus, Ohio 43215.

A handwritten signature in black ink, consisting of several fluid, connected strokes, positioned above a horizontal line.

Assistant Prosecuting Attorney

NO.

09-2208

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 91324

STATE OF OHIO,  
Plaintiff-Appellant

-vs-

WILLIAM DAVIS,  
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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APPEAL FROM  
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NO. 91324

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STATE OF OHIO,  
Plaintiff-Appellant

-vs-

WILLIAM DAVIS,  
Defendant-Appellee

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**NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO**

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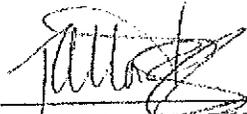
Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized November 17, 2009 which reversed and remanded the decision of the trial court.

Said cause did not originate in the Court of Appeals and involves a felony.

Respectfully submitted,

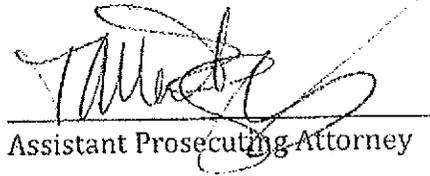
WILLIAM D. MASON  
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**SERVICE**

A true and accurate copy of the foregoing Memorandum in Support of Jurisdiction has been sent by regular United States Mail this John F. Corrigan, 19885 Detroit road #335, Rocky River, Ohio 44116 and The Office of the Ohio Public Defender, 8 East Long Street, 11<sup>th</sup> Floor, Columbus, Ohio 43215

  
Assistant Prosecuting Attorney

NOV 17 2009

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 91324

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**WILLIAM N. DAVIS**

DEFENDANT-APPELLANT

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**JUDGMENT:  
REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-500668

**BEFORE:** Sweeney, J., Stewart, P.J., and Boyle, J.

**RELEASED:** October 1, 2009

**JOURNALIZED:**

NOV 17 2009

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FILED AND JOURNALIZED  
PER APP.R. 22(C)

NOV 17 2009  
GERALD E. FURBER  
CLERK OF THE COURT OF APPEALS  
BY *[Signature]* DEP.

NOV 17 2009

*[Signature]*

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

JAMES J. SWEENEY, J.:

Defendant-appellant, William N. Davis ("defendant"), appeals his convictions for multiple sex offenses. After reviewing the facts of the case and pertinent law, we reverse and remand for a new trial.

On September 17, 2007, defendant was charged with 31 counts of rape and gross sexual imposition involving his two nieces, D.T.1<sup>1</sup> and D.T.2. According to D.T.1, defendant sexually molested her from 1999, when she was nine years old, until 2005, when she was 15 years old. According to D.T.2, defendant began to molest her in 2006 when she was eight or nine years old.

These allegations came to light in the fall of 2006, when D.T.1 told her mother that defendant had sexually abused her for six years. A subsequent investigation led to defendant's indictment. On February 20, 2008, a 12-person jury was impaneled without alternates, and court was adjourned. When court re-convened the next day, February 21, 2008, Juror 6 told the court that she was the victim of a domestic violence assault earlier that week, and again the previous night, and was treated for injuries. She felt that she was unable to complete her service because of the stress of the incident.

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<sup>1</sup>The parties are referred to herein by their initials or title in accordance with this Court's established policy regarding non-disclosure of identities of juveniles.

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The prosecution moved the court to discharge Juror 6 pursuant to R.C. 2945.36, stating that it was prepared to go forward with the case if defendant agreed to try it to a jury of 11. Defendant indicated that he had no objection to discharging Juror 6 and going forward with 11 jurors. The court then expressed concern about proceeding because if the case ran into the following week, there was a possibility of running out of jurors. Specifically, the court stated the following:

“That is the concern of the Court because I don’t want this case not to be prosecuted because of running out of jurors. And we can certainly anticipate since we don’t have alternates because we went through our entire venire yesterday and we are down to 11 if we excuse juror number 6, and then if any one of our jurors cannot be present Monday for any reason, I would anticipate - I don’t know, I’m just guessing - speculating, that you would then move the Court to dismiss this case, to mistry this case and have your client discharged from all of the counts against him.

“Since we can anticipate that there - that if there’s any additional problems we are minus jurors. I don’t know that I’m so willing to proceed with 11 jurors instead of 12.”

The court then asked defense counsel whether, if Juror 6 was discharged, he would agree to the entire jury being discharged without prejudice to the prosecution under R.C. 2945.36. Defense counsel objected.

The court then excused Juror 6 from jury service under R.C. 2945.36(A). Next, the court discharged the remaining jury with no prejudice to the State pursuant to R.C. 2945.36 and 2945.29. The court rescheduled the trial for March 3, 2008. A second jury was sworn in, and on March 7, 2008, this jury found defendant guilty of six counts of rape of a child under 13 years of age in violation of R.C. 2907.02(A)(1)(b); 13 counts of rape by force in violation of R.C. 2907.02(A)(2); one count of gross sexual imposition by force in violation of R.C. 2907.05(A)(1); and three counts of gross sexual imposition of a child under 13 years of age in violation of R.C. 2907.05(A)(4). On March 12, 2008, the court sentenced defendant to life in prison.

Defendant now appeals, raising three assignments of error for our review:

"I. The defendant was twice put in jeopardy for the same offenses contrary to the Fifth Amendment to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution when after jeopardy having attached, the court denied appellant's request to try his case to a jury of eleven, dismissed the sworn panel, and impanelled [sic] a second jury.

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"II. The appellant was denied a fair trial when evidence was admitted that appellant had a general propensity to molest young females when he was on trial for rape and GSI of two of his nieces.

"III. Appellant was prejudiced by ineffective assistance of counsel."

Pursuant to the Double Jeopardy Clauses of the U.S. and Ohio Constitutions, no person shall be put in jeopardy twice for the same crime. Fifth Amendment to the U.S. Constitution; Article I, Section 10 of the Ohio Constitution. "Where a criminal defendant has invoked the right to a trial by jury, jeopardy does not attach so as to preclude subsequent criminal proceedings until the jury is impaneled and sworn. \* \* \* [I]nsofar as the Double Jeopardy Clause precludes successive criminal prosecutions, the proscription is against a *second criminal trial* after jeopardy has attached in a *first criminal trial*." *State v. Gustafson* (1996), 76 Ohio St.3d 425, 435 (emphasis in original).

Once jeopardy has attached, the issue of whether there can be a subsequent prosecution after a mistrial has been declared depends on whether a retrial falls within an exception to the Constitutional bar of double jeopardy. "In cases where a mistrial has been declared without the defendant's request or consent, double jeopardy will not bar a retrial if (1) there was a manifest necessity or a high degree of necessity for ordering a mistrial, or (2) the ends of public justice would otherwise be defeated." *City of Cleveland v. Wade* (Aug. 10,

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2000), Cuyahoga App. No. 76652, citing *Sidney v. Little* (1997), 119 Ohio App.3d 193, 196-97. "An order of the trial judge declaring a mistrial during the course of a criminal trial, on motion of the State is error and contrary to law, constituting a failure to exercise sound discretion, where, taking all the circumstances under consideration, there is no manifest necessity for the mistrial, no extraordinary and striking circumstances and no end of public justice served by a mistrial, and where the judge has not made a scrupulous search for alternatives to deal with the problem." *Id.*, citing *State v. Schmidt* (1979), 65 Ohio App.2d 239, 244-45.

Revised Code 2945.29 governs the court's course of action when jurors become unable to perform duties: "If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled." (Emphasis added.) Additionally, R.C. 2945.36 states that a "trial court may discharge a jury without prejudice to the prosecution: (A) For the sickness or corruption of a juror or other accident or

calamity; \* \* \* The reason for such discharge shall be entered on the journal.”

A trial court is vested with broad discretion in deciding whether to grant or deny a mistrial. *State v. Sage* (1987), 31 Ohio St.3d 173. The instant case presents a unique set of facts in that defendant, the State, and the court all agreed that Juror 6 should be discharged. However, defendant did not agree that, pursuant to R.C. 2945.36, the court should discharge the entire jury and start anew. Rather, defendant argues on appeal that he had an unequivocal constitutional right to proceed with 11 jurors, and that the court's declaring a mistrial was neither manifestly necessary nor imperative.

As support for his proposition that he was entitled to proceed with 11 jurors, defendant cites *State v. Baer* (1921), 103 Ohio St. 585. Defendant misreads the case law. *Baer*, stands for the proposition that a criminal defendant's right to trial by jury may be waived. At the time *Baer* was decided, a jury was composed of 12 men, and today, Crim.R. 23(B) states that “[i]n felony cases juries shall consist of twelve.” The Ohio Supreme Court held that “this right may be waived, and accused persons may, with the approval of the court, consent to be tried by a jury composed of less than twelve men.” *Id.* at paragraph two of syllabus (emphasis added). Thus, *Baer* concludes that a case *may* go forward with 11 jurors; nothing in Ohio jurisprudence concludes that a case *must* go forward with 11 jurors. Although in the instant case defendant and

the State consented to the 11-person jury, they did not have court approval. See, also, *U.S. v. Ramos* (C.A. 6, 1988), 861 F.2d 461, 466 (holding that the "decision to excuse a juror, and to continue with eleven remaining members of the jury, pursuant to the dictates of [Fed.] Rule 23(b), was within the sound discretion of the trial court").

We now turn to whether there was a manifest need to try the case before a second jury. According to the record, the court found that: discharging Juror 6 left 11 jurors to hear the case; there were no alternate jurors because the parties used all their juror challenges; the jurors were on their second to last day of service, and at least two people stated they would not be able to serve into the next week; the State anticipated resting its case Monday of the following week; and if additional jurors had to be discharged, defense counsel may move for a mistrial.

Taking R.C. 2945.36 into consideration, the court made the following findings:

"Specifically, with respect to 2945.36 for what cause a jury may be discharged, the trial court may discharge a jury without prejudice to the prosecution, Subsection A, for the sickness or corruption of a juror, or other accident or calamity.

"This qualified. Last night, [Juror 6] was assaulted. She was knocked down. She hit her head. She was taken by ambulance to a hospital.

"She testified as to feeling poorly with an unsolicited - that was an unsolicited response.

"I would certainly consider being the victim of this type of an assault, especially since it seemed to be so troubling to her that it happened in a public place to qualify as a calamity.

"The fact that she was treated with emergency care, taken to a hospital, is suffering pain and doesn't wish to be here qualified under 2945.36(A) as a reason that this Court may discharge a jury without prejudice to the prosecution."

In reviewing the facts of the jury discharge in light of the statutory and case law surrounding double jeopardy, we cannot say that the court abused its discretion in determining there was a manifest necessity for a second jury. By declaring a mistrial at an early stage of the proceedings, the court attempted to thwart the possibility of a mistrial after evidence had been presented and testimony given. In the instant case, opening statements were not yet made, and the risk of proceeding with 11 jurors and no alternates outweighed any possible prejudice to defendant by impaneling another jury.

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Admittedly, whether to discharge the jury is a close call under the facts of this case. However, “[w]hen applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court.” *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-38. The trial court acted within its discretion by discharging the jury; therefore, double jeopardy does not bar defendant’s retrial.

Accordingly, defendant’s first assignment of error is overruled.

Sua sponte, we raise the issue of whether defendant’s wife, Alberta Patricia Davis, chose to testify voluntarily at trial. Evid.R. 601(B) states that a person is incompetent to be a witness testifying against his or her spouse, unless, inter alia, he or she elects to testify. In *State v. Brown*, 115 Ohio St.3d 55, 67, 2007-Ohio-4837, the Ohio Supreme Court held the following: “Once it has been determined that a witness is married to the defendant, the trial court must instruct the witness on spousal competency and make a finding on the record that he or she voluntarily chose to testify. Failure to do so constitutes reversible plain error.” See, also, *State v. Adamson* (1995), 72 Ohio St.3d 431, 434 (holding that under Evid.R. 601(B), “a spouse remains incompetent to testify until she makes a deliberate choice to testify, with knowledge of her right to refuse. \* \* \* [T]he judge must take an active role in determining competency, and make an affirmative determination on the record that the spouse has elected

to testify. Just because a spouse responds to a subpoena and appears on the witness stand does not mean that she has elected to testify.”)

In the instant case, the defendant’s wife testified on behalf of the State against defendant. She testified that she had no direct knowledge of the allegations and made several inconsistent statements about whether she believed defendant committed the offenses. Eventually, the court permitted the State to ask defendant’s wife leading questions in its case-in-chief under Evid.R. 611(C), which allows leading questions on direct examination when “a party calls a hostile witness, an adverse party, or a witness identified with an adverse party \* \* \*.” Additionally, at one time the court admonished defendant’s wife stating, “you’re not to direct your attention to the defendant throughout this proceeding.” However, at no time did defense counsel object to this testimony, nor did the court instruct defendant’s wife that she had a right to not testify against her husband.<sup>2</sup> Furthermore, there is no finding on the record that defendant’s wife voluntarily chose to testify.

While we are aware of the sensitive and traumatic nature of child sex abuse allegations, we are compelled to remand this case for a new trial, given the mandates in *Brown* and *Adamson*, supra.

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<sup>2</sup>We note that both the State and defendant reserved the right to call defendant’s wife as a witness at trial; however, we find this immaterial to the analysis at hand. See *State v. Brown*, supra, 115 Ohio St.3d at 67 (holding that “the rule in *Adamson* is absolute. \* \* \* Whether [the spouse] would have still chosen to testify after a proper instruction was given to her is not relevant to the issue of error).

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Under the authority of App.R. 12(A)(1)(c), our order for a new trial renders defendant's remaining assignments of error moot and we do not consider them.

Judgment reversed and case remanded for a new trial.

It is ordered that appellant recover from appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for new trial.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., CONCURS;  
MARY J. BOYLE, J., CONCURS IN PART AND DISSENTS IN PART (SEE ATTACHED OPINION)

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

I respectfully dissent from the majority's resolution of the first assignment of error because the record fails to demonstrate a "manifest necessity" for sua sponte ordering a mistrial.

At the outset, I must emphasize that the constitutional protection afforded under the Double Jeopardy Clause also "embraces the defendant's 'valued right

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to have his trial completed by a particular tribunal.” *Arizona v. Washington* (1978), 434 U.S. 497, quoting *United States v. Jorn* (1971), 400 U.S. 470, 484, and *Wade v. Hunter* (1949), 336 U.S. 684, 689.

And although a trial court has the power to sua sponte declare a mistrial without the defendant’s consent, “the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.” *United States v. Perez* (1824), 22 U.S. 579, 580 (case wherein the United States Supreme Court initially coined the “manifest necessity” phrase); *United States v. Toribio-Lugo* (C.A.1, 2004), 376 F.3d 33, 38-39. Indeed, recognizing that a constitutionally protected interest is affected by a court’s sua sponte declaration of a mistrial, the Supreme Court has cautioned trial courts to exercise its authority only after a “scrupulous exercise of judicial discretion.” *Jorn*, 400 U.S. at 485. As stated by the Supreme Court:

“[A] trial judge, therefore, ‘must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.’” *Washington*, 434 U.S. at 514, quoting *Jorn*, 400 U.S. at 486 (Harlan, J.).

With these considerations in mind, the “manifest necessity” standard is a heavy burden. *Washington*, 434 U.S. at 505. And although there is no precise, mechanical formula to determine whether a mistrial is supported by “manifest

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necessity,” a reviewing court must be satisfied that the trial court exercised “sound discretion” in declaring a mistrial. *Id.* at 506, 514; see, also *Ross v. Petro* (C.A.6, 2008), 515 F.3d 653. To exercise “sound discretion” in determining that a mistrial is necessary, “the trial judge should allow both parties to state their positions on the issue, consider their competing interests, and explore some reasonable alternatives before declaring a mistrial.” *State v. Rodriguez*, 8th Dist. No. 88913, 2007-Ohio-6303, ¶23, citing *Washington*, *supra*.

Based on the circumstances of this case, I do not believe that the trial judge exercised “sound discretion” in declaring a mistrial. Here, after the court properly excused Juror 6, there was a clear alternative to a mistrial: proceeding with 11 jurors. Indeed, *both* the state and defense agreed to have the case heard by 11 jurors and were ready to proceed. Thus, they shared the same position, i.e., proceed with the jury impaneled and sworn. And although the trial judge heard from both sides and discussed the possibility of proceeding with 11 jurors, she nevertheless opted to sua sponte declare a mistrial.

The judge’s decision to declare a mistrial was based in part on the trial most likely carrying over to the next week, which the judge believed would have created a severe hardship for some members of the jury. The judge inquired of the members, and two indicated that they had a conflict if the case proceeded past Monday of the following week. (But, as noted by the trial judge, the jurors stated during voir dire that they would fulfill their duty and appear for service

despite any hardship.) The judge further expressed concern that if a juror failed to appear on Monday, the defense would then move for a mistrial.

All of the trial judge's stated concerns, however, fail to demonstrate "manifest necessity" for declaring a mistrial. Notably, the judge's stated concerns were speculative. And, if in fact any of them arose, the court could have addressed them at that time. As for the concern of the defense later moving for a mistrial if there were insufficient number of jurors, such motion would not have implicated the double jeopardy issues present in this case. Simply put, I do not find that the trial court adequately considered Davis's "valued right to have his trial completed by a particular tribunal." See *Washington*, supra.

Further, while I recognize that "manifest necessity" does not mean that a mistrial was absolutely necessary or that there was no other alternative, it does require a trial court to give meaningful consideration to other alternatives before sua sponte ordering a mistrial. This court has repeatedly recognized that a trial court abuses its discretion in sua sponte declaring a mistrial when other less drastic alternatives are easily available. See *North Olmsted v. Himes*, 8th Dist. Nos. 84076 and 84078, 2004-Ohio-4241 (finding an abuse of discretion in declaring a mistrial when a curative instruction would have sufficiently cured any prejudice); *State v. Coon*, 8th Dist. No. 79641, 2002-Ohio-1813 (finding an abuse of discretion because the court failed to consider less drastic alternatives);

*State v. Morgan* (1998), 129 Ohio App.3d 838 (finding an abuse of discretion because the trial court failed to cure or otherwise determine the effect of the purportedly tainted evidence).

Here, the trial court could have proceeded with 11 jurors, as consented to by both the state and Davis, and its sua sponte ordering of a mistrial constitutes an abuse of discretion. Therefore, Davis's retrial was barred by double jeopardy, and his first assignment of error should be sustained. See *State v. Glover* (1988), 35 Ohio St.3d 18.

Not Reported in N.E.2d, 2007 WL 2917209 (Ohio App. 12 Dist.), 2007 -Ohio- 5395  
**(Cite as: 2007 WL 2917209 (Ohio App. 12 Dist.))**

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

Court of Appeals of Ohio,  
 Twelfth District, Warren County,  
 CITY OF MASON, Plaintiff-Appellee,

v.

Michael G. MOLINARI, Defen-  
 dant-Appellant.

Decided Oct. 9, 2007.

Criminal Appeal from Mason Municipal  
 Court, Case No. 06-TRC-00104.

Robert W. Peeler, Mason City Prosecutor,  
 Teresa R. Wade, Mason, OH, for plain-  
 tiff-appellee.

The Farrish Law Firm, Robert W. Dziech II,  
 Cincinnati, OH, for defendant-appellant.

BRESSLER, J.

\*1 {¶ 1} Defendant-appellant, Michael G. Molinari, appeals his conviction and sentence in the Mason Municipal Court for operating a motor vehicle while under the influence.

{¶ 2} On January 5, 2006, appellant was found walking on State Route 42 by two of his employees, Nicholas Rakel and Tom Mellen. Upon noticing that appellant was talking to himself, Rakel and Mellen drove up to him and told him they were going to take him home. Appellant resisted at first, but eventually got into Rakel's car. Appellant told them he had Warren CA2006-05-056 been drinking and needed to retrieve his vehicle, which he had left at a local area bar.

{¶ 3} Upon arriving at the bar, appellant said that he did not have enough money to pay his \$15 bar tab. Rakel paid appellant's tab and the three of them went to Rakel's residence in the city of Mason, in Warren County, Ohio, with Mellen driving appellant in appellant's car and Rakel following them in his vehicle. Along the way, appellant tried to get Mellen to stop the car so that he could get out, but Mellen refused to do so. Appellant also made statements at this time indicating that he was going to kill himself.

{¶ 4} When they arrived at appellant's house, appellant went inside where his wife, Joanna,<sup>FN1</sup> was, and started speaking in a very agitated manner. He began pacing around the house, stating repeatedly, "give me a bottle, I need one more night to party." He then got into his mini-van, which was parked in the driveway, with Rakel's vehicle parked immediately behind it. As he backed out of the driveway, he tried to maneuver his car around Rakel's, but when he did so, he clipped the front end of Rakel's vehicle. Joanna ran out into the yard to try to stop him, but he continued to drive through the yard, across the sidewalk, and onto the road, where he drove off at a speed that Rakel would later describe as "excessively fast for a residential street."

FN1. In his testimony, Rakel referred to Joanna Molinari as "Joy," but Mrs. Molinari identified herself at trial as "Joanna." Therefore, we shall refer to her as "Joanna" rather than "Joy."

{¶ 5} Rakel and Mellen got in Rakel's car and

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started following appellant. They also called 911 and provided a description of appellant's car. When appellant saw that he was being followed, he turned around and drove back to his residence. Rakel and Mellen followed appellant back to his residence and went inside upon realizing that Joanna was still inside the residence and that appellant posed a potential threat to her.

{¶ 6} Once inside, Rakel and Mellen saw appellant acting much like he had before, though even more agitated, and repeatedly saying "give me a bottle," "I want to party one more time," and "you can't control me." At one point appellant overturned a chair and made threats against Joanna. Rakel and Mellen tried to calm him down as they waited for the police to arrive. Rakel took appellant's keys to his vehicles to keep appellant from being able to get to them because it was obvious to him that appellant was intoxicated, and he did not want appellant to leave. When the police came to appellant's residence, appellant told Rakel, "Nick go get rid of the cops."

\*2 {¶ 7} Sergeant Peter Schultz and Officer Scott Miller of the Mason Police Department arrived on the scene and noticed that the vehicle they pulled behind was damaged. Appellant's wife gave Sgt. Schultz permission to enter the home. Sgt. Schultz noticed that appellant's eyes were glassy and somewhat red and bloodshot. When he got appellant up on his feet, he detected a strong odor of an alcoholic beverage on appellant's person. Sgt. Schultz also noticed that appellant was unsteady on his feet, and he had to make sure that appellant did not fall back in the chair.

{¶ 8} When Officer Miller walked over to appellant, he detected the same things about

him that Sgt. Schultz had detected. Officer Miller also noticed that appellant was starting to raise his voice and becoming "a little more vocal," and heard appellant say that there was really no reason to live. At that point, the officers called a life squad for appellant. At Sgt. Schultz's request, Officer Miller administered a horizontal gaze nystagmus test to appellant, and observed all six of the six indicators of intoxication that the HGN test is designed to detect.

{¶ 9} The officers placed appellant under arrest and charged him with operating a motor vehicle under the influence of alcohol in violation of Mason Codified Ordinance 333.01(a)(1)(A), a misdemeanor of the first degree, and leaving the scene of an accident in violation of Mason Codified Ordinance 335.13, a misdemeanor of the second degree.

{¶ 10} On March 28, 2006, appellant was tried on the charges by the bench. Plaintiff-appellee, the city of Mason, presented the testimony of Rakel, Mellen, Sgt. Schultz, and Officer Miller, who testified to the facts related above. Appellee also called appellant's wife, Joanna, to the witness stand, without objection from appellant. Joanna testified that appellant had a mental breakdown on the day of the incident, but stated that he did not appear to her to have been drinking, rather he appeared to her have been "very angry [and] agitated."

{¶ 11} In cross-examining appellee's witnesses, appellant's trial counsel sought to establish that appellant was not drunk on the day in question, but only angry, agitated, and even suicidal, and his behavior was misinterpreted as intoxication by the police and others. Appellant himself chose not to testify at trial.

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{¶ 12} The trial court found appellant not guilty of the charge of leaving the scene of an accident, but guilty of the charge of operating a motor vehicle under the influence. The court sentenced appellant to serve 120 days in jail, imposed a 180-day suspension of his driving privileges except for driving to and from work and court appointments, and ordered him to pay \$250 in fines and court costs. The court suspended appellant's jail sentence on the condition that he comply with the terms of his community control sanctions and probation.

{¶ 13} Appellant now appeals from his conviction and sentence, raising the following assignments of error.

\*3 {¶ 14} Assignment of Error No. 1:

{¶ 15} "THE TRIAL COURT ERRED WHEN IT FAILED TO FIND APPELLANT'S WIFE INCOMPETENT TO TESTIFY AT TRIAL."

{¶ 16} Appellant argues that the trial court committed reversible error when it failed to find that his wife was incompetent pursuant to Evid.R. 601 to testify as a witness for appellee. We disagree with this argument.

{¶ 17} Evid.R. 601 states in pertinent part:

{¶ 18} "Every person is competent to be a witness except:

{¶ 19} " \* \* \*

{¶ 20} "(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

{¶ 21} "(1) A crime against the testifying spouse or a child of either spouse is charged;

{¶ 22} "(2) The testifying spouse elects to testify."

{¶ 23} "Under Evid.R. 601(B), a spouse remains incompetent to testify until she makes a deliberate choice to testify, with knowledge of her right to refuse. The trial court must take an active role in determining competency, and must make an affirmative determination on the record that the spouse has elected to testify." *State v. Adamson*, 72 Ohio St.3d 431, syllabus, 1995-Ohio-199. See, also, *State v. Henness*, 79 Ohio St.3d 53, 57, 1997-Ohio-405 (following *Adamson*).

{¶ 24} In this case, the trial court failed to make an affirmative determination on the record that appellant's wife elected to testify, with knowledge of her right to refuse, as required by *Adamson*. However, appellant failed to raise this issue at trial.

{¶ 25} Evid.R. 103 provides that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party has been affected, and in the case where the ruling is one that admits evidence, the party objecting to the evidence makes a timely objection to the evidence, stating the specific ground of the objection if the specific ground was not apparent from the context. See Evid.R. 103(A)(1). Generally, failure to object to the introduction of evidence at trial constitutes a waiver of any challenge to the evidence. *State v. Roberts*, 156 Ohio App.3d 352, 356, 2004-Ohio-962.<sup>FN2</sup>

FN2. See 1 Ginannelli & Snyder, *Evidence* (2006), 388, Section 601.8,

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(failure to object at trial to spouse's testimony on competency grounds waives the objection), citing, in fn. 83, *Locke v. State*, 33 Ohio App.3d 445. See, also *Adamson*, 72 Ohio St.3d at 434-435, (where the Ohio Supreme Court indicated that when a defendant failed to object to his wife's testimony at trial on the grounds that the testimony violated the spousal competency rule in Evid.R. 601[B], the error could be recognized on appeal only because the erroneous introduction of the wife's testimony in that case rose to the level of plain error under Crim.R. 52[B] ).

{¶ 26} Crim.R. 52(B) allows a reviewing court to take notice of "plain errors" or defects affecting substantial rights even though they were not brought to the attention of the [trial] court." See, also, Evid.R. 103(D) (nothing in Evid.R. 103 precludes a reviewing court from taking notice of plain errors affecting substantial rights even though they were not brought to the attention of the trial court). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91 \* \* \*, paragraph three of the syllabus. 'Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.' *State v. Moreland* (1990), 50 Ohio St.3d 58, 62 \* \* \*." *Adamson*, 72 Ohio St.3d at 434-435.

\*4 {¶ 27} Here, appellant failed to call the issue of spousal competency to the trial court's attention, and thus waived all but plain error. See Evid.R. 103(D). Moreover, any error in admitting the testimony of ap-

pellant's wife did not constitute plain error under the facts of this case. Cf. *Adamson* at 435 (finding that the outcome of defendant's trial "would certainly have been different had his wife not testified against him").

{¶ 28} At trial, appellant's wife, Joanna, testified that appellant had a "breakdown" on the day in question and wound up in the hospital. She acknowledged that she had seen her husband drink alcohol in the past and that there was alcohol in their basement. However, she testified that while appellant looked very angry, agitated, and upset on the day in question, he did not seem to have been drinking that day. She also testified that she did not want appellant to have the keys to his automobile because she was worried for him since he had already been through a mental breakdown earlier in the week, but she stated that she was not worried about him drinking on that day.

{¶ 29} A review of the testimony of appellant's wife shows that the testimony tended to help rather than hurt appellant, and, therefore, it cannot be said that but for the error in not ruling the testimony of appellant's wife to be incompetent, the outcome of the trial would clearly have been different. *Adamson*, 72 Ohio St.3d at 435, quoting *Moreland*, 50 Ohio St.3d at 62. Additionally, the evidence of appellant's guilt on the charge of operating a motor vehicle under the influence was overwhelming, and, therefore, declaring the testimony of appellant's wife to be incompetent would not have changed the outcome of the proceedings. *Id.*

{¶ 30} Appellant's first assignment of error is overruled.

{¶ 31} Assignment of Error No. 2:

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{¶ 32} “THE TRIAL COURT ERRED WHEN IT FAILED TO FIND APPELLANT’S WIFE’S TESTIMONY FELL WITHIN O.R.C. 2945.42, THE SPOUSAL PRIVILEGE.”

{¶ 33} Appellant argues that the trial court committed reversible error by failing to exclude his wife’s testimony on grounds that the testimony fell within the spousal privilege set forth in R.C. 2945.42. We disagree with this argument.

{¶ 34} R.C. 2945.42 states in pertinent part:

{¶ 35} “Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness \* \* \*.”

{¶ 36} While Evid.R. 601(B) is a rule of procedure that governs the *competency* of spouses to testify against each other regarding criminal activity, *Adamson*, 72 Ohio St.3d at 433, R.C. 2945.42 is a rule that “confers a substantive right upon the accused to exclude *privileged* spousal testimony concerning a confidential communication made or act done during coverture unless a third person was present or one of the other specifically enumerated exceptions contained in the statute is applicable.” (Emphasis added.) *State v. Rahman* (1986), 23 Ohio St.3d 146, 149.

\*5 {¶ 37} The Ohio Supreme Court has noted that “there are significant differences between a rule granting a particular privilege and one which defines a class of witnesses as

incompetent.” *State v. Savage* (1987), 30 Ohio St.3d 1, 4. “[P]rivileges are generally asserted to block the introduction of *testimony* on particular *subjects* which yet allows the witness to give unimpeded testimony on other subjects. However, a rule of incompetency defines which *witness* may not offer testimony and then sets forth limited exceptions for when witnesses may be heard.” *Id.*

{¶ 38} “Under R.C. 2945.42, an accused may prevent a spouse from testifying about private acts or communications.” *Adamson*, 72 Ohio St.3d at 433. However, if the accused fails to raise a specific objection to his spouse’s testimony regarding such matters, the accused waives his right to raise the issue on appeal. See *Heness*, 79 Ohio St. at 59.

{¶ 39} In this case, appellant never raised a specific objection to his wife’s testimony on the grounds that it violated the spousal privilege in R.C. 2945.42. Therefore, he has waived this issue. *Id.*

{¶ 40} Furthermore, any error the trial court made in allowing appellant’s wife to testify was harmless under the circumstances of this case. Appellant argues that the “vast majority” of his wife’s testimony breached the privilege for spousal acts and communications sought to be protected under R.C. 2942.42, but the only examples he can point to is that his wife testified that there was alcohol in their basement, and she had seen appellant in the past when he had been drinking.

{¶ 41} However, the vast majority of communications and acts between appellant and his wife took place in front of third persons, namely, Rakel, Mellen, Sgt. Schultz, and Officer Miller, and, therefore, the spousal

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privilege in R.C. 2945.42 clearly does not apply. See *Rahman*, 23 Ohio St.3d at 149. Furthermore, the testimony of appellant's wife that there was alcohol in their basement did not play a prominent role in appellant's conviction, as there was overwhelming evidence in the record that appellant had been drinking alcohol on the day of his arrest, including appellant's own admissions to his friends and the police. Cf. *id.* at 150.

{¶ 42} Moreover, appellant's wife testified that while she had seen appellant when he had been drinking in the past, he did not seem as if he had been drinking on the day of his arrest. Instead, she testified, appellant only seemed "very angry" and "agitated." This testimony supported the defense's theory that appellant was suicidal on the day of his arrest, and his condition was misinterpreted by the police and others as intoxication. Therefore, the testimony of appellant's wife tended to help rather than hurt him, and any error in admitting that testimony was harmless. Cf. *Rahman*, 23 Ohio St.3d at 150 (where the court found it was "difficult to minimize the prejudicial impact" of the testimony of defendant's wife in that case).

\*6 {¶ 43} Appellant's second assignment of error is overruled.

{¶ 44} Assignment of Error No. 3:

{¶ 45} "THE DEFENDANT-APPELLANT'S PECUNIARY [sic] RIGHTS WERE AFFECTED BY THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL."

{¶ 46} Appellant argues that his trial counsel provided him with constitutionally ineffective assistance of counsel. We disagree with

this argument.

{¶ 47} In order to prevail on an ineffective assistance of counsel claim, a criminal defendant must make the two-pronged showing set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that his counsel's performance "fell below an objective standard of reasonableness." *Id.* at 687-688. Judicial review of trial counsel's performance must be "highly deferential," and the reviewing court must indulge a strong presumption that counsel's conduct is professionally reasonable and, under the circumstances, might be viewed as sound trial strategy. *Id.* at 689.

{¶ 48} Second, a defendant must show that his defense counsel's performance prejudiced him. *Id.* at 687. This requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A failure to make a sufficient showing on either the "performance" or "prejudice" prong of the *Strickland* standard will doom a defendant's ineffective assistance of counsel claim. See *id.* at 697.

{¶ 49} Appellant argues that his trial counsel provided him with ineffective assistance by failing to challenge his wife's testimony on the grounds of spousal privilege and competence. However, for the reasons set forth in our response to appellant's first two assignments of error, we find that appellant has failed to demonstrate that the outcome of his trial would have been different if he had raised such challenges at trial. *Id.* at 694.

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{¶ 48} Moreover, the decision by appellant's trial counsel to allow appellant's wife to testify may have been a deliberate trial tactic on his part, since her testimony actually served to buttress the defense's theory of the case, i.e., appellant was not drunk on the day in question, but only angry, agitated, and suicidal, and his behavior was misinterpreted as intoxication by the police and others. This tactical decision on the part of appellant's trial counsel is entitled to wide deference from a reviewing court. *Id.* at 689.

{¶ 51} Appellant also argues that his counsel provided him with constitutionally ineffective assistance by failing to file a motion to suppress the results of the HGN test conducted by Officer Miller on the grounds that the officer performed the test incorrectly. Alternatively, he asserts that his trial counsel should have at least challenged the weight and sufficiency of appellee's evidence regarding the HGN test at trial. We find these arguments unpersuasive.

\*7 {¶ 52} “The HGN test is one of several field sobriety tests used by police officers in detecting whether a driver is intoxicated. ‘Nystagmus’ is an involuntary jerking of the eyeball. ‘Horizontal gaze nystagmus’ refers to a jerking of the eyes as they gaze to one side. The position of the eye as it gazes to one side is called ‘maximum deviation.’ In administering the test, an officer takes some object, a pen for example, and places it approximately twelve to fifteen inches in front of the suspect's nose. The officer then observes the suspect's eyes as they follow the object to determine at what angle nystagmus occurs. The more intoxicated a person becomes, the less the eyes have to move toward to the side before nystagmus begins. \* \* \* Other signs of intoxication include distinct

nystagmus at maximum deviation and the inability of the suspect's eyes to smoothly follow the object.” (Citations omitted.) *State v. Homan*, 89 Ohio St.3d 421, 422, fn. 1, 2000-Ohio-212.

{¶ 53} *Homan* required that field sobriety tests be administered in strict compliance with testing procedures. See *id.* at paragraph one of the syllabus. However, as appellant acknowledges, *Homan* was legislatively overruled by 2001 Am.Sub.S .B. 163, which became effective April 9, 2003. See R.C. 4511.19(D)(4)(b). Under that law, the prosecution only needs to establish by clear and convincing evidence that in performing a field sobriety test like the HGN test, the law enforcement officer substantially complied with generally accepted testing standards, including, but not limited to those set by the NHTSA. *Id.*

{¶ 54} Appellant asserts that a review of Officer Miller's testimony demonstrates that the officer failed to perform the HGN test properly. Among other things, appellant contends that Officer Miller's testimony “indicated that he incorrectly timed his passes,” and “raises question about the number of passes in the order of the test.” He also faults his trial counsel for not asking “if other crucial procedures were followed.”

{¶ 55} However, contrary to what appellant asserts, a review of Officer Miller's testimony shows that the officer was not asked to testify about the issues regarding the HGN test that appellant is now raising on appeal. Instead, appellant's trial counsel raised the issue of whether the HGN test was reliable when it was administered to someone who was in a highly agitated, even suicidal, state as was appellant on the date he was arrested.

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The decision of appellant's trial counsel to proceed with this line of attack on the reliability of the HGN test, rather than to follow the approach now set forth by appellant on appeal, was a decision involving trial tactics and strategy that is owed great deference by this court. See *Strickland*, 466 U.S. at 689.

{¶ 56} Furthermore, appellee presented an overwhelming amount of evidence in proving its charge that appellant operated a motor vehicle while under the influence of alcohol other than the results of the HGN test that Officer Miller performed on appellant. As one commentator has observed, “[r]arely will the [HGN test] comprise the bulk of the evidence against the accused, so therefore, it is unlikely that its presence or absence will have any major effect on the case.” Painter, *Ohio Driving Under the Influence Law* (2007 Ed.) 52, Section 3:9.

\*8 {¶ 57} Here, the bulk of appellee's case against appellant was not dependent on the HGN test that Officer Miller performed on appellant. Therefore, the failure of appellant's trial counsel to have the results of the HGN test suppressed or to oppose that evidence more vigorously at trial would not have changed the outcome of these proceedings.

{¶ 58} Appellant's third assignment of error is overruled.

{¶ 59} Assignment of Error No. 4:

{¶ 60} “THE DEFENDANT-APPELLANT'S CONVICTION OF THE MASON MUNICIPAL CODE 333.01 WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 61} Appellant argues that his conviction for operating a motor vehicle under the influence was contrary to the manifest weight of the evidence. We disagree with this argument.

{¶ 62} In considering a manifest weight of the evidence challenge, an appellate court must review the entire record, weighing the evidence and all reasonable inferences that can be drawn from it, and consider the credibility of the witnesses, to determine whether the trier of fact clearly lost its way in resolving conflicts in the evidence, and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 63} While a reviewing court must consider the credibility of the witnesses in evaluating a manifest weight of the evidence claim, the court must be mindful of the fact that the weight to be given the evidence and the credibility of the witnesses are primarily matters for the jury or trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Moreover, the decision of the jury or trier of fact is owed deference since they are “ ‘best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.’ ” *State v. Miles* (Mar. 18, 2002), Butler App. No. CA2001-04-079, quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 64} Appellant was convicted of operating a motor vehicle under the influence in violation of Mason Codified Ordinance

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330.01(a)(1)(A), which states in pertinent part:

{¶ 65} “(a) Driving Under the Influence.

{¶ 66} “(1) No person shall operate any vehicle within this Municipality, if, at the time of the operation, any of the following apply:

{¶ 67} “A. The person is under the influence of alcohol, a drug of abuse, or combination of them.”

{¶ 68} Appellant argues that the trial court’s finding that he was under the influence of alcohol at the time he was operating a motor vehicle is contrary to the manifest weight of the evidence. We disagree with this argument.

{¶ 69} Mason Codified Ordinance 333.01(a)(1)(A) is similar to R.C. 4511.19(A)(1)(a), which states in pertinent part:

\*9 {¶ 70} “(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶ 71} “(a) The person is under the influence of alcohol, a drug of abuse, or combination of them.”

{¶ 72} The phrase “under the influence of influence of intoxicating liquor” has been defined as “[t]he condition in which a person finds himself after having consumed some intoxicating beverage in such quantity that its effect on him adversely affects his actions, reactions, conduct, movement or mental processes or impairs his reactions to an appreciable degree, thereby lessening his abil-

ity to operate a motor vehicle.” *Toledo v. Starks* (1971), 25 Ohio App.2d 162, 166. See, also, *State v. Steele* (1952), 95 Ohio App. 107, 111 (“[B]eing ‘under the influence of alcohol or intoxicating liquor’ means that the accused must have consumed some intoxicating beverage, whether mild or potent, and in such quantity, whether small or great, that the effect thereof on him was to adversely affect his actions, reactions, conduct, movements or mental processes, or to impair his reactions, under the circumstances then existing so as to deprive him of that clearness of the intellect and control of himself which he would otherwise possess”).

{¶ 73} The definition of “under the influence” of alcohol or intoxicating liquor found in cases like *Starks* and *Steele* is used in the Ohio Jury Instructions to define the term “under the influence” for purposes of R.C. 4511.19(A)(1). See 4 Ohio Jury Instructions (2007), 898, Section 711.19(6).

{¶ 74} In this case, the state presented overwhelming evidence that appellant operated a motor vehicle while under the influence of alcohol. Appellant was found by two of his employees, Rakel and Mellen, walking along a highway, talking to himself. He admitted to Rakel and Mellen that he had been drinking and had left his vehicle at a bar. When the three of them went to the bar, one of the employees paid appellant’s \$15 bar tab. Appellant, himself, has asked us to take judicial notice of the fact that in 2007, alcoholic beverages cost three dollars a piece. If that is true, then there is evidence to show that appellant, by his own admission, had purchased at least five alcoholic beverages at the time of his arrest.

{¶ 75} After appellant was driven home, he

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went back out, even though his car was blocked by Rakel's vehicle. Appellant attempted to maneuver around Rakel's vehicle, but ended up striking and damaging it. Despite causing the accident, appellant drove over his yard and then out onto the street, traveling at a high rate of speed. Rakel testified that appellant was obviously drunk on the day in question, and both he and Mellen were concerned about the welfare of appellant and his wife as a result of appellant's behavior.

{¶ 76} Sgt. Schultz and Officer Miller both noticed that appellant's eyes were glassy and bloodshot, and that he had trouble standing. Appellant admitted to the officers that he had been drinking. When Officer Miller performed the HGN test on appellant, he observed all six of six indicators of intoxication the HGN test is designed to detect. The evidence presented in this case, when viewed in its entirety, provided overwhelming proof that appellant was guilty of the offense of operating a motor vehicle under the influence of alcohol.

\*10 {¶ 75} Appellant again argues in this assignment of error that Officer Miller's testimony shows that the officer failed to perform the HGN test correctly. However, we reject this argument for the same reasons stated in our response to appellant's third assignment of error. Among other things, even if trial counsel had pointed out the mistakes Officer Miller allegedly made in conducting the HGN test, it would not have changed the outcome of these proceedings, as the remaining evidence presented by appellee provided overwhelming proof of appellant's guilt on the charge of operating a motor vehicle while under the influence of alcohol.

{¶ 78} Appellant's fourth assignment of error is overruled.

{¶ 78} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.  
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**H**

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

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

STATE of Ohio, Plaintiff-Appellee, v.

Edward HODGE, Defendant-Appellant.

No. 04AP-294.

Dec. 21, 2004.

**Background:** Defendant was convicted in the Court of Common Pleas, Franklin County, of two counts of aggravated murder with firearm and death penalty specifications and two counts of kidnapping with firearm specifications and was sentenced to total prison term of life plus 13 years. Defendant appealed.

**Holdings:** The Court of Appeals, Klatt, J., held that:

- (1) admission of recorded telephone conversations between defendant and his wife was not plain error;
- (2) trial court did not abuse its discretion when it limited defendant's cross-examination of state's key witness about an unrelated murder;
- (3) state's failure to turn over their key witness's oral statements to prosecutors did not violate Brady, so as to warrant mistrial;
- (4) aggravated murder instruction that contained distinct, alternative forms of the offense was not erroneous;
- (5) instruction that provided jury with both of the alternative forms of the felony-murder death penalty specification was not erroneous;
- (6) trial counsel was not ineffective; and
- (7) evidence was sufficient to support aggravated murder conviction.

Affirmed.

## West Headnotes

## [1] Criminal Law 110 ↪ 1036.1(6)

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in  
Lower Court of Grounds of Review  
110XXIV(E)1 In General  
110k1036 Evidence  
110k1036.1 In General  
110k1036.1(3) Particular Evid-  
ence

110k1036.1(6) k. Document-  
ary Evidence. Most Cited Cases  
Murder defendant waived argument regarding ad-  
mission at trial of two recorded telephone conversa-  
tions between defendant and his wife, but for plain  
error, where his counsel had stipulated that woman  
was actually defendant's ex-wife when the conversa-  
tions took place and did not object on compet-  
ency grounds when the state introduced the record-  
ed conversations into evidence. Rules of Evid.,  
Rule 601(B).

## [2] Criminal Law 110 ↪ 1137(5)

110 Criminal Law  
110XXIV Review  
110XXIV(L) Scope of Review in General  
110XXIV(L)11 Parties Entitled to Allege  
Error

110k1137 Estoppel  
110k1137(5) k. Admission of Evid-  
ence. Most Cited Cases  
Admission at murder trial of two recorded tele-  
phone conversations between defendant and his  
wife was not plain error, since wife's statements  
during these conversations indicated that she did  
not think defendant could have murdered anyone  
and defense counsel had invited any error by stipu-  
lating that she was actually defendant's ex-wife  
when the conversations took place. Rules of Evid.,  
Rule 601(B).

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**[3] Criminal Law 110 ↪338(7)**

110 Criminal Law  
110XVII Evidence  
110XVII(D) Facts in Issue and Relevance  
110k338 Relevancy in General  
110k338(7) k. Evidence Calculated to Create Prejudice Against or Sympathy for Accused. Most Cited Cases

**Criminal Law 110 ↪369.2(4)**

110 Criminal Law  
110XVII Evidence  
110XVII(F) Other Offenses  
110k369 Other Offenses as Evidence of Offense Charged in General  
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General  
110k369.2(3) Particular Offenses, Prosecutions for  
110k369.2(4) k. Assault, Homicide, Abortion and Kidnapping. Most Cited Cases  
Trial court did not abuse its discretion when it limited murder defendant's ability to cross-examine state's key witness about an unrelated murder, given risk of confusing jury with facts about the unrelated murder and risk of unfairly prejudicing defendant by linking him to another murder. Rules of Evid., Rule 611(B).

**[4] Criminal Law 110 ↪1998**

110 Criminal Law  
110XXXI Counsel  
110XXXI(D) Duties and Obligations of Prosecuting Attorneys  
110XXXI(D)2 Disclosure of Information  
110k1993 Particular Types of Information Subject to Disclosure  
110k1998 k. Statements of Witnesses or Prospective Witnesses. Most Cited Cases  
(Formerly 110k700(3))  
State's failure to turn over to murder defendant their key witness's oral statements to prosecutors did not violate Brady, so as to warrant mistrial, since these

statements supported witness's testimony and thus were detrimental to defendant. U.S.C.A. Const.Amend. 14.

**[5] Criminal Law 110 ↪1032(5)**

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review  
110XXIV(F)1 In General  
110k1032 Indictment or Information  
110k1032(5) k. Requisites and Sufficiency of Accusation. Most Cited Cases

**Criminal Law 110 ↪1038.1(4)**

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review  
110XXIV(E)1 In General  
110k1038 Instructions  
110k1038.1 Objections in General  
110k1038.1(3) Particular Instructions  
110k1038.1(4) k. Elements of Offense and Defenses. Most Cited Cases  
Murder defendant who did not object to aggravated murder instruction that contained distinct, alternative forms of the offense or object to the indictment which charged him with aggravated murder in identical, alternative language waived all but plain error. R.C. § 2903.01.

**[6] Criminal Law 110 ↪798(.7)**

110 Criminal Law  
110XX Trial  
110XX(G) Instructions: Necessity, Requisites, and Sufficiency  
110k798 Manner of Arriving at Verdict  
110k798(.7) k. Unanimity as to Facts, Conduct, Methods, or Theories. Most Cited Cases  
(Formerly 110k798(.5))

**Homicide 203 ↪1456**

Not Reported in N.E.2d, 2004 WL 2944162 (Ohio App. 10 Dist.), 2004 -Ohio- 6980  
(Cite as: 2004 WL 2944162 (Ohio App. 10 Dist.))

## 203 Homicide

### 203XII Instructions

203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense

203k1456 k. Degree or Classification of Homicide. Most Cited Cases

Aggravated murder instruction that contained distinct, alternative forms of the offense was not erroneous, since it was not so confusing that a jury could not understand it and trial court also instructed jury to be unanimous as to any alternative way of committing an offense. R.C. § 2903.01.

## [7] Criminal Law 110 ⇨ 1032(1)

### 110 Criminal Law

#### 110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

#### 110XXIV(E)I In General

110k1032 Indictment or Information

110k1032(1) k. In General. Most Cited Cases

## Sentencing and Punishment 350H ⇨ 1789(3)

### 350H Sentencing and Punishment

#### 350HVIII The Death Penalty

#### 350HVIII(G) Proceedings

350HVIII(G)4 Determination and Disposition

350Hk1789 Review of Proceedings to Impose Death Sentence

350Hk1789(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases

Murder defendant who did not object to jury instruction on death penalty specification or indictment that charged him with death penalty specification waived all but plain error. R.C. § 2929.04(A).

## [8] Criminal Law 110 ⇨ 798(.7)

### 110 Criminal Law

#### 110XX Trial

110XX(G) Instructions: Necessity, Requis-

ites, and Sufficiency

110k798 Manner of Arriving at Verdict

110k798(.7) k. Unanimity as to Facts, Conduct, Methods, or Theories. Most Cited Cases (Formerly 110k798(.5))

## Homicide 203 ⇨ 1409

### 203 Homicide

#### 203XII Instructions

#### 203XII(B) Sufficiency

203k1408 Killing in Commission of or with Intent to Commit Other Unlawful Act

203k1409 k. In General. Most Cited Cases

Jury instruction during guilt phase of aggravated murder trial that provided jury with both of the alternative forms of the felony-murder death penalty specification was not erroneous, given trial court's instruction requiring unanimity for any alternatives. R.C. § 2929.04(A)(7).

## [9] Criminal Law 110 ⇨ 1038.1(3.1)

### 110 Criminal Law

#### 110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

#### 110XXIV(E)I In General

#### 110k1038 Instructions

110k1038.1 Objections in General

110k1038.1(3) Particular Instructions

110k1038.1(3.1) k. In General. Most Cited Cases

Any error in jury instruction during guilt phase of aggravated murder trial that provided jury with both of the alternative forms of the felony-murder death penalty specification was not plain error, where jury found defendant guilty of other death penalty specifications. R.C. § 2929.04(A)(4), (5), (7).

## [10] Criminal Law 110 ⇨ 1948

### 110 Criminal Law

#### 110XXXI Counsel

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(Cite as: 2004 WL 2944162 (Ohio App. 10 Dist.))

110XXXI(C) Adequacy of Representation  
110XXXI(C)2 Particular Cases and Issues  
110k1945 Instructions  
110k1948 k. Objecting to Instructions. Most Cited Cases  
(Formerly 110k641.13(2.1))  
Trial counsel was not ineffective for failing to object to jury instructions in aggravated murder trial. U.S.C.A. Const.Amend. 6.

**[11] Criminal Law 110 ⇨ 1932**

110 Criminal Law  
110XXXI Counsel  
110XXXI(C) Adequacy of Representation  
110XXXI(C)2 Particular Cases and Issues  
110k1921 Introduction of and Objections to Evidence at Trial  
110k1932 k. Declarations, Confessions, and Admissions. Most Cited Cases  
(Formerly 110k641.13(6))  
Trial counsel was not ineffective for failing to object to admission of taped conversations between defendant and his wife at aggravated murder trial, since they were largely favorable to defendant. U.S.C.A. Const.Amend. 6.

**[12] Homicide 203 ⇨ 1139**

203 Homicide  
203IX Evidence  
203IX(G) Weight and Sufficiency  
203k1138 First Degree, Capital, or Aggravated Murder  
203k1139 k. In General. Most Cited Cases  
Aggravated murder conviction was supported by testimony of individual who was with defendant when he robbed victims, as well as telephone logs that corroborated this individual's testimony. R.C. § 2903.01.

Appeal from the Franklin County Court of Common Pleas Ron O'Brien, Prosecuting Attorney, and Richard Fermuhlen, II, for appellee.

David J. Graeff, for appellant.

OPINION

KLATT, J.

(REGULAR CALENDAR)

\*1 {¶ 1} Defendant-appellant, Edward Hodge, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas for two counts of aggravated murder with firearm and death penalty specifications and two counts of kidnapping with firearm specifications. For the following reasons, we affirm that judgment.

{¶ 2} Ricky Palmer and Denise Evans lived together with their two children at 2482 Dawnlight Avenue in Columbus, Ohio. Palmer had been selling marijuana out of his house for the past five or ten years and previously sold marijuana to appellant. By the beginning of 2002, appellant owed Palmer a significant amount of money for past drug purchases and appellant was ignoring Palmer's requests for payment. Palmer told friends and family that he was upset over appellant's debt. Due to concerns about safety, Palmer always kept his doors locked and only let people he knew into his house. He also preferred guests to call before coming to his house.

{¶ 3} On March 12, 2002, appellant called Paul Hodge (the two are not related-hereinafter "Paul"), and told him that he knew a guy who had a lot of money and drugs in his house and that they should rob him. Paul then called Eric Franklin, whom Paul met while the two men were in prison together in 1998. Franklin lived in West Virginia. Paul asked Franklin to take part in the robbery. Franklin drove to Columbus and met with Paul and appellant at appellant's sister's house around 9:00 a.m. on March 13, 2002. During that meeting, appellant told the others about the plan to rob Palmer. Pursuant to the plan, appellant would first call Palmer and tell him that appellant was with two people from New York

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City who were interested in selling Palmer marijuana. When the three men entered the house, they would duct tape and rob Palmer.

{¶ 4} Around 10:00 a.m., the three men drove together to a pay phone near Palmer's house where appellant called Palmer. Thereafter, they drove to Palmer's house. Palmer let appellant into the house while Paul and Franklin remained in the car. After a few minutes, Palmer invited Paul and Franklin into the house. Once inside the house, Paul gave Palmer a shoebox full of marijuana. As Palmer looked into the shoebox, Paul and Franklin pulled out guns and ordered Palmer to lay face down on the floor. Palmer complied with their request and had his eyes and hands taped. Shortly thereafter, appellant brought Evans into the kitchen, laid her on the ground next to Palmer and duct taped her hands and eyes. While appellant and Franklin went through the house looking for money, drugs, and other valuable property, Paul stayed with Palmer and Evans in the kitchen. Palmer told Paul that there was no money in the house. Hearing that, Paul went outside and sat in the car. After a few trips carrying various items from the house to the car, Franklin joined Paul in the car. Appellant was still in the house. While waiting in the car for appellant, Paul thought he heard multiple thumping sounds. A few minutes later, appellant came out of the house and the three men drove to appellant's apartment and then parted ways. Later that day, Palmer and Evans' children returned home from school and found their parents in the kitchen, dead from multiple gunshot wounds to the head and back.

\*2 {¶ 5} As a result, on March 28, 2003, appellant was charged with two counts of aggravated murder in violation of R.C. 2903.01 and two counts of kidnapping in violation of R.C. 2905.01. Both aggravated murder charges contained death penalty specifications pursuant to R.C. 2929.04(A) and all of the charges contained a firearm specification pursuant to R.C. 2941.145. Appellant entered not guilty pleas to the charges and proceeded to a jury trial. The jury found appellant guilty of all charges and

the accompanying death penalty and firearm specifications. Accordingly, a mitigation hearing was held for the jury to consider the imposition of the death penalty. The jury was unable to determine beyond a reasonable doubt whether the aggravating circumstances outweighed the mitigating circumstances and, therefore, imposed a life sentence without parole eligibility for the two aggravated murder convictions. The trial court sentenced appellant to a total prison term of life plus 13 years.

{¶ 6} Appellant appeals, assigning the following errors:

Assignment of Error One

PREJUDICIAL ERROR OCCURS IN AN AGGRAVATED MURDER TRIAL WHEN THE JUDGE GIVES A JURY INSTRUCTION THAT CONTAINS TWO SEPARATE OFFENSE IN ONE COUNT, CONTRA THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Assignment of Error Two

PLAIN ERROR OCCURS WHEN THE SPOUSE TESTIFIES AGAINST THE ACCUSED CONTRA EVID.R. 601(B) AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Assignment of Error Three

PREJUDICIAL ERROR OCCURS WHEN THE TRIAL JUDGE GIVES AN IMPROPER JURY INSTRUCTION ON A DEATH PENALTY SPECIFICATION, AND QUESTIONS FROM THE JURY DURING THEIR DELIBERATIONS SHOW THE JURY FOUND THE ACCUSED WAS THE ACCOMPLICE, CONTRA THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Assignment of Error Four

THE TRIAL COURT COMMITS PREJUDI-

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CIAL ERROR IN REFUSING TO ALLOW THE DEFENSE TO CROSS-EXAMINE THE PROSECUTION'S MAIN WITNESS ON ANOTHER SIMILAR HOMICIDE, CONTRA EVID.R. 404(B)(sic), AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Assignment of Error Five

PREJUDICIAL ERROR OCCURS WHEN DEFENSE COUNSEL ARE INEFFECTIVE, CONTRA THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Assignment of Error Six

WHERE THE RECORD DEMONSTRATES THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT THE CHARGE OF AGGRAVATED MURDER, THE CONVICTION CANNOT STAND.

Assignment of Error Seven

PREJUDICIAL ERROR OCCURS WHEN THE TRIAL COURT DENIES A MISTRIAL WHEN IT IS REVEALED THE PROSECUTOR FAILED TO TURN OVER BRADY MATERIAL, CONTRA THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

{¶ 7} For ease of analysis, we address appellant's assignments of error out of order. In his second assignment of error, appellant contends the trial court committed plain error by allowing two recorded phone conversations between him and Glenda Hodge to be played to the jury. The conversations were recorded when appellant called Glenda Hodge from jail. Appellant contends that Glenda Hodge was not competent to testify against him under Evid.R. 601(B), which provides that a spouse is incompetent to testify until she makes a deliberate choice to testify, with knowledge of her right to refuse. *State v. Adamson* (1995), 72 Ohio St.3d 431, 434, 650 N.E.2d 875.

\*3 [1] {¶ 8} At trial, appellant's counsel stipulated that Glenda Hodge was appellant's ex-wife at the time these conversations took place and did not object on competency grounds when the state introduced the recorded conversations into evidence. Accordingly, appellant has waived this argument but for plain error. See *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894.

[2] {¶ 9} Appellant now contends he was married to Glenda Hodge. Without determining whether appellant and Glenda Hodge were in fact married when these conversations took place or whether Glenda Hodge's recorded statements constituted testimony, we conclude that the admission of the two recorded conversations, even if error, does not rise to the level of plain error. The overriding theme of Glenda Hodge's statements during these conversations was that she did not think appellant could have murdered anyone. Glenda Hodge's statements were not harmful to appellant. Accordingly, we cannot say that but for the admission of these recorded statements, the outcome of the trial clearly would have been different. Moreover, appellant's counsel invited any error by stipulating that Glenda Hodge was appellant's ex-wife. *State v. Seiber* (1990), 56 Ohio St.3d 4, 17, 564 N.E.2d 408 ("A party cannot take advantage of an error he invited or induced.") Appellant's second assignment of error is overruled.

{¶ 10} Appellant contends in his fourth assignment of error that the trial court abused its discretion by prohibiting defense counsel from fully cross-examining Paul. We disagree. A trial court has the discretion to limit the scope of cross-examination.

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*Berlinger v. Mt. Sinai Medical Ctr.* (1990), 68 Ohio App.3d 830, 838, 589 N.E.2d 1378. Cross-examination shall be permitted on all relevant matters and matters affecting credibility. Evid.R. 611(B). The trial court also retains wide latitude to impose reasonable limits on cross-examination based upon concerns of harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674. As such, an appellate court should be slow to disturb a trial court's ruling on the scope of cross-examination unless the trial court has abused its discretion and the party illustrates a material prejudice. *Reinoehl v. Trinity Universal Ins. Co.* (1998), 130 Ohio App.3d 186, 194, 719 N.E.2d 1000. "The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

\*4 {¶ 11} Paul was the State's main witness against appellant. Paul testified about the planning of the robbery. He was present at the scene of the murders and identified appellant as the person who was in the house when Paul heard muffled gunshots. At the time of trial, however, Paul was serving a 12-year federal prison term and was also facing a number of other federal and state criminal charges. He had signed plea agreements with federal prosecutors pleading guilty to a federal drug conspiracy charge and with Ohio prosecutors pleading guilty to involuntary manslaughter in connection with the deaths of Palmer and Evans and the unrelated death of Manuel Rueben. In exchange for those guilty pleas and his testimony against appellant in this case and against Franklin in the Rueben case, Paul was to receive 21 years in prison for the involuntary manslaughter convictions and would be recommended for a 20-year concurrent prison term for his federal drug conspiracy charge. Paul would face no other federal criminal charges arising from his testimony.

{¶ 12} At trial, appellant's counsel sought to cross-examine Paul about the facts underlying the Rueben homicide. Paul and Franklin allegedly robbed and killed Rueben over drug money Paul owed Rueben. Paul allegedly identified Franklin as the shooter in the Rueben case. Appellant's counsel admitted that he had no facts about the Rueben homicide with which he could impeach Paul, but he wanted to show that Paul was involved in a similar murder and had named Franklin as the person who killed Rueben. Appellant's counsel sought to show that someone other than appellant could have killed Palmer and Evans. The state, however, argued that if the underlying facts of the Rueben murder were brought out, they would also show that Paul introduced Rueben to appellant, who, in turn, purchased large amounts of marijuana from Rueben and then sold the marijuana to Palmer. The trial court prohibited counsel from questioning Paul about the facts underlying the Rueben homicide because of the court's concerns that those facts would unfairly prejudice appellant and confuse the jury.

[3] {¶ 13} The trial court did not completely deny appellant's counsel the opportunity to cross-examine Paul about Paul's involvement in the Rueben homicide. Appellant's counsel was allowed to read the criminal indictment in the Rueben case which charged Paul with aggravated murder with death penalty and firearm specifications. Appellant's counsel also brought out that Franklin was a defendant in that case. Paul was also asked repeatedly about his plea agreements and the effect of those on the amount of jail time he received for his criminal offenses. We conclude that the trial court did not abuse its discretion in limiting the questioning of Paul in this manner. The risk of confusing the jury with facts about the unrelated Rueben homicide was a legitimate concern. More significantly, the facts underlying the Rueben homicide would unfairly prejudice appellant by linking him to another homicide and by connecting him to another drug transaction involving Palmer. Given these valid concerns, the trial court did not abuse its discretion by limiting Paul's cross-examination. Accordingly,

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appellant's fifth assignment of error is overruled.

\*5 {¶ 14} In his seventh assignment of error, appellant contends the trial court abused its discretion when it denied his motion for a mistrial after it was discovered that the State failed to provide appellant with oral statements made by Paul. We disagree. A trial court has discretion to grant or deny a motion for mistrial. *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343. This court must defer to the judgment of the trial court, as it is in the best position to determine whether the circumstances warrant the declaration of a mistrial. *State v. Glover* (1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900. Accordingly, an appellate court will not disturb a trial court's decision granting or denying a motion for mistrial unless it constitutes an abuse of discretion. *State v. Treesh* (2001), 90 Ohio St.3d 460, 480, 739 N.E.2d 749, certiorari denied, 533 U.S. 904, 121 S.Ct. 2247, 150 L.Ed.2d 234. An abuse of discretion means more than an error of law or judgment; it implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. *Blakemore*, supra.

{¶ 15} In September of 2002, FBI Agent Kevin Horan interviewed Paul about the Rueben homicide as well as the Palmer and Evans homicides. In that interview and in a second interview a month later, Paul confessed to his involvement in those homicides. Agent Horan was not able to record those interviews but, instead, wrote his own summaries of the interviews. During Paul's cross-examination, appellant's counsel asked him about inconsistencies between his testimony at trial and Agent Horan's summaries of the interviews. Paul acknowledged some inconsistent points, such as who duct taped Palmer and whether he heard gunshots while he was sitting in the car. In Paul's re-direct examination, the State sought to rehabilitate him with oral statements Paul later made to prosecutors while preparing for trial clarifying his previous statements and explaining the inconsistencies between the summaries and his testimony. These oral statements were not recorded or transcribed. Nevertheless, ap-

pellant's counsel objected and requested a mistrial, claiming that appellant was entitled to those statements during discovery. The trial court denied appellant's motion and allowed the State to continue with Paul's redirect. Appellant now claims that the State was required to disclose Paul's oral statements to prosecutors. We disagree.

{¶ 16} The prosecution's failure to disclose evidence favorable to the accused upon request constitutes a violation of the Fourteenth Amendment's due process guarantee of a fair trial "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215; see, also, *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898; Crim.R. 16(B)(1)(f). *Brady* requires the disclosure only of "material" evidence, and evidence is "material" only if there is "a reasonable probability that," had the evidence been disclosed to the defense, "the result of the proceeding would have been different." *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs* (1976), 427 U.S. 97, 109-110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342.

\*6 [4] {¶ 17} The State did not violate its duty under *Brady* because the oral statements Paul made to the prosecutors supported Paul's testimony and were, therefore, detrimental to appellant. The statements did not assist appellant in his alibi defense. See *State v. LaMar*, 95 Ohio St.3d 181, 767 N.E.2d 166, 2002-Ohio-2128, at ¶ 28. The assertion that appellant's counsel would have taken a different approach to Paul's cross-examination if they had known of Paul's later statements is insufficient to demonstrate a reasonable probability that, had the evidence been disclosed to appellant, the result of the proceeding would have been different. *Bagley*.

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supra. In fact, appellant's counsel was still able to impeach Paul by pointing out several inconsistencies between his testimony and the FBI summaries. Accordingly, because the State did not violate *Brady* when it failed to disclose Paul's oral statements, the trial court did not abuse its discretion in denying appellant's motion for a mistrial. Appellant's seventh assignment of error is overruled.

{¶ 18} In his first assignment of error, appellant contends the trial court's aggravated murder instructions to the jury were improper because they both contained distinct, alternative forms of the offense. Specifically, the jury was instructed that appellant could be found guilty of aggravated murder if he "purposely, with prior calculation and design, caused the death" of Palmer or Evans "and/or purposely caused the death of [Palmer or Evans] while the defendant was committing, or attempting to commit, or while fleeing immediately after committing or attempting to commit aggravated robbery and/or kidnapping." Appellant now claims that because the jury instructions contain alternative forms of aggravated murder, it is impossible to determine whether the jury unanimously convicted him of either of the alternatives.

[5] {¶ 19} Appellant did not object to the jury instructions, nor did he object to the indictment which charged him with aggravated murder in identical, alternative language. Accordingly, he has waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 608, 605 N.E.2d 916; *State v. Pena*, Franklin App. No. 03AP-174, 2004-Ohio-350, at ¶ 24. Again, plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *Moreland*, supra, at 62, 552 N.E.2d 894.

[6] {¶ 20} The trial court's instructions merged alternative forms of aggravated murder into one charge. Appellant contends that given the alternative form of the instructions, there is no way to determine whether the jury unanimously convicted appellant of either of the alternatives. We disagree. A jury must unanimously agree that a defendant is

guilty of a particular criminal offense before returning a guilty verdict on that offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph three of the syllabus. Although the trial court's instruction provided the jury with alternative forms of aggravated murder, it was not so confusing that a jury could not understand the instruction.

\*7 {¶ 21} More importantly, the trial court specifically instructed the jury that "[b]efore you can find the defendant guilty on an offense providing alternatives, you must be unanimous in your verdict as to any one alternative." Jurors are generally presumed to follow the trial court's instructions. *State v. Herring* (2002), 94 Ohio St.3d 246, 254, 762 N.E.2d 940. Given the trial court's instruction that the jury be unanimous as to any alternative way of committing an offense, we cannot say that the jury was less than unanimous when it convicted appellant of aggravated murder. See *State v. Clay* (Mar. 28, 2000), Franklin App. No. 99AP-404 (finding no error in jury instructions which included alternative ways of committing offense when trial court instructed jury that it had to be unanimous in the verdict as to any one alternative). Accordingly, having found no error, let alone any plain error, appellant's first assignment of error is overruled.

[7] {¶ 22} Appellant contends in his third assignment of error that the trial court's instructions during the guilt phase of the trial regarding one of the death penalty specifications were improper. Specifically, the trial court instructed the jury that before it could find appellant guilty of the felony-murder death penalty specification in R.C. 2929.04 (A)(7), it must find beyond a reasonable doubt that appellant "purposely caused the death of [Palmer or Evans] while committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery and/or kidnapping, and the defendant personally committed each act which constituted the aggravated murder, including firing the shot that caused the death of [Palmer or Evans], and/or committed aggravated

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murder with prior calculation and design.” Appellant’s counsel did not object to this instruction or the indictment which charged him with the death penalty specification and, therefore, has waived all but plain error. Again, plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *Moreland*, supra, at 62, 552 N.E.2d 894. Even though appellant’s counsel seemed to concede at oral argument that this assignment of error would only be relevant if we reversed appellant’s convictions and remanded the matter for a new trial, we nevertheless will address it.

{¶ 23} In *State v. Penix* (1987), 32 Ohio St.3d 369, 513 N.E.2d 744, Penix was convicted of aggravated murder with accompanying death penalty specifications. During the penalty phase, the trial court instructed the jury to weigh the factors in mitigation against the aggravating circumstances found in the felony-murder specification. However, that court instructed the jury that the two aggravating circumstances were: (1) that the defendant acted with prior calculation and design, and (2) that the defendant was the principal offender and committed the offense while committing or attempting to commit aggravated robbery. The Supreme Court of Ohio noted that the language of the felony-murder specification was in the alternative and could not be charged and proven in the same case, because the prior calculation and design portion of the specification was only applicable if the defendant was not the principle offender. Thus, because the jury in the guilt phase determined that the defendant personally committed the acts, the prior calculation and design portion of the specification should not have been considered by the jury in the penalty phase. *Id.* at 371, 513 N.E.2d 744. Because the presentation of an aggravating circumstance not permitted by statute impermissibly tipped the scale in favor of death and undermined the reliability of the jury’s decision to impose the death penalty, the Supreme Court reversed the imposition of the death penalty and remanded the matter for resentencing.

\*8 {¶ 24} Appellant contends that the trial court’s instruction was similarly improper because it presented to the jury both alternatives for the felony-murder specification as in *Penix*. We disagree. In *Penix*, the improper instruction was given during the penalty phase of the trial which tipped the scale in favor of the death penalty. In the present matter, however, appellant objects to an instruction given in the guilt phase of appellant’s trial. Therefore, the concern that additional, improper aggravating circumstances would be improperly weighed by the jury in the penalty phase in favor of the death penalty is not implicated. *Cf. State v. Keene* (Sept. 20, 1996), Montgomery App. No. 14375 (agreeing with Eleventh District Court of Appeals that concern in *Penix* was to prevent jury from considering both prongs of felony-murder specification in penalty phase). Appellant cannot contend that the jury improperly considered both prongs of the felony-murder specification during the penalty phase of the trial because the trial court’s instruction during the penalty phase of this trial did not include both prongs of the felony-murder aggravating circumstance. Therefore, *Penix* is not dispositive of this assignment of error.

{8} {¶ 25} The trial court’s instruction during the guilt phase of appellant’s trial provided the jury with both of the alternative forms of the felony-murder death penalty specification found in R.C. 2929.04(A)(7). And, as noted earlier, the trial court properly instructed the jury that “[b]efore you can find the defendant guilty on an offense providing alternatives, you must be unanimous in your verdict as to any one alternative.” The felony-murder specification instruction, when coupled with the trial court’s instruction requiring unanimity for any alternatives, was not erroneous because the jury could not find appellant guilty of a felony-murder specification unless it unanimously agreed that appellant committed one of the alternatives. *Cf. Clay*, supra.

{9} {¶ 26} Moreover, the jury also found appellant guilty of death penalty specifications found in R.C.

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2929.04(A)(4) and (5). Appellant does not address either of those findings in this appeal. Accordingly, even if we were to find error in the trial court's guilt phase instruction for the felony-murder specification, we cannot say that the outcome of this case clearly would have been different because the jury still found appellant guilty of other death penalty specifications and appellant still would have proceeded to the penalty phase of the trial. Appellant does not raise any assignments of error in relation to the penalty phase of the trial. Accordingly, appellant's third assignment of error is overruled.

{¶ 27} Appellant contends in his fifth assignment of error that his trial counsel was ineffective for failing to object to the errors raised in his first, second, and third assignments of error. In order to prevail on an ineffective assistance of counsel claim, appellant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Id.* at 690. In analyzing the first prong of *Strickland*, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83.

\*9 {¶ 28} If appellant successfully proves that counsel's assistance was ineffective, the second prong of the *Strickland* test requires appellant to prove prejudice in order to prevail. *Strickland*, supra, at 692. To meet that prong, appellant must show counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. *Id.* at 687. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

{10} {¶ 29} Having found no error in appellant's first and third assignments of error, trial counsel was not ineffective for failing to object to those jury instructions. See *State v. Craun*, 158 Ohio App.3d 389, 815 N.E.2d 1141, 2004-Ohio-4403, at ¶ 15. Additionally, we cannot say that there is a reasonable probability that the result of appellant's trial would have been different had trial counsel objected to the admission of the taped conversations between appellant and Glenda Hodge which is the subject of appellant's second assignment of error. First, appellant's counsel stipulated that the conversations were between appellant and his ex-wife, Glenda Hodge. Therefore, the spousal incompetency rule would not bar these conversations from being played to the jury. *State v. Sandoval* (Mar. 15, 2002), Sandusky App. No. S-00-042; *State v. Taylor* (Aug. 10, 1988), Lorain App. No. 4280. Additionally, the conversations were largely favorable to appellant. Accordingly, even if trial counsel was ineffective for failing to object to the admission of the taped conversations, appellant was not prejudiced by that failure. Appellant's fifth assignment of error is overruled.

{¶ 30} In his sixth assignment of error, appellant contends that his aggravated murder convictions were not supported by sufficient evidence. The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61

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Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶ 31} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompson* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 767 N.E.2d 216, 2002-Ohio-2126, at ¶ 79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *Treesh*, supra; *Jenks*, supra, at 273, 574 N.E.2d 492.

\*10 [12] {¶ 32} When the evidence is viewed in the light most favorable to the prosecution, it is clear that reasonable minds could find appellant guilty of aggravated murder beyond a reasonable doubt. Paul's testimony, if believed, provided sufficient evidence for a rational trier of fact to have found appellant guilty beyond a reasonable doubt for the aggravated murders of Palmer and Evans. Appellant owed Palmer a significant amount of money

and was avoiding Palmer's requests for payment. Paul testified that appellant called him the day before the murders and asked him to assist him in robbing the Palmer house. The next day Paul, appellant, and Franklin went into the Palmer residence and bound Palmer and Evans on the kitchen floor. Paul further testified that he left the house and waited outside in the car and that when he left, Palmer and Evans were alive in the kitchen. While he and Franklin were waiting in the car, he heard multiple thumping sounds from inside the house and then saw appellant come out of the house.

{¶ 33} Logs of phone calls made that day between appellant and Paul also corroborate Paul's testimony. Paul testified that he attempted to use his cell phone as a walkie-talkie by calling appellant's cell phone and leaving the phone on when appellant first entered Palmer's house. Phone logs of appellant's and Paul's cell phones show an incoming phone call on appellant's cell phone log and an outgoing call on Paul's cell phone log at 10:27 a.m., which was consistent with Paul's testimony and timeline. Additionally, there were no signs of forced entry into Palmer's house. A call log from a pay phone near Palmer's house indicated that a call was made to Palmer's cell phone at the approximate time Paul said such a call was made, and Palmer's cell phone log showed an incoming phone call at the same time. This evidence corroborates at least some aspects of Paul's testimony and demonstrates that the three men followed appellant's plan for the robbery. When viewed in the light most favorable to the prosecution, this evidence is sufficient for a rational trier of fact to find appellant guilty of the aggravated murders of both Palmer and Evans. Accordingly, appellant's sixth assignment of error is overruled.

{¶ 34} Having overruled all of appellant's assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BOWMAN and BRYANT, JJ., concur.

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

Court of Appeals of Ohio, Tenth District,  
 Franklin County.  
 STATE of Ohio, Plaintiff-Appellee,  
 v.  
 Rommel KNOX, Defendant-Appellant.  
**No. 96APA09-1265.**

June 24, 1997.

APPEAL from the Franklin County Court of  
 Common Pleas.

Ronald J. O'Brien, Prosecuting Attorney, and  
 Diane F. Paul, for appellee.

David J. Graeff, for appellant.

DESHLER, J.

\*1 This is an appeal by defendant, Rommel Knox, from a judgment of the Franklin County Court of Common Pleas, following a jury trial in which defendant was found guilty of aggravated murder.

On January 17, 1995, defendant was indicted on one count of aggravated murder, in violation of R.C. 2903.01, and one count of intimidation, in violation of R.C. 2921.03. The aggravated murder count included a death penalty specification under R.C. 2929.04(A)(8) and a firearm specification under R.C. 2941.141. The indictment arose out of the shooting death of Patricia Smith on

January 4, 1995. The state's theory of the case at trial was that defendant planned and aided in the murder of Smith for the purpose of eliminating her as a witness in an upcoming trial in which defendant was charged with theft. The theft charge involved a ring taken from Smith's apartment.

At trial, the state presented evidence that, in June 1994, the defendant was hired as a trainee by Ohio Exterminating, a pest control company. On June 17, 1994, the defendant and his supervisor went to the apartment of Patricia Smith, located at 736 Countrybrook West, to treat the apartment for rodents. After the work was completed, Smith reported that a ring was missing from the apartment. The defendant became the focus of an investigation and he was subsequently charged with theft. A trial in the matter was scheduled for February 1995. Shortly after Smith reported the missing ring, the defendant quit his job with Ohio Exterminating.

On January 4, 1995, Patricia Smith was killed by a single gunshot wound to the face. Smith's body was found near the doorway of her apartment. The state presented evidence indicating that the defendant and three other individuals, Will Anthony, Mary "Buffy" Payne, and John Knox had driven to Smith's apartment complex on the night of the shooting.

Mary Payne was called as a witness by the state to testify regarding the events of January 4, 1995. Payne, who stated that her nickname was "Buffy," first met the defendant in November of 1994. Payne and the defendant socialized and had a relationship.

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When she first met the defendant, Payne was not aware that the defendant was married. Payne also became acquainted with the defendant's brother, John Knox, and an individual named Will Anthony. Anthony's nickname was "Wheels."

The defendant told Payne about a pending criminal charge, in which he was accused of stealing a ring while working for an exterminating company. On January 4, 1995, the defendant asked Payne to go out with him that evening. The defendant arrived at Payne's residence with John Knox and Will Anthony.

As they were leaving Payne's house, the defendant requested a favor from Payne. Specifically, the defendant asked Payne to go up to the apartment of the lady that "had a court case against him, and knock on the door so that Wheels could talk to her and to see if \* \* \* he could offer her money or something like that to drop the charges against Rommell so he wouldn't have to go to jail." (Tr. Vol.V, 27.) Payne wondered why the defendant would not talk to the lady himself. At the time, Payne assumed that "Wheels" was going to try to intimidate the woman. The defendant wanted Payne to knock on the door first because of defendant's belief that the lady would not open the door for a black male.

\*2 The four individuals got into a car driven by defendant's brother, John Knox. The defendant was in the front passenger seat while Payne and Anthony rode in the back seat. They drove to the Countrybrook Apartments and parked on the corner of the street. Payne and Anthony got out of the car and walked up to the apartment. Payne knocked on the door. Payne noticed the woman look through a

peephole and then Payne heard the lock start to open. Anthony told Payne that she could go back to the car "so he could talk to her." (Tr. Vol.V, 31.)

As Payne turned off the stoop and started walking back toward the car, Payne heard "a boom and I turned and looked and he had a gun in his hand and he was coming at me." (Tr. Vol.V, 31.) Anthony came running at Payne, grabbed her by the arm and said "move, Bitch." (Tr. Vol.V, 31.) Anthony put her in the back seat of the car and they drove away.

Payne stated that she heard only one shot. She testified that, directly before the shot was fired, she did not hear any conversation. As they were driving away, Payne became sick; she opened the car door and vomited. Payne stated that Anthony "was supercharged up for what he just done. I think he really took enjoyment in it." (Tr. Vol.V, 33.) According to Payne, Anthony had no remorse.

Payne testified that, as they were driving down the road, the defendant turned around and "snatched my arms up twisting them outwards and told me that if I even thought that I was going to tell on him, that I would end up the same way." (Tr. Vol.V, 34.) The defendant also told Payne that "he had the power to do it and he looked at Wheels, and Wheels says 'you got that right, cuss.'" (Tr. Vol.V, 34.) Payne stated that she "knew they meant it." (Tr. Vol.V, 34.)

The men drove Payne to her residence. The defendant told Payne to wait by the sidewalk while he spoke briefly with his brother and Anthony. John Knox and Anthony then drove away. The defendant told Payne that she was not allowed to leave her house or to

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talk to anyone. The defendant also told Payne that he would be checking on her regularly and that he would have people in the neighborhood watching her. The defendant told her that if she left the house or talked to anyone "he would genocide me and my children and everybody else that had anything to do with me." (Tr. Vol.V, 37.)

Over the next few days, the defendant would call Payne's residence periodically to see if she was home and to tell her that he would be calling back later. The defendant subsequently called Payne and told her that he was in jail. Payne hung up and then called her mother and told her what had happened. Payne eventually turned herself in to the police.

Payne described the gun used by Anthony as "a big silver gun." (Tr. Vol.V, 42.) She stated that the gun resembled the one defendant "used to keep in his car," although she was not positive whether it was the same weapon. (Tr. Vol.V, 42.) The defendant had told Payne that the weapon he carried was a .380. Payne stated that she initially did not speak with police for fear that "if Rommel was loose, he would kill me." (Tr. Vol.V, 51.)

\*3 Kimyana Knox, the sister of the defendant, testified that in January of 1995, the defendant came over to the house where Kimyana and her mother resided and showed them a newspaper article regarding the death of Patricia Smith. Kimyana gave the following testimony about her conversation with the defendant regarding the newspaper article:

"Q. OKAY. WHEN HE CAME TO THE HOUSE, DID HE TELL YOU SOME THINGS?

"A. YES, HE DID.

"Q. COULD YOU TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT HE TOLD YOU?

"A. HE CAME IN AND SHOWED ME A NEWSPAPER ARTICLE.

"Q. WHAT WAS THE NEWSPAPER ARTICLE ABOUT?

"A. ABOUT A LADY-ABOUT A LADY GETTING KILLED. AND I HAD READ IT AND I ASKED HIM IF HE DONE IT. HE SAID NO. AND I ASKED HIM WHY IT HAPPENED. HE'S LIKE IT WAS EITHER SHE GO OR HE GO, AND HE SAID HE WASN'T GOING TO JAIL.

"Q. OKAY. DID HE TELL YOU WHAT HAPPENED?

"A. YES, HE DID.

"Q. WHAT DID HE TELL YOU?

"A. HE SAID THAT-HE SAID THAT SHE HAD ACCUSED HIM OF STEALING A RING AND HE DIDN'T STEAL IT, AND HE HAD HIRED TWO PEOPLE TO DO THE JOB. AND HE WAS GOING TO PAY ONE PERSON TO DO IT ALL, BUT WITH HIM BEING BLACK SHE WOULDN'T OPEN THE DOOR FOR HIM. SO HE HAD THE WHITE GIRL GO UP TO THE DOOR WITH HIM.

"Q. OKAY. WHAT DID THE WHITE GIRL DO?

"A. SHE KNOCKED ON THE DOOR. AS

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FAR AS I KNOW. FROM WHAT I WAS TOLD, SHE KNOCKED ON THE DOOR AND SAID HER CAR WAS MESSED UP OR SOMETHING. WHEN THE LADY OPENED THE DOOR OR WHATEVER, THAT IS-THEY JUST SHOT.

“Q. OKAY. WHO SHOT? WHO DID HE SAY DID THE SHOOTING?”

“A. HE DIDN'T SAY.

“Q. WHO DID HE SAY WENT UP TO THE DOOR?”

“A. WILL AND BUFFY.

“Q. WHO IS WILL?”

“A. A CLOSE FRIEND OF THE FAMILY.

“Q. DO YOU KNOW WHAT HIS LAST NAME IS?”

“A. ANTHONY.” (Tr. 123-124.)

The defendant told Kimyana that “he was going to pay Will \$500 to do it.” (Tr. Vol.IV, 129.) The defendant explained to Kimyana that, “[w]ith Will being black, the lady wouldn't open the door. He had to split the money between Will and Buffy.” (Tr. Vol.IV, 129.) The defendant told his sister that “they were going to learn not to F with him” and the defendant indicated that “he wasn't going to jail for nothing he didn't do.” (Tr. Vol.IV, 128.) The defendant also told Kimyana that he had asked his lawyer what would happen if Smith did not show up for court and, “if she was to get killed, what would happen.” (Tr. Vol.IV, 131-132.)

Kimyana stated that the defendant called her

one day and “wanted me and Regina to write some stuff down dealing with the case.” (Tr. Vol.IV, 132.) Specifically, the defendant “wanted us to write some things down \* \* \* where he could have an alibi saying that where he was and where we was, and was we together or not.” (Tr. Vol.IV, 133.)

On January 7, 1995, Columbus Police Detective Brian Lacy received a call from a woman named Regina Knox. Knox indicated that she had information regarding the murder. Knox came to police headquarters and was interviewed that day. Lacy testified that, following this interview, the prime suspects in the case were the defendant, his brother John Knox, an individual named Will and a woman referred to as “Buffy.” That evening, Columbus police officers detained John Knox approximately one mile from his residence. The defendant was also arrested later that evening.

\*4 Shortly after the arrests, police officers conducted a search of a 1981 Cadillac. Evidence at trial indicated that the vehicle belonged to John Knox. On the front floor of the Cadillac, police officers recovered a “Jennings Bryco Model 59” .380 automatic pistol. The weapon contained live ammunition.

Police detectives interviewed both John Knox and the defendant shortly after their arrests. Detective Lacy first conducted an interview with John Knox. Lacy also took part in the interview of the defendant, along with two other detectives. Lacy observed the first part of the interview from a separate room. When the interview appeared to be stalling, Lacy went to the interview room and began questioning the defendant.

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At trial, the videotape of the police interview was played for the jury. The interview of the defendant lasted approximately one hour. During the initial stages of the interview, the defendant stated that he had not left his house on January 4, 1995. He also denied that he knew anybody named "Buffy."

During the later part of the interview, the defendant acknowledged that he knew "Buffy." He also stated that he was at Patricia Smith's apartment complex on the night of the shooting. The defendant told the detectives that his brother John was driving and that he was sitting in the front passenger seat. Will and Buffy were in the back seat. They parked the car and Buffy and Will got out. The defendant stated that "[w]e pulled up and like \* \* \* didn't hear no shots, we didn't hear nothing. Didn't even know, I mean, we didn't think they both had the nerve or anything like that." (Police Interview Rommell Knox, 30.) The defendant stated that when Buffy and Will got back inside the car, Will stated, "I already done it, I shot the old lady." (Police Interview Rommell Knox, 33.)

Dr. Larry Tate, a pathologist with the Franklin County Coroner's Office, performed an autopsy on the shooting victim, Patricia Smith. Tate testified that the victim died of a gunshot wound to the head. The bullet entered through the left side of the victim's mouth and exited through her neck.

Mary Gage testified for the defense. Mary Payne and her two daughters moved into Gage's residence beginning in the fall of 1994. On January 4, 1995, the defendant came over to Gage's house and picked up Payne. Payne and the defendant returned at approximately midnight. According to Gage, Payne looked pale and said that she was sick

to her stomach. Payne moved out of Gage's residence about three or four days later.

Robin Dunlap also testified on behalf of the defendant. Dunlap resides at 714 Countrybrook Drive West. Dunlap was home at the time of the shooting. Dunlap heard the sound of a gunshot and she got up and looked out the window. Dunlap observed a woman who was standing in the grass. The woman appeared to be pointing. Dunlap then observed the woman start running.

Following deliberations, the jury returned a verdict finding defendant guilty of aggravated murder, as well as the aggravating circumstance, *i.e.*, that the victim of the aggravated murder was a witness to an offense and was purposely killed to prevent her testimony in a criminal proceeding. The jury further found that defendant had a firearm on or about his person or under his control while committing the aggravated murder. The jury returned a not guilty verdict on the charge of intimidation of a witness (Mary Payne). Following a mitigation hearing, the jury returned a verdict recommending a sentence of twenty years to life on the aggravated murder conviction. The defendant was sentenced by entry filed August 30, 1996.

\*5 On appeal, defendant sets forth the following nine assignments of error for review:

"Assignment of Error One

"THE TRIAL COURT ERRS IN OVERRULING A MOTION FOR A MISTRIAL DURING CLOSING ARGUMENT; PROSECUTORIAL MISCONDUCT OCCURS DURING THE COURSE OF A CLOSING ARGUMENT WHEN THERE ARE REPEATED COMMENTS MADE RE-

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GARDING THE LACK OF DEFENSE TESTIMONY, THE RIGHT TO REMAIN SILENT, PERSONAL OPINION OF THE PROSECUTOR AND REFUSAL TO FOLLOW THE TRIAL COURT'S RULING ON THE SPOUSAL PRIVILEGE CONTRA THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

“Assignment of Error Two

“THE TRIAL COURT COMMITS PREJUDICIAL ERROR IN OVERRULING A MOTION TO SUPPRESS A STATEMENT BY THE ACCUSED WHEN THE PRE-TRIAL TESTIMONY SHOWS THE ACCUSED WAS INTOXICATED AT THE TIME OF HIS STATEMENT, WITH DRUGS AND ALCOHOL, AND THE DETECTIVE THREATENED TO SHOWCASE THE ACCUSED AS AN ‘ANIMAL’ AT THE FORTHCOMING JURY TRIAL CONTRA THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

“Assignment of Error Three

“PREJUDICIAL ERROR OCCURS DURING THE COURSE OF A JURY TRIAL WHEN HEARSAY TESTIMONY FROM THE WIFE OF THE ACCUSED IS INTRODUCED, CONTRA EVID.R. 601(B)(2), EVID.R. 501, R.C. 2945.42, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

“Assignment of Error Four

“THE TRIAL COURT COMMITS PREJUDICIAL ERROR IN OVERRULING A

MOTION FOR A NEW TRIAL WHEN THE ACCUSED LEARNS A DEAL HAD BEEN STRUCK TO NOT PROSECUTE THE KEY WITNESS IN THE CASE AND THE PROSECUTOR FAILED TO DIVULGE THIS EXCULPATORY EVIDENCE CONTRA THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

“Assignment of Error Five

“(a) THE TRIAL COURT COMMITS PREJUDICIAL ERROR IN REFUSING TO GIVE AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF MURDER.

“(b) PLAIN ERROR OCCURS WHEN THE TRIAL COURT GIVES AN ACQUITTAL FIRST INSTRUCTION ON AGGRAVATED MURDER.

“Assignment of Error Six

“(a) WHERE THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW FOR CONVICTION, THE TRIAL COURT COMMITS PREJUDICIAL ERROR IN OVERRULING A MOTION FOR ACQUITTAL.

“(b) THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

“Assignment of Error Seven

“THE TRIAL COURT COMMITS PREJUDICIAL ERROR IN A CAPITAL CASE WHEN IT ADMITS A GRUESOME HOMICIDE PHOTO OVER THE OBJECTION OF DEFENSE, BECAUSE OF ITS IN-

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#### FLAMMATORY NATURE.

“Assignment of Error Eight

“A JUDGE, WHO HEARS PRE-TRIAL TESTIMONY REGARDING A PROTECTIVE ORDER, ERRS IN REFUSING TO DIVULGE THE NAMES AND ADDRESSES OF KEY WITNESSES.

“Assignment of Error Nine

“THE TRIAL COURT ERRS IN RULING THE ACCUSED HAD NO STANDING TO CONTEST THE VALIDITY OF A SEARCH WARRANT ON AN AUTOMOBILE.”

The issues raised under defendant's first and third assignments of error are interrelated. For purposes of review, we will address the third assignment of error first.

Under the third assignment of error, defendant contends that the trial court erred in allowing the state to introduce hearsay testimony of the defendant's wife, Regina Knox, throughout portions of the trial.

\*6 The record indicates that, prior to trial, defense counsel filed a motion *in limine* to prevent the state from mentioning Regina Knox's name or making reference to any possible testimony that she might give if called as a witness. The matter was considered at a pretrial hearing. At the hearing, the prosecution argued that it should not be prohibited from mentioning Regina Knox's name where such reference was relevant to explaining the commencement of the police investigation. Specifically, the state argued that, even if defendant's wife elected not to testify, the state should not be prohibited

from “making things logical, chronological, and/or otherwise for the jury to understand how the investigation unfolded and how things led to the next step.” (Tr. Vol.III, 5.) At the hearing, the trial court ruled that “the motion in limine with regard to statements that the prosecution believes that Mrs. Knox may or may not make will be sustained as to opening. But you are not prohibited from using her name. I agree with the state's position as to the use of Mrs. Knox's name.” (Tr. Vol.III, 5-6.)

During the state's opening argument, the prosecutor referred to Regina Knox in relating the chronology of events regarding how the police became aware of certain suspects immediately following the victim's death. Specifically, the prosecutor noted that, as a result of an interview with Knox, “there were a number of suspects that the police directed their focus on.” (Tr. Vol.III, 19.)

Regina Knox's name was also mentioned during the state's direct examination of Detective Brian Lacy, in which the detective testified regarding his interview of the defendant at police headquarters shortly after his arrest. In response to a question by the prosecution regarding what information Lacy had obtained prior to the time he interviewed the defendant, Lacy stated that his knowledge came from Regina Knox and the defendant's brother, John Knox. Finally, during closing argument, the prosecutor noted that, following a police interview with Regina Knox, the defendant became the focus of the police investigation.

Defendant contends that the state, realizing that Regina Knox was not going to testify at trial, attempted to get her testimony in through prejudicial hearsay. Defendant as-

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serts that such hearsay testimony was prohibited under Evid.R. 601(B)(2) and R.C. 2945.42.

Evid.R. 601(B)(2) states that:

“Every person is competent to be a witness except:

“ \* \* \*

“(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

“ \* \* \*

“(2) The testifying spouse elects to testify.”

R.C. 2945.42 provides in part that:

“ \* \* \* Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or rape or the former offense of felonious sexual penetration in a case in which the offense can be committed against a spouse, or bigamy, or failure to provide for, or neglect or cruelty of either to their children under eighteen years of age or their physically or mentally handicapped child under twenty-one years of age, violation of a protection order or consent agreement, or neglect or abandonment of a spouse under a provision of those sections. \* \* \* ”

\*7 In *State v. Adamson* (1995), 72 Ohio St.3d 431, 433, 650 N.E.2d 875, the Ohio Supreme

Court noted that “[t]he focus of Evid.R. 601(B) is the competency of the testifying spouse; in contrast, R.C. 2945.42 focuses on the privileged nature of spousal communications.”

Initially, we note that, while Evid.R. 601(B) concerns the competency of a spouse to testify at trial, in the instant case the defendant's wife elected not to testify against the defendant. Further, while R.C. 2945.42 “ ‘confers a substantive right upon the accused to exclude privileged spousal testimony concerning a confidential communication,’ ” *Adamson, supra*, at 433, 650 N.E.2d 875, the record in the instant case indicates, as noted by the state, that the prosecution's references did not mention a spousal communication. Stated otherwise, the jury was not made aware of any purported communication between the defendant and his wife as neither the prosecutor nor the detective repeated what Regina Knox related during her police interview.

Evid.R. 801(C) defines “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” The record in the instant case indicates that the trial court, in ruling on the defendant's motion *in limine*, determined that the state would be permitted to mention Regina Knox's name for the limited purpose of explaining the commencement of the investigation of the case and how defendant initially became a suspect. We find no error by the trial court. Under Ohio law, statements which are not offered to prove the truth of the matter asserted but offered to explain a police officer's conduct while investigating a crime are not hearsay. *State v. Cantleberry* (1990), 69 Ohio App.3d 216, 221, 590 N.E.2d 342,

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citing *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401. As noted above, the references to Regina Knox did not reveal what information she provided the police, and such references, while showing how the defendant became a suspect, were not offered for the truth of the matter asserted and thus did not constitute hearsay statements.

Even assuming, however, that the references to defendant's wife were improper, such error was harmless where it is highly probable that the evidence did not contribute to defendant's conviction. *State v. Bayless* (1976), 48 Ohio St.2d 73, 106, 357 N.E.2d 1035, vacated on other grounds, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155. In the present case, excluding the references to defendant's wife, there was overwhelming evidence, discussed more fully *infra*, to support defendant's conviction.

Defendant's third assignment of error is overruled.

Under the first assignment of error, defendant asserts that he was denied a fair trial based upon prosecutorial misconduct occurring during the state's closing argument. Specifically, defendant argues that the prosecutor engaged in the following instances of misconduct: referring to defendant's wife, in contravention of the trial court's instructions; stating that there was no defense in this case and that defendant's theory of the case was ridiculous; and, commenting on testimony not in evidence.

\*8 In general, wide latitude is to be granted both sides during closing argument. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, 559 N.E.2d 710. In reviewing a claim of prosecutorial misconduct during closing ar-

gument, the test is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883.

Upon review, we conclude that defendant's right to a fair trial was not violated by the conduct of the prosecution during closing. Defendant first contends that the prosecutor immediately began closing argument by referring to defendant's wife, Regina, when the state had been specifically instructed not to do so.

The record indicates that, at the start of closing argument, defense counsel objected to the prosecutor's reference to Regina Knox. Following the objection, a sidebar conference was held outside the hearing of the jury. Defense counsel made a motion for mistrial on the basis that, because defendant's wife chose not to testify, any mention of her name would involve hearsay. The record indicates the following exchange between the prosecutor and the trial court:

“ \* \* \* [THE PROSECUTOR]: YOUR HONOR, I'M FOLLOWING THE GUIDELINES PUT FORTH BY THE COURT DURING THE TRIAL ON CLOSING ARGUMENT. IT FOLLOWS THE WAY THE EVIDENCE CAME OUT. I'M MERELY STATING THAT THE INVESTIGATION WAS STARTED AS A RESULT OF AN INTERVIEW WITH REGINA KNOX. AS A RESULT OF THE INTERVIEW WITH REGINA KNOX, HE WAS TARGETED AS A SUSPECT, PERIOD.

“THE COURT: ALL RIGHT.

“ \* \* \* [THE PROSECUTOR]: THAT IS

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CONSISTENT WITH WHAT THE EVIDENCE IS IN THE CASE, AND THAT IS AS FAR AS I'M GOING WITH IT.

"THE COURT: FIRST OF ALL, THE EVIDENCE SHOWS THAT MORE THAN ONE PERSON WENT, SO I DON'T WANT YOU MISCHARACTERIZING THIS BECAUSE WHAT THAT DOES IS MAKE THEM BELIEVE THAT REGINA KNOX MADE CERTAIN STATEMENTS. AT NO TIME IN THIS TRIAL WAS REGINA KNOX'S STATEMENTS EVER ALLOWED IN-

" \* \* \* [THE PROSECUTOR]: THAT'S CORRECT.

"THE COURT:-THE COURTROOM. LET ME FINISH. SO BEING CONSISTENT WITH THE COURT'S RULING, YOU CAN COMMENT ON THE EVIDENCE WHICH IS THAT SHE WENT TO THE POLICE. I'M NOT GOING TO ALLOW YOU TO MISCHARACTERIZE IT SO THEY CAN BELIEVE WHAT MS. KNOX'S STATEMENT WAS ABOUT HER HUSBAND. \* \*

"TO YOUR OBJECTION, SHE WAS ALLOWED TO EXERCISE HER RIGHT NOT TO COME IN. THE COURT HAS CONSISTENTLY ALLOWED THEM TO COMMENT ON THE EVIDENCE, WHICH AT THIS POINT IS THAT SHE WENT TO THE POLICE, AND THAT IS THE ONLY COMMENT I WILL ALLOW YOU TO MAKE. YOUR OBJECTION FOR A MISRIAL IS OVERRULED." (Tr. Vol.VI, 141-142.)

Defendant essentially reiterates his contention, addressed above, that any reference to

Regina Knox constituted impermissible hearsay. We have previously concluded, however, that the references regarding Knox did not violate the hearsay rule. Further, contrary to defendant's contention, the state's mention of Knox was not in contravention of the trial court's prior ruling on defendant's motion *in limine*. Rather, the record, as noted above, indicates that the reference during closing argument was consistent the court's prior ruling that the state could mention Knox's name for the limited purpose of indicating how the investigation began.

\*9 Defendant further contends that the prosecutor engaged in misconduct by stating that "there was no defense" and that the defense had "presented nothing that contradicts the state's case." We disagree. In *State v. Williams* (1986), 23 Ohio St.3d 16, 19-20, 490 N.E.2d 906, the court held that a prosecutor's reference in closing argument to "uncontradicted evidence is not a comment on the accused's failure to testify, where the comment is directed to the strength of the state's evidence and not to the silence of the accused, and where the jury is instructed \* \* \* to not consider the accused's failure to testify." In the present case, we find that, taken in context, the prosecutor's statements were directed to the strength of the state's case, rather than defendant's silence. Further, we note that the jury was instructed by the trial court not to consider defendant's silence for any purpose.

Defendant next argues that it was improper for the prosecution to comment on the "theories of the defense" and to state that such theories were "ridiculous." In *State v. Brown* (1988), 38 Ohio St.3d 305, 528 N.E.2d 523, the defendant asserted that misconduct occurred where the prosecutor

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stated that defense counsel followed a “dartboard approach,” that he “talked out of both sides of his mouth,” and that counsel's theory of the case was “baloney.” The Ohio Supreme Court upheld such comments, stating that:

“ \* \* \* [I]nflammatory and purely derogatory comments are improper. \* \* \* This precedent, however, does not mean that the prosecution cannot be colorful or creative. What is not permitted are comments are purely abusive. Otherwise, counsel for both parties are afforded wide latitude during closing argument. In our view, the above remarks were permissible.” *Id.* at 317, 528 N.E.2d 523.

In accordance with the holding in *Brown, supra*, we find that the remarks at issue were neither prejudicial nor inflammatory. Further, even assuming the comments to be improper, we cannot conclude that the challenged comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431.

Finally, defendant contends that the prosecution misstated the evidence by commenting that a payment of \$250 was given to Mary “Buffy” Payne for her participation in the homicide. Upon review, defendant has failed to show prejudicial error. The record indicates that, while the court sustained an objection to the above comment, the prosecutor subsequently clarified that the payment had not actually occurred, thereby accurately reflecting the evidence presented. Specifically, the prosecutor noted that Kimyana Knox testified that the defendant stated he was going to split \$500 between Payne and

Will Anthony as payment for the murder. We further note that the jury was instructed that closing arguments do not constitute evidence. Defendant cannot show prejudice under these circumstances.

\*10 Based upon the foregoing, defendant's first assignment of error is overruled.

Under the second assignment of error, it is asserted that the trial court erred in overruling defendant's motion to suppress a statement by defendant during his police interview. Defendant argues that the videotaped interview shows that he was intoxicated at the time the statement was given. Defendant further contends that the statement was induced by threats from the police detective who conducted the interview.

Initially, we address defendant's contention that the videotaped interview shows that he was intoxicated at the time he spoke with police detectives. We have carefully reviewed the entire video of the interview and we discern no indication that defendant was impaired by alcohol or drugs. Although defendant stated during the interview that he had consumed alcohol approximately eight hours prior to the interview, he also stated that he was not intoxicated at the time. We find that defendant's demeanor on the video, as contended by the state, reveals that defendant was thinking clearly and speaking coherently. In sum, the record simply does not support the assertion that defendant was under the influence of alcohol or drugs at the time he spoke with the police detectives.

We next consider defendant's contention that his statements were not voluntary because, it is asserted, they were the result of coercive tactics employed by Detective Lacy. Specif-

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ically, defendant points to comments by the detective stating that he would make the defendant look like an animal in front of the jury.

In *Columbus v. Stepp* (Oct. 6, 1992), Franklin App. Nos. 92AP-486 & 487, unreported, (1992 Opinions 4671, 4680), this court noted that:

“The basic test for voluntariness is whether the confession is ‘the product of an essentially free and unconstrained choice by its maker.’ *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854. In applying this test, a court must consider the totality of circumstances surrounding the confession. *Id.* at 225; *Frazier v. Cupp* (1969), 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684. Factors a court should weigh when making a voluntariness determination include:

“ ‘In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.’ *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus, vacated in part, 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155.

“Coercive police activity, however, is a necessary predicate to finding a confession ‘involuntary’ within the meaning of the Due Process Clause. *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473. In the absence of such coercive

police conduct, no due process violation exists. *Id.* at 167.”

\*11 In considering the “totality of the circumstances,” the record indicates that defendant was twenty-three years of age and had prior experience with the law and police procedure, including an arrest and conviction. Defendant appeared to have average intelligence and his demeanor did not suggest that he was particularly susceptible to intimidation. As noted above, there was no indication that defendant was impaired by drugs or alcohol at the time of the interview. Defendant signed the Miranda waiver form and indicated that he understood the implications involved in waiving his rights. The interview was relatively short, lasting approximately one hour. During the interview, defendant requested, and received, a glass of water.

Defendant's contention that the detective's threat to make him look like an animal at trial rendered his statement involuntary is not persuasive. Initially, we note that there was a definite time lapse between Detective Lacy's comments and defendant's subsequent statements, indicating a lack of causal connection. As noted by the state, the record indicates that defendant's statements appeared to be prompted, not by threats or inducements, but rather by the detectives' indication that they were terminating the interview on the grounds that their requests to hear defendant's version of the incident were futile. Further, in the context of the manner in which Detective Lacy's comments were posed, the inducements at issue constituted admonitions to tell the truth. Such admonitions do not constitute improper police conduct. See *State v. Acquista* (Dec. 12, 1995), Franklin App. No. 95APA04-431, unrc-

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ported, (1995 Opinions 5291, 5299) (“admonitions to tell the truth are considered to be neither threats nor promises and are permissible”), citing *State v. Loza* (1994), 71 Ohio St.3d 61, 67, 641 N.E.2d 1082.

Upon review of the entire record, we find that the trial court did not err in finding that defendant's statements were voluntary and not the product of improper police conduct. Defendant's second assignment of error is overruled.

Under the fourth assignment of error, defendant asserts that the trial court erred in overruling his motion for a new trial. Defendant argues that the motion should have been granted after the defense became aware that a deal had been struck between the state and a key witness, Mary Payne, and the prosecution failed to disclose such information prior to trial.

Defendant notes that, prior to trial, defense counsel filed a motion to disclose any promises, deals or other exculpatory evidence. At a pretrial hearing, defense counsel raised the issue of whether any promises, including a promise not to prosecute, had been made to Mary Payne. At that time, one of the prosecutors indicated that he was “not aware of my office ever granting her immunity in this case.” (Tr. Vol.I, 37.) The trial judge also indicated at that time, based upon her review of the evidence, that the court was not aware of any offers made to Payne.

\*12 The record further indicates that, between the guilt and penalty phases of the trial, defendant filed a motion for new trial, alleging that the prosecution had failed to reveal an agreement between the state and Payne. The basis for the motion was a con-

versation during the trial between one of defendant's attorney's, Susan Laughlin-Schopis, and a prosecutor, Timothy Braun, in which defense counsel inquired as to the reason why Payne had not been charged.

At a hearing on the motion, Braun gave the following response to defense counsel's suggestion that an agreement had been made:

“MR. BRAUN: \* \* \* WHAT MS. LAUGHLIN-SCHOPIS IS REFERRING TO IS THE CONVERSATION THAT WE HAD HERE IN THE COURTROOM WHERE SHE ASKED ME WHY MARY PAYNE WAS NOT CHARGED. DURING THE COURSE OF THAT CONVERSATION, I GAVE HER MY OPINION, WHICH WOULD HAVE BEEN THAT, IF BACK 18 MONTHS AGO, I PROBABLY WOULD HAVE CHARGED HER, AND THAT'S TRUE.

“I THINK EVERYONE IN THE COURTROOM KNOWS MY REPUTATION IN PROSECUTIONS AND THE STANCE I SOMETIMES TAKE ON CASES. WE ARE IN A SITUATION, HOWEVER, WHERE NO ONE HAS EVER MADE HER A DEAL. WHAT I DID COMMUNICATE TO MS. LAUGHLIN-SCHOPIS WAS THAT KATHY PETERSON MADE A DECISION AT THAT TIME DURING THE JUVENILE BINDOVER, IN TALKING WITH DETECTIVES, WHICH \* \* \* IS IN A VERY EARLY STAGE IN THE INVESTIGATION \* \* \*.

“AND I INDICATED TO HER THAT, YES, I PROBABLY WOULD HAVE CHARGED HER AT THAT POINT. THERE HAS BEEN NO DEAL MADE WITH MARY PAYNE AND, YES, SHE HAS NOT BEEN

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ARRESTED ON THIS CASE, AND THAT DECISION WAS MADE BY SOMEONE ELSE.

"IN MY DISCUSSIONS WITH THE PROSECUTORS WHO HAVE BEEN INVOLVED IN THE CASE PRIOR TO ME, SCOTT SAEGOR, WHO WAS ALSO INVOLVED IN THE JUVENILE BINDOVER, HE WAS AWARE OF NO DEAL BEING MADE WITH MARY PAYNE.

"I HAVE TALKED TO SCOTT VANDERKARR ABOUT THIS ISSUE, MARY PAYNE, AND WHETHER MARY PAYNE SHOULD HAVE BEEN ARRESTED OR CHARGED OR NOT, AND HE INDICATED TO ME, AGAIN, THAT NO DEALS HAVE BEEN MADE TO HER.

" \* \* \*

"IF YOU ASK ME WHAT MY PERSONAL OPINION IS 18 MONTHS AGO WHEN THIS CASE WAS DEVELOPING AND EVERYONE WAS BEING CHARGED, I PROBABLY WOULD HAVE CHARGED HER. KATHY PETERSON MADE A DIFFERENT DECISION. I CAN'T STAND HERE AND CRITICIZE HER DECISION OR HER MOTIVATIONS IN DEVELOPING A CASE AGAINST A JUVENILE CO-DEFENDANT, WILL ANTHONY, WHICH IS WHY SHE WAS TALKING TO BUFFY PAYNE AT THAT STAGE IN THIS INVESTIGATION AND THESE COURT HEARINGS." (Tr. Vol.VII, 5-8.)

Following arguments on the motion, the trial court agreed with the state's position that the record did not indicate that an agreement had ever been struck involving Payne. Specifically, the trial court stated:

" \* \* \* FOR THE RECORD, THE COURT DID OVERHEAR PART OF THAT CONVERSATION AND RECALLS THE CONVERSATION, AT LEAST IN PART, TO BE THE WAY MR. BRAUN HAD JUST STATED IT, AND THAT HE SAID IF MR. KNOX WANTED TO GIVE INFORMATION, HE WOULD BE HAPPY TO CHARGE BUFFY PAYNE. IT APPEARS THAT THE DEFENSE KNEW MS. PAYNE WASN'T BEING PROSECUTED EARLY ON, AND THAT THE DECISION NOT TO PROSECUTE HER WAS MADE BY PROSECUTORIAL DISCRETION, AND THE PROSECUTION HAS STATED ON THE RECORD THAT FLATLY NO DEAL HAS BEEN MADE.

\*13 "THEREFORE, THE MOTION FOR A NEW TRIAL IS OVERRULED." (Tr. Vol.VII, 9-10.)

Generally, "[a] motion for new trial pursuant to Crim.R. 33(B) is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54, paragraph one of the syllabus. In the present case, we find no abuse of discretion by the trial court in overruling defendant's motion for a new trial. The record reveals that the trial court agreed with the prosecutor's contention that defense counsel had misinterpreted the prosecutor's response to counsel's inquiry regarding why Payne had not been prosecuted. The trial court noted that defense counsel was made aware, early in the proceedings, that Payne was not being prosecuted and, further, the state denied that it was aware of any deal by the state involving Payne. Defendant failed to present evidence at the hearing to support

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the claim that such a deal had been made with the witness.

Finding no abuse of discretion, defendant's fourth assignment of error is overruled.

Under his fifth assignment of error, defendant contends that the trial court erred in refusing to give an instruction on murder. Defendant further argues that the court erred in giving an "acquittal first" instruction.

Regarding the trial court's failure to give an instruction on murder, the record shows that, following the presentation of the evidence, the defense requested a jury instruction as to the offense of involuntary manslaughter. The prosecution initially objected, arguing that the evidence only supported a theory that the murder was planned by defendant and that he aided in the killing with prior calculation and design. Defense counsel argued that the evidence supported a charge on involuntary manslaughter based upon testimony by Mary Payne, in which she stated that defendant asked her to knock on Smith's door so that "Wheels" could talk with Smith about dropping the charge against defendant. Following a review of the transcript of Payne's testimony, the trial court indicated that an instruction on involuntary manslaughter would be given.

Defense counsel also argued that an instruction on murder should be given. Specifically, counsel contended that if Will Anthony, the gunman, went to the door and for "some reason unknown to our client" committed a purposeful killing, defendant was entitled to an instruction on the lesser included offense of murder. (Tr. Vol. VI, 136.) In response, the prosecutor argued that, "if their client didn't intend for him to kill this woman it wouldn't

be a purposeful killing. It couldn't be murder." (Tr. Vol. VI, 136.)

Defendant notes that the evidence throughout the trial indicated that Will Anthony was the triggerman in the homicide. Defendant argues that the jury could have easily deliberated on the sole offense of murder because of the testimony of Mary "Buffy" Payne, who testified that she knocked on the door to see if Patricia Smith would be willing to drop the theft charges against the defendant. Defendant argues that it can reasonably be concluded that Will Anthony took it upon himself to commit the murder spontaneously at the time the victim answered the door, and thus the evidence supported a finding that there was no plan or scheme to commit the homicide.

\*14 In the present case, defendant was convicted of aggravated murder pursuant to R.C. 2903.01. R.C. 2903.01(A) provides in part that "[n]o person shall purposely, and with prior calculation and design, cause the death of another \* \* \*." R.C. 2903.02, Ohio's murder statute, provides in part that "[n]o person shall purposely cause the death of another \* \* \*." Thus, "[t]he difference between murder and aggravated murder is that aggravated murder is a purposeful killing 'with prior calculation and design' and murder is any purposeful killing." *State v. Grasa* (June 10, 1996), Butler App. No. CA94-12-231, unreported.

In *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus, the court held:

"Even though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included

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offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. (*State v. Kidder* [1987], 32 Ohio St.3d 279 \* \* \*; *State v. Davis* [1983], 6 Ohio St.3d 91 \* \* \*; *State v. Wilkins* [1980], 64 Ohio St.2d 382 \* \* \* clarified.)”

Upon review, we find that the trial court did not err in refusing to instruct on the lesser included offense of murder. In the present case, the state presented evidence which, if believed, indicated that defendant aided and abetted Will Anthony in a purposeful killing, with prior calculation and design, for the purpose of eliminating the victim as a witness in defendant's upcoming theft trial. The state's evidence included the testimony of Kimyana Knox, the defendant's sister, who stated that the defendant told her about his plan to pay Will Anthony \$500 to kill Smith in order to avoid going to jail on the theft charge. The defendant told his sister that he procured Mary Payne, a white female, to knock on the victim's door because of his belief that the victim would not open the door for a black male. The state presented other evidence which further supported a finding of aggravated murder.

In contrast, under the defendant's theory of the case, Will Anthony merely went to the victim's door to speak with her about dropping the pending theft charge against defendant, and thus, for some unexplained reason, the killing was the result of Anthony's spontaneous act. The trial court addressed this theory by granting defendant's request for an instruction on involuntary manslaughter (which does not require a specific intent).<sup>FN1</sup> However, a lesser included instruction on murder was only required if the jury could

have reasonably found that defendant aided and abetted in the purposeful killing of Smith, but without prior calculation and design. Further, a lesser included instruction “is not required every time some evidence is presented.” *State v. Goodwin* (Apr. 17, 1997), Cuyahoga App. No. 68531, unreported. Rather, “[t]here must be sufficient evidence admitted at trial to allow the jury to reasonably reject the greater offense and find the defendant guilty on the lesser included offense.” *Id.* Based upon the evidence presented in the instant case, we find there was insufficient evidence to support the requested instruction on murder.

FN1. We note that the issue whether the trial court properly granted defendant's request for an instruction on involuntary manslaughter is not before this court on appeal.

\*15 Defendant relies upon evidence presented by the state in support of the argument that an instruction on murder should have been provided. However, assuming that the jury found credible the testimony presented by the state's witnesses, the facts did not support a finding that defendant aided and abetted in the purposeful killing of Smith without also finding that he acted with prior calculation and design. Defendant appears to contend that evidence indicating that Payne was unaware of a plan to murder Smith constituted evidence that defendant likewise did not know that the murder was planned. We disagree. As noted by the state, Payne did not testify that defendant was unaware of a murder plan. In fact, Payne's testimony suggested otherwise as she related that, moments after the shooting, defendant threatened her with the same fate if she told anyone. Nor did Payne provide testimony to suggest that

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Anthony simply acted impulsively. We note that neither the defendant nor Will Anthony testified at trial, and, while the state presented sufficient evidence to convince the jury beyond a reasonable doubt regarding defendant's prior calculation and design in the murder of the victim, the remaining evidence was insufficient for the jury to reject the greater offense to find defendant guilty of murder. See, e.g., *Goodwin, supra*; *State v. Hoyle* (Dec. 2, 1987), Summit App. No. 13129, unreported (trial court did not err in failing to give instruction on lesser included offense of murder where there was no testimony that would enable jury to find defendant purposely shot victim but without prior calculation and design); *State v. South* (Nov. 5, 1987), Adams App. No. 446, unreported (assuming jury found state's witnesses to be credible, there was no evidence of simple murder, but only aggravated murder).

We further disagree with defendant's contention that the trial court gave a prejudicial "acquittal-first" instruction. The record indicates that the court gave the following instruction to the jury:

"IF YOU FIND THAT THE STATE FAILED TO PROVE PURPOSE TO KILL, BUT PROVED CAUSATION AND DEATH, YOU MAY ALSO CONSIDER INVOLUNTARY MANSLAUGHTER AS A LESSER OFFENSE OF MURDER." (Tr. Vol. VI, 236.)

In *State v. Thomas, supra*, at 213, paragraph three of the syllabus, the Ohio Supreme Court held:

"A jury must unanimously agree that the defendant is guilty of a particular criminal offense before returning a verdict of guilty on

that offense. If a jury is unable to agree unanimously that a defendant is guilty of a particular offense, it may proceed to consider a lesser included offense upon which evidence has been presented. The jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense."

In *Thomas*, the trial court gave the following instruction:

\*16 " 'If you find that The State has proven beyond a reasonable doubt all of the essential elements of the crime of aggravated murder, then your verdict must be that the Defendant is guilty of aggravated murder; and you will not consider the lesser offense.

" 'However, if you find that The State has failed to prove beyond a reasonable doubt the element of prior calculation and design, then your verdict must be that the Defendant is not guilty of aggravated murder.

" 'You will then proceed with your deliberations and decide whether The State has proven beyond a reasonable doubt all of the essential elements of the lesser crime of murder.' " *Id.* at 220.

The Ohio Supreme Court held that the above instruction was not prejudicial because it "does not expressly require unanimous acquittal on the charged crime, but rather addresses possible disagreement by the jury on the element of prior calculation and design and a corresponding inability to reach a verdict of guilty of aggravated murder." *Id.*

Similarly, in the present case, the instruction at issue did not require the jury to unanim-

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ously acquit defendant on the aggravated murder charge before it could consider the lesser included offense of involuntary manslaughter. Rather, the instruction only informed the jury that it could also consider whether defendant was guilty of involuntary manslaughter if it did not reach a unanimous verdict of guilty as to the aggravated murder charge.

Defendant's fifth assignment of error is without merit and is overruled.

Under the sixth assignment of error, defendant contends that his conviction for aggravated murder was not supported by sufficient evidence and was against the manifest weight of the evidence.

In *State v. Conley* (Dec. 16, 1993), Franklin App. No. 93AP-387, unreported (1993 Opinions 5437, 5438), this court noted the applicable standards of review in considering the sufficiency and weight of the evidence, holding:

“ \* \* \* The test to be used in reviewing the sufficiency of the evidence to support a criminal conviction is set forth in the second paragraph of syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259 \* \* \*. Upon such issue, determining whether, as a matter of law, the evidence is sufficient to support a conviction, the evidence must be construed in a light most favorable to the prosecution, and the reviewing court must determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The test for reviewing the manifest weight of the evidence, however, is slightly different. When the manifest weight of the evidence is the issue, the evidence is not construed most

strongly in favor of the state. Instead, the appellate court must engage in a limited weighing of the evidence to determine whether there is sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt. \* \* \* ”  
 (Citations omitted.)

\*17 As previously noted, R.C. 2903.01 sets forth the offense of aggravated murder and provides in part that “[n]o person shall purposely, and with prior calculation and design, cause the death of another \* \* \*.” R.C. 2923.03 provides in pertinent part:

“(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

“ \* \* \*

“(2) Aid or abet another in committing the offense;

“ \* \* \*

“(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

“(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.”

Under R.C. 2903.03, “a person may be an accomplice in an offense and prosecuted as the principal offender if, among other things,

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he aids or abets another in committing the offense while acting with the kind of culpability required for the commission of the offense.” *State v. Coleman* (1988), 37 Ohio St.3d 286, 287, 525 N.E.2d 792, paragraph two of the syllabus. Further, evidence of aiding and abetting another in the commission of an offense “may be demonstrated by both direct and circumstantial evidence. Thus, ‘[p]articipation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.’ ” *State v. Cartellone* (1981), 3 Ohio App.3d 145, 150, 444 N.E.2d 68, citing *State v. Pruett* (1971), 28 Ohio App.2d 29, 34, 273 N.E.2d 884.

In the present case, the state presented evidence which, if believed, showed that defendant aided and abetted in the commission of the purposeful murder of Patricia Smith, with prior calculation and design. There was evidence indicating that he solicited Will Anthony to shoot the victim and that defendant also procured the services of Mary Payne to knock on the door because of defendant's concern that the victim would be reluctant to open the door for a black male. The defendant arranged for transportation to the crime scene, he pointed out the victim's apartment, and there was evidence indicating that he provided the weapon used to commit the offense. As noted by the state, defendant was present in the car both before and after the killing and he was the only individual in the car who was acquainted with the victim or who had a motive to kill her.

Defendant's sister, Kimyana Knox, testified that defendant told her that he planned the murder to avoid going to jail. The defendant told his sister that he was going to pay Anthony “\$500 to do it.” (Tr. Vol.IV, 129.) In

addition to Kimyana Knox's testimony regarding the issue of intent, defendant's threat to Payne moments after the shooting, in which he stated that she would get the same treatment if she talked with anybody, also evinces the elements of purpose, prior calculation and design. Further, defendant's statement to police detectives, in which he commented that, “we didn't think they both had the nerve or anything like that,” constituted evidence upon which the jury could infer that defendant acted with the requisite intent to support a verdict of guilty on the charge of aggravated murder.

**\*18** Upon review of the record, we conclude that there was substantial evidence upon which the jury could reasonably conclude that defendant aided and abetted in the purposeful killing of Patricia Smith with prior calculation and design and that all the elements of the charged offense were proven beyond a reasonable doubt. We further find that the jury verdict was not against the manifest weight of the evidence as there was competent, credible evidence upon which a reasonable trier of fact could have found guilt beyond a reasonable doubt.

Defendant's sixth assignment of error is overruled.

Under the seventh assignment of error, defendant contends that the trial court erred in admitting a gruesome photograph over the objection of defense counsel.

The photograph at issue was the state's Exhibit No. A-16, a photograph of the victim taken at the crime scene. Defendant contends that the photograph was inflammatory in nature and that there was no need for its introduction where the evidence was undis-

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puted as to the nature of the death.

“It is well-settled \* \* \* that the determination of whether photographs meet the test for admissibility rests within the sound discretion of the trial court.” *State v. Phillips* (1995), 74 Ohio St.3d 72, 77, 656 N.E.2d 643. In *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768, paragraph seven of the syllabus, the Ohio Supreme Court held:

“Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.”

We find that the trial court did not abuse its discretion by allowing the admission of the photograph at issue. The probative value of the photograph, depicting the location of the wound, was illustrative in explaining the testimony of the coroner and establishing intent and purpose to cause death. Further, inasmuch as only one crime scene photograph of the victim was offered, the admission of this evidence was clearly not repetitive or cumulative. Finding that the probative value of the photograph outweighed the danger of prejudice, the trial court did not err in admitting the photograph.

Defendant's seventh assignment of error is overruled.

Under the eighth assignment of error, defendant asserts that the trial court erred in granting a protective order for two of the state's witnesses.

The record indicates that, prior to the trial of this action, the prosecutor, pursuant to Crim.R. 16(B)(1)(e), filed a motion for a protective order on behalf of two unnamed witnesses for the prosecution. The basis for the request was the state's concern that the witnesses would be subject to physical danger and/or coercion by the defendant. The matter was referred to a judge who was not assigned to conduct the trial of the matter and the court conducted an *ex parte* hearing outside the presence of defense counsel. Following the hearing, the court denied defendant's request for discovery regarding these witnesses and the court ordered that the transcript be sealed.

\*19 Crim.R. 16(B)(1)(e) provides in part that:

“ \* \* \* Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial \* \* \*. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. \* \* \* ”

In *State v. Daniels* (1993), 92 Ohio App.3d 473, 480, 636 N.E.2d 336, the court noted that:

“The right to confront witnesses is guaranteed to an accused through the Sixth and Fourteenth Amendments to the United States Constitution, and by Section 10, Article I of the Ohio Constitution. \* \* \* However, this right is legitimately constrained by Crim.R.

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16(B)(1)(e), which permits the trial court to issue an order allowing the state to withhold the name and address of a witness if the state certifies that disclosure may subject the witness to physical harm or coercion. \* \* \* Certification by the state under Crim.R. 16 is not satisfied by the prosecutor's merely stating his conclusion that a witness might be subject to harm, but requires the state's reasons for requesting witness protection to appear on the record. \* \* \* The prosecution must show the existence of an undue risk of harm to the witness to be relieved of its obligation to disclose the name of its witness. \* \* \* Finally, where relief from discovery is sought, the procedure must be *ex parte* to prevent the defense from learning the information sought to be concealed, the identities of the endangered witnesses. \* \* \* ”

We note that, in his appellate brief, defendant speculates that the two individuals the prosecution sought to protect were Mary “Buffy” Payne and Regina Knox, the defendant's wife. As noted by the state, however, the subjects of the protective order were Kimyana Knox, the defendant's sister, and Regina Knox. Further, as noted by the state, the record indicates that Payne's name appeared on the state's witness list.

Regarding the evidence adduced at the *ex parte* hearing, the record reveals that the prosecutor expressed concern that the defendant had shown, based upon facts expected to be presented at trial, a willingness to hire someone to eliminate a prosecuting witness. The prosecutor also indicated that there had been communications between the defendant and his brother, John Knox, in which the defendant had made threats and stated in effect that his brother should help him or suffer the consequences. The prose-

cutor further stated that during the investigation, at the time Regina Knox was cooperating with police, her car had been vandalized and there had been damage to other personal property belonging to her. Finally, the prosecutor stated that, based upon the close relationship of the defendant to the witnesses, *i.e.*, defendant's wife and sister, the risk of influence or harm was immediately apparent.

\*20 Upon review, we find that there was evidence upon which the trial court could have concluded that the disclosure of the names of the witnesses may have subjected those witnesses to physical harm or coercion. Further, even assuming that the trial court erred in its determination, defendant cannot show prejudice from the record. One of the witnesses, Regina Knox, did not testify at trial. Thus, defendant's right to confront this witness was not implicated. Further, Kimyana Knox's identity was “not absolutely withheld” as she was “present at trial and subject to cross-examination.” *Daniels, supra*, at 481, 636 N.E.2d 336. Moreover, as noted by the state, the record indicates that defense counsel interviewed Kimyana Knox prior to trial.

Defendant's eighth assignment of error is without merit and is overruled.

Under the ninth assignment of error, defendant asserts that the trial court erred in ruling that the defendant had no standing to contest the validity of an automobile search.

At a pretrial hearing on defendant's motion to suppress, Columbus Police Detective Ronald Jester testified regarding a search warrant filed for a green 1981 Cadillac. According to Detective Jester, the vehicle was registered in the name John Knox, the defendant's brother.

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John Knox testified at the suppression hearing regarding the events occurring on the day of his arrest. The evidence indicated that John Knox was arrested on January 7, 1995, after leaving his residence at approximately 8:30 p.m. He was stopped in the vehicle in question after driving a short distance from his residence. Knox was taken to police headquarters and he told police detectives during an interview that the weapon used in the homicide was inside the automobile. The vehicle was subsequently searched and a .380 caliber automatic pistol was recovered.

At the suppression hearing, the state argued that defendant had no standing to challenge the search of his brother's automobile. The state noted that defendant was not in the vehicle at the time his brother was stopped and arrested. Following the presentation of evidence, the trial court ruled that there was no reasonable expectation of ownership by the defendant and, thus, the court agreed with the state's contention that there was no standing to challenge the search of the automobile.

Defendant asserts that the evidence indicates that he and his brother spent a great deal of time together and that there is "every reason to believe the cars in question were used interchangeably." We find no merit to this contention.

In *Rakas v. Illinois* (1978), 439 U.S. 128, 144, 99 S.Ct. 421, 58 L.Ed.2d 387, the United States Supreme Court held that in order to challenge the legality of a search, a defendant must establish that he had a "legitimate expectation of privacy." In *Rakas*, the court held that a passenger in a vehicle who asserts neither a property nor a possessory interest in an automobile seized lacks standing to challenge the constitutionality of the

search of the vehicle.

\*21 In the present case, the evidence at the suppression hearing indicated that defendant did not own the car nor was he present at the stop so as to be exercising actual control over the vehicle. Defendant's vague assertion that there is every reason to believe that the brothers used their cars interchangeably is not supported by evidence in the record. There was no testimony by John Knox indicating that his brother had permission to use the vehicle. The burden was on the defendant to show facts sufficient to establish an expectation of privacy. Upon review, we find that defendant has asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. *Rakas, supra*. Accordingly, the trial court did not err in holding that defendant lacked standing to challenge the search of his brother's automobile.

Defendant's ninth assignment of error is overruled.

Based upon the foregoing, defendant's first, second, third, fourth, fifth, sixth, seventh, eighth and ninth assignments of error are overruled and the judgment of the trial court is hereby affirmed.

*Judgment affirmed.*

PETREE and CLOSE, JJ., concur.

Ohio App. 10 Dist., 1997.

State v. Knox

Not Reported in N.E.2d, 1997 WL 360849  
 (Ohio App. 10 Dist.)

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Not Reported in N.E.2d, 1997 WL 360849 (Ohio App. 10 Dist.)  
(Cite as: 1997 WL 360849 (Ohio App. 10 Dist.))

Baldwin's Ohio Revised Code Annotated Currentness  
Rules of Criminal Procedure (Refs & Annos)  
→ **Crim R 52 Harmless error and plain error**

**(A) Harmless error**

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

**(B) Plain error**

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

CREDIT(S)

(Adopted eff. 7-1-73)

Current with amendments received through 1/15/10

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Baldwin's Ohio Revised Code Annotated Currentness  
Ohio Rules of Evidence (Refs & Annos)  
    ☞ Article VI. Witnesses  
        → Evid R 601 General rule of competency

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

(1) a crime against the testifying spouse or a child of either spouse is charged;

(2) the testifying spouse elects to testify.

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

(E) As otherwise provided in these rules.

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