

ORIGINAL

**IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 09-0739**

STATE OF OHIO

Appellee

v.

HERSIE R. WESSON

Appellant

**On Appeal from the Summit
County Court of Common Pleas
Case No. 2008-03-0710**

CAPITAL CASE

**MERIT BRIEF OF APPELLEE
STATE OF OHIO**

SHERRI BEVAN WALSH

Prosecuting Attorney

RICHARD S. KASAY (#0013952) (Counsel of Record)

Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue
Akron, Ohio 44308
(330) 643-2800
Fax (330) 643 2137
Email kasay@prosecutor.summitoh.net

Counsel For Appellee, State Of Ohio

DAVID L. DOUGHTEN (#0002847) (Counsel of Record)

4403 St. Clair Avenue
Cleveland, Ohio 44103-1125
(216) 361-1112
Fax (216) 881-3928

GEORGE C. PAPPAS (0037374) (Counsel of Record)

1002 Key Building
159 Main Street
Akron, Ohio 44308
(330) 535-6185

Counsel For Appellant, Hersie R. Wesson

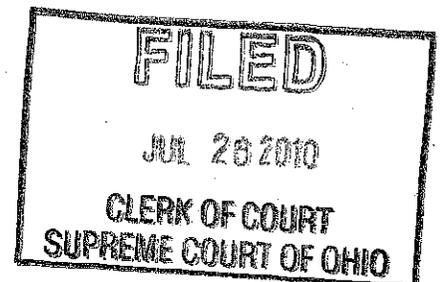
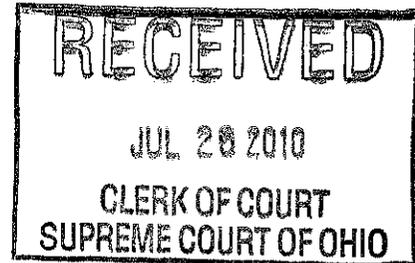


TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES..... V

STATEMENT OF FACTS 1

ARGUMENT:

Proposition of Law I:

An Indictment Which Fails To Set Forth Each And Every Element Of The Charged Offense, Including The Mens Rea, Is In Violation Of The Due Process Clause Of Both The State And Federal Constitution..... 4

Proposition of Law II:

Where A Defendant Is Found Guilty For Having Committed An Offense While Under Postrelease Control, The Conviction Is Invalid Where The Sentencing Entry Placing The Defendant On Postrelease Control Failed To Follow The Mandates Of R.C. 2967.28(B)..... 6

Proposition of Law III:

Where A Defendant's Right To Present A Defense Is Arbitrarily Infringed By A State Rule Of Evidence, The Former Prevails. Therefore, A Trial Court Must Preclude Essential Defense Evidence Based Solely On State Rules Of Evidence..... 9

Proposition of Law IV:

When A Capital Defendant Waives His Right To A Jury Trial, Revised Code 2945.06 Requires That The Presiding Judge Of The Court Rather Than The Case Itself Select The Other Members Of A Three Judge Panel To Hear And Decide A Capital Murder Trial..... 11

Proposition of Law V:

Where The Presumption Against The Waiver Of Miranda Protections Is Not Overcome By The Totality Of The Circumstances Of The Waiver, Any Resultant Statement By A Defendant Must Be Suppressed. 15

TABLE OF CONTENTS - continued

PAGE(S)

Proposition of Law VI:

Tampering With Evidence, R.C. 2921.12 And Aggravated Robbery, R.C. 2911.01 Are Allied Offenses Pursuant To R.C. 2945.21 Where The Underlying Theft Offense And The Making The Element Unavailable Constitute The Same Animus..... 18

Proposition of Law VII:

Victim-Impact Statements Made By Or On Behalf Of Family Members Of The Decedent At The Time Of Sentencing Are Limited In Nature And May Not Address The Families Characterization Of And Opinions About The Crime, The Defendant And The Appropriate Sentence. 20

Proposition of Law VIII:

The Failure To Raise And Preserve Meritorious Issues During The Culpability Phase Results In The Denial Of A Defendant's Right To Effective Assistance Of Counsel..... 21

Proposition of Law IX:

The Death Penalty May Not Be Sustained Where The Cumulative Errors That Occurred In The Trial Deprived The Defendant Of A Fair Consideration Of The Appropriateness Of The Death Penalty..... 24

Proposition of Law X:

O.R.C. 2929.04(A) (7) Is Unconstitutional Where The Same Acts Which Constitute The Charge Of Aggravated Murder Are Also Used To Narrow The Class Of Death Eligible Defendants..... 25

Proposition of Law XI:

The Death Penalty Cannot Be Upheld Where The Reviewing Court Fails To Follow The Statutory Provisions Regarding The Proportionality Review Of The Defendant's Sentence. 26

TABLE OF CONTENTS - continued

PAGE(S)

Proposition of Law XII:

The Death Penalty Is Unconstitutional As Presently Administered In Ohio.	27
---	----

CONCLUSION	29
------------------	----

PROOF OF SERVICE.....	30
-----------------------	----

APPENDIX

Appx. Page

Journal Entry of the Summit County Court of Common Pleas (Mar. 18, 2009).....	A-1
Judgment Order of the Summit County Court of Common Pleas (Mar. 18, 2009).....	A-5
Journal Entry of the Summit County Court of Common Pleas (Jan. 29, 2009)	A-21
Judgment Entry of the Summit County Court of Common Pleas (Jan. 15, 2009)	A-23
Judgment Entry of the Summit County Court of Common Pleas (Jan. 12, 2009).....	A-24
Order of the Summit County Court of Common Pleas (Jan. 3, 2009).....	A-26
Amended Waiver Of Trial By Jury filed in the Summit County Court of Common Pleas (Jan. 7, 2009)	A-31
Order of the Summit County Court of Common Pleas (June 27, 2008).....	A-33

CONSTITUTIONAL PROVISIONS, STATUTES:

Ohio Rules of Evidence

Evid.R. 801.....	47
Evid.R. 804	48

United States Constitution

Fifth Amendment to the United States Constitution	49
---	----

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE(S)</u>
<i>Blakemore v. Blakemore</i> (1983), 5 Ohio St.3d 217	9
<i>Colorado v. Connelly</i> (1986), 479 U.S. 157	16
<i>Colorado v. Spring</i> (1987), 479 U.S. 564	16
<i>Dickerson v. United States</i> , (2000), 530 U.S. 428	16
<i>In re Coy</i> (1993), 67 Ohio St.3d 215.....	10
<i>McDonald v. City of Chicago</i> (U.S.S.Ct. 2010), 2010-WL-2555.....	5
<i>People v. McGowan</i> (Mich. App. 2009), 2009 WL 4827442	10
<i>State v. Bezak</i> , 114 Ohio St.3d 94, 2007-Ohio-3250.....	6
<i>State v. Blankenship</i> (1988), 38 Ohio St.3d 116.....	18
<i>State v. Bloomer</i> , 122 Ohio St.3d 200, 2009-Ohio-2462	6
<i>State v. Bradley</i> (1989), 42 Ohio St.3d 136.....	21
<i>State v. Buehner</i> , 110 Ohio St.3d 403, 2006-Ohio-4707	4
<i>State v. Burnside</i> , 100 Ohio St.3d 152, 2003-Ohio-5372.....	15
<i>State v. Cabrales</i> , 118 Ohio St.3d 54, 2008-Ohio-1625	18-19
<i>State v. Carter</i> , 72 Ohio St.3d 545, 1995-Ohio-104	27
<i>State v. Colon</i> , 118 Ohio St.3d 26, 2008-Ohio-1624	4
<i>State v. Colon</i> , 119 Ohio St.3d 204, 2008-Ohio-3749.....	4
<i>State v. Craig</i> , 110 Ohio St.3d 306, 2006-Ohio-4571	28
<i>State v. Davis</i> , 116 Ohio St.3d 404, 2008-Ohio-2.....	26
<i>State v. DeMarco</i> (1987), 31 Ohio St.3d 191.....	24
<i>State v. Eley</i> (1996), 77 Ohio St.3d 174.....	12, 14, 22
<i>State v. Elmore</i> , 111 Ohio St.3d 515, 2006-Ohio-6207	21, 26

TABLE OF AUTHORITIES - continued

<u>CASES:</u>	<u>PAGE(S)</u>
<i>State v. Fautenberry</i> (1995), 72 Ohio St.3d 435	20
<i>State v. Ferguson</i> , 108 Ohio St.3d 451, 2006-Ohio-1501	27, 28
<i>State v. Fry</i> , 125 Ohio St.3d 163, 2010-Ohio-1017	5, 7, 25, 27
<i>State v. Garner</i> (1995), 74 Ohio St.3d 49	24
<i>State v. Hale</i> , 119 Ohio St.3d 118, 2008-Ohio-3246	20
<i>State v. Hardison</i> , 9 th Dist. App. No. 23050, 2007-Ohio-366	9
<i>State v. Hoffner</i> , 102 Ohio St.3d 358, 2004-Ohio-3430	26, 28
<i>State v. Ketterer</i> , 111 Ohio St.3d 70, 2006-Ohio-5283	27
<i>State v. Lester</i> , 123 Ohio St.3d 396, 2009-Ohio-4225	4
<i>State v. Lewis</i> , 67 Ohio St.3d 200, 1993-Ohio-181	27
<i>State v. Long</i> (1978), 53 Ohio St.2d 91	4, 9, 18
<i>State v. Mather</i> , 9 th Dist. App. No. 07CA009242, 2008-Ohio-2902 .	10
<i>State v. Mills</i> (1992), 62 Ohio St.3d 357	16
<i>State v. Mink</i> , 101 Ohio St.3d 350, 2004-Ohio-1580	27
<i>State v. Mundt</i> , 115 Ohio St.3d 22, 2007-Ohio-4836	21
<i>State v. Otte</i> , 74 Ohio St.3d 555, *562, 1996-Ohio-108	16
<i>State v. Payne</i> , 114 Ohio St.3d 502, 2007-Ohio-4642	12, 13, 18
<i>State v. Perez</i> , 125 Ohio St.3d 122, 2009-Ohio-6179	26
<i>State v. Perry</i> , 101 Ohio St.3d 118, 2004-Ohio-297	4, 18
<i>State v. Post</i> (1987), 32 Ohio St.3d 380	13
<i>State v. Sage</i> (1987), 31 Ohio St.3d 173	9

TABLE OF AUTHORITIES - continued

<u>CASES:</u>	<u>PAGE(S)</u>
<i>State v. Singleton</i> , 124 Ohio St.3d 173, 2009-Ohio-6434.....	6
<i>State v. Stewart</i> (1991), 75 Ohio App.3d 141.....	16
<i>State v. Swann</i> , 119 Ohio St.3d 552, 2008-Ohio-4837	10
<i>State ex rel. Rash v. Jackson</i> , 102 Ohio St.3d 145, 2004-Ohio-2053.	13
<i>State ex rel. White v. Cuyahoga Metro. Hous. Auth.</i> (1997), 79 Ohio St.3d 543	13
<i>United States v. Newman</i> (6 th Cir, 1989), 889 F.2d 88	16
<i>United States v. Rambo</i> (8 th Cir. 1986), 789 F.2d 1289.....	16
<i>U.S. v. Suarez</i> (11 th Cir. 2007), 215 Fed. Appx. 872	10

CONSTITUTIONAL PROVISIONS, STATUTES:

Ohio Revised Code

R.C. 2903.01.....	1, 5, 27
R.C. 2911.01.....	1, 4, 18
R.C. 2911.12	6
R.C. 2921.12.....	18
R.C. 2929.04	1, 5, 6, 7, 27, 28
R.C. 2929.05.....	26
R.C. 2941.25	18
R.C. 2945.06.....	11, 13, 14, 22
R.C. 2967.28.....	6

Ohio Rules of Evidence

Evid.R. 801.....	9, 10
Evid.R. 804	10

MISCELLANEOUS

United States Constitution

Fifth Amendment to the United States Constitution	5
---	---

STATEMENT OF THE CASE

Appellant Hersie R. Wesson waived trial by jury and consented to trial before a three judge panel. Amended Waiver of Trial by Jury dated January 7, 2009; R. 196; Order dated January 8, 2009; R. 202.

A pretrial motion to suppress evidence was denied. Order dated June 27, 2008; R. 103.

The panel convicted Wesson and sentenced him on one count of aggravated felony murder and three specifications and sentenced Wesson to death. Wesson was also convicted and sentenced for attempted murder, aggravated robbery, having weapons under disability, and tampering with evidence. The panel merged two counts of aggravated murder. The State elected to proceed on Count Two. Sentencing Journal Entry dated March 18, 2009; R. 256.

Count Two, R. 2, charged Wesson with aggravated felony murder in that he committed the offense of aggravated murder while committing or attempting to commit, etc. the offense of aggravated robbery. R.C. 2903.01(B); R.C. 2911.01(A)(1). There are three specifications to Count Two.

The specifications are first, that Wesson committed aggravated murder while Wesson was under detention. R.C. 2929.04(A)(4)(b). As stated below the detention arose from a void sentence. Second, that Wesson committed aggravated murder as part of a course of conduct. R.C. 2929.04(A)(5). Third, that Wesson committed aggravated murder while committing, attempting to commit, etc aggravated robbery and Wesson was the principal offender in commission of aggravated murder. R.C. 2929.04(A)(7). R. 2. The indictment was amended prior to trial without objection. Order dated January 8, 2009; R. 202.

There are extensive findings of fact and conclusions of law concerning the imposition of the death penalty. Judgment Entry-Opinion of the Court dated March 18, 2009: R. 250.

Wesson traded on the friendship shown to him by an elderly disabled man to go into his home to steal. Wesson stabbed the man, Emil Varhola, repeatedly in the neck, chest and back. Wesson was going through Emil Varhola's pockets when Emil's wife Mary Varhola walked in. Emil had his social security money in his wallet. T. III, 239, 245-246, 304.

Wesson went at Mary Varhola grinning that he had killed her husband. Wesson beat and stabbed Mary Varhola who feigned death to halt Wesson's assault. Wesson wanted to know where Emil kept his gun. Wesson wanted the gun to kill his girlfriend. T. III, 242, 247-250, 287. After Wesson left it was discovered that money and jewelry was missing. Mary Varhola had been wearing some of this jewelry before Wesson attacked her. T. III, 252-253, 299-300. Mary Varhola never had sex with Wesson. T. III, 255.

The identity of the intruder is no mystery. Wesson admitted stabbing Emil and Mary. Wesson told police he was having sexual relations with seventy-eight year old Mary Varhola; eighty-year old Emil Varhola, who had to breathe oxygen through a tube, saw them on the floor and threatened to shoot Wesson. Wesson claimed that he disarmed Emil who then came at Wesson with a knife. Wesson took the knife away and stabbed Emil in self-defense. Then Wesson stabbed his erstwhile lover, Mary Varhola, because she hit Wesson with a cane. T. V, 542-543.

The autopsy on Emil Varhola's body showed a deep cut to the carotid artery and jugular vein. T. V, 473. Emil had also been stabbed in his heart. T. V, 476-479. There

were three stab wounds in the back. T. V, 480-484. Emil Varhola had been stabbed in the neck and torso before being stabbed in the back. T. V, 484-485.

Wesson accepted no responsibility and showed no remorse at sentencing. Wesson said he reacted to a threat; Wesson accused Emil Varhola of reaching into Varhola's pocket (contrary to his statement to police). Wesson did not explain how Mary Varhola threatened Wesson with serious bodily harm causing him to stab her, why he came at her grinning with a knife, or why he stabbed Emil several times in the back after stabbing him in the neck and heart. T. X, 7-8.

PROPOSITION OF LAW I

AN INDICTMENT WHICH FAILS TO SET FORTH EACH AND EVERY ELEMENT OF THE CHARGED OFFENSE, INCLUDING THE MENS REA, IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF BOTH THE STATE AND FEDERAL CONSTITUTION.

LAW AND ARGUMENT

Wesson does not identify where these arguments were raised below so review should be for plain error. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749.

Plain error correction is a discretionary act and requires the defendant to show that his substantial rights were affected, that the outcome clearly would have been otherwise and that a manifest miscarriage of justice would occur absent the error. *State v. Long* (1978), 53 Ohio St.2d 91, paragraphs two and three of the syllabus; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶14.

Wesson was convicted on Count Seven, aggravated robbery, R.C. 2911.01(A)(1); and Count Thirteen, aggravated robbery, R.C. 2911.01(A)(3) Count Thirteen in the Supplemental Indictment clearly states that Wesson “did *** recklessly inflict, or attempt to inflict, serious physical harm on another ***.” R. 58. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. Wesson was not sentenced on Count Thirteen as the panel merged that offense with Count Seven. R. 256, Pg. 3.

R.C. 2911.01(A)(1), Count Seven, does not require a mental element of reckless. The offense as it concerns possession of a deadly weapon is a strict liability offense. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225. Theft, and not the elements of theft, is the essential element in the offense of aggravated robbery. See *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶10-¶12.

Count Two is aggravated felony murder based on aggravated robbery, R.C. 2903.01(B). The language in the count recites that Wesson “***did purposely cause the death of Emil Varhola***.” In *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017 this Court upheld a count in an indictment for aggravated felony murder where the count contained the mental element of purpose. Id. ¶40.

Further, the aggravated felony murder count in *Fry* read together with the separate count charging the predicate offense provided “ample notification of the elements of the underlying offenses that the state was required to prove.” Id. ¶41.

In Wesson’s case the counts charging the predicate offense, Counts Seven and Thirteen are stated correctly. This indicates that the grand jury considered the elements of the offenses. Moreover, the grand jury requirement in the Fifth Amendment to the United States Constitution does not apply to the States. *McDonald v. City of Chicago* (U.S.S.Ct. 2010), 2010-WL-2555, *15, FN.13.

Specification Three to Count Two alleged that Wesson committed aggravated murder while Wesson was committing, etc. aggravated robbery. In *Fry*, supra this Court held that a death penalty specification pursuant to R.C. 2929.04(A)(7) “does not include a mens rea component.” Id. 2010-Ohio-1017, ¶51. As with the aggravated felony murder count in *Fry* and in Wesson’s case the indictment separately and correctly charged the predicate offense. Id. ¶51.

This Proposition must be rejected.

PROPOSITION OF LAW II

WHERE A DEFENDANT IS FOUND GUILTY FOR HAVING COMMITTED AN OFFENSE WHILE UNDER POSTRELEASE CONTROL, THE CONVICTION IS INVALID WHERE THE SENTENCING ENTRY PLACING THE DEFENDANT ON POSTRELEASE CONTROL FAILED TO FOLLOW THE MANDATES OF R.C. 2967.28(B).

LAW AND ARGUMENT

Specification One to Count Two charged that the aggravated murder was committed while under detention. R.C. 2929.04(A)(4)(b). At trial the State offered State Exhibit 100, Journal Entry in CR 03 05 1343, to prove that Wesson had been sentenced to include post-release control. The testimony was that Wesson had been placed on post-release control on May 4, 2007 for a period of three years. T. V, 457-459.

The journal entry in CR 03 05 1343 is a sentencing entry dated July 31, 2003 for conviction of burglary, R.C. 2911.12(A)(1), a felony of the second degree, among other offenses. The entry orders Wesson “subject to post-release control to the extent the parole board may determine as provided by law.”

Former R.C. 2967.28(B)(2) requires mandatory post-release control for three years for a felony of the second degree that is not a felony sex offense. The entry also does not recite that violation of post-release control can result in incarceration for up to one-half of the stated prison term. The sentence is void. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶168; *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶11.

Wesson argues that the State did not prove that he was under detention. The State concedes that point because of this Court’s post-release control void sentence jurisprudence. A void sentence is a nullity and there is no judgment. See *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, ¶12.

The proper remedy should be to treat Specification One as if it were a specification that should have been merged for sentencing but was not. The State is not aware of another case where a capital specification is based upon a void sentence.

It is error for the fact finder to consider duplicative specifications. But, “resentencing is not automatically required where the reviewing court independently determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and that the jury’s consideration of duplicative aggravating circumstances in the penalty phase did not affect the verdict.” *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶181, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, paragraph five of the syllabus.

Here the panel did weigh Specification One against the evidence in mitigation. Judgment Entry dated March 18, 2009; R. 250, Pg. 2, 5. The panel did not find any mitigation in the nature and circumstances of the offense. *Id.* Pg. 4. Only very limited weight was given to the R.C. 2929.04(B)(3) factor. *Id.* Pg. 15.

The panel found that Wesson showed no remorse. Limited weight was given to the love and support shown Wesson by his family. A small amount of weight was given to Wesson’s conduct in jail and prison. *Id.* Pg. 13. The panel considered that evidence together with the testimony of forensic psychologist Dr. Smalldon and assigned significant weight to the R.C. 2929.04(B)(7) catch-all factor. *Id.* Pg. 15.

But the panel found that weight in mitigation fell far short of enabling the panel to find that the aggravating circumstances did not outweigh mitigation beyond a reasonable doubt. *Id.* Pg. 15. The panel did assign weight to Specification One and Specification Three (aggravated robbery). But the most weight was assigned to Specification Two (course of conduct). The other two specifications, “only [add] further

weight to the already very significant multiple-victim aggravating circumstance.” Id.
Pg. 14.

Because of the specific finding of the panel that the greatest factor in aggravation was the course of conduct specification and because of the existence of the other aggravating circumstance, Specification Three, the State submits that consideration by the panel of Specification One did not affect the verdict. The panel would have sentenced Wesson to death absent Specification One. The State further believes that this Court’s independent sentence review without consideration of Specification One will result in a death sentence for Wesson. This Proposition must be rejected.

PROPOSITION OF LAW III

WHERE A DEFENDANT'S RIGHT TO PRESENT A DEFENSE IS ARBITRARILY INFRINGED BY A STATE RULE OF EVIDENCE, THE FORMER PREVAILS. THEREFORE, A TRIAL COURT MUST PRECLUDE ESSENTIAL DEFENSE EVIDENCE BASED SOLELY ON STATE RULES OF EVIDENCE.

LAW AND ARGUMENT

The trial court did not violate any of Wesson's rights constitutional or otherwise by not allowing him to introduce his self-serving hearsay statement through a State witness.

Evidentiary rulings are reviewed under an abuse of discretion standard. A defendant must show material prejudice to warrant a reversal. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus; *State v. Long* (1978), 53 Ohio St.2d 91, *98. An abuse of discretion is more than an error of law and "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, *219.

On November 21, 2008 Wesson filed a notice repudiating his arrest day statement to police. R. 147.

After Wesson filed his notice of repudiation the State filed a motion in limine to prevent introduction of the statement. R. 201. The court granted the motion in limine. Order dated January 15, 2009, R. 210; T. I, 8-10.

At trial Wesson proffered the statement. T. VI, 678-681. On appeal Wesson does not explain what precise defense he was prevented from making.

The court correctly ruled that Wesson's statement is hearsay. The rule is clear. Admissions by a party opponent are not hearsay if they are offered against the party. Evid.R. 801(D)(2); *State v. Hardison*, 9th Dist. App. No. 23050, 2007-Ohio-366, ¶6. But

where a party seeks to offer his own out of court statement the statement is inadmissible hearsay. *In re Coy* (1993), 67 Ohio St.3d 215, *218; *State v. Mather*, 9th Dist. App. No. 07CA009242, 2008-Ohio-2902, ¶29.

This Court analyzed a defendant's right to present a complete defense in *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837. This Court held that because Evid.R. 804(B)(3) served a legitimate interest in the admission of trustworthy evidence the rule did not deprive a defendant of the right to present a complete defense. *Id.* syllabus.

A defendant does not have a right to present evidence that is inadmissible under the standard rules of evidence. *Id.* ¶13, citing *Taylor v. Illinois* (1988), 484 U.S. 400, *410. A rule of evidence may properly restrict the admissibility of unreliable evidence. *Id.* ¶14, citing *United States v. Scheffer* (1998), 523 U.S. 303, *309.

There is no question that barring a criminal defendant from introducing his own self-serving out of court statement protects the legitimate interest of the State in having reliable evidence presented in a criminal trial. Were Wesson's interpretation correct a defendant's non-hearsay statement, capable of being tested by a motion to suppress for a violation of the defendant's constitutional rights, could be undermined by a later out of court statement designed to serve the defendant's ends without the State having the ability to cross-examine the defendant on the new statement. That cannot be the law.

Wesson's argument was rejected in *People v. McGowan* (Mich. App. 2009), 2009 WL 4827442, *16 and *U.S. v. Suarez* (11th Cir. 2007), 215 Fed. Appx. 872, *878. Evid.R. 801(D)(2) makes Wesson's statement inadmissible hearsay. *In re Coy*, supra. The rule is neither arbitrary nor illogical. *Swann*, supra ¶31, citing *Holmes v. South Carolina* (2006), 547 U.S. 319. The State contends that this Proposition must be rejected.

PROPOSITION OF LAW IV

WHEN A CAPITAL DEFENDANT WAIVES HIS RIGHT TO A JURY TRIAL, REVISED CODE 2945.06 REQUIRES THAT THE PRESIDING JUDGE OF THE COURT RATHER THAN THE CASE ITSELF SELECT THE OTHER MEMBERS OF A THREE JUDGE PANEL TO HEAR AND DECIDE A CAPITAL MURDER TRIAL.

LAW AND ARGUMENT

Wesson says that he did not validly waive his right to jury trial because the three judge panel was not properly constituted.

R.C. 2945.06 provides,

*** If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. *** If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

Wesson signed an Amended Waiver of Trial by Jury in open court on January 7, 2009. The amended waiver was filed that day. R. 196. Subsequently Judge Teodosio designated Judge Unruh and Judge Gippin, both members of the Summit County Court of Common Pleas, as the other members of the panel. Judgment Entry dated January 12, 2009, R. 204.

Judge Teodosio explained the circumstances surrounding the amended waiver in the Order dated January 8, 2009. R. 202. That Order states that pursuant to *State v. Eley* (1996), 77 Ohio St.3d 174, *184 the additional members of the panel may be designated by the judge (Judge Teodosio) presiding over the capital defendant's criminal trial. The amended waiver involved Judge Teodosio designating two Summit County Judges instead of the Chief Justice. Wesson and all counsel agreed to the amendment. Id.

The transcript of January 7, 2009 shows that Judge Teodosio stated that as presiding judge (presiding at that time) he could designate the other members of the panel instead of the Supreme Court. T. 1/7/09, 2-4. The amended waiver was given to defense counsel who then had Wesson read it. Wesson signed the amended waiver. Judge Teodosio stated that he wanted to make it clear that he, as presiding judge, would be appointing two common pleas judges rather than the Chief Justice. Id. 4-5.

By Journal Entry dated January 29, 2009 the panel indicated that on January 12, 2009 the panel as constituted was "approved by counsel for Defendant." R. 235, Pg. 1.

The State contends that Wesson affirmatively agreed to have Judge Teodosio designate the other members of the panel and by doing so waived and not forfeited any error. "Waiver is the intentional relinquishment or abandonment of a right, and waiver of a right 'cannot form the basis of any claimed error under Crim.R. 52(B)." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶23 (Citation omitted.)

By signing the amended waiver after being told expressly that the amended waiver would result in Judge Teodosio designating the other members of the panel Wesson agreed that procedure was appropriate. The record indicates that counsel for Wesson approved the other members of the panel. Journal Entry dated January 29,

2009; R. 235. This Court should find a waiver and hold that Wesson cannot now claim error.

Wesson can waive error because “the failure to comply with the three judge-panel requirement of R.C. 2945.06 [constitutes] an error in the court’s exercise of jurisdiction, ***.” *State ex rel. Rash v. Jackson*, 102 Ohio St.3d 145, 2004-Ohio-2053, ¶9, citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980. Where the trial court has jurisdiction but exercises it erroneously the sentence is not void but voidable. *State v. Payne*, supra ¶28.

Accordingly, any error makes the sentence voidable and Wesson can waive error because he would not be bestowing subject matter jurisdiction to the court. Were the sentence void Wesson could raise the error on appeal because a party cannot waive or bestow subject matter jurisdiction. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, *544. Wesson concedes that the subject matter jurisdiction of the court is not involved. Brief, 28.

Support for the State’s position is found in *State v. Post* (1987), 32 Ohio St.3d 380 where the defendant was tried by a three judge panel. The panel did not examine the witnesses as expressly required by R.C. 2945.06. The defendant agreed that the State would read into the record a statement of facts. This Court stated,

Agreements, waivers and stipulations made by the accused, or by the accused’s counsel in his presence, during the course of a criminal trial are binding and enforceable. See *State v. Robbins* (1964), 176 Ohio St. 362, 27 O.O.2d 312, 199 N.E.2d 742, paragraph two of the syllabus. Although R.C. 2945.06 requires the court to “examine the witnesses” in determining whether the accused is guilty of aggravated murder, we find that appellant was bound by the agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence.

Id. *393.

The same result should obtain here. Wesson absolutely knew that Judge Teodosio would designate the other members of the panel and agreed that he could do so; he agreed by signing the amended waiver with knowledge of its import. Wesson should not now be allowed to perpetrate a travesty of justice and rescind his agreement and seek a new trial after he is convicted and sentenced to death.

Should this Court nevertheless address the issue the State contends that Judge Teodosio acted in accordance with *State v. Eley*, supra.

There, this Court stated,

R.C. 2945.06 provides that the three-judge panel is to be composed of three judges: the judge presiding at the time in the trial of criminal cases and two judges to be designated by that judge or by the presiding judge or chief justice of that court.

Id. 77 Ohio St.3d, *184.

Wesson should not be entitled to a new trial because Judge Teodosio followed a statement by this Court particularly where the procedure was specifically explained to him without complaint on his part. Wesson says that R.C. 2945.06 makes no sense if the judge presiding in the criminal case means the same as the presiding judge of the court. Whether the statute makes sense or not that is how this Court interprets it. Judge Teodosio did not err in following the statement of this Court. This Proposition must be rejected.

PROPOSITION OF LAW V

WHERE THE PRESUMPTION AGAINST THE WAIVER OF MIRANDA PROTECTIONS IS NOT OVERCOME BY THE TOTALITY OF THE CIRCUMSTANCES OF THE WAIVER, ANY RESULTANT STATEMENT BY A DEFENDANT MUST BE SUPPRESSED.

LAW AND ARGUMENT

Review of a motion to suppress presents a mixed question of law and fact. On appeal the court accepts the trial court's findings of fact if they are supported by competent, credible evidence. If the facts are accepted, the court independently determines whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8 (Citations omitted.) On appeal Wesson argues that the facts found by the court in the Order dated June 27, 2008; R. 103, are not supported by competent, credible evidence; this must be his argument since he insists that he was intoxicated when he made the statements.

Wesson concedes that *Miranda* warnings were provided to him. Brief, Pg. 31. The interview was taped. State Exhibit 2, Suppression Hearing of May 16, 2008. The trial court reviewed the tape at the suppression hearing. R. 103, Pg. 9-10. Review of that tape will show that Wesson was read line by line each warning and gives a clear, coherent and knowing acknowledgement after each warning.

Wesson argues that he was too intoxicated to validly waive his rights. Review of the taped interview proves that assertion false. The interview lasted under an hour. Wesson answered all the questions and gave a coherent narrative of his version of the incident. The tape contains no evidence that Wesson was intoxicated at all much less to a degree making his statement involuntary.

The trial court found that Wesson's claim of intoxication was contradicted by the taped interview and testimony of the police. R. 103, Pgs. 11, 12-14. There is no law saying that a trial court has to credit the statements of a defendant at a suppression hearing. To the contrary the trial court has the duty to determine the credibility of the witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, *366.

The voluntariness of a statement is judged under the totality of the circumstances. *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of the syllabus, vacated on other grounds (1978), 438 U.S. 911. Intoxication even if present does not make a statement involuntary in and of itself. Intoxication is merely one factor that may be considered in the totality of the circumstances. *State v. Stewart* (1991), 75 Ohio App.3d 141, *147; See *United States v. Newman* (6th Cir, 1989), 889 F.2d 88, *94; *United States v. Rambo* (8th Cir. 1986), 789 F.2d 1289, *1297 (intoxication or mental agitation does not render a statement involuntary).

Where a defendant challenges the voluntariness of his statements there must be a showing of coercive police action before the statements can be suppressed. *Colorado v. Connelly* (1986), 479 U.S. 157, *164; *State v. Otte*, 74 Ohio St.3d 555, *562, 1996-Ohio-108. The issue is whether the will of the defendant was overborne and his capacity for self-determination critically impaired. *Colorado v. Spring* (1987), 479 U.S. 564, *574; See *Dickerson v. United States*, (2000), 530 U.S. 428, *433: "a confession forced from the mind by the flattery of hope or the torture of fear *** is rejected."

Wesson also argues that his extensive criminal history shows his lack of intellect. Brief, Pg. 35. Wesson had five prior convictions, from 1978 through 2001. R. 103, Pg. 5. Wesson cites no authority that a person has to have a low intellect to be a criminal.

The State contends that a review of Wesson's taped interview will show that all of his claims have no basis in fact, that the trial court's credibility determinations are supported by competent and credible evidence, and that the trial court did not err in denying the motion to suppress. This Proposition must be rejected.

PROPOSITION OF LAW VI

TAMPERING WITH EVIDENCE, R.C. 2921.12 AND AGGRAVATED ROBBERY, R.C. 2911.01 ARE ALLIED OFFENSES PURSUANT TO R.C. 2945.21 WHERE THE UNDERLYING THEFT OFFENSE AND THE MAKING THE ELEMENT UNAVAILABLE CONSTITUTE THE SAME ANIMUS.

LAW AND ARGUMENT

Wesson was sentenced to four years on the tampering with evidence conviction consecutively with nine years on the aggravated robbery conviction. Sentencing Entry dated March 18, 2010; R. 256. He did not argue that these offenses merged for sentencing so review is for plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642 ¶21, ¶24.

Plain error correction is a discretionary act and requires the defendant to show that his substantial rights were affected, that the outcome clearly would have been otherwise and that a manifest miscarriage of justice would occur absent the error. *State v. Long* (1978), 53 Ohio St.2d 91, paragraphs two and three of the syllabus; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶14.

Aggravated robbery, R.C. 2911.01(A)(1), and tampering with evidence, R.C. 2921.12(A)(1) are not allied offenses of similar import so the question of a separate or the same animus is not reached. R.C. 2941.25(B); *State v. Blankenship* (1988), 38 Ohio St.3d 116, *117.

This Court articulated the test to determine whether offenses are allied offenses of similar import in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625:

[i]n determining whether offenses are allied offenses of similar import under R.C. 2945.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the

offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar imports.”

Id. paragraph one of the syllabus.

It is plain that aggravated robbery does not involve any sort of official investigation or proceeding and tampering with evidence does not involve possession of a deadly weapon. Commission of either offense does not necessarily result in commission of the other. This Proposition must be rejected.

PROPOSITION OF LAW VII

VICTIM-IMPACT STATEMENTS MADE BY OR ON BEHALF OF FAMILY MEMBERS OF THE DECEDENT AT THE TIME OF SENTENCING ARE LIMITED IN NATURE AND MAY NOT ADDRESS THE FAMILIES CHARACTERIZATION OF AND OPINIONS ABOUT THE CRIME, THE DEFENDANT AND THE APPROPRIATE SENTENCE.

LAW AND ARGUMENT

The mitigation hearing held March 6, 2009 is encompassed by Volume IX of the transcript. There is no victim impact evidence in it. The sentencing hearing referenced by Wesson commenced March 13, 2009. That is Volume X of the transcript. Judge Teodosio immediately announced that the panel sentenced Wesson to death. T. X, 4. Accordingly, there is no possibility that anything said afterwards by friends or family members of Emil and Mary Varhola influenced the verdict. *State v. Fautenberry* (1995), 72 Ohio St.3d 435, *438-*439.

This was the situation in *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3246 where the trial judge announced his decision on the sentence before hearing from the relatives. This Court found that any statements could not have influenced the sentencing decision. Id. ¶147-¶148. This Proposition must be rejected.

PROPOSITION OF LAW VIII

THE FAILURE TO RAISE AND PRESERVE MERITORIOUS ISSUES DURING THE CULPABILITY PHASE RESULTS IN THE DENIAL OF A DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

LAW AND ARGUMENT

Wesson lists five instances where he says trial counsel were ineffective. Wesson makes no attempt whatsoever to show that any instance alone or in combination prejudiced him in a particular manner. Accordingly, the Proposition should be summarily rejected.

Wesson must demonstrate both deficient performance and prejudice in order to establish ineffective assistance of counsel. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus. Prejudice requires Wesson to show a reasonable probability that, but for counsels' errors, the result of the trial would have been different. *Id.*

Each instance cited by Wesson is the subject of a separate Proposition. The State stands by its argument in response to those Propositions except as supplemented below.

Concerning the jury waiver issue raised in Proposition IV Wesson cannot show a reasonable probability that the outcome of the trial would have been different under different facts. Further, counsel did not render deficient performance in agreeing to the procedure used.

Any argument concerning prejudice is built on speculation. Speculation cannot prove the prejudice prong of ineffective assistance. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶115, ¶132; *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶121.

Assuming that counsel had objected to the procedure used by Judge Teodosio then either Judge Teodosio would have either 1) agreed with counsel and the other members of the panel would have been designated by the presiding judge of the Summit County Court of Common Pleas or by the Chief Justice of this Court; or 2) disagreed with counsel and proceeded as he did in designating the other members of the panel himself. It is impossible to say with any degree of certainty which course Judge Teodosio would have followed.

According to Wesson's argument in Proposition IV Judge Teodosio adopted a nonsensical interpretation of R.C. 2945.06. It is therefore reasonable to believe that an objection by counsel would have resulted in the other panel members being selected by a different Judge. Had that been done it is impossible to say that Wesson would have been acquitted on any particular charge or that he would not have been sentenced to death.

No doubt Wesson can speculate that after objection Judge Teodosio would have still acted as he did. Then Wesson has the issue on direct appeal without a waiver obstacle. Then the outcome would depend on this Court's interpretation of the statute and *State v. Eley*, supra. This Court would have to reach that issue here in order to know whether Wesson was prejudiced. If that issue is reached then the State contends that *Eley* should be followed.

The State does not believe that counsel rendered deficient performance in not objecting to the procedure. That procedure, according to the Journal Entry dated January 29, 2009; R. 235, allowed defense counsel to approve the other members of the panel. That is a benefit and not a detriment to Wesson. Therefore counsel rendered

beneficial and not deficient performance in agreeing to the procedure. This Proposition must be rejected.

PROPOSITION OF LAW IX

THE DEATH PENALTY MAY NOT BE SUSTAINED WHERE THE CUMULATIVE ERRORS THAT OCCURRED IN THE TRIAL DEPRIVED THE DEFENDANT OF A FAIR CONSIDERATION OF THE APPROPRIATENESS OF THE DEATH PENALTY.

LAW AND ARGUMENT

The doctrine of cumulative error stated in *State v. DeMarco* (1987), 31 Ohio St.3d 191 is founded on a demonstration of multiple instances of harmless error. *State v. Garner* (1995), 74 Ohio St.3d 49, *64. The doctrine requires a showing of multiple errors. Wesson has not demonstrated multiple instances of error and this Proposition must be rejected.

PROPOSITION OF LAW X

O.R.C. 2929.04(A)(7) IS UNCONSTITUTIONAL WHERE THE SAME ACTS WHICH CONSTITUTE THE CHARGE OF AGGRAVATED MURDER ARE ALSO USED TO NARROW THE CLASS OF DEATH ELIGIBLE DEFENDANTS.

LAW AND ARGUMENT

This argument was rejected in *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017,

¶184. This Proposition must be rejected.

PROPOSITION OF LAW XI

THE DEATH PENALTY CANNOT BE UPHELD WHERE THE REVIEWING COURT FAILS TO FOLLOW THE STATUTORY PROVISIONS REGARDING THE PROPORTIONALITY REVIEW OF THE DEFENDANT'S SENTENCE.

LAW AND ARGUMENT

The statute under which this Court performs a proportionality review does not require that the review include cases in which a life sentence was imposed. R.C. 2929.05(A). This Court compares the facts of the case before it to cases it has decided in the past.

This Court has always rejected arguments that cases in which death was not imposed should be compared to cases in which death was imposed. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶187; See *State v. Perez*, 125 Ohio St.3d 122, 2009-Ohio-6179, ¶253-¶254; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶13; *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶1. This Proposition must be rejected.

PROPOSITION OF LAW XII

THE DEATH PENALTY IS UNCONSTITUTIONAL AS PRESENTLY ADMINISTERED IN OHIO.

LAW AND ARGUMENT

Wesson goes on for some twenty-five pages listing claims that have been rejected more than once. Summary rejection of these settled issues is appropriate. See *State v. Fry*, supra 2010-Ohio-1017, ¶214-¶215.

The claims are grouped into nine categories as follows. The citations are to cases among others where the claim has been rejected.

1. Arbitrary and unequal punishment. *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1501, ¶86.
2. Unreliable sentencing procedures. *State v. Ferguson* supra, ¶87.
3. Induced ineffective assistance of counsel. *State v. Carter*, 72 Ohio St.3d 545, 1995-Ohio-104, *560.
4. Individualized sentencing. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶162; *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, ¶105.
5. Defendant's right to a jury trial is burdened. *State v. Ferguson* supra, ¶89.
6. Mandatory submission of reports and evaluations. *State v. Ferguson* supra, ¶90.
7. ORC 2929.04(A) (7) is constitutionally invalid when used to aggravate ORC 2903.01(B) aggravated murder. *State v. Ferguson* supra, ¶91; *State v. Lewis*, 67 Ohio St.3d 200, 1993-Ohio-181, *206.

8. ORC 2929.03 and 2929.04 are unconstitutionally vague. *State v. Ferguson* supra, ¶92.
9. Proportionality and appropriateness review. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶124; *State v. Ferguson* supra, ¶93.
10. Beyond a reasonable doubt standard. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶61.
11. Ohio's statutory death penalty scheme violates international law. *State v. Craig* supra, 2006-Ohio-4571, ¶127.

This Proposition must be rejected.

CONCLUSION

Pursuant to the argument offered, the State respectfully contends that the Judgments convicting Appellant Wesson and sentencing him to death should be affirmed.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "R S Kasay", written over a horizontal line.

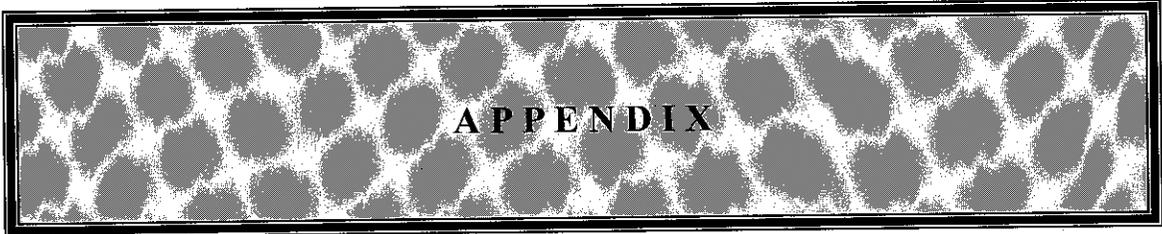
RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue
Akron, Ohio 44308
(330) 643-2800
Reg. No. 0013952

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Brief was sent by regular U.S. Mail to Attorney David L. Doughten, 4403 St. Clair Ave., Cleveland, Ohio 44103, and to Attorney George C. Pappas, 1002 Key Building, 159 Main Street, Akron, Ohio 44308, Attorneys for Appellant, on the 24th day of July, 2010.

A handwritten signature in black ink, appearing to read "R S Kasay", written over a horizontal line.

RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division



APPENDIX

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

DANIEL M. HOBBIAN

THE STATE OF OHIO 2009 MAR 18 PM 1:21

Case No. CR 08 03 0710

vs.

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

HERSIE R. WESSON
(PAGE 1 OF 4)

THIS DAY, to-wit: The 18th day of March, A.D., 2009, upon due consideration of this Court, IT IS HEREBY ORDERED that the Journal Entry dated March 13, 2009 be amended to read as follows:

THIS DAY, to-wit: The 13th day of March, A.D., 2009, now comes the Assistant Prosecuting Attorneys Margaret Kanellis and Felicia Easter on behalf of the State of Ohio, the Defendant, HERSIE R. WESSON, being in Court with counsel, LAWRENCE WHITNEY and DONALD HICKS, for sentencing.

Heretofore on January 23, 2009, the three-judge panel consisting of Judge Thomas A. Teodosio (Presiding), Judge Brenda Burnham Unruh and Judge Robert M. Gippen, returned their verdict finding the Defendant, HERSIE R. WESSON, GUILTY, beyond a reasonable doubt, of the crime of AGGRAVATED MURDER, as contained in Count Two (2) of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony; GUILTY, beyond a reasonable doubt, of Specification One to Count Two of the indictment, Ohio Revised Code Section 2929.04(A)(4)(b); GUILTY, beyond a reasonable doubt, of Specification Two to Count Two of the indictment, Ohio Revised Code Section 2929.04(A)(5); GUILTY, beyond a reasonable doubt, of Specification Three To Count Two of the indictment, Ohio Revised Code Section 2929.04(A)(7); GUILTY, beyond a reasonable doubt, of the crime of AGGRAVATED MURDER, as contained in Count Three (3) of the Indictment, Ohio Revised Code Section 2903.01(D), a special felony; GUILTY, beyond a reasonable doubt, of Specification One To Count Three of the indictment, Ohio Revised Code Section 2929.04(A)(4)(b); GUILTY, beyond a reasonable doubt, of Specification Two to Count Three of the indictment, Ohio Revised Code Section 2929.04(A)(5); GUILTY, beyond a reasonable doubt, of Specification Three to Count Three of the indictment, Ohio Revised Code Section 2929.04(A)(7); GUILTY, beyond a reasonable doubt, of the crimes of AGGRAVATED ROBBERY, as contained in Count 7 of the Indictment, Ohio Revised Code Section 2911.01(A)(1), a felony of the first (1st) degree; GUILTY, beyond a reasonable doubt, of the crime of HAVING WEAPONS WHILE UNDER DISABILITY, as contained in Count 9 of the Indictment, Ohio Revised Code Section 2923.13(A)(2), a felony of the third (3rd) degree; GUILTY, beyond a reasonable doubt, of the crime of TAMPERING WITH EVIDENCE, as contained in Count 10 of the Indictment, Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree; GUILTY, beyond a reasonable doubt, of the crime of ATTEMPTED MURDER, as contained in Count 11 of the Supplement One to indictment, Ohio Revised Code Section 2903.02(A)/2923.02, a felony of the first (1st) degree; GUILTY, beyond a reasonable doubt, of the crime of ATTEMPTED MURDER, as contained in Count 12 of the Supplement One to Indictment, Ohio Revised Code Section 2903.02(B)/2923.02, a felony of the first (1st) degree; GUILTY, beyond a reasonable doubt, of the crime of AGGRAVATED ROBBERY, as contained in Count 13 of the Supplement One to Indictment, Ohio Revised Code Section 2911.01(A)(3), a felony of the first (1st) degree, which offenses all occurred on or about February 25, 2008.

Prior to the mitigation/sentencing phase, the Court ordered the merger of Count Two and Count

COPY

Three, both of which involved the aggravated murder of the same victim, Emil Varhola. The State elected to proceed on Count Two and the three specifications to Count Two of the indictment at the mitigation/sentencing phase of the trial.

The mitigation/sentencing phase of trial commenced on the 6th day of March, 2009 at 9:00 a.m. The Defendant was present in open Court accompanied by his Attorneys, Lawrence Whitney and Donald Hicks. The State was present by Assistant Prosecuting Attorneys Margaret Kanellis and Felicia Easter.

The panel began its deliberations on March 6, 2009 at 3:00 p.m. After due deliberations, on March 13, 2009 at 2:20 p.m., the three-judge panel announced that it had reached a verdict. The Defendant, HERSIE R. WESSON, his Attorneys, Lawrence Whitney and Donald Hicks and Assistant Prosecuting Attorneys Margaret Kanellis and Felicia Easter, were brought back into open Court. The panel, in the presence of the Defendant, HERSIE R. WESSON, and his counsel, announced its verdict that it unanimously found by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. Based on the finding of the 3-judge panel, and in accordance with the requirements of Ohio law and Ohio Revised Code Section 2929.03(D)(3) a sentence of death shall be imposed on the Defendant.

Prior to imposing the sentence the Court inquired of counsel for Defendant if they wished to speak on behalf of Defendant. Counsel for Defendant did address the Court prior to sentence being imposed.

The Court then inquired of the Defendant, HERSIE R. WESSON, if he desired to make a statement or present any evidence to the Court prior to sentence being pronounced against him. The Defendant did address the Court prior to sentence being imposed.

The Court then inquired of Assistant Prosecutor Kanellis if the State, the victim or a representative of the victims desired to make a statement or present any relevant information. The panel heard from the victims' son, Paul Varhola, and his wife Mary Varhola; the victims' nephew Denny Woods; and a taped statement from the victim, Mary Varhola.

The Court then inquired of counsel for Defendant if they desired to respond to any new material facts raised by the victims or the victim representatives in their comments. Counsel for Defendant declined to respond to any new material facts raised by the victims or the victim representatives in their comments.

Whereupon, the Court proceeded to impose sentence in this matter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THIS COURT that Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for punishment of the crime of AGGRAVATED MURDER, as to the death of Emil Varhola, as contained in Count Two of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony, with Specification One to Count Two, O.R.C. 2929.04(A)(4)(b); Specification Two to Count Two, O.R.C. 2929.04(A)(5), Specification Three to Count Two, O.R.C. 2929.04(A)(7), and that **the sentence is DEATH**. The Court finds that because of the nature of the sentence on Count Two there is no reason to advise the defendant of post-release control on this special felony.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for a **mandatory** prison term of Nine (9) years for punishment of the crime of AGGRAVATED ROBBERY, as contained in Count Seven (7) of the Indictment, Ohio Revised Code Section 2911.01(A)(1), a felony of the first degree, together with a period of 5 years **mandatory** post-release control pursuant to Ohio Revised Code Section 2967.28. The Defendant has a

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO

vs.

HERSIE R. WESSON
(PAGE 3 OF 4)

)
)
)
)

Case No. CR 08 03 0710

JOURNAL ENTRY

prior conviction for Burglary, a felony of the second degree; therefore the nine-year sentence imposed on Count Seven (7) is a mandatory term of imprisonment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for a prison term of Four (4) years for punishment of the crime of HAVING WEAPONS WHILE UNDER DISABILITY, as contained in Count Nine (9) of the Indictment, Ohio Revised Code Section 2923.13(A)(2), a felony of the third degree, together with a period of post release control to the extent the parole board may determine, as provided by law and pursuant to Ohio Revised Code Section 2967.28.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for a prison term of Four (4) years for punishment of the crime of TAMPERING WITH EVIDENCE, as contained in Count Ten (10) of the Indictment, Ohio Revised Code Section 2921.12(A)(1), a felony of the third degree, together with a period of post release control to the extent the parole board may determine, as provided by law and pursuant to Ohio Revised Code Section 2967.28.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for a **mandatory** prison term of Nine (9) years for punishment of the crime of ATTEMPTED MURDER, as contained in Count Eleven (11) of the Supplement One to Indictment, Ohio Revised Code Sections 2903.02(A)/2923.02, a felony of the first degree, together with a period of 5 years **mandatory** post release control pursuant to Ohio Revised Code Section 2967.28. The Defendant has prior a prior conviction for Burglary, a felony of the second degree; therefore the nine-year sentence imposed on Count Eleven (11) is a mandatory term of imprisonment.

IT IS FURTHER ORDERED that the Court, pursuant to Ohio Revised Code Section 2941.25(A), declines to impose a sentence on the Defendant, HERSIE R. WESSON, on the charge of ATTEMPTED MURDER, as contained in Count Twelve (12) of the Supplement One to Indictment, Ohio Revised Code Sections 2903.02(B)/2923.02, a felony of the first degree, for the reason that said offense is merged with the charge of ATTEMPTED MURDER, as contained in Count Eleven (11) of the Supplement One to Indictment.

IT IS FURTHER ORDERED that the Court, pursuant to Ohio Revised Code Section 2941.25(A), declines to impose a sentence on the Defendant, HERSIE R. WESSON, on the charge of AGGRAVATED ROBBERY, as contained in Count Thirteen (13) of the Supplement One to Indictment, Ohio Revised Code

COPY

Section 2911.01(A)(3), a felony of the first degree, for the reason that said offense is merged with the charge of AGGRAVATED ROBBERY, as contained in Count Seven (7) of the Indictment.

IT IS FURTHER ORDERED that the sentences imposed in Counts Seven, Nine, Ten, and Eleven are ordered to be served consecutively and not concurrently with each other.

THEREUPON, the Court informed the Defendant of the consequences of violating the terms and conditions of post-release control and the consequences of being convicted of a new felony offense while on post-release control.

THEREUPON, the Court informed the Defendant of his right to appeal pursuant to Rule 32, Criminal Rules of Procedure.

IT IS FURTHER ORDERED that the Attorneys George C. Pappas and David L. Doughton, both certified death penalty qualified appellate counsel under Rule 20 of the Rules of Superintendence for the Courts of Ohio, were appointed to represent the Defendant, HERSIE R. WESSON, for purpose of appeal, as the Defendant is indigent and unable to employ counsel.

IT IS FURTHER ORDERED that the Summit County Clerk of Courts deliver the entire record in this case to the Ohio Supreme Court pursuant to Ohio Revised Code Section 2929.03(G)(2).

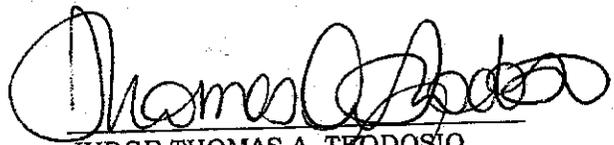
IT IS FURTHER ORDERED that the Defendant, HERSIE R. WESSON, receive credit for 401 days against his sentence for time served in the Summit County Jail.

IT IS FURTHER ORDERED that the Defendant, HERSIE R. WESSON, pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662.

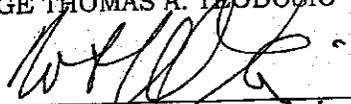
IT IS FURTHER ORDERED that the Defendant, HERSIE R. WESSON, is to be conveyed by the Sheriff of Summit County, Ohio, within Five (5) days to the CORRECTIONAL RECEPTION CENTER at Orient, Ohio, for immediate transport to the SOUTHERN OHIO CORRECTIONAL FACILITY, at Lucasville, Ohio, and he be there safely kept until February 25, 2010, on which day, within an enclosure, inside the walls of said SOUTHERN OHIO CORRECTIONAL FACILITY, prepared for that purpose, according to law, the said Defendant, HERSIE R. WESSON, shall be administered a lethal injection by the Warden of the said SOUTHERN OHIO CORRECTIONAL FACILITY, or in the case of the Warden's death or inability, or absence, by a Deputy Warden of said Institution; that the said Warden or his duly authorized Deputy, shall administer a lethal injection until the Defendant, HERSIE R. WESSON, is **DEAD**.

IT IS SO ORDERED.

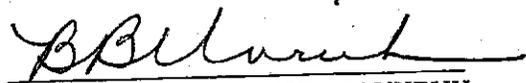
APPROVED:
March 18, 2009
TAT/pmw



JUDGE THOMAS A. TEODOSIO



JUDGE ROBERT M. GIPPIN



JUDGE BRENDA BURNHAM UNRUH

- cc: Assistant Prosecutor Felicia Easter
- Assistant Prosecutor Margaret Kanellis
- Criminal Assignment
- Attorney Lawrence J. Whitney - **CERTIFIED**
- Attorney Donald Hicks - **CERTIFIED**
- (Court Convey - **EMAIL**)
- (Pretrial Services - **JAIL CREDIT - EMAIL**)
- Registrar's Office
- Southern Ohio Correctional Facility - **CERTIFIED**

DANIEL M. MORRISAN
2009 MAR 18 AM 9:19
SUMMIT COUNTY
CLEVELAND COURTS
STATE OF OHIO,

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

Plaintiff,	)	CASE NO. CR 2008-03-0710
)	
	)	JUDGE THOMAS A. TEODOSIO
)	
-vs-)	
)	
HERSIE R. WESSON,	)	<u>JUDGMENT ENTRY -</u>
	)	<u>OPINION OF THE COURT</u>
Defendant.	)	<u>FINDINGS OF FACT AND</u>
	)	<u>CONCLUSIONS OF LAW</u>
	)	<u>REGARDING IMPOSITION</u>
	)	<u>OF THE DEATH PENALTY</u>

The three-judge panel finds that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The Court shall impose the penalty of death on the Defendant, Hersie R. Wesson, in accordance with the mandates of R.C. § 2929.03(D)(3) and all other applicable provisions of law.

As required by R.C. § 2929.03(F), this Opinion states the panel's specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the Defendant was found guilty of committing, and the reasons why the aggravating circumstances the Defendant was found guilty of committing were sufficient to outweigh the mitigating factors.

I. PROCEDURAL STATUS

On January 23, 2009, the three-judge panel found Hersie R. Wesson guilty of two counts of Aggravated Murder (Counts Two and Three) and of three death penalty specifications to each of those counts for the killing of Emil Varhola. Prior to the sentencing phase of the trial, the

Court merged Counts Two and Three, by its Order filed on March 3, 2009. The State elected to proceed on Count Two for purposes of sentencing. Under Count Two, the Defendant was convicted of purposely causing the death of Emil Varhola while committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of aggravated robbery.

The specifications to Count Two of which the Defendant was convicted and which serve as the aggravating circumstances for the sentencing phase of the Defendant's trial were: First, that the aggravated murder occurred while the Defendant was under detention; Second, that the aggravated murder was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons; and Third, that the aggravated murder was committed while the Defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and that the Defendant was the principal offender in the commission of the aggravated murder.

A sentencing hearing was held on March 6, 2009, before the same three-judge panel that presided over the trial phase. The three-judge panel deliberated following the hearing.

II. FINDINGS OF FACT

A. NATURE AND CIRCUMSTANCES OF THE OFFENSE

The Defendant murdered Emil Varhola in the early evening of February 25, 2008, and attempted to kill Mary Varhola, his wife, shortly thereafter. Mr. and Mrs. Varhola were both elderly and suffered from serious medical conditions, but lived together self-sufficiently in the home they had owned for most of their married life.

Mr. Varhola had a pacemaker implanted and a continuous oxygen supply. In the home, a

long tube connected to the oxygen pump allowed Mr. Varhola substantial mobility. Mrs. Varhola required a cane to walk.

The Defendant, then about 50 years old, had become acquainted with the Varhola's the previous year, when he began living with a girlfriend in the same neighborhood. In particular, the Defendant became casually friendly with Mr. Varhola, sitting outside and chatting with him on numerous occasions. The Defendant had been inside the Varhola's house one time before, in December of 2007, for an impromptu social visit.

Mr. Varhola maintained a collection of long guns; an additional collection belonging to the Varhola's son Paul was also stored in the house. Mr. Varhola also owned a handgun for protection. The handgun was normally kept hidden in a hollowed-out book in the living room. The Varhola's were security-conscious, keeping the doors well-locked and installing video cameras outside to discourage intruders. The cameras did not operate, but appeared to do so.

The Defendant said in his unsworn statement that when he came to the door in December, he saw that Mr. Varhola was holding a handgun. According to the Defendant, Mr. Varhola put the gun in his pocket after he recognized the Defendant and let him in.

The Defendant was not living with his girlfriend on February 25, 2008, because of incidents that had occurred between them. The girlfriend had contacted the Defendant's Parole Officer concerning the incidents.

That evening, the Defendant rode from across town by bus, arriving in the neighborhood sometime shortly before 7:00 p.m. He apparently went directly to the backdoor of the Varhola's house. The Varhola's readily let him in. There was no evidence that Mr. Varhola had the handgun with him on this occasion. The Defendant and Mr. Varhola sat and talked in the kitchen, while Mrs. Varhola remained in the living room. The Defendant was apparently offered

some food and drink. He also used the upstairs bathroom.

After awhile, Mrs. Varhola heard a whistling noise from the kitchen. When she got there (slowed by her infirmity), she saw her husband lying bleeding and motionless on the floor. The whistling noise she heard was coming from Mr. Varhola's wind pipe. The Defendant was going through Mr. Varhola's pockets. Mrs. Varhola cried out that the Defendant had killed her husband and the Defendant said that he had, grinning at her.

The Defendant then came at Mrs. Varhola with a knife. He asked her repeatedly, "Where is the gun?" They struggled, Mrs. Varhola attempting to defend herself as best she could with her cane. The Defendant punched, kicked, and stabbed Mrs. Varhola repeatedly. She finally decided to "play dead" and went quiet and motionless, though she remained conscious. The Defendant only then left her alone and spent a few minutes going around the house before exiting. Mrs. Varhola was able to move to a phone to call her son for help awhile later.

The Medical Examiner's Report showed that Mr. Varhola was stabbed deeply with a knife multiple times, in his neck, chest, and back. The evidence indicated that the back wounds were made after Mr. Varhola's heart had stopped.

One of the Varhola's long guns and a teacup were found in bushes outside the house, with the Defendant's DNA on them. Mr. Varhola's wallet was found weeks later, several blocks away, without any money in it. There was no evidence of the Defendant's DNA on the wallet. Mrs. Varhola reported that jewelry and coins were missing. There was no evidence that the handgun was removed from its book compartment until after the incident.

The panel finds that the nature and circumstances of the offense do not provide any mitigating factors.

B. AGGRAVATING CIRCUMSTANCES

The State introduced seven exhibits that were admitted at the trial phase of the proceedings and submitted no further evidence. State Exhibits 100, 100A, and 100B were submitted in support of the First Aggravating Circumstance. Exhibit 100 is a certified copy of the Defendant's journal entry of conviction, filed July 31, 2003, for the offenses of Burglary, a felony of the second degree and three misdemeanors. Exhibit 100A is the Ohio Department of Rehabilitation and Correction's Post Release Control Assessment of Defendant, dated January 10, 2007, finding that he was subject to mandatory post release control upon release from prison. Exhibit 100B is the State of Ohio Department of Rehabilitation and Correction Adult Parole Authority's conditions of post-release control supervision for Defendant, which were signed by him on May 7, 2007.

State Exhibits 108 and 118 were submitted in support of the Second Aggravating Circumstance. Exhibit 108 is the Summit County Medical Examiner's Report of Investigation and Report of Autopsy concerning the February 25, 2008, death of Emil Varhola. Exhibit 118 contains the medical records of Mary Varhola. Those records diagnosed an assault, abrasions, lacerations, multiple stab wounds on the chest, abdomen, and on the third and fourth digits of the right hand. The physical exam revealed a large V shaped laceration to the right cheek; "four superficial linear lacerations" on the left breast; "three superficial linear lacerations" on the abdomen; and a laceration on the third and fourth digits of the right hand. According to the records, Mary Varhola was 77 years old when examined.

State Exhibits 37 and 99 were submitted in support of the Third Aggravating Circumstance. Exhibit 37 is a photograph of the butt of the rifle taken from the Varhola residence as it was found sticking out from an evergreen bush. Exhibit 99 is the wallet of Emil

Varhola, found beneath the porch of a house a few blocks from the crime scene.

The State also asked the Court to consider the evidence at the trial phase that was relevant to the three aggravating circumstances of which the Defendant was convicted.

The three-judge panel finds the aggravating circumstances to have been very substantial and gives them great weight. The panel gives particular weight to the Second Aggravating Circumstance, concerning the Defendant's multiple homicidal acts.

C. MITIGATING FACTORS

The Defendant introduced the expert testimony of a clinical forensic psychologist, Dr. Jeffrey L. Smalldon, the testimony of the Defendant's older sister, Yvette Wesson, and the unsworn statement of the Defendant. The panel found both witnesses to be fully credible, though not the Defendant, for the most part. Evidence of the following factors was considered in mitigation of the death penalty:

Victim Inducement or Facilitation (R.C. § 2929.04(B)(1)) – The panel found the Defendant's statement that Emil Varhola induced or facilitated the crime not to be credible and gives this factor no weight. The factor will accordingly not be discussed further.

Duress, Coercion, or Strong Provocation (R.C. § 2929.04(B)(2)) – The panel similarly finds that the Defendant's statements that Emil Varhola's actions against him had strongly provoked him were not credible. There is no evidence of duress or coercion. Accordingly, this factor is given no weight. It also will not be discussed further.

Lack of Substantial Capacity to Conform to the Requirements of the Law (R.C. § 2929.04(B)(3)) –

Dr. Smalldon expressed the view that certain conditions of the Defendant that he had diagnosed could have affected the Defendant's ability to conform to the requirements of the law.

Dr. Smalldon ruled out any effect on the Defendant's capacity to appreciate the criminality of his conduct and that aspect of this statutory mitigating factor will not be discussed further. Dr. Smalldon did not express any formal professional opinions to a reasonable degree of certainty concerning the Defendant.

Dr. Smalldon diagnosed the Defendant to have these conditions: (1) depressive disorder, not otherwise specified; (2) borderline intellectual functioning; (3) alcohol dependence; and (4) personality disorder, not otherwise specified, with passive-aggressive, narcissistic and antisocial features.

Dr. Smalldon spent approximately 15 hours face to face with the Defendant over the course of three trips to Akron. While at the Summit County Jail, Dr. Smalldon observed that the Defendant was friendly, respectful, and congenial with the deputies. In his interviews with Dr. Smalldon, the Defendant was respectful, polite, cooperative, and compliant, although he refused to take certain tests.

Dr. Smalldon also reviewed the Defendant's records from the Ohio Department of the Ohio Adult Parole Authority; Community Health Center counseling records for the period September 2007 through January 2008; records received from defense counsel that they obtained through pretrial discovery; collateral interview records and interviews he did with Yvette Wesson, two half-sisters, one of the Defendant's daughters, an aunt, his girlfriend and others. He also received background information from the defense team's mitigation specialist. Dr. Smalldon believed that he had a valid social history for the Defendant.

The evidence presented concerning the Defendant that supported Dr. Smalldon's diagnoses was as follows:

Family History and Background / Poor Family Environment – The Defendant had a very

difficult childhood. He was born in 1957. He has an older full sister (Yvette) and a younger full brother (Wayne). He has several younger half-siblings through both parents.

The Defendant's parents were both alcoholics who drank heavily daily. His mother drank when she was pregnant with the Defendant. When the Defendant was six months old, he and his sister were locked in a closet with a pillow and a blanket while their mother and grandmother went out drinking. Before leaving, they prepared a bottle that contained a mixture of Gordon's Gin and gave it to Yvette to feed to the Defendant. Yvette gave the bottle to her younger brother, after which he passed out and she thought he was dead.

Yvette described herself as the Defendant's primary caregiver from the ages 1-5 years old. She made sure he had food to eat. While their mother worked two jobs, a maid was hired to watch the children to avoid having them taken by Child Services and so the children would not be home alone. The neighborhood and extended family provided extensive care for the Wesson children. There was evidence presented of positive role models, especially the Defendant's uncle Eugene.

When he was 11 months old, the Defendant was reported by Yvette to have suffered a head injury when his cousin fell down stairs while holding him. Her recollection was that the Defendant was knocked out but was not taken to the hospital.

The Defendant's father often beat him and belittled him. The beatings were with razor straps, electric chords, belts, switches with knots, and whatever else was available. At times, Yvette was also made by their father to beat the Defendant. When the Defendant was ten years old, Yvette confronted their father about the beatings that he inflicted upon the Defendant. She told him to beat her instead, which the father did. However, the beatings of the Defendant then stopped over the next four years.

The Defendant had a bad stuttering speech impairment, which was a subject of the father's belittlement. He was beaten when he would not respond quickly to his father due to his stuttering. Mr. Wesson's sister and brother also stuttered. They all had a cut made underneath their tongues, which helped Yvette and Wayne's conditions but not the Defendant's. The Defendant ultimately received treatment while in prison for his condition and was able to make his unsworn statement to the panel without stuttering.

When he was five years old, the family became homeless, so the Defendant moved in with his maternal aunt in Cleveland. Yvette went to live with a different cousin in Cleveland. His parents separated and, in 1963, the father moved to Tennessee. The family experienced extreme poverty. The Defendant's mother became involved with another man named Marino who moved them into his home. Marino was violent at times. He once placed the Defendant's mother in a bathtub, tied her up, and threw glasses at her while the Defendant and Yvette fought him. He also caused their mother to miscarry due to assaults against her. The Defendant and his sister witnessed this violence.

When the Defendant was twelve years old he came to live with his alcoholic grandmother in Akron. The grandmother forced the Defendant to do very rigorous chores and would hit him with her cane.

The Defendant quit school in the seventh grade. He had attended many schools and had performed poorly. His stuttering condition caused him to be teased frequently.

The Defendant was robbed and mugged when he was 15-16 years old. He was hurt in the incident and suffered cuts to the back of his head and hand. The Defendant's brother also hit him over the head with a 35-40 pound glass fruit basket during a fight in those years. There were other reports of head injuries from falling out of a tree and from a police beating.

In 1973, when the Defendant was 16 years old, Yvette moved to Oakland, California. She attempted to have the Defendant join her in California, but he remained in Oakland with Yvette for only 23 hours before returning to Akron, because he missed his mother and was homesick. There was no evidence that he lived other than in Akron thereafter.

There was evidence that the Defendant fathered five children in three relationships, has numerous grandchildren, and an extensive loving and supportive family (many of whom were present at the hearing). Other than the Defendant's criminal history, there was no evidence presented concerning his life experiences between his childhood and the time of the murder. Yvette remained a significant support for him.

Yvette was in Las Vegas in January 2008 until approximately February 15, 2008. The Defendant lived at Yvette's house in Akron with her roommate while she was in Las Vegas. Prior to going to Las Vegas, Yvette took the Defendant to appointments at Portage Path Mental Health, and also took him on job searches and to the parole office. He also worked with her in her bakery. She described the Defendant as doing great at that time. He had a girlfriend and she thought he was complying with the rules and regulations of parole.

However, the Defendant lost his job in the Fall of 2007, which affected his mood negatively. There was evidence presented at trial that the Defendant's relationship with Mimi Ford, with whom he had been living nearby to the Varohola's, had encountered difficulties in the days before the murder and that the Defendant was facing a possible parole violation because of information Ms. Ford had provided.

The information Dr. Smalldon received about the Defendant's history was consistent and corroborative of a chaotic childhood with frequent physical abuse of the Defendant and of his mother in his presence. There was little encouragement and supervision. Dr. Smalldon stated

that the effect on the Defendant is that he is very insecure, has deep feelings of inadequacy, low self-esteem and is filled with self-doubt.

Substance Abuse, Personality Disorders and Low Level of Intelligence --

Dr. Smalldon identified some prenatal risk factors based on information received from family members concerning the mother's alcoholism. He did not diagnose the Defendant as suffering from Fetal Alcohol Syndrome; however, he did believe that the Defendant was exposed to alcohol prenatally and displays symptoms of Fetal Alcohol Effect. Fetal Alcohol Effect can be characterized by an inability to assess the consequences of behavior and respond appropriately to social clues; expressive language skill deficits (such as stuttering); difficulty with language comprehension; impulsivity; and frustration. Dr. Smalldon testified that Fetal Alcohol Effect is one of many factors that predisposed the Defendant to developing a personality disorder, based on an inability to respond to developmental stressors.

There were reports of the Defendant's alcohol consumption as a child. The Defendant is an admitted alcoholic. Records from the Community Health Center indicate a diagnosis of alcohol dependence and major depression in 2007.

Dr. Smalldon assumed as accurate the reported history of head injuries suffered by the Defendant. He did not review any records that documented any incidents involving a head injury to the Defendant. Dr. Smalldon testified that head injuries can cause behavioral problems and cause one to be impulsive and have poor judgment. He stated that neuropsychological testing could have determined the presence of a head injury, but that the Defendant refused to consent to that testing.

Dr. Smalldon did perform a number of psychological tests on the Defendant. The significant results demonstrate very low literacy and arithmetic skills; a full-scale IQ of 76

(borderline range); poor judgment, constructional, articulation, and perceptual motor accuracy skills; clinical depression, low self-worth, and high anxiety. The Defendant did show a high level of motivation. Dr. Smalldon found the results to be consistent with brain injury, but could not make any diagnosis from the limited information.

The Community Health Center records noted the Defendant's frustration over his inability to find work, low self-esteem and poor relationships with women that were filled with conflict, alcohol, and ambivalence. Dr. Smalldon expressed the view that the Defendant's insecurity, his deep feelings of inadequacy, and his self-doubt made him dependent on acceptance by females. He became frantic when he perceived rejection. When those relationships ended, it rekindled his bad childhood.

As to his diagnosis of depressive disorder, Dr. Smalldon testified that the Defendant did not meet the full diagnostic criteria. Rather his diagnosis was based on the 2007 diagnosis reflected in the Community Health Center records and the Defendant's social history of depression, hopelessness, despair, and frustration. The Community Health Center records also supported his diagnosis of alcohol dependence. The diagnosis of personality disorder not otherwise specified, with passive-aggressive, narcissistic, and antisocial features, is a diagnosis deeply rooted in a person's developmental history.

Dr. Smalldon concluded that the Defendant is impulsive, overreacts, and does not think of consequences, especially when alcohol is involved, and that these factors, together with his limited intelligence and other factors, could affect his ability to conform his conduct to the law.

R.C. § 2929.04(B)(4)(youth), (5)(absence of criminal history), and (6)(not principal offender) –

The panel considered the mitigating factors set forth in those subdivisions, as required,

but finds no evidence that gives them any mitigating weight.

Other Factors Relevant to Whether Defendant Should be Sentenced to Death (R.C. § 2929.04(B)(7)) –

The panel takes all of the evidence previously discussed into account in weighing this “catch-all” factor. In addition, the panel considers the following:

Remorse – The Defendant stated that he “regretted that night” and that he was “sorry for that night.” He said that he did not intend to kill Mr. Varhola (or Mrs. Varhola), but noted that if he is threatened he will react and will never let anyone hurt him again. He said that Mr. Varhola “should have never reached into his pocket.” The panel does not find any evidence of remorse in the Defendant’s statement. He seemed to blame the victim for what happened, instead of appreciating that he had committed a wrong against him.

Love/Support of Family Members – The panel gives some limited weight to the evident love and support the Defendant’s family has for him.

Good Prison Conduct – The panel gives a small amount of weight to the Defendant’s reportedly cooperative conduct in jail and the absence of any evidence of bad conduct in prison.

III. APPLICABLE LAW

Pursuant to R.C. § 2929.03(D)(3), if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose a sentence of death on the offender.

In order to sentence the Defendant to death, R.C. § 2929.04 requires that the three-judge panel find that the aggravating circumstances in this case outweigh the mitigating factors beyond a reasonable doubt. The panel must consider and weigh against the aggravating circumstances

proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the Defendant, and the applicable statutory mitigation factors.

Mitigating factors are factors which, while they do not justify or excuse the crime, nevertheless in fairness and mercy, may be considered as they call for a penalty less than death, or lessen the appropriateness of a sentence of death. Mitigating factors are factors about an individual which weigh in favor of a decision that one of the life sentences is the appropriate sentence.

IV. CONCLUSIONS

As required by R.C. § 2923.03(D)(1), the panel considered the evidence raised at trial that is relevant to the aggravated circumstances the Defendant was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, the testimony and other evidence that is relevant to the nature and circumstances of the aggravated circumstances the Defendant was found guilty of committing, the mitigating factors set forth in R.C. § 2929.04(B) and any other factors in mitigation of the imposition of the sentence of death, the statement of the Defendant, and the arguments of counsel for the defense and prosecution relevant to the penalty that should be imposed.

As noted in Sec. II.B., the panel gives great weight to the three aggravating circumstances, particularly the second one involving the Defendant's killing of Emil Varhola and attempted killing of Mary Varhola. That the murder moreover occurred while the Defendant was still in detention through post-release control and in the course of an aggravated robbery only adds further weight to the already very significant multiple-victim aggravating circumstance.

The defense primarily asserted that the Defendant's diagnosed conditions, the result of his pre-natal development, and childhood abuse warranted giving them very significant weight.

The panel finds them to be worthy of only limited weight. The aggravating circumstances far outweigh them.

While Dr. Smalldon stated that he had diagnosed four conditions as to the Defendant, he expressed no professional opinions concerning the effects of those conditions on the Defendant's conduct in murdering Emil Varhola. He could only provide a "qualified yes" to the question of whether those conditions caused the Defendant to be substantially unable to conform to the requirements of law.

Dr. Smalldon's carefully limited statements, without the expression of any professional opinion, fell far short of establishing that much, if any, weight could be given to mitigating factor (B)(3). The panel concludes that the factor can only be given very limited weight.

However, the evidence pertaining to factor (B)(3), together with other trial evidence, the testimony from Yvette Wesson and the Defendant's unsworn statement, does carry weight as to factor (B)(7), the "catch-all" factor. While the panel considers that weight to be significant, it nevertheless falls far short of what would be required to enable the panel to find that the aggravating circumstances did not outweigh all of the mitigating factors taken together beyond a reasonable doubt.

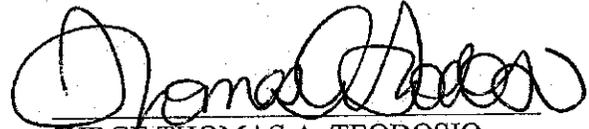
Consequently, notwithstanding the regret the panel must feel that the Defendant experienced so unhappy a childhood and the panel's acknowledgement that he suffers from the disorders Dr. Smalldon diagnosed, the result required by the statutory weighing of the evidence is very clearly adverse to the Defendant.

The three-judge panel accordingly finds unanimously by proof beyond a reasonable doubt that the aggravating circumstances presented here far outweigh the mitigating factors evidenced in the nature and circumstances of the offense, the history, character and background

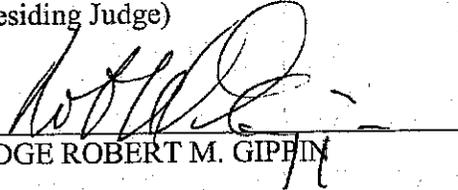
of the Defendant, and the applicable statutory mitigating factors.

The panel sentences the Defendant to the penalty of death.

IT IS SO ORDERED.



JUDGE THOMAS A. TEODOSIO
(Presiding Judge)



JUDGE ROBERT M. GIFFIN



JUDGE BRENDA BURNHAM UNRUH

cc: Asst. Pros. Felicia Easter
Asst. Pros. Margaret Kanellis
Attorney Lawrence J. Whitney
Attorney Donald Hicks

**IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT**

DATE: 2009 JAN 29 PM 2:15

THE STATE OF OHIO

2009 JAN 29 PM 2:15

Case No. CR 08 03 0710

vs.

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

HERSIE R. WESSON

THIS DAY, to wit: the 15th day of January, 2009, now comes Assistant Prosecuting Attorneys MARGARET KANELIS and FELICIA EASTER on behalf of the State of Ohio, the Defendant, HERSIE WESSON, being in Court with counsel, LAWRENCE WHITNEY and DONALD HICKS, for trial herein.

Heretofore on January 6, 2009 and January 7, 2009, the Defendant, HERSIE WESSON, waived his right to a jury trial in open court and in writing.

On January 8, 2009, the charges of ATTEMPTED AGGRAVATED MURDER, as contained in Counts 4, 5, and 6; and AGGRAVATED ROBBERY, as contained in Count 8 of the Indictment, were DISMISSED upon motion of the State.

On January 12, 2009 a three-judge panel consisting of Judge Thomas A. Teodosio (Presiding), Judge Brenda Burnham Unruh and Judge Robert M. Gippen was selected and approved by counsel for Defendant. The trial commenced on January 15, 2009 at 1:00 P.M. and the three-judge panel did a view, the trial not being completed on January 15, 2009 was adjourned, and recommenced on January 16, 2009 at 9:00 A.M., January 20, 2009 at 9:00 A.M., January 21, 2009 at 1:00 P.M., January 22, 2009 at 1:00 P.M. and January 23, 2009 at 9:00 A.M. On January 23, 2009, the three-judge panel having heard the testimony adduced by both parties hereto and the arguments of counsel, retired for deliberation at 10:55 A.M.

At the close of the State's case, the Court granted the Defendant's Criminal Rule 29 motion and the charge of AGGRAVATED MURDER, as contained in Count 1 of the Indictment with the SPECIFICATION ONE TO COUNT ONE, the SPECIFICATION TWO TO COUNT ONE, and the SPECIFICATION THREE TO COUNT ONE of the Indictment were DISMISSED.

And thereafter, to wit: On January 23, 2009 at 2:40 P.M., the three-judge panel came again into the Court and returned their verdict in writing finding the Defendant, HERSIE WESSON, GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count Two (2) of the indictment, Ohio Revised Code Section 2903.01(B), a special felony; GUILTY beyond a reasonable doubt of Specification One to Count Two (2) of the indictment, Ohio Revised Code Section 2929.04(A)(4)(b); GUILTY beyond a reasonable doubt of Specification Two to Count Two (2) of the indictment, Ohio Revised Code Section 2929.04(A)(5); GUILTY beyond a reasonable doubt of Specification Three to Count Two (2) of the indictment, Ohio Revised Code Section 2929.04(A)(7); GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count Three (3) of the indictment, Ohio Revised Code Section 2903.01(D), a special felony; GUILTY beyond a reasonable doubt of Specification One to Count Three (3) of the indictment, Ohio Revised Code Section 2929.04(A)(4)(b); GUILTY beyond a reasonable doubt of Specification Two to Count Three (3) of the

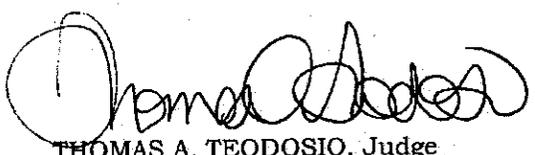
COPY

5

indictment, Ohio Revised Code Section 2929.04(A)(5); GUILTY beyond a reasonable doubt of Specification Three to Count Three (3) of the indictment, Ohio Revised Code Section 2929.04(A)(7); GUILTY beyond a reasonable doubt of the crime of AGGRAVATED ROBBERY, as contained in Count Seven (7) of the indictment, Ohio Revised Code Section 2911.01(A)(1), a felony of the first degree; GUILTY beyond a reasonable doubt of the crime of HAVING WEAPONS WHILE UNDER DISABILITY, as contained in Count Nine (9) of the indictment, Ohio Revised Code Section 2923.13(A)(2), a felony of the third degree; GUILTY beyond a reasonable doubt of the crime of TAMPERING WITH EVIDENCE, as contained in Count Ten (10) of the indictment, Ohio Revised Code Section 2921.12(A)(1), a felony of the third degree; GUILTY beyond a reasonable doubt of the crime of ATTEMPTED MURDER, as contained in Count Eleven (11) of the indictment, Ohio Revised Code Section 2903.02(A)/2923.02, a felony of the first degree; GUILTY beyond a reasonable doubt of the crime of ATTEMPTED MURDER, as contained in Count Twelve (12) of the indictment, Ohio Revised Code Section 2903.02(B)/2923.02, a felony of the first degree; GUILTY beyond a reasonable doubt of the crime of AGGRAVATED ROBBERY, as contained in Count Thirteen (13) of the indictment, Ohio Revised Code Section 2911.01(A)(3), a felony of the first degree, which offenses occurred after July 1, 1996.

IT IS FURTHER ORDERED that Defendant's bond is REVOKED, and the Defendant, HERSIE WESSON, is remanded to the Summit County Jail to await the penalty phase two mitigation hearing scheduled for March 6, 2009 at 9:00 A.M..

APPROVED:
 January 27, 2009
 TAT/pw



THOMAS A. TEODOSIO, Judge
 Court of Common Pleas
 Summit County, Ohio



BRENDA BURNHAM UNRUH, Judge
 Court of Common Pleas
 Summit County, Ohio



ROBERT M. GIPPIN, Judge
 Court of Common Pleas
 Summit County, Ohio

cc: Prosecutor Margaret Kanellis/Felicia Easter
 Criminal Assignment
 Registrar's Office
 (Attorney Larry Whitney)
 (Attorney Don Hicks)
 (Attorney Tyler Whitney)

DANIEL M. HERRIGAN

2008 JAN 15 PM 4:24 IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO)
CLERK OF COURTS)

Plaintiff,

-vs-

HERSIE R. WESSON,

Defendant.

CASE NO. CR 2008-03-0710

JUDGE THOMAS A. TEODOSIO

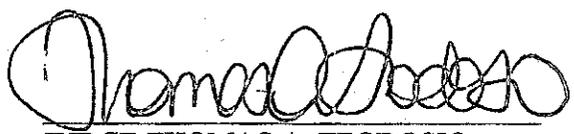
JUDGMENT ENTRY

This matter is before the Court upon the State of Ohio's Motion In Limine #12.

Upon consideration, the Court finds said motion well taken. Pursuant to Rule 801(D)(2) of the Ohio Rules of Evidence, admissions by party opponents are not hearsay and are admissible. *State v. Kelly* (9th Dist. 1998), 1998 Ohio App. LEXIS 1135. The rule requires, however, that the statement be offered against the party who made it. Defendant cannot introduce his own statement. It does not, therefore, qualify as admissible pursuant to Rule 801(D)(2).

Therefore, the State of Ohio's Motion In Limine #12 is GRANTED. "A ruling on a motion in limine reflects the court's anticipated treatment of an evidentiary issue at trial and, as such, is a tentative, interlocutory, precautionary ruling." *State v. French* (1995), 72 Ohio St. 3d 446. "Thus, the trial court is at liberty to change its ruling on the disputed evidence in its actual context at trial. Finality does not attach when the motion is granted." *Id.*

IT IS SO ORDERED.



JUDGE THOMAS A. TEODOSIO

- cc: Asst. Pros. Felicia Easter
- Asst. Pros. Margaret Kanellis
- Attorney Lawrence J. Whitney
- Attorney Donald R. Hicks

DANIEL M. MORRISON
JAN 12 11 0:56
SUMMIT COUNTY
COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO,

Plaintiff,

-vs-

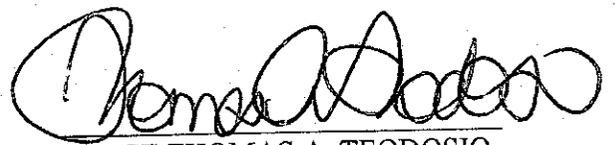
HERSIE R. WESSON,

Defendant.

) CASE NO. CR 2008-03-0710
)
) JUDGE THOMAS A. TEODOSIO
)
)
) JUDGMENT ENTRY
)
)

The Court designates that Judge Brenda Burnham Unruh and Judge Robert M. Gippin shall be assigned to sit as part of a three-judge panel in the within matter, the Defendant having entered an appropriate waiver of trial by jury. Said three-judge panel shall consist of Judge Thomas A. Teodosio (presiding), with Judge Brenda Burnham Unruh and Judge Robert M. Gippin acting as the balance of the three-judge panel in the within matter.

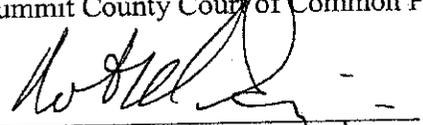
Trial shall commence on January 15th, 2009, at ~~9:00 A.M.~~ 1:00 P.M.



JUDGE THOMAS A. TEODOSIO
Assigned Trial Judge
Summit County Court of Common Pleas

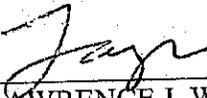


JUDGE BRENDA BURNHAM UNRUH
Summit County Court of Common Pleas

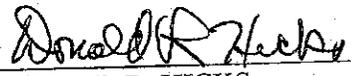


JUDGE ROBERT M. GIPPIN
Summit County Court of Common Pleas

APPROVED:



LAWRENCE J. WHITNEY
Defense Counsel



DONALD R. HICKS
Defense Counsel

cc: Judge Brenda Burnham Unruh
Judge Robert M. Gippin
Asst. Pros. Felicia Easter
Asst. Pros. Margaret Kanellis
Attorney Lawrence J. Whitney
Attorney Donald Hicks
Attorney Tyler Whitney

DAVID M. ...

IN THE COURT OF COMMON PLEAS

2009 JAN -3 PM 2:52

COUNTY OF SUMMIT

SUMMIT COUNTY
STATE OF OHIO, COURTS

Plaintiff,

vs.

HERSIE R. WESSON,

Defendant.

) CASE NO. CR 2008-03-0710
)
) JUDGE THOMAS A. TEODOSIO
)
)
) ORDER
)
)
)

This matter came before the Court on January 7, 2009. Assistant Summit County Prosecutors Margaret Kanellis and Felicia Easter were present on behalf of the State of Ohio and Attorneys Lawrence Whitney and Donald Hicks were present on behalf of the Defendant. The Defendant, Hersie Wesson, was also present. The pretrial conference was held in open Court and covered the following topics:

1. Amendment of Defendant's "Waiver of Trial by Jury" Form

On January 6, 2009, in open court and in writing, the Defendant voluntarily waived his right to a trial by jury and elected to be tried by a three-judge panel. The Court filed the written "Waiver of Trial by Jury" on January 6, 2009, at 9:46 A.M. The "Waiver of Trial by Jury" states that the three-judge panel will consist of Judge Thomas A. Teodosio and "two other judges to be designated by the Chief Justice." The Court also filed a journal entry on January 6, 2009, at 10:19 A.M., which orders that "a three-judge panel shall be empanelled pursuant to law."

R.C. § 2945.06 states that the two additional judges are to be "designated by the presiding judge or chief justice of that court." In *State v. Eley*, the Supreme Court of Ohio held that the two additional judges may be designated by the judge presiding over the capital defendant's

criminal trial. *State v. Eley* (1996), 77 Ohio St.3d 174, 184, 1996-Ohio-323, 672 N.E.2d 640.

Counsel for Defendant was presented with an amended "Waiver of Trial by Jury" form, which was reviewed with the Defendant. The Court explained to the Defendant that the only amendment to the waiver involved the Court designating two Summit County Judges instead of the Chief Justice. The Defendant was further advised that if it was necessary that a judge from another county be assigned, said judge would be designated and appointed by the Chief Justice of the Supreme Court of Ohio.

Counsel for the State, counsel for the Defendant, and the Defendant all agreed in open Court to the amendment, thereby consenting to "be tried by a Court to be composed of three judges, consisting of Judge Thomas A. Teodosio, presiding at this time, and two other judges to be designated pursuant to law."

2. Photographs - Defendant's Motion Number 13

The Court previously Ordered counsel to meet and collectively review the photographs that the State seeks to place into evidence at trial. Counsel for the Defendant were ordered to compile a list of photographs that they find too prejudicial for use at trial. Counsel for the State were ordered to review the Defendant's list and provide the Court with a list of photographs it will withdraw and a list of photographs it seeks to use despite the Defendant's objections. Defense counsel Whitney stated that he had reviewed the list of photographs provided by the State and are not requesting a pretrial exclusion of any of the photographs. Counsel for the Defendant stated that the defense would object at trial if the defense believed that any photograph lacked evidentiary value, was too prejudicial, cumulative, or was otherwise inadmissible. Therefore, Defendant's motion in limine to exclude photographs of the deceased is DENIED.

3. Amendment to Statutory References in Indictment

The State of Ohio moved to amend the Indictment to properly state statutory code sections as follows:

Specification One to Count One, amend from R.C. § 2929.04(4)(b) to 2929.04(A)(4)(b);

Specification Two to Count One, amend from R.C. § 2929.04(5) to 2929.04(A)(5);

Specification Three to Count One, amend from R.C. § 2929.04(7) to 2929.04(A)(7);

Specification One to Count Two, amend from R.C. § 2929.04(4)(b) to 2929.04(A)(4)(b);

Specification Two to Count Two, amend from R.C. § 2929.04(5) to 2929.04(A)(5);

Specification Three to Count Two, amend from R.C. § 2929.04(7) to 2929.04(A)(7);

Specification One to Count Three, amend from R.C. § 2929.04(4)(b) to

2929.04(A)(4)(b);

Specification Two to Count Three, amend from R.C. § 2929.04(5) to 2929.04(A)(5);

Specification Three to Count Three, amend from R.C. § 2929.04(7) to 2929.04(A)(7);

Count Twelve, amend from R.C. § 2903.12(A)(1) to 2903.11(A)(1).

Defense counsel Whitney stated that the defense had no objections to the motion to amend and the Court GRANTED the State's oral motion to amend the Indictment and Ordered the above stated amendments to the Indictment.

4. Dismissal of Counts in the Indictment

The State moved to dismiss the following counts in the Indictment:

Count Four - Attempted Aggravated Murder

Count Five - Attempted Aggravated Murder

Count Six - Attempted Aggravated Murder

Count Eight - Aggravated Robbery

Defense counsel stated that the Defendant did not object to the motion to dismiss. The Court Orders Counts Four, Five, Six, and Eight of the Indictment DISMISSED.

5. Withdrawal of Defendant's Pretrial Motions

Defendant withdrew Defendant's Motion Numbers 5, 6, 7, and 8 pertaining to voir dire. Defendant withdrew Defendant's Motion Numbers 21, 24, 26, 32, 33, and 36 pertaining to jury instructions with the proviso that the defense is submitting the law set forth in said motions as the law that should be utilized by the three-judge panel in making its findings. The Court Orders that defense motion numbers 5, 6, 7, 8, 21, 24, 26, 32, 33, and 36 are withdrawn and that defense may utilize the law set forth in defense Motion Numbers 21, 24, 26, 32, 33, and 36 as the basis for the Defendant's legal arguments in this case.

6. Amendment of State's Motion to Identify Them by Number

The State moved to amend the caption of their motion for deposition of Mary Varhola to add to the caption "State's Motion Number Seven". The defense had no objection. The Court Orders said amendment.

The State moved to amend the caption of their motion for an Order that the deposition of Mary Varhola be filed with the Summit County Clerk of Courts to add to the caption "State's Motion Number Eight". Defense had no objection. The Court Orders said amendment.

5. Trial Date

The Court stated that the bailiff checked the availability of the Summit County Court of Common Pleas Judges and that Judge Brenda Unruh and Judge Robert Gippin were available to sit on the panel but that a meeting to coordinate the various court dockets was necessary to determine when the trial could commence. The Court inquired and Defendant Wesson consented to the Court scheduling the trial date with counsel for the State and counsel for the defense, but

without the Defendant being present, and he waived his appearance in open court for purposes of scheduling trial dates.

6. Stipulations

Counsel for the State presented the Court with State's Number 13 which are stipulations agreed to by counsel for the State and counsel for the Defendant as to the authenticity of: (1) the medical records of Mary Varhola, and (2) the 911 call. State's Number 13 is ORDERED amended to read "authenticity" as opposed to "admission."

7. Motion In Limine

The State presented the Court with a motion in limine referred to as State's Motion 12. Defense counsel Whitney stated that he would file a written response. The Court takes State's Motion 12 under advisement.

IT IS SO ORDERED.


JUDGE THOMAS A. TEODOSIO

cc: Assistant Prosecutor Margaret Kanellis
Assistant Prosecutor Felicia Easter
Attorney Lawrence Whitney
Attorney Donald Hicks
Attorney Tyler Whitney

DANIEL M. HERRIGAN
2008 JAN -7 AM 10:18

SUMMIT COUNTY
CLERK OF COURTS
IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO)

Plaintiff)

-vs-)

HERSIE R. WESSON)

Defendant)

CASE NO. CR 2008-03-0710

JUDGE THOMAS A. TEODOSIO

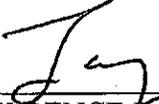
AMENDED
WAIVER OF TRIAL BY JURY

I, HERSIE R. WESSON, Defendant in the above cause, and in open court, having been arraigned and having had an opportunity to consult with counsel, and having consulted with both of my counsel and being presently accompanied by both counsel, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a three-judge panel of the court in which the said case is pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury. I wish to give up my right to a trial by jury in this case.

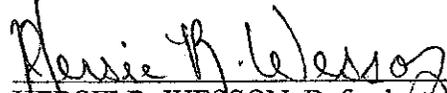
I, HERSIE R. WESSON, consent to be tried by a Court to be composed of three judges, consisting of Judge Thomas A. Teodosio, presiding at this time, and two other judges to be designated pursuant to law.

I fully understand that I am also waiving my right to have a jury decide the sentence to be imposed in the event of a guilty verdict. I fully understand the sentence would be determined by the same three-judge panel, upon completion of a sentencing hearing, that had determined I was guilty of the crime charged and the specification.

APPROVED BY DEFENSE COUNSEL:

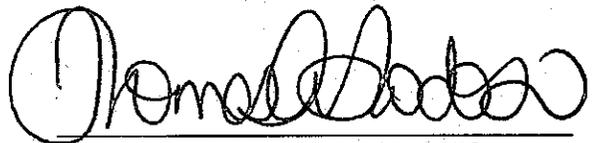

LAWRENCE J. WHITNEY


DONALD R. HICKS


HERSIE R. WESSON, Defendant

JUDGMENT ENTRY

The Court having made inquiry of the Defendant, the Court herein grants the Waiver of Trial by Jury signed and approved by the Defendant. The Court finds said Waiver of trial by Jury to have been made by the Defendant Knowingly, intelligently and voluntarily.



JUDGE THOMAS A. TEODOSIO

cc: Asst. Pros. Felicia Easter
Asst. Pros. Margaret Kanellis
Attorney Lawrence J. Whitney
Attorney Donald R. Hicks

ctb
CR08-0710-waiver

COPY

DANIEL M. HERRIGAN
2008 JUN 27 PM 12:49
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,	)	CASE NO. CR 2008-03-0710
)	
Plaintiff,	)	JUDGE THOMAS A. TEODOSIO
)	
-vs-)	
)	
HERSIE R. WESSON,	)	<u>ORDER</u>
)	
Defendant.)	

This matter came on for hearing on May 23, 2008, on Defendant's Motion to Suppress. The motion asserts that the Defendant's intoxication rendered his statement involuntary and therefore constitutionally invalid because he did not fully understand his rights.

Appearing on behalf of the Defendant were Attorneys Lawrence Whitney, Donald Hicks, and Tyler Whitney. Appearing on behalf of the State of Ohio were Assistant Prosecutors Margaret Kanellis and Felicia Easter.

Prior to the hearing, the parties agreed to the calling of witnesses out of order so that the Defendant's expert witness Robert Belloto, Jr. and the Defendant could testify first at the suppression hearing.

FACTS

Dr. Belloto testified concerning his credentials. He received his Bachelor's (1979), Master's (1981), and Ph.D. (1996) degrees from the Ohio State University College of Pharmacy. He consults in the areas of pharmacy/medical practice and forensic toxicology. He has taught at the University of Toledo, the University of Southern Nevada, and was a graduate teaching

associate at Ohio State University. He has worked as a pharmacist in the private sector and is a member of approximately 12 associations. He is a staff pharmacist at a Dayton area hospital. He has studied and taught in the area of pharmacokinetics, which involves the absorption, distribution, metabolization, and excretion of drugs. He has been qualified as an expert in courts of law and has testified on approximately 60 occasions. His curriculum vitae was introduced as Defendant's Motion Exhibit A.

Dr. Belloto testified that alcohol acts as a central nervous system depressant and that the symptoms associated with the consumption of alcohol include a reduced ability to judge risks, slurred speech, drowsiness, gait abnormalities, difficulty sitting, impaired memory, and impaired depth perception. He stated that the effects of alcohol increase to a point of unconsciousness.

Dr. Belloto testified that there is a scientific method, known as the "Widmark Method," which he used to approximate the Defendant's blood alcohol level within a range. Defense counsel presented him with the hypothetical of a 5'7" 50-year-old man, weighing approximately 147 pounds, who is a chronic alcoholic, who began drinking in the early afternoon and continued drinking until about 9 p.m., consuming a large bottle of Mogan David wine and approximately 6 to 8 beers; who goes to sleep at approximately 11 p.m. and awakes at about 3:15 a.m. and is taken to a police station and questioned at approximately 4:15 a.m.

Dr. Belloto's opinion, based upon reasonable scientific certainty, was that at 4:00 to 4:30 a.m. the blood alcohol level of the aforesaid hypothetical person would be between .1 to .24 grams per deciliter. He testified that knowledge of the rate of elimination would lead to a more precise result and that since he does not know the elimination rate for the hypothetical man, his best estimate within the range would be a blood alcohol level of .17.

On cross-examination, Dr. Belloto admitted that he had absolutely no knowledge as to

what amount of alcohol the defendant consumed, if any, prior to his interview at the Akron police department. He also admitted that he did not know the elimination rate of the Defendant, that he had never met the Defendant and that he had not viewed any laboratory reports associated with the Defendant. He knew the defendant's age, gender, weight and height.

He testified that the consumption of food reduces the effects of alcohol and that in rendering his opinion he did not take into account whether food was consumed. He assumed that the hypothetical man had not consumed any food over the time range in reaching his conclusion, but said his calculation would not change that much given the large period of time during which alcohol was consumed in the hypothetical.

He testified he used "Bud Ice," which has an alcohol content of 5.5%, in his calculations because that is what he ascertained the Defendant had been drinking on the night in question. He also admitted that his opinion is only accurate as to the facts assumed in the hypothetical given to him by defense counsel; that since he had not tested the Defendant he could not testify as to what the Defendant's blood alcohol content was on the date of his interview; that he did not examine the Defendant, so he could not testify as to whether or not the Defendant was a chronic alcoholic; that he did not weigh or measure the Defendant's height; that he did not know the Defendant's physiological make up; and that he did not know the Defendant's rate of elimination. Contrary to the facts in the hypothetical, the Defendant testified that he only drank half of the bottle of Mogan David wine and that he drank three brands of beer: "Milwaukee's Best," "Bud Ice," and "City Blues." In addition, in his recorded statement, the Defendant stated that he drank "Busch" beer and "moonshine."

The second witness to testify at the hearing, by agreement of the parties, was the Defendant, Hersie Wesson, Jr. He testified that on February 25, 2008, he awoke at about 10:00

a.m. and that he had nothing to eat that day. He gave inconsistent testimony concerning the amount and chronology of alcohol he drank prior to his 4:00 a.m. interview at the police station.

On direct examination he testified that he consumed:

- Grape-flavored Mogan David "Mad Dog" wine between 2:00 and 2:45 p.m.
- Two tall cans of "Bud Ice" at approximately 4:00 p.m.
- 6-7 additional beers before going to bed at approximately 11:00 p.m.

On cross-examination, he testified that he consumed:

- A 24-ounce can of "Bud Ice" beer at approximately 2:45 p.m.
- A 24-ounce can of "Bud Ice" beer at approximately 4:00 p.m.
- "About 1/2 bottle" of grape Mogan David wine at approximately 5:15 p.m.
- A 12-ounce "Milwaukee's Best" beer at approximately 6:55 p.m. at the victim's house.
- A 24-ounce can of "Bud Ice" at about 9:00 p.m.
- 4 cans of "City Blues" beer before going to bed at 11:00 p.m.

Under both scenarios the Defendant's testimony was that he had not consumed alcohol for at least five hours (11:00 p.m. to 4:00 a.m.) prior to being interviewed at the police station. His testimony as to what he drank also contradicts his statement to the detectives that he had been drinking "Busch" beer and "moonshine." The Defendant had told the detectives that the victim gave him some "Busch" beer and that he "drank some beer over at his house."

He testified that during the questioning he was intoxicated, chained to a desk, and that he kept falling out of his chair when trying to get up. He testified that the officers threatened him, stating that one "tried to bully" him by saying he "can get really mean."

On cross-examination he testified that he knows what the *Miranda* warnings are. He testified that they include the right to remain silent, the right to have an attorney present and that anything he said could be used against him in a court of law. He testified he was familiar with the provision that if you could not afford an attorney one would be appointed for you and that if at any time you want to stop answering questions you can. He testified that he agreed to answer

the officers' questions and that he was not promised anything in return for answering the questions. He testified that he did not remember seeing a tape recorder in the room, or being advised of his *Miranda* rights, or if he invoked his right to remain silent, or if he told the officers that he wanted an attorney present, or how long the questioning lasted, or if he was given anything to eat or drink.

During the hearing, the parties agreed to make the Defendant's criminal history a part of the record for purposes of the suppression hearing only. It was marked as State's Exhibit 3. The Defendant's criminal history includes convictions for: Escape in 1978; Obstructing Official Business in 1979; Burglary in 1982; Attempted Failure to Comply with Signal or Order of Police Officer in 1998; Domestic Violence in 2001; and Burglary, Violating A Protective Order, Criminal Damaging or Endangering, and Domestic Violence in 2003.

The State's first witness was Akron Police Department patrolman Justin Ingham. He testified that in the course of his six-plus year's employment as an Akron patrol officer he has dealt with hundreds of intoxicated individuals and regularly comes in contact with intoxicated individuals. He has had training with regard to intoxicated persons in the academy in areas of DUI stops, standard field sobriety tests, and training about odors and visual clues involved with alcohol. Officer Ingham testified that he was dispatched to 490 South Arlington Road concerning an aggravated murder charge. When he arrived at approximately 3:30 a.m., other detectives were already on the scene. A woman directed Officer Ingham to a bedroom where he found the Defendant lying on a bed wearing a shirt, pants, and shoes. When he opened the door he saw the Defendant open his eyes, then shut them, and just lie there. Officer Ingham gave the Defendant several commands to which the Defendant did not respond. The officer described this conduct as the Defendant "playing possum." Officer Ingham placed the Defendant in handcuffs,

sat him up on the bed, and took his blood-splattered shoes off to retain as evidence. Officer Ingham testified that in escorting the Defendant to the paddy wagon he had a "light hold" on the Defendant's arm so that he would not run away. He testified that the Defendant walked fine, did not fall back on the bed when his shoes were removed while he was handcuffed, and that he did not notice any odor of alcohol. Officer Ingham testified that, based on his observations and experience, the Defendant did not appear to be under the influence of alcohol.

The State's next witness was Steve Perch. Mr. Perch has been a toxicologist with the Summit County Medical Examiner's Office for the past 7 years and analyzes blood, urine, tissue, and other samples for alcohol, drugs and poisons. Mr. Perch has a Bachelor's degree in Biology from the University of Akron and received his toxicology training at the Medical College of Ohio. He is certified in toxicology through the National Registry in Clinical Chemistry. He worked for Summa Health Systems for 25 years and while there he published several articles, taught, and lectured. He conducts seminars for pathology students at Akron City Hospital. He is the Director of the Akron Police Department's forensic lab. He does consulting work for Oriana House, Inc. He has testified as an expert in the Summit County Common Pleas Court.

Mr. Perch stated that in order to determine the blood alcohol level of the man in the defense counsel's hypothetical, one would need to know more than the man's height, weight, age and the number of drinks consumed. He testified that additional information would be required as to the kind of beer consumed, the frequency at which he drank them, the time period over which the alcohol was consumed, whether the person ate, whether there was food in his stomach, and his elimination rate.

He also stated that there is no way to accurately determine a person's blood alcohol level without a urine, blood, or breath test and that the ranges produced by the Widmark method are

only as valid as the data utilized. He testified that knowing the individual's elimination factor is extremely important to an accurate determination of blood alcohol level. Also, results differ based on the models used by the expert. In this case the data utilized in forming Dr. Belloto's opinion was inconsistent with the testimony of the Defendant as to the type and amount of alcohol consumed. In addition, Dr. Belloto did not know the elimination rate of the Defendant when he made his calculations.

The State's third witness was Akron Police Officer Darrell Parnell. He assisted in taking a bodily-fluid swab from Defendant while he was detained in a holding cell after detectives had questioned him. A tape of the interview conducted during the swabbing, taken on February 26, 2008, at 09:36 hours, was introduced as State's Exhibit 1. Officer Parnell testified that the Defendant was seated when he saw him and that, when he observed the Defendant, he did not notice any odor of alcohol, slurred speech, or glassy eyes. He stated that the Defendant "seemed to be okay" and that he never observed the Defendant falling out of his chair. He testified that the Defendant's answers were appropriate to the to the questions asked of him. He stated that the Defendant was offered food and drink at the start of the interview but declined said offer.

The State's fourth witness was Akron Police Department Detective Kevin Keballier. Detective Keballier has been a police officer for 12 years and a detective since December 2007. His training included interview and basic investigation schools. He has dealt with intoxicated persons as a patrol officer with the traffic division for four years and is a senior BAC operator.

Detective Keballier participated in the Defendant's interview at the police station on February 26, 2008, at approximately 4:00 a.m. He testified that the Defendant appeared to be alert, focused, coherent, and conscious of what was going on; that he did not appear to be intoxicated by alcohol or drugs; that he noticed no odor of alcohol; that the Defendant did not

have slurred speech or glassy eyes; that the Defendant never fell out of his seat during the interview; and that the Defendant's answers were appropriate for the questions which were asked of him. He further testified (1) that the Defendant never invoked his right to remain silent, (2) the Defendant agreed to answer the questions without an attorney being present, (3) that no promises were made to the Defendant and he was not coerced by threats or actions, and (4) that it appeared that the statement was freely and voluntarily given.

Detective Keballier also testified that he was present in the bedroom when the Defendant was taken into custody and that, at that time, he did not notice slurred speech when the Defendant spoke, albeit only a few words. He also stated that the Defendant was not stumbling when he walked to the paddy wagon and that he observed nothing that would make him think the Defendant was under the influence of alcohol or drugs.

The State's final witness was Detective Frank Harrah from the Akron Police Department. Detective Harrah has been a police officer for 13 years and a detective for 7 years. Detective Harrah read the Defendant his *Miranda* warnings from a card prior to interviewing him on February 25, 2008, at the police station. As he read the Defendant his *Miranda* warnings he paused after each right and waited for a response from the Defendant. The Defendant indicated that he understood each and every one of the *Miranda* rights and never requested an attorney. At no time did the Defendant ask for the questioning to cease.

Detective Harrah testified that he has encountered over 200 persons under the influence of alcohol or drugs during his career. He has had training in the detection of persons under the influence. He testified that, based on his experience and training, the Defendant did not appear to be under the influence of alcohol or drugs when he was interviewed. He stated that the Defendant responded to his questions appropriately, that he appeared to understand the questions

regarding his rights, that he spoke coherently, did not have glassy eyes, did not have slurred speech, and was seated throughout the interview. Detective Harrah specifically testified that the Defendant never fell out of his chair. He testified that the Defendant agreed to answer all of questions without an attorney being present; that he was not promised anything in return for making his statement; that neither he nor Detective Keballier coerced the Defendant into making a statement by threats or their actions; that in his opinion the statement was given freely and voluntarily; and that the answers given were appropriate to the questions that were asked. The interview was recorded in its entirety and identified as State's Exhibit 2. The tape/CD was played in open court.

During his recorded statement the Defendant stated his date and place of birth and acknowledged his understanding of his *Miranda* rights. He claims that he arrived at the victims' house at about 6:00 p.m. He stated that he and the murder victim's 77-year-old wife were having unprotected sex as they had for the previous 6 to 7 months. He stated that the 81-year-old murder victim was on the floor watching the Defendant having sex with his wife when he became angry, started hitting the Defendant, and pulled a shotgun rifle on the Defendant. Elsewhere in his statement, the Defendant stated that the murder victim pointed a "black pistol" at him. The Defendant stated that after he kicked the rifle away from the murder victim, the victim came at him waving a knife, which he knocked away from the victim. The Defendant stated he picked up the knife and tried to defend himself. He stated that he stabbed the murder victim in self-defense as the victim came at him, but does not recall how many times or where he stabbed him. He stated the murder victim's wife jumped on him and started hitting him with a cane on the side of the head and that he acted to protect himself. The Defendant did not recall how many times or where he stabbed her. He then left the house with the shotgun because he

was afraid that the victim might come after him. He stated that he took a bus from the victims' house and arrived at a house on South Arlington Street at approximately 9:00 p.m.

After providing a statement as to what occurred in the home, the Defendant later told the detectives that he did not recall what he had done during the three hours he was at the victims' house because he blacked out from drinking too much that day. When asked how much he consumed he replied, "I ain't got the slightest idea." When asked what type of alcohol he consumed, the Defendant stated "moonshine and beer."

At one point during the interview, the Defendant stated, "I know I am in trouble." When asked what he did to make him think he was in trouble, the Defendant stated, "trying to defend myself." He also stated "I know you got me already so why are you asking me all these questions?" He stated that he was sorry he stabbed the victims and that the knife was "like a steak knife" and had a "black handle." Also when asked if he thought he did anything wrong, the defendant answered "yes." When asked what part of his actions was wrong, he replied, "I took that man's life." He then reasserted that the victims were trying to hurt him and stated, "he came at me the wrong way."

LAW

The Fifth Amendment to the United States Constitution provides persons with a privilege against compelled self-incrimination. In *Miranda vs. Arizona*, the U.S. Supreme Court held that a person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way must first be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Miranda vs. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 36 O.O.2d 237. In the case sub judice, the

Defendant acknowledged that he knew his rights and waived them. He never indicated in any manner or at any stage of the process that he wished to consult with an attorney before speaking.

Once properly advised under *Miranda*, an accused may waive his rights, provided the waiver is made voluntarily, knowingly, and intelligently. *Id.* The Defendant asserts that he could not have voluntarily waived his *Miranda* rights because he was intoxicated. Once the admissibility of a confession is challenged, the State must prove its voluntariness by a preponderance of the evidence. *State v. Gumm* (1995), 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253; *State v. Rosenberger* (9th Dist., 1993) 90 Ohio App.3d 735, 630 N.E.2d 435. The Court, in determining the voluntariness of a pretrial statement, "should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of 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, 3 O.O.3d 18, paragraph two of the syllabus. The same considerations apply to whether the Defendant understood and voluntarily waived his *Miranda* rights. *State v. Green* (2000), 90 Ohio St.3d 352, 366, 2000-Ohio-182, 738 N.E.2d 1208; *State v. Eley* (1996), 77 Ohio St.3d 174, 178, 1996-Ohio-323, 672 N.E.2d 640.

Defendant's claims of intoxication and a lack of understanding of his rights are contradicted by the tape/CD of his statement to the police and the testimony of the detectives who interviewed him and the police officers who arrested him. Nor do Defendant's claims appear to be credible in view of Dr. Perch's testimony at the suppression hearing.

In this case, the Defendant was 50 years old at the time of the interview with the police officers. There was no evidence that he was suffering from any mental illness. The Defendant was fully advised of his *Miranda* rights before questions were asked. He recited these rights

during his testimony at the suppression hearing and admitted knowing the *Miranda* rights.

Detective Harrah testified that he read the Defendant his *Miranda* warnings from a card prior to interviewing him and that he paused after each right and waited for a response from the Defendant. The Defendant indicated that he understood each and every one of the *Miranda* rights and never requested an attorney. At no time did the Defendant ask for the questioning to cease.

Detective Harrah further testified that the Defendant was not promised anything in return for making his statement; that neither he nor Detective Keballier coerced the Defendant into making a statement by threats or their actions; that in his opinion the statement was given freely and voluntarily; and that the answers given were appropriate to the questions that were asked. A review of the recorded statement confirms each of these points.

In addition, the Defendant has an extensive prior criminal felony record as reflected in State's Exhibit 3. There was no evidence presented during his testimony that he was not represented by counsel in these prior cases. He clearly was familiar with the criminal justice system.

There was no evidence presented that the length, intensity, or frequency of the questioning was improper. The CD/tape of the main interview is only 38 minutes, 43 seconds long. A follow up interview was only 4 minutes, 45 seconds long. Thus, the interview process clearly was not unduly long.

There was no evidence presented to support a finding of physical deprivation or mistreatment. The interview of the Defendant was recorded in its entirety, identified as State's Exhibit 2, and played in open court. At no point during the recorded interview with the Defendant is there any indication that the Defendant was subjected to physical deprivation or

mistreatment. According to both detectives, the Defendant was offered food and drink, although testimony differed as to when that occurred. The Defendant testified that he could not remember if either was offered to him.

A review of the tape/CD also corroborates the Detectives' testimony that no threats or inducements were made to the Defendant. There is no indication on the recording that the Defendant was falling out of his chair as he alleged in his testimony. Rather, the recording supports the detectives' testimony that the Defendant never fell out of his chair and responded appropriately to the questions asked of him. Likewise, nowhere in the recording did either detective state or infer that they "can get really mean" as was alleged by the Defendant in his testimony. The recording contains no sounds associated with threats, such as screaming, yelling or fighting. Furthermore, the Defendant's statements are inconsistent with regard to numerous details, including what alcohol was consumed, the chronology of that consumption, and the weapon that was allegedly possessed by the murder victim. The Court finds that the detectives' testimony was more credible than the Defendant's.

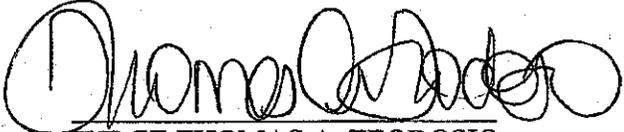
Detective Harrah testified that, based on his experience and training, the Defendant did not appear to be under the influence of alcohol or drugs when he was interviewed. He testified that the Defendant responded to his questions when read the *Miranda* warnings and appeared to understand the questions regarding his rights. He testified that the Defendant's speech was coherent and not slurred and his eyes were not glassy. Detective Kebabler testified that the Defendant appeared to be alert, focused, coherent, and conscious of what was going on. He testified that the Defendant did not appear to be intoxicated by alcohol or drugs and that there was no odor of alcohol in the small interview room. He testified that the Defendant never fell out of his seat during the interview and that the Defendant's answers were appropriate for the

questions that were asked of him. The Court finds the detectives' testimony credible and supported by the recording of the interview.

CONCLUSION

Based on consideration of the totality of the circumstances, the Court concludes that the Defendant made a knowing, voluntary, and intelligent waiver of his constitutional rights, and that his statement to police was voluntarily made. The determination that the Defendant's statement was voluntary is based on the totality of the circumstances existing at the time, including his adult age, mentality (no evidence of incompetence or disability), known criminal history and criminal experiences, the short duration of interrogation, the absence of physical deprivation and mistreatment, and the absence of threats or inducement, in accordance with *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, 3 O.O.3d 18. Accordingly, the Defendant's Motion to Suppress is DENIED.

It is SO ORDERED.


JUDGE THOMAS A. TEODOSIO

cc: Asst. Pros. Felicia Easter
Asst. Pros. Margaret Kanellis
Attorney Lawrence J. Whitney
Attorney Donald Hicks
Attorney Tyler Whitney
Criminal Assignment

RULE 801. Definitions

The following definitions apply under this article:

(A) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(B) Declarant. A "declarant" is a person who makes a statement.

(C) Hearsay. "Hearsay" is 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.

(D) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) Admission by party-opponent. The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

[Effective: July 1, 1980; amended effectively July 1, 2007.]

RULE 804. Hearsay Exceptions; Declarant Unavailable
RULE 804 Hearsay Exceptions; Declarant Unavailable

(A) Definition of unavailability. "Unavailability as a witness" includes any of the following situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- (3) testifies to a lack of memory of the subject matter of the declarant's statement;
- (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;
- (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against

**THE CONSTITUTION OF THE
UNITED STATES OF AMERICA**

Amendment V

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