

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**10-1891**

**STATE OF OHIO/CITY OF LEBANON** : **On appeal from the Warren County**  
**Plaintiff-Appellee,** : **Court of Appeals**  
: **12<sup>th</sup> Appellate District**

**vs.** :

**THOMAS EVANS** : **Case No: CA09-08-116**

**Defendant-Appellant, Pro se** :

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# **Memorandum in Support**

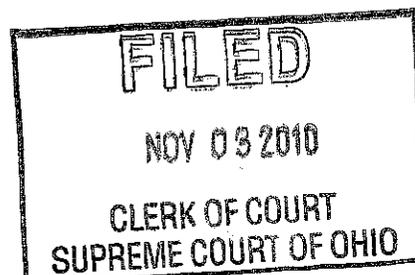
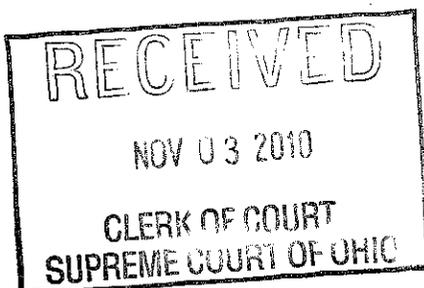
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**MEMORANDUM IN SUPPORT OF APPELLANT, THOMAS G. EVANS**

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## **MEMORANDUM IN SUPPORT OF APPELLANT, THOMAS G. EVANS**

### **Proposition of Law**

It is the position of the Appellant that when an Appellate Court is presented with the entire body of evidence of a case, it is incumbent upon the Appellate Court to review the evidence in its totality in order to make a determination a) on the credibility of any witnesses testifying on behalf of the State of Ohio, and b) if a witness is found to not meet credibility requirements, to determine if enough evidence exists to uphold the original trial court's decision.

### **Memorandum in Support**

#### **History**

In December 2008, the Appellant was placed under arrest for marked lanes violation §4511.33 and operating a vehicle impaired (OVI) ORC §4511.19(A)(1)(a). Trooper Sidney Steele followed the Appellant for about 4 miles on I-75 northbound, between the 29 and 33 mile markers in Turtlecreek Township, Ohio. It was Trooper Steele's opinion that the Appellant entered the interstate at a high rate of speed, failed to use his turn signals on multiple lane changes, and for violating the lanes as marked on the interstate. A motion to suppress hearing was held on February 2, 2009, at which time the judge denied the motion to suppress based on the testimony of Trooper Steele. The case ultimately had a jury trial conducted on July 22, 2009, and the Appellant was found guilty of both counts. The Appellant was sentenced to 180 days in jail and 3 years of state supervised probation. 170 days of the jail sentence were suspended. The trial court also imposed court costs and fines in the amount of \$2,064. On March 29, 2010 the Appellant's attorney filed the appeals brief with the Warren County 12<sup>th</sup> Circuit Court of

## MEMORANDUM IN SUPPORT OF APPELLANT, THOMAS G. EVANS

Appeals. Ultimately on September 20, 2010, the appeals court denied the appeal, stating there was sufficient evidence to support the conviction.

### Argument of the Appellant

In the original appeal brief submitted by counsel for the appellant, the first assignment of error stated the trial court erred in overruled Evans' motion to suppress. Upon review by this court, it determined the assignment of error was overruled stating "Trooper Steele also had reasonable and articulable suspicion to stop Evans for an improper lane change (Para 14). In Para 4 of the appellate opinion, the Court also recognizes the video obtained from the dashboard camera was "not helpful because it was so far away from Evans' vehicle." This determination made the position that the video tape could not be used to show any violations of traffic law, and the balance of the motion to suppress hearing and any subsequent hearings would rely on the statements made by the Trooper. The appellate court also makes reference to *State V. Burnside* in Para 5, quoting *Burnside* in that "an appellate court must accept the trial court's findings of fact, **if they are supported by competent, credible evidence.**" The appellate court also noted in Para 5, that "an appellate court must independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." As such, it is incumbent upon the appellant court to review the body of evidence as a whole to determine credibility of a witness. Statements presented throughout this court's decision indicate this did not occur. In *State v. Cattledge* 2010-Ohio-4953, 5, the 10<sup>th</sup> Circuit Court of Appeals stated "In order to

undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses". In *State of Ohio v. Thompkins* 78 Ohio St.3d 380 (1997), the Appeals Court determined when a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Precedence exists for the appeals court to review the evidence in its totality and make a determination as to the true credibility of any witnesses. Since this was a jury trial containing only one witness and no physical evidence (the cruiser video displayed no signs of any traffic violation and was ruled ineffective by the trial court judge, and the Appellant declined to take a breathalyzer test at the time of arrest.) the issue comes down to the credibility of the State's sole witness, Ohio State Highway Trooper Steele.

In Para 13 of the appellate opinion, it states "The Trooper testified that he saw Evans "go out of his marked lanes a couple of times and that's when I knew I was going to stop him." When asked to describe how far into the other lane Evans' vehicle strayed, the Trooper indicated the tires hit the dotted lines. When questioned further about the extent to which the tires of Evans' vehicle left the marked lane, the Trooper replied "I am not for sure." (Motion to Suppress transcript page 26, line 2). When testifying to a fact of violation it should not be prudent for an officer of the law to testify that he does not know the extent to which he observed a violation. Considering the testimony of the Trooper that his vehicle was approximately ¼ mile behind Evans and that this distance also made the video not useful in displaying the traffic violations stated by the Trooper, the veracity of his statements that the vehicle left the marked lane must be questioned.

In Para 17 of the judgement entry, the appellate court states “the Trooper could have initiated a lawful traffic stop based on the lane changes without a signal.” The Trooper testified in the motion to suppress hearing that “As he (Evans) came off the exit ramp, he shot over to the left lane and continued.” (Page 4 line 21) But he also went on to testify that Evans entered the interstate, paused in each lane and signaled the lane changes. (Page 22, lines 1-5). This complete change in testimony invalidates any lane change violations that allegedly occurred while Evans entered the highway. In addition, there were several other vehicles occupying the highway at the time of the alleged incidents. In order to ascertain Evans’ vehicle was responsible for any lane change violations, the Trooper must have maintained visual control over the vehicle, due the distance between the Trooper’s vehicle and fact it was 2:30AM and very dark. During the motion to suppress hearing the Trooper testified “at that point, I really couldn’t tell because there is a hill crest there and he got out of my sight.” (Page 22, line 11). Yet during the jury trial the Trooper was asked “Despite the distance between...you were able to maintain a visual on him?” (Page 29, line 18). The Trooper’s response was “Yes I was.” (Page 29, line 21).

In addition, during the motion to suppress hearing, in regard to the initial activity that drew his attention, the Trooper was asked “And you were inside your vehicle at the time when you were completing that paperwork?” (Page 21, line 9). The Trooper’s response was “I was entering it on the computer...so I was in the process of doing that.” (Page 21, line 11). However, during the jury trial, the Trooper was asked “Were you concerned about the way – did you observe those initial lane changes while you were still outside of your cruiser?” (Page 26, line 21). The Trooper’s response was “The first one, yes, outside of my cruiser.” (Page 26, line 24). Of lesser importance, but nonetheless evidence of the lack of credibility of the witness was when

during the motion to suppress hearing, the Trooper was asked when he did start his cruiser video. The Trooper was asked “And you turned your video on approximately where?” (Page 34, line 21). The Trooper’s response was “It was probably just near the Solid Rock, I’d say, which is about 30 (milepost).” (Page 34, line 23). However, during the jury trial, the Trooper testified “Once I got back to my vehicle and started, I turned my video on so I could get him driving.” (Page 27, line 15).

Given the fact that the State’s sole witness had access to all notes, video and transcripts, the discrepancies identified above in the testimony of said witness show the witness willfully made incorrect and contradicting statements to the court, making the witness less than credible. This willful disregard for providing consistent, accurate testimony may even be construed as perjury. The witness, an employee of the State of Ohio, paid to enforce the laws of the State and to present accurate testimony when called to trial failed to do such. As citizens we are taught to respect the law and all police officers, as they are the individuals charged with our daily safety. We are taught to not question their positions, as they are our daily connection to law, order and integrity. Unfortunately, the jury in this case, the triers of fact, heard one story. One set of circumstances established by the Trooper. Our upbringing tells us his story is correct. And unfortunately, the jury was did not know of the multitude of misstatements made by the Trooper, who had a completely different set of circumstances to present to the judge during the motion to suppress hearing. Standing on their own, both trials and finders of fact may have been properly covered by *Burnside* in assessing credibility. However, when the entire body of evidence is reviewed, and the number of statements of testimony that were fundamentally changed – the lane changes and signaling, the failure to maintain visual control and the sequencing of events – to

meet the needs of the prosecution, it must be found that the credibility of the witness has been impugned, and any statements regarding any alleged traffic violations must be stricken. With the only evidence available being the testimony of the state trooper, and now that evidence being made inadmissible as a result of the inconsistent statements made by the trooper and his lack of credibility, there is no evidence available to support the initial traffic stop, and the motion to suppress decision should be reversed. With the motion to suppress decision reversed, the Appellant respectfully requests that all charges against him be dropped and the incident removed from his record.

For the foregoing reasons, the Defendant-Appellant respectfully requests this court to reverse the decision of the trial court and to discharge him.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the within was sent by regular US mail to Matthew J. Graber, 423 Reading Road, Mason, Ohio 45040 on the 2<sup>nd</sup> day of November, 2010.

  
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Thomas G. Evans

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY ✓

COURT OF APPEALS  
WARREN COUNTY  
FILED

SEP 20 2010

James L. Spaeth, Clerk  
LEBANON OHIO

STATE OF OHIO/CITY OF LEBANON, :

Plaintiff-Appellee, :

CASE NO. CA2009-08-116

JUDGMENT ENTRY

- VS -

THOMAS G. EVANS, :

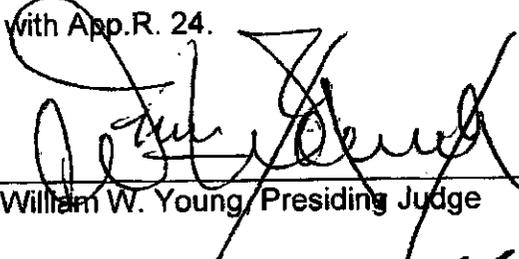
Defendant-Appellant. :

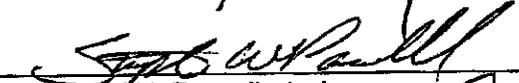
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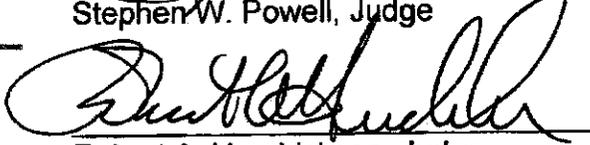
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Lebanon Municipal Court for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

  
William W. Young, Presiding Judge

  
Stephen W. Powell, Judge

  
Robert A. Hendrickson, Judge

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WARREN COUNTY, OHIO  
COMMON PLEAS COURT

BY   
DEPUTY



\* WC 030 - 2009 - 08 - 116 \*  
09/20/10 JUDGMENT ENTRY (COPY MAILED TO

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY ✓

COURT OF APPEALS  
WARREN COUNTY  
FILED

SEP 20 2010

James L. Spaeth, Clerk  
LEBANON OHIO

STATE OF OHIO/CITY OF LEBANON, :  
Plaintiff-Appellee, : CASE NO. CA2009-08-116  
- vs - : OPINION  
 : 9/20/2010  
THOMAS G. EVANS, : 075 198  
Defendant-Appellant. :

CRIMINAL APPEAL FROM LEBANON MUNICIPAL COURT  
Case No. TRC 0803568 A

Matthew J. Graber, 423 Reading Road, Mason, Ohio 45040, for plaintiff-appellee

Fred S. Miller, Baden & Jones Building, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

**POWELL, J.**

{11} Thomas Evans asks this court to overturn his conviction for driving under the influence (OVI). The judgment of the Lebanon Municipal Court is affirmed because the stop of Evans' vehicle was lawful, there was sufficient evidence for the jury to find guilt, and the trial court did not abuse its discretion in admitting the officer's opinion that Evans' driving was impaired.

{12} Ohio State Highway Patrol Trooper Sydney Michael Steele first noticed



Evans' car at 2:30 a.m. when it accelerated down the ramp onto I-75 at what he described as a "high rate of speed," merged onto the highway, and moved over to the next lane. Steele was out of his vehicle at the time. He returned to his vehicle and tried to catch up to the car. Trooper Steele said he observed the car make several lane changes and at least two of the lane changes were made without a signal. The trooper also saw the car drive out of its marked lane when the tires "hit the dotted lines."

{¶13} Trooper Steele stopped the vehicle. Evans' eyes were bloodshot. The trooper smelled what he described alternatively as a "strong" or "moderate" odor of alcoholic beverage. Evans initially admitted to drinking two beers and agreed to submit to field sobriety tests. Trooper Steele arrested Evans after he did not perform well on the tests. Evans refused to take a chemical test to measure his alcohol levels. He eventually told the trooper he drank five beers.

{¶14} Evans was charged with driving under the influence under R.C. 4511.19(A)(1). Evans moved to suppress evidence. The state presented a videotape from the trooper's vehicle. The municipal court overruled the motion based on testimony, while noting that the videotape was not helpful because it was so far away from Evans' vehicle. A jury trial was held and the jury found Evans guilty. On appeal, Evans first challenges the trial court's decision to deny his motion to suppress evidence.

{¶15} The Ohio Supreme Court said in *State v. Burnside* that appellate review of a motion to suppress presents a mixed question of law and fact.<sup>1</sup> The supreme court explained that the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.<sup>2</sup> An appellate court must accept the trial court's findings of fact if they are supported by

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1. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶18.

2. *Id.*

competent, credible evidence.<sup>3</sup> But, an appellate court must independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.<sup>4</sup>

075 200

{¶6} Evans argues that the trial court erred in overruling his motion because the trooper lacked a reasonable and articulable suspicion that a marked lane violation had occurred.

{¶7} The United States Supreme Court in *Berkemer v. McCarty* explained that a traffic stop is constitutionally valid if an officer has a reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit a crime.<sup>5</sup>

{¶8} The Ohio Supreme Court in *Dayton v. Erickson* found that a minor violation of a traffic regulation witnessed by a police officer is sufficient justification to stop a vehicle.<sup>6</sup>

{¶9} The same court said later in *State v. Mays* that if an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all of the circumstances, the stop is constitutionally valid.<sup>7</sup>

{¶10} According to R.C. 4511.33(A)(1), when a road has been divided into two or more clearly marked lanes for traffic, a vehicle shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety.

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3. *Id.*

4. *Id.*

5. *Berkemer v. McCarty* (1984), 468 U.S. 420, 439, 104 S.Ct. 3138.

6. *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 1996-Ohio-431.

7. *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶8.

Trooper Steele stated that he observed Evans "hit the dotted lines" in his lane of travel.

{¶11} The *Mays* court held that a traffic stop is constitutionally valid when a law enforcement officer witnesses a motorist drift over the lane markings in violation of the marked lane statute even without further evidence of erratic or unsafe driving.<sup>8</sup>

{¶12} In *Mays*, the defendant argued that the stop for marked lanes was not justified.<sup>9</sup> According to the defendant, there was no showing he failed to determine whether he could leave his lane safely or that he had not stayed within his lane as nearly as practicable.<sup>10</sup> The court stated that a possible defense to a traffic violation was not relevant to the analysis of whether the officer had a reasonable and articulable suspicion to initiate a traffic stop.<sup>11</sup> And further, the "as practicable" language of the statute requires the driver to remain within the lane markings unless the driver cannot reasonably avoid straying.<sup>12</sup> The *Mays* court said the purpose of the statute was not to punish a driver who strayed from the marked lane to avoid, for example, striking a person or animal, a parked vehicle, or debris in the road.<sup>13</sup>

{¶13} The trooper testified that he saw Evans "go out of his marked lanes a couple of times, and that's when I knew I was going to stop him." When asked to describe how far into the other lane Evans' vehicle strayed, the trooper indicated the tires hit the dotted lines.

{¶14} The municipal court did not err in finding the trooper had a reasonable and articulable suspicion that a marked lane violation occurred. In addition, the court did not

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8. *Id.* at syllabus.

9. *Id.* at ¶17.

10. *Id.*

11. *Id.*

12. *Id.* at ¶18.

13. *Id.* at ¶19.

err in deciding the suppression motion because Trooper Steele also had reasonable and articulable suspicion to stop Evans for an improper lane change. 075 202

{¶15} The applicable lane change statute says that no driver may move right or left on a highway unless the driver has exercised due care to determine that the movement can be made with reasonable safety and has given an appropriate signal.<sup>14</sup> Trooper Steele indicated that Evans made several lane changes and two of them were made without signaling.

{¶16} The Third Appellate District recently said in *State v. Burwell*, that even if the trial court's reliance on a particular traffic violation was in error, the error would be harmless where the officer had an independent reason to initiate a traffic stop based upon another traffic violation for which the defendant was not cited.<sup>15</sup>

{¶17} The trooper could have initiated a lawful traffic stop based upon the lane changes without a signal. Evans' first assignment of error is overruled.

{¶18} Evans argues under his second assignment of error that there was insufficient evidence that he was driving under the influence. Specifically, Evans claims he committed no traffic violations, he drove appropriately, and had no "bad behavior," that would indicate he was driving under the influence.

{¶19} When reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, the Ohio Supreme Court in *State v. Hancock* explained that the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>16</sup>

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14. R.C. 4511.39.

15. *State v. Burwell*, Putnam App. No. 12-09-06, 2010-Ohio-1087, ¶14.

16. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶34.

{¶20} R.C. 4511.19 states, in pertinent part, that no person shall operate any vehicle if, at the time of the operation, the person is under the influence of alcohol, a drug of abuse, or a combination of them.

675 203

{¶21} The Sixth Appellate District explained in *State v. Dorf* that a defendant's driving need not be erratic or in violation of a traffic law to be found guilty of driving under the influence.<sup>17</sup> The effect of the alcohol must adversely affect a defendant's actions, reactions, conduct, movements or mental process, or impair his reactions, under the circumstances, "to deprive him of that clearness of the intellect and control of himself which he would otherwise possess."<sup>18</sup>

{¶22} The Eleventh district in *State v. Wargo* stated that the state may show impaired driving ability by relying on physiological factors such as slurred speech, bloodshot eyes, odor of alcohol, and coordination tests to demonstrate that physical and mental ability to drive is impaired.<sup>19</sup>

{¶23} In this case, Trooper Steele indicated that Evans committed a marked lane violation and failed to signal lane changes two times while making multiple lane changes. Upon stopping Evans, the trooper observed that Evans had bloodshot eyes and a strong or moderate odor of alcoholic beverage. Evans admitted to drinking two beers and later indicated he drank five beers. Evans exhibited four out of six clues on the horizontal gaze nystagmus test, did not pass the one-leg stand test, and exhibited three of eight clues on

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17. *State v. Dorf*, (June 30, 1993), Wood App. No. 92-WD-059, \*2.

18. *Id.*; see, also, *State v. Peters*, Wayne App. No. 08CA0009, 2008-Ohio-6940, ¶5-6.

19. *State v. Wargo* (Oct. 31, 1997), Trumbull App. No. 96-T-5528, \*3.

the walk and turn field sobriety test. Further, evidence of a refusal to submit to a chemical test is a factor that may be used against a defendant at trial.<sup>20</sup>

675 204

{¶24} When this evidence is viewed in the light most favorable to the prosecution, a rational trier of fact could conclude that Evans consumed alcohol and it impaired his driving ability. The second assignment of error is overruled.

{¶25} Evans next argues that the trial court should not have permitted the trooper to offer his opinion that Evans was driving under the influence when it was the ultimate issue for the jury to decide.

{¶26} The Ohio Supreme Court has explained that a determination as to the admissibility of evidence is a matter generally within the sound discretion of the trial court.<sup>21</sup>

{¶27} Evidentiary rule 704 states that testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact. Comments to the rule from 1980 explain that the rule provides that opinion evidence on an ultimate issue is not excludable per se, but must be read in conjunction with evidence rules 701 and 702, each of which requires that opinion testimony be helpful to, or assist, the trier of the fact in the determination of a factual issue.<sup>22</sup>

{¶28} The prosecutor asked the trooper whether, given the trooper's law enforcement experience, he had any doubt that Evans was driving under the influence. Evans' trial counsel objected, but the trial court overruled the objection. Trooper Steele

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20. *Westerville v. Cunningham* (1968), 15 Ohio St.2d 121; *State v. Wise*, Guernsey App. No. 2008-CA-9, 2008-Ohio-7003, ¶82-83.

21. *Schaffter v. Ward* (1985), 17 Ohio St.3d 79, 80.

22. Evid.R. 704, Evid.R. 701, Evid.R. 702.

replied that Evans was impaired.

075 205

{¶29} After having reviewed the trooper's testimony and the applicable law, we find that the trooper's testimony was rationally based on the trooper's perception and helpful to a clear understanding of the testimony or determination of a fact in issue.<sup>23</sup> The trial court did not abuse its discretion in permitting the trooper's testimony. Evans' third assignment of error is overruled.

{¶30} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

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23. Evid.R. 701.