

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, )  
 )  
 Plaintiff-Appellee, )  
 )  
 -VS- )  
 )  
 JOSEPH REDDY, )  
 )  
 Defendant-Appellant, )  
 )

10-2213

On appeal from the  
Cuyahoga County  
Court of Appeals,  
Eighth Appellate District,  
  
Case Number 92924

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MEMORANDUM IN SUPPORT OF JURISDICTION

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JOSEPH REDDY, *pro se*  
Defendant-Appellant,  
TCI 5701 Burnett rd.  
Leavittsburg, OH 44430

Counsel for Plaintiff-Appellee  
WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR  
The Justice Center, 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

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**EXPLANATION WHY THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The defendant, Joseph Reddy, respectfully asks this Honorable Court to accept jurisdiction on this discretionary appeal to decide a case with unique and extraordinary circumstances.

The foundation of this discretionary appeal is to determine whether a decision by the court of appeals that a conviction based on insufficient evidence in a bench trial, is reversible error, where jury instructions were not applicable, and the trial court refused any meaningful consideration of inferior degrees of the charge based on an erroneous pre-determination of guilt.

In State v. Nemeth (1998) 82 Ohio St.3d 202, 694 N.E.2d 1332, this honorable court affirmed an appellate court's decision to reverse and remand for a new trial because the trial court precluded an expert, in the form of a psychologist, to testify at trial for the defense of a boy responsible for a matricide in a non-confrontational situation.

The case at bar and *Nemeth* have many similarities. Both cases involved males who were tried as adults for the death of their mother. Both had presented evidence at trial that they were physically and mentally abused by their mother for years. Both were denied requests for voluntary manslaughter, and both were unable to present available psychiatric testimony.

With the many similarities, come many differences. In *Nemeth*, the defendant was 16 years old at the time of the killing; he used a weapon and proceeded with a jury trial. The defendant in *Nemeth* wished to present psychiatric testimony in support of a self-defense claim, although he was in a *non-confrontational* setting. The issue of presenting psychiatric testimony was central to *Nemeth's* appeal. The Seventh District Court of Appeals reversed, the State appealed.

In *Reddy*, the defendant was 22 years old at the time of the offense, was involved in a *confrontational* setting, did not use a weapon, and proceeded with a bench trial.

The defendant's counsel in *Reddy* requested a Voluntary Manslaughter R.C. 2903.03(a) conviction based on the evidence of serious provocation. The trial court denied consideration for manslaughter stating: "[y]ou don't go from agg murder to voluntary" (Tr. 781).

The Eighth District Court of Appeals decided there was not sufficient evidence to support the element of 'prior calculation and design' R.C. 2903.01(a). Rather than reverse, the Appellate panel elected to modify the conviction to Murder R.C. 2903.02, despite the evidence of one or more mitigating circumstances contained in the statute for voluntary manslaughter.

In *Nemeth*, this court recognized the psychological effects of abuse suffered by battered children:

"The behavioral and psychological effects of child abuse, or battered child syndrome, are most often discussed as a form of posttraumatic stress disorder ("PTSD"). PTSD is an anxiety disorder listed in the DSM-IV, which categorizes universally recognized mental disorders. \*\*\* The triggering event for posttraumatic stress disorder can be any traumatic event that involved 'actual or threatened death or serious injury, or a threat to the physical integrity of self or others' and where the person's response involved 'intense fear, helplessness, or horror.'" See: DSM-IV at 427-428. Citing: *State v. Nemeth, supra*.

In the case at bar, the defendant's diagnosis of PTSD (stemming from abuse) is present from the review of the re-sentencing record and there was a considerable amount of evidence produced at trial to show that the defendant had been physically abused by his mother throughout his life.

There was evidence that the decedent pulled a knife on the defendant just prior to the altercation that led to her death, which could reasonably be considered a "triggering event" that involved "actual or threatened death."

The defendant suggests the Fifth and Fourteenth Amendment's Due Process Clause would encourage the proper remedy for this error would be to reverse and remand for a new trial.

The cornerstone for Due Process is a trier of fact determining guilt or innocence based on facts. The trier of fact in the case at bar does not make such a determination on facts but rather inferences based on untested suspected blood.

The appellate court is not a trier of fact, and therefore, with a modification of the conviction, the defendant has never received the most important part of Due Process; a fact-finder.

As the defendant's conviction stands, with the trial court making an erroneous determination, the defendant's trial served more as an evidentiary hearing for the court of appeals to determine the defendant's mental state rather than a meaningful adversarial process.

The trial court, acting as fact-finder and "gate-keeper" of evidence, denied the defendant of any meaningful considerations on inferior degrees of homicide; equally as prejudicial as a failure to properly instruct a jury where it otherwise would be required.

The complexity of a parricide defendant's mental state is a fact-finding process only a new trial can provide; a fact-finding process that the defendant was deprived of.

The opportunities the acceptance of this discretionary appeal would present this court are plentiful. New case law for Ohio could be made to clarify the admissibility requirements for untested blood photographs, expert testimony on untested blood, and create a new rules forbidding inference stacking by the state.

This case could also serve a purpose to create a new rule governing bench trials and the process by which a trial court determines how to consider lesser-included offenses and/or lesser degree offenses, since the nonexistence of a jury alters the normal process because of the absence of jury instructions.

Further, the defendant has now been acquitted of all charges on his original indictment. The state consistently and continuously "over-indicts" defendants prejudicing defenses.

The appellate court's choice to modify rather than reverse, only further encourages the state to continue to "over-indict" as a "safety net" for convictions. For example, had the defendant been properly indicted on the charge of Murder R.C. 2903.02, he would have then been able to request a meaningful consideration for Voluntary Manslaughter R.C. 2903.03(A).

*The questions of law the defendant would present to this honorable court in the discretionary appeal are:*

Should an appellate court be permitted to modify a conviction based on insufficient evidence, rather than reverse, although a trial would be necessary to determine if mitigating circumstances are present which may alter that conviction to a lesser degree offense rather than a lesser-included offense? (i.e; murder R.C.2903.02 to voluntary manslaughter R.C.2903.03(A); [or] Felonious assault R.C.2903.11 to aggravated assault R.C.2903.12; as opposed to statutes without inferior degrees, but restricted to all lesser included offenses, i.e; drug trafficking to drug possession; robbery to theft).

Should remand, *without reversal*, to hold an evidentiary hearing on the mitigating circumstances of sudden passion or fit of rage and serious provocation, be a possible remedy?

Does proof a trial court did not rely on “relevant, competent and material evidence” void the jury waiver terms “knowingly, voluntarily and intelligently”, and thus reversible error? (Appellate courts, lawyers, prosecutors and defendants all universally presume that a trial court in a bench trial will only rely on competent evidence, without the trial court fulfilling that obligation, the jury waiver should be void; otherwise, there is no logical reason to waive a jury).

Does a finding of insufficient evidence on appeal from a conviction subsequent to a bench trial require an automatic reversal rather than a modification of conviction? (Where the defendant is twice as prejudiced with the court being engaged in the role of two positions).

Is the mental state at the time of the offense of a parricide defendant too complex of an issue to decide with an appellate review of the record?

Does a finding of insufficient evidence on appeal from a conviction subsequent to a bench trial, require a reversal and/or remand, if there is evidence of one or more mitigating circumstances that could lesser the charge to an inferior degree?

## STATEMENT OF THE CASE

Defendant-Appellant Joseph Reddy (hereafter "Appellant") was indicted by a Cuyahoga Grand Jury on January 18<sup>th</sup>, 2008, in Case No. 505854. He was charged in Count 1 with Aggravated Murder in violation of R.C.2903.01 (a). He was charged in Count 2 with Aggravated Robbery in violation of R.C.2911.01. Appellant waived his right to a jury trial and the matter proceeded to a bench trial on February 4<sup>th</sup>, 2009 under jurisdiction of Honorable Judge Janet Burnside. Appellant's Motion for acquittal pursuant to Crim.R.29 was granted as to Count 2, Aggravated Robbery, but was denied as to Count 1, Aggravated Murder with prior calculation and design. On February 6<sup>th</sup>, 2009, the court returned a verdict of guilty as to the charge of Aggravated Murder. Appellant was sentenced to a term of life with eligibility after twenty years. During sentencing, Appellant informed the court that he wished to appeal. Appellate counsel submitted three assignments of error; Appellant, acting *pro se*, filed a supplemental brief asserting seven additional assignment of error. Oral arguments were held on June 23<sup>rd</sup>, 2010, and the decision was released August 26<sup>th</sup>, 2010. The Eighth District Court of Appeals decided that the evidence was insufficient to support a conviction of Aggravated Murder with prior calculation and design R.C. 2903.01(a). The court entered judgment to modify the conviction to Murder R.C. 2903.02 rather than reverse and remand for a new trial, finding there was sufficient evidence to support a lesser-included offense of Murder.

Pursuant to Appellate Rule 26 (A), defendant, *pro se*, filed an Application for Re-Consideration with the Eighth District Court of Appeals. The court of appeals granted that application and vacated the original journal entry and opinion filed August 24<sup>th</sup> 2010, with a new opinion on November 24<sup>th</sup> 2010.

## STATEMENT OF THE FACTS

Defendant-Appellant, Joseph Reddy ("Reddy") had a troubled relationship with his mother, Gloria. In a statement to police, Reddy stated that when he was 14 years old, he was removed from Gloria's care after she physically assaulted him. He was placed in a group home, where he lived for four years. When Reddy turned 18 years old, he left the group home and moved in with his girlfriend, Michelle Dahlberg ("Dahlberg"). He lived with Dahlberg until January 2007, when he and Dahlberg ended their relationship. Reddy, 21 years old, moved in with his mother who lived in a multi-family house, where his 17-year-old brother, Andrew, also lived. Reddy further stated that Gloria suffered from mental illness, as well as drug and alcohol problems, and she became increasingly violent toward Reddy and Andrew. On July 26, 2007, due to the fact that Gloria was in jail and there had been increasing discontent and violence in the home, Andrew moved out and went to live with a neighbor, Donna Amato ("Amato"), who lived a few houses down. (Tr. 171-180.) According to Amato, she took Andrew into her home after he arrived at her son's birthday party bruised and bloodied, and stated that Reddy had physically assaulted him. On December 24, 2007, at approximately 4:00 a.m., according to the statement Reddy gave to police, Gloria came into his bedroom and told him he had to leave the house. Reddy refused to leave because it was Christmas Eve and he had nowhere to go. He alleged that the argument escalated and Gloria went to her bedroom and returned with a dagger, pushed Reddy's bedroom door in, and threatened to kill him. Reddy punched Gloria in the face several times, tackled her to the ground, and then choked her until she was unconscious. Reddy maintained that the entire event occurred in his bedroom. On December 31, 2007, Andrew contacted his uncle, Theodore Reddy ("Theodore"), and informed him that he could not find Gloria. The following day, Theodore met Andrew outside Gloria's house. The two entered together and walked throughout the house looking for Gloria, but did not find her.

On January 2, 2008, Theodore met Andrew again at Gloria's house. Theodore contacted the Cleveland police. Lieutenant James Plent ("Lieutenant Plent") responded. Lieutenant Plent noticed apparent bloodstains on the walls. Theodore kicked in the locked door to the basement storage area. Lieutenant Plent entered the storage area and discovered the decedent's body, at which point he contacted the homicide unit. On January 9, 2008, Reddy arrived at Jason Pagan's ("Jason") house and showed the brothers a dagger he had brought with him and stated his mother had tried to kill him with it. Reddy told Jonathan he was going to Dahlberg's house. Jonathan called police as soon as Reddy left. Cleveland police officers responded to Dahlberg's residence. Cleveland police officer, Robert Nagy, entered the residence through a window. Several other officers subsequently entered, and Reddy was apprehended in the basement. A dagger was found lying next to him.

PROPOSITION OF LAW NO. I WHEN A CONVICTION IS NOT SUSTAINED BY SUFFICIENT EVIDENCE ON APPEAL DUE PROCESS REQUIRES THAT THE CONVICTION IS REMANDED IF MITIGATING CIRCUMSTANCES ARE PRESENT THAT COULD FURTHER LESSER THE CHARGE TO AN INFERIOR DEGREE OFFENSE.

PROPOSITION OF LAW NO. II WHEN AN APPELLATE COURT FINDS A CONVICTION SUBSEQUENT TO A BENCH TRIAL IS NOT SUSTAINED BY SUFFICIENT EVIDENCE THE JURY WAIVER TERMS KNOWINGLY VOLUNTARY AND INTELLIGENTLY ARE VOID CREATING REVERSIBLE ERROR.

PROPOSITION OF LAW NO. III THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE US CONSTITUTION AND SECTION 10 ARTICLE 1 OF THE OHIO CONSTITUTION WHEN (A) COUNSEL FAILED TO OBJECT TO OR REBUT QUESTIONING, TESTIMONY, AND ARGUMENTS OF UNTESTED SUSPECTED BLOOD SPATTER AND/OR THE ADMISSION OF THE PHOTOGRAPHS OF UNTESTED SUSPECTED BLOOD SPATTER (B) COUNSEL FAILED TO SECURE TESTIMONY FROM A KEY WITNESS WHO WOULD HAVE BOLSTERED DEFENDANTS CLAIM HE WAS ATTACKED WITH A KNIFE (C) COUNSEL FAILED TO REQUEST A CONTINUANCE WHEN KEY WITNESS DID NOT ARRIVE VIOLATING THE DEFENDANTS RIGHT TO COMPULSORY PROCESS (E) COUNSEL FAILED TO HAVE SUSPECTED BLOOD SPATTER AND KNIFE TESTED FOR DNA (D) COUNSEL FAILED TO PRESENT RELEVANT AND AVAILABLE PSYCHIATRIC TESTIMONY ON THE DEFENDANT'S PERCEPTION OF DANGER BASED ON CHILDHOOD PHYSICAL ABUSE.

PROPOSITION OF LAW NO. IV THE DEFENDANT WAS DENIED HIS RIGHT TO CONFRONTATION OF WITNESSES AS GUARANTEED BY THE SIXTH AMENDMENTS CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND SECTION 10 ARTICLE 1 OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. V THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE PHOTOGRAPHS OF UNTESTED SUSPECTED BLOOD SPATTER AND FINDING THE DEFENDANT GUILTY BASED ON PHOTOGRAPHS OF UNTESTED SUSPECTED BLOOD SPATTER TO THE PREJUDICE OF THE DEFENDANT IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND SECTION 16 ARTICLE 1 OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. VI THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO CONSIDER LESSER DEGREE OF HOMICIDE IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND OHIO CONSTITUTION.

PROPOSITION OF LAW NO. VII THE DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION AS GUARANTEED BY THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT EMPHASIZED THAT THE DEFENDANT COULD NOT EXPLAIN UNTESTED SUSPECTED BLOOD SPATTER.

PROPOSITION OF LAW NO. VIII TRIAL COURT IMPROPERLY ALLOWED QUESTIONING AND TESTIMONY REGARDING UNTESTED SUSPECTED BLOOD SPATTER PHOTOGRAPHS TO THE PREJUDICE OF THE DEFENDANT IN VIOLATION OF DUE PROCESS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE US CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. IX THE PROSECUTION STACKING INFERENCES UPON INFERENCES DEPRIVED DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND SECTION 16 ARTICLE 1 OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. I WHEN A CONVICTION IS NOT SUSTAINED BY SUFFICIENT EVIDENCE ON APPEAL DUE PROCESS REQUIRES THAT THE CONVICTION IS REMANDED IF MITIGATING CIRCUMSTANCES ARE PRESENT THAT COULD FURTHER LESSER THE CHARGE TO AN INFERIOR DEGREE OFFENSE.

The defendant argues that the decision to modify the conviction from Aggravated Murder R.C.2903.01(A) to Murder R.C.2903.02 violated his right to Due Process as guaranteed by the Fifth and Fourteenth Amendment of the United States Constitution.

The trial court, as finder of fact, refused to consider lesser degrees of homicide because the defendant was charged with Aggravated Murder. It is proposed that this error was equally as prejudicial as refusing to properly instruct a jury; which would require a reversal.

The trial court stated: “[Y]ou don’t go from agg murder to voluntary” (Tr. 781). As the appeal results now show, the trial court erred when it did not acquit the defendant of the element ‘prior calculation and design.’ The proper charge would have then been Murder R.C.2903.02.

“The Ohio Jury Instructions recommend that a jury be told that if it finds that a defendant has committed murder but also finds that the defendant acted while under the influence of sudden passion or in a sudden fit of rage provoked by the victim, ‘then you must find the defendant not guilty of murder and guilty of voluntary manslaughter.’” 4 Ohio Jury Instructions (2002), Section 503.02, at 156 Citing State v. Duncan (2003) 154 Ohio App.3d 254,796 N.E.2d 1006 at ¶ 29; See also State v. Griffin (2008) 886 N.E.2d 921.

“[I]n any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury.” State v. Parker (2002) 769 N.E.2d 846

The defendant asserts that while a trial court cannot instruct itself on inferior degrees of a charge, the court should at least give the charge that would otherwise be instructed a meaningful consideration. The appellate panel determined “\*\*\*the trial court erred in relying exclusively on the presence of blood throughout the home as the critical factor in determining that there was prior calculation and design.” (emphasis added) State v. Reddy (2010-Ohio-3996) WL 3351428

During the verdict, the trial court explained its findings stating:

“The trouble this court has in interpreting this as being something other than **prior calculation and design** \*\*\* you cannot explain blood splatters on both sides of the hallway or out the living room. You may not even be able to explain the blood splatters in the bedroom\*\*\* So all of the evidence to this court points in the direction of a **purposeful killing**, and not a killing that is in reaction to an assault instigated by the victim, even though she may have, in fact instigated it with a knife or some other objects in the course of this argument\*\*\*\*” (Tr.824-825). (emphasis added)

Reviewing the trial court’s findings above, it is apparent that the trial court’s “\*\*\*\*opinion equates purpose with prior calculation and design. \*\*\*Purposeful cannot be a basis for finding prior calculation and design.” *State v. Goodwin* (1999) 84 Ohio St.3d 331 (Moyer CJ, Pfeifer and Cook JJ., dissenting) “The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine.” *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212.

*Dehass, supra*, tells us that the weight of the evidence is primarily for the finder of fact. The Eighth District Court of Appeals substitutes its judgment for that of the trial court. Although the ‘prior calculation and design’ is now vacated, the defendant was nevertheless prejudiced.

If a trier of fact believes a murder was committed with prior calculation and design, no further inquiry need be given to determine ‘purposeful’ since ‘prior calculation and design’ is a more stringent mental state.

Simply put, because a murder with ‘prior calculation and design’, cannot be committed without ‘purpose;’ the ‘purposeful’ element may very well have been presumed based on the determination of ‘prior calculation and design.’ These factors should be considered in determining whether a reversal and/or remand is necessary rather than a modification.

The defendant does not wish to ask this court if it believes the defendant is guilty of Voluntary Manslaughter, but rather if the denial of such consideration by the trial court was prejudicial.

Because the appeal results show no evidence of ‘prior calculation and design,’ the base charge should have been murder. (An “over-indictment” should not prejudice an accused).

The *Ohio Jury Instructions (2002), Section 503.02* state that Murder R.C.2903.02 combined with “the influence of sudden passion or in a sudden fit of rage provoked by the victim,” requires that one must “find the defendant not guilty of murder and guilty of voluntary manslaughter.”

The defendant respectfully asks this Honorable Court to decide if the trial court’s refusal to consider inferior degrees of crime charged was prejudicial, and if the Court of Appeals should have reversed the conviction rather than modify to a lesser-included offense. Or in the alternative, remand (without reversal) for an evidentiary hearing to consider the mitigating circumstances found in the statute for voluntary manslaughter, i.e; rage/passion, provocation.

PROPOSITION OF LAW NO. II WHEN AN APPELLATE COURT FINDS A CONVICTION SUBSEQUENT TO A BENCH TRIAL IS NOT SUSTAINED BY SUFFICIENT EVIDENCE THE JURY WAIVER TERMS KNOWINGLY VOLUNTARY AND INTELLIGENTLY ARE VOID CREATING REVERSIBLE ERROR.

It is presumed a trial court in a bench trial only relies on credible evidence. A defendant waives his right to a jury trial under these presumptions. It is proposed that when the record shows the court did not rely on competent, credible and relevant evidence, the defendant has not knowingly, voluntarily, and intelligently waived his right to a jury trial.

Propositions of law through III through IX are for the purpose of preserving these issues for Federal Habeas Corpus review in the event this Honorable Court does not accept jurisdiction.

PROPOSITION OF LAW NO. III THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE US CONSTITUTION AND SECTION 10 ARTICLE 1 OF THE OHIO CONSTITUTION WHEN (A) COUNSEL FAILED TO OBJECT TO OR REBUT QUESTIONING, TESTIMONY, AND ARGUMENTS OF UNTESTED SUSPECTED BLOOD SPATTER AND/OR THE ADMISSION OF THE PHOTOGRAPHS OF UNTESTED SUSPECTED BLOOD SPATTER (B) COUNSEL FAILED TO SECURE TESTIMONY FROM A KEY WITNESS WHO WOULD HAVE BOLSTERED DEFENDANTS CLAIM HE WAS ATTACKED WITH A KNIFE (C) COUNSEL FAILED TO REQUEST A CONTINUANCE WHEN KEY WITNESS DID NOT ARRIVE VIOLATING THE DEFENDANTS RIGHT TO COMPULSORY PROCESS (E) COUNSEL FAILED TO HAVE SUSPECTED BLOOD

SPATTER AND KNIFE TESTED FOR DNA (D) COUNSEL FAILED TO PRESENT RELEVANT AND AVAILABLE PSYCHIATRIC TESTIMONY ON THE DEFENDANT'S PERCEPTION OF DANGER BASED ON CHILDHOOD PHYSICAL ABUSE.

Trial counsel failed to subject the state's case to the type of adversarial process that the Sixth Amendment prescribes. (Request further briefing please).

PROPOSITION OF LAW NO. IV THE DEFENDANT WAS DENIED HIS RIGHT TO CONFRONTATION OF WITNESSES AS GUARANTEED BY THE SIXTH AMENDMENTS CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND SECTION 10 ARTICLE 1 OF THE OHIO CONSTITUTION.

The out of court statements of a witness was admitted through the testimony of homicide detective Ignatius Sowa as "explanatory hearsay." The appellant asserts that the U.S. Supreme Court's holding in cases such as *Crawford v. Washington* and *Melendez-Diaz* reserves the defendant the right to confront and cross-examine witnesses to the nature of their testimony. Such testimony may not be admitted without prior opportunity to cross-examine.

PROPOSITION OF LAW NO. V THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE PHOTOGRAPHS OF UNTESTED SUSPECTED BLOOD SPATTER AND FINDING THE DEFENDANT GUILTY BASED ON PHOTOGRAPHS OF UNTESTED SUSPECTED BLOOD SPATTER TO THE PREJUDICE OF THE DEFENDANT IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND SECTION 16 ARTICLE 1 OF THE OHIO CONSTITUTION.

This proposition of law was all but sustained with the court of appeals stating: "trial court erred in relying exclusively on the presence of blood throughout the home as the critical factor in determining that there was prior calculation and design." *Reddy, supra*.

"Even if evidence is relevant, it is not admissible unless the court, as gatekeeper, finds it reliable." *Kumho Tire v. Carmichael* (1999), 526 U.S. 137, 119 S.Ct. 1167

The court of appeals cited *State v. Hoop* (1999), 134 Ohio App.3d 627, 731 N.E.2d 1177, to assert whether the substance in the photographs was actually blood "went to the probative value of the photographs, not their admissibility." *Hoop* at 637-638.

However, the *Hoop* court also stated that:

“[A] photograph is admissible where its probative value *outweighs the danger of prejudice* to the defendant and where its evidentiary value is not repetitive or cumulative in nature.” Evid. Rule 403, *State v. Hoop* (1999), 134 Ohio App.3d 627, 731 N.E.2d 1177, (emphasis added)

The defendant asserts with the appeal results, the danger of prejudice outweighed any probative value these photographs had to offer. Further, the suspected blood does not meet the reliability requirements for admission into evidence because the samples were not tested. The appellate panel goes on to say that “merely because the suspected blood spatter evidence is prejudicial does not mean it is inadmissible.” (Pg.20 Judgment entry Nov. 24<sup>th</sup> 2010). The panel goes on to say that “it is axiomatic that evidence of suspected blood spatter is relevant,” because “**Reddy repeatedly stabbed his mother.**” Yet there is not one inkling of evidence in the record to say that the defendant stabbed the decedent; on the contrary the panel states “\*\*\* Gloria came at him with a dagger, **he did not stab Gloria with the dagger**, rather he used his bare hands” (Pg.7-8 *Reddy, supra*, Judgment entry Nov. 24<sup>th</sup> 2010) (emphasis added).

**HOW CAN THE COURT OF APPEAL’S JUDGMENT ENTRY BE RELIED ON AS HAVING PRODUCED A JUST RESULT WITH THE ESSENTIAL FACTS BEING INCONSISTENT?**

PROPOSITION OF LAW NO. VI THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO CONSIDER LESSER DEGREE OF HOMICIDE IN VIOLATION OF THE DEFENDANT’S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND OHIO CONSTITUTION.

This Assignment of Error was overruled as the appellate panel stated “\*\*\*we **presume** the trial court in reaching a verdict considered all lesser and included offenses as well as inferior degree offenses unless the record shows otherwise.” *Reddy supra* (emphasis added).

Correcting erroneous presumptions is the reason the conviction had to be modified in the first place. More importantly, the appellate panel’s presumption is wrong, as the record shows the trial

court would not consider lesser-included or lesser degree offenses because of the trial court's reliance on the untested blood.

PROPOSITION OF LAW NO. VII APPELLANTS FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION AS GUARANTEED BY THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT EMPHASIZED THAT APPELLANT COULD NOT EXPLAIN UNTESTED SUSPECTED BLOOD SPATTER.

"In a federal trial, a judge's [or prosecutor's] comment on defendant's failure to testify is reversible error." Griffin v. State of Cal. (1965), 380 U.S. 609 (parenthesis added)

The trial court stated that "\*\*\*Mr. Reddy\*\*\*you cannot explain blood spatters on both sides of the hallway or out the living room. You may not even be able to explain the blood spatters in the bedroom if she if first choked." (Verdict; Tr.824-825) (emphasis added)

This comment is similar to other comments that have traditionally required a reversal. "George [the decedent] can't talk, Clark [the defendant] won't." State v Clark (1991), 74 App.3d 151,156. In another case, the state made a comment on a defendant's failure to testify; "\*\*\*I can tell you that the defendant cannot explain the unexplainable. He cannot account for it. He cannot dismiss it. He can't even address it." State v. Butler Not Reported in N.E.2d (2002) WL465091

How else can the defendant explain the suspected blood spatter unless he was to take the stand and testify? The trial Court's comment on defendant's inability to explain attacks the defendant's right not to testify.

PROPOSITION OF LAW NO. VIII TRIAL COURT IMPROPERLY ALLOWED QUESTIONING AND TESTIMONY REGARDING UNTESTED SUSPECTED BLOOD SPATTER PHOTOGRAPHS TO THE PREJUDICE OF THE DEFENDANT IN VIOLATION OF DUE PROCESS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE US CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION.

"'Knowledge,' within meaning of Federal Rule of Evidence stating that if scientific, technical, or other specialized 'knowledge'\*\*\**connotes more than subjective belief or unsupported speculation.*" Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (emphasis added)

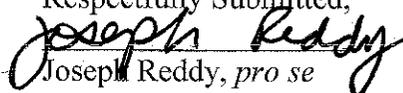
The trial court allowed a homicide detective to testify that spatter was the blood of the decedent and caused by blunt force, although he was not qualified as blood spatter expert and none of the samples were tested for DNA or preliminary signs for blood.

PROPOSITION OF LAW NO. IX THE PROSECUTION STACKING INFERENCES UPON INFERENCES DEPRIVED DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND SECTION 16 ARTICLE 1 OF THE OHIO CONSTITUTION.

(Request more briefing please)

### CONCLUSION

Appellant respectfully urges this Honorable Court to accept jurisdiction for this discretionary appeal in this case to decide if because of the unique circumstances and complexity of a parricide defendant's mental state, Due Process requires a reversal of the conviction rather than a modification of conviction or in the alternative, remand for an evidentiary hearing to consider mitigating circumstances of passion brought on from provocation. It is respectfully requested the defendant be allowed further briefing before this Honorable Court decides whether to accept this discretionary appeal.

Respectfully Submitted,  
  
Joseph Reddy, *pro se*  
Defendant-Appellant,  
TCI 5701 Burnett rd.  
Leavittsburg, OH 44430

### CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing memorandum in support of jurisdiction, a notarized affidavit of indigence, and a copy of the court of appeals journalized decision has been sent by U.S. mail to William D. Mason, the prosecuting attorney of Cuyahoga County on this 15<sup>th</sup>, day of December, 2010, at 1200 Ontario Cleveland Ohio 44113.

  
Joseph Reddy #562-809  
Defendant-Appellant  
TCI 5701 Burnett rd.  
Leavittsburg, OH 44430

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Plaintiff-Appellee

vs.

JOSEPH REDDY

Defendant-Appellant

COA NO.  
92924

LOWER COURT NO.  
CR-505854

Common Pleas Court

MOTION NO. 437216

DATE: November 24, 2010

JOURNAL ENTRY

Motion by Appellant for Reconsideration is granted. The Journal Entry and Opinion of this Court released on August 26, 2010 (2010-Ohio-3996) is hereby vacated and substituted with the Journal Entry and Opinion issued this same date.

CHRISTINE T. McMONAGLE, J., AND

MARY J. BOYLE, J., CONCUR

*Mary Eileen Kilbane*

MARY EILEEN KILBANE  
PRESIDING JUDGE

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 92924

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JOSEPH REDDY**

DEFENDANT-APPELLANT

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**JUDGMENT:  
CONVICTION MODIFIED; SENTENCE VACATED;  
REMANDED FOR RESENTENCING**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-505854

**BEFORE:** Kilbane, P.J., McMonagle, J., and Boyle, J.

**RELEASED AND JOURNALIZED:** November 24, 2010



ON RECONSIDERATION<sup>1</sup>

MARY EILEEN KILBANE, P.J.:

Appellant, Joseph Reddy ("Reddy"), appeals his conviction for the aggravated murder of his mother, Gloria Reddy ("Gloria"). Counsel for Reddy argues that the State failed to present sufficient evidence to support the finding that he acted with prior calculation and design, that his conviction was against the manifest weight of the evidence, and that his counsel was ineffective. In a pro se brief filed by Reddy, he argues that the trial court erred in admitting photographs depicting suspected blood spatter and alleges prosecutorial misconduct. After a review of the record and pertinent law, we modify Reddy's conviction from aggravated murder to murder, vacate his sentence, and remand for resentencing.

The following facts give rise to the instant appeal.

Reddy had a troubled relationship with his mother, Gloria. In a statement to police, Reddy stated that when he was 14 years old, he was removed from Gloria's care after she physically assaulted him. He was placed in a group home, where he lived for four years. When Reddy turned 18 years old, he left the group

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<sup>1</sup>The original announcement of decision, *State v. Reddy*, Cuyahoga App. No. 92924, 2010-Ohio-3996, released August 26, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A).

home and moved in with his girlfriend, Michelle Dahlberg ("Dahlberg"). He lived with Dahlberg until January 2007, when he and Dahlberg ended their relationship. Reddy, 21 years old, moved in with his mother who lived in a multi-family house, located at 1432 West 112th Street, Cleveland, Ohio, where his 17-year-old brother, Andrew, also lived.

Reddy further stated that Gloria suffered from mental illness, as well as drug and alcohol problems, and she became increasingly violent toward Reddy and Andrew. On July 26, 2007, due to the fact that Gloria was in jail and there had been increasing discontent and violence in the home, Andrew moved out and went to live with a neighbor, Donna Amato ("Amato"), who lived a few houses down, at 1422 West 112th Street, in Cleveland Ohio. (Tr. 171-180.) According to Amato, she took Andrew into her home after he arrived at her son's birthday party bruised and bloodied, and stated that Reddy had physically assaulted him.

On December 24, 2007, at approximately 4:00 a.m., according to the statement Reddy gave to police, Gloria came into his bedroom and told him he had to leave the house. Reddy refused to leave because it was Christmas Eve and he had nowhere to go. He alleged that the argument escalated and Gloria went to her bedroom and returned with a dagger, pushed Reddy's bedroom door in, and threatened to kill him. Reddy punched Gloria in the face several times,

tackled her to the ground, and then choked her until she stopped moving. Reddy maintained that the entire event occurred in his bedroom.

Reddy wrapped Gloria's body in a blanket, placed it in a basement storage locker, took Gloria's ATM card, and left the house. Reddy used the ATM card several times to withdraw cash from an ATM machine at Fred's Deli, located at 11119 Detroit Avenue, in Cleveland.

On December 31, 2007, Andrew contacted his uncle, Theodore Reddy ("Theodore"), and informed him that he could not find Gloria. The following day, Theodore met Andrew outside Gloria's house. The two entered together and walked throughout the house looking for Gloria, but did not find her.

On January 2, 2008, Theodore met Andrew again at Gloria's house. After they were still unable to find her, Theodore contacted the Cleveland police. Lieutenant James Plent ("Lieutenant Plent") responded to the call and arrived at Gloria's house. Lieutenant Plent stated that he noticed bloodstains on the walls, and Andrew informed him that the key to the basement storage area was missing. (Tr. 198-202.)

Lieutenant Plent believed that Gloria's body could be in the basement storage area. Theodore kicked in the locked door to the basement storage area. Lieutenant Plent entered the storage area and discovered Gloria's body, at which point he contacted the homicide unit.

On January 9, 2008, Reddy arrived at Jason Pagan's ("Jason") house appearing dirty and distraught. Reddy confessed to Jason's brother, Jonathan Pagan ("Jonathan"), that he had killed his mother during an argument before Christmas. Reddy showed the brothers a dagger he had brought with him and made several references to going to Dahlberg's residence to give her and her boyfriend a "Christmas present."

Fearing that Reddy might harm Dahlberg, Jonathan called police as soon as Reddy left and told them Dahlberg may be in danger. Cleveland police officers responded to Dahlberg's residence. When Dahlberg did not answer the door, Cleveland police officer, Robert Nagy, entered the residence through a window. Several other officers subsequently entered, and Reddy was apprehended in the basement.

On January 18, 2008, a two-count indictment was issued against Reddy. Count 1 charged Reddy with aggravated murder, in violation of R.C. 2903.01(A), a felony of the first degree. Count 2 charged Reddy with aggravated robbery, in violation of R.C. 2911.01(A)(3), a felony of the first degree.

On February 3, 2009, Reddy waived his right to a jury trial, and the matter proceeded to a bench trial.

On February 6, 2009, the trial court granted Reddy's Crim.R. 29 motion with respect to Count 2, aggravated robbery, and found Reddy guilty of Count 1, aggravated murder.

On February 15, 2009, the trial court sentenced Reddy to 20 years to life imprisonment.

Reddy, through his counsel, raised three assignments of error.

#### ASSIGNMENT OF ERROR NUMBER ONE

#### **"THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR AGGRAVATED MURDER."**

When this court reviews a defendant's claim that the evidence presented at trial was insufficient to support the conviction, "the relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, 818 N.E.2d 229, at ¶31, quoting *State v. Jenks* (1991), 60 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

When an appellate court addresses the sufficiency of the evidence, it does not assess whether the State's evidence should be believed, but rather, if believed, whether it would support the conviction. *State v. Dykas*, 8th Dist. No. 92683, 2010-Ohio-359, at ¶10, citing *Jenks* at 263. Specifically, this court must look to whether the State met its burden at trial with respect to each of the

elements of the charged crime. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541.

Reddy was charged with aggravated murder, in violation of R.C. 2903.01, which states in pertinent part, “[n]o person shall purposely, and with *prior calculation and design*, cause the death of another \* \* \*.” (Emphasis added.) This statute was amended in 1973, because “[b]y judicial interpretation of the former Ohio law, murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment.” *State v. Hough*, 8th Dist. No. 91691, 2010-Ohio-2770, quoting *State v. Schaffer* (1960), 113 Ohio App. 125, 177 N.E.2d 534. The legislature, apparently disagreeing with that interpretation, amended the aggravated murder statute to require prior calculation and design. While Reddy does not dispute that he killed his mother, he argues that there was no evidence to support that he acted with prior calculation and design.

In *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, the Ohio Supreme Court reasoned that there is no bright-line rule to determine whether a defendant acted with prior calculation and design. The *Cassano* court acknowledged that prior calculation and design required more than premeditation. *Cassano* at 98, quoting, *State v. Cotton* (1978), 56 Ohio St.2d 8, 381 N.E.2d 190. Specifically, prior calculation and design requires “a scheme

designed to implement the calculated decision to kill.” *State v. D’Ambrosio*, 67 Ohio St.3d 185, 196, 1993-Ohio-170, 616 N.E.2d 909, quoting *Cotton*.

Although there is no bright-line rule for determining prior calculation and design, in *State v. Taylor* (1997), 78 Ohio St.3d 15, 1997-Ohio-243, 676 N.E.2d 82, the Ohio Supreme Court stated that factors to consider include:

**“(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or ‘an almost spontaneous’ eruption of events.”** *Taylor* at 19, citing *State v. Jenkins* (Apr. 8, 1976), 8th Dist. No. 34198.

In the instant case, the parties obviously knew each other, being mother and son, and they had a strained relationship; however, the remaining two factors indicate that there was no prior calculation and design.

With respect to the second factor enumerated in *Taylor*, a review of the record in this case demonstrates that Reddy did not deliberately choose the murder weapon or the location of the murder.

Gloria was murdered in the early morning hours of Christmas Eve during yet another argument between her and Reddy. Reddy alleged that Gloria came into his bedroom with a dagger and began the altercation. Reddy did not seek out Gloria, nor did he have a weapon. Although he stated that Gloria came at him with a dagger, he did not stab Gloria with the dagger, rather, he used his bare

hands. This evidences the fact that there was no planning with respect to the weapon to be used, as Reddy used his hands when he could have used the dagger after gaining the upper-hand in their physical struggle. Reddy did not seek out Gloria by going into her bedroom; rather, the incident occurred in Reddy's bedroom after Gloria pushed Reddy's door in and threatened him with a dagger.

The third factor listed in *Taylor*, analyzes whether the killing was drawn out or a spontaneous eruption of events. The facts in this case indicate it was a spontaneous eruption of events. Gloria was mentally ill and had substance abuse problems, which resulted in frequent violent outbursts. On December 22, 2008, Gloria gave her neighbor, Amato, a sealed letter that was to be opened if something ever happened to her. The letter stated that a listening device was installed in her basement and that the Mafia and "men from Hollywood" were taking pictures of her with their cell phones. The letter also stated that if she was murdered, it was by the record industry because they were upset with her for not responding to certain love songs. This letter supports Reddy's contention that his mother suffered from mental illness and was unstable.

In concluding that Reddy's attack on Gloria was a drawn-out event, the trial court relied heavily on pictures that depicted blood throughout the house. The trial court stated that blood was not only present in Reddy's room where he alleges the incident took place, but also in the hallways and living room.

However, there was no testing performed on the alleged blood stains to determine if the substance was in fact blood and, if so, whose blood it was and how long the blood had been there. There is evidence of a history of violent behavior in the home, and the blood depicted in the photographs could have been there from prior physical violence.

Gloria had been increasingly violent with Andrew during the last year of her life. Andrew testified to numerous instances of violence within the home. He stated that his mother chased him with a hammer and, on one occasion, bruised his rib. Andrew also stated that shortly before he moved out of Gloria's house to live with his neighbor, Amato, Reddy punched his fist into one of the walls, drawing blood. Thus, the blood could have come from any one of the individuals in the house, during one of the numerous instances of violence within the house. We find that the trial court erred in relying exclusively on the presence of blood throughout the home as the critical factor in determining that there was prior calculation and design.

This court recently analyzed prior calculation and design in *Hough*, which demonstrates the level of planning required to establish prior calculation and design. Hough had a longstanding feud with one of his neighbors. One night, upset that a neighbor and his friends were being noisy, Hough approached the neighbor with a loaded gun and stated, "You f\*\*king kids won't be doing this s\*\*t

no more.” Id. at ¶3. Hough then shot the neighbor and two of his friends, killing all three of them. Hough then shot two other individuals, injuring them, and went back into his house.

Although Hough argued that he “just snapped,” this court concluded that he acted with prior calculation and design. Hough put deliberate thought into his choice of weapon. Hough’s wife testified that she heard Hough get out of bed and go down to the kitchen. Rather than take the gun in his bedroom, he specifically went to the kitchen to get a different gun that was stored in a cabinet. Hough also waited for the neighbors across the street to go inside before going outside with his loaded gun and confronting his neighbors.

The facts in this case do not demonstrate that there was prior calculation and design, as was present in *Hough*. Hough specifically chose both his weapon and the location of the murders. He specifically waited for his other neighbors to go back inside before he approached the victims.

In the instant case, there was no evidence to suggest that Reddy planned to kill his mother. In fact, the only evidence presented at trial indicates that it was a spontaneous act that occurred during yet another argument between Reddy and Gloria. It was Gloria who confronted Reddy in his bedroom. This is in sharp contrast to the facts in *Hough*, in which Hough sought out the victims.

Detective Ignatius Sowa ("Detective Sowa") of the Cleveland Police Department testified that he interviewed Gloria's neighbor, Alescia Hughley ("Hughley"), shortly after the discovery of Gloria's body. Hughley told Detective Sowa that she had heard Reddy and Gloria arguing shortly before Gloria disappeared, and specifically, that she heard Reddy yelling at Gloria to put her knife down.

Numerous witnesses testified that Reddy and his mother had a troubled relationship, and that Reddy had been physically and verbally abused by his mother for years. These facts support Reddy's contention that he did not plan to kill his mother, and that she was killed during an instantaneous eruption of events. Reddy's uncle, Theodore, as well as his two longtime friends, Jonathan and Jason Pagan, all testified that Reddy told them that Gloria came into his bedroom with a knife and threatened him.

In *State v. Simms* (Sept. 19, 1996), 8th Dist. No. 69314, this court concluded that murder stemming from an instantaneous eruption of events does not constitute prior calculation and design. In *Simms*, the defendant got into a fight with one of his friends at a party. The defendant placed his friend in a chokehold while holding a gun to his head. The friend begged the defendant not to shoot him, at which point the defendant shot him multiple times, killing him. This court concluded that there was no evidence of prior calculation and design

because the incident stemmed from a spontaneous fight. Similarly, in the instant case, Gloria's death stemmed from an eruption of events between her and Reddy in the early morning hours of Christmas Eve.

Although the record clearly does not support a conviction for aggravated murder, the record does support a conviction for murder pursuant to R.C. 2903.02. It is well established that this court has the authority to reduce a conviction to that of a lesser included offense when it is supported by the record, rather than ordering an acquittal or a new trial. *State v. Davis* (1982), 8 Ohio App.3d 205, 207, 456 N.E.2d 1256, citing *State v. Sumlin* (June 29, 1978), 8th Dist. No. 37559.

Murder is defined by R.C. 2903.02, which states, "[n]o person shall purposefully cause the death of another." An individual acts purposefully when "it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his intention to engage in conduct of that nature." R.C. 2901.22(A).

Reddy admitted in his statement that he intentionally pressed his hands around his mother's neck in order to render her unconscious. An accused is presumed to know and intend what he does, and "[a] guilty intent may be established from inferences reasonably drawn \* \* \* from facts which have been

proved beyond a reasonable doubt, including acts and statements of a defendant.” *State v. Wallen* (1969), 21 Ohio App.2d 27, 34, 254 N.E.2d 716. Further, Reddy’s intent may be inferred from all of the surrounding circumstances, “including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound.” *State v. Robinson* (1954), 161 Ohio St. 213, 118 N.E.2d 517, paragraph five of the syllabus. Thus, in the present case, when we contrast Reddy’s subsequent statement that he did not intend to kill his mother with his admission that he intentionally strangled her and all the surrounding circumstances, it is not sufficient enough to warrant outright reversal, as opposed to modification. Consequently, we modify Reddy’s conviction to find him guilty of one count of murder.

Therefore, Reddy’s first assignment of error is sustained in part and his conviction is modified accordingly.

**ASSIGNMENT OR ERROR NUMBER TWO**

**“THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”**

In light of our disposition of the above assignment of error, this assignment of error is moot.

**ASSIGNMENT OF ERROR NUMBER THREE**

**“APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION AND THE**

**SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN TRIAL COUNSEL FAILED TO SUBPOENA A WITNESS WHO WOULD CORROBORATE THAT APPELLANT WAS ATTACKED BY THE VICTIM WITH A KNIFE AND FAILED TO HAVE SUSPECTED BLOOD DNA TESTED.”**

Reddy argues that his counsel was ineffective because he failed to subpoena Gloria’s upstairs neighbor, Alecia Hughley (“Hughley”) to testify that she heard the altercation between Reddy and Gloria and heard Reddy telling Gloria to put her knife down. Reddy also contends that his counsel was ineffective in failing to test the dagger for blood. After a review of the record, we disagree.

The Sixth Amendment affords criminal defendants the right to receive counsel to assist in their defense. In order for a defendant to establish that his counsel was ineffective, he must demonstrate that counsel’s performance fell below an objective standard of reasonable representation. *State v. Lottie*, 8th Dist. No. 93050, 2010-Ohio-2598, at ¶15, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

In *Strickland*, the United States Supreme Court established a two-prong test to analyze whether defense counsel’s representation was so deficient that the defendant’s conviction merits reversal. The court stated:

**“First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show the deficient performance**

**prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland* at 687.**

There is a strong presumption that counsel provided effective assistance. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128, citing *Strickland* at 687. A properly licensed attorney is presumed competent. *Smith* at 100, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301, 209 N.E.2d 164. The burden of demonstrating that counsel was ineffective is on the defendant. *State v. Smith* (1981), 3 Ohio App.3d 115, 444 N.E.2d 85.

Although Reddy maintains that counsel was ineffective in failing to subpoena Hughley, a review of the record reveals that Hughley was sent a subpoena, but that she no longer lived at that address; therefore, she did not receive the subpoena. We cannot conclude that Reddy was prejudiced by Hughley not being present to testify because Detective Sowa specifically testified that during his investigation, Hughley told him she heard Reddy and Gloria arguing, and that Reddy yelled for his mother to put down her knife. This was a bench trial, and the trial court had the opportunity to hear Hughley's statements during Detective Sowa's testimony.

Reddy also argues that trial counsel was ineffective because he failed to have the dagger and the blood found within the residence tested for DNA. In his statement to police, Reddy never stated that he had been cut with the dagger;

therefore, there would be no reason to test it for blood. A preliminary test indicated that blood may have been present on the dagger; however, Curtiss Jones, the supervisor of the trace evidence department at the Cuyahoga County Coroner's Office, testified that because the dagger was partially made of copper it could give a false reading for the presence of blood.

Further, Reddy's argument that the blood spatter in the home should have been tested is moot. The trial court relied on the blood spatter evidence to find that Reddy acted with prior calculation and design; however, we determined in Reddy's first assignment of error that the State failed to present evidence to support this contention.

Therefore, Reddy's third assignment of error is overruled.

In addition to the three assignments of error asserted by Reddy's counsel, Reddy also filed a supplemental brief asserting seven additional assignments of error.

On reconsideration, Reddy argues that we have somehow failed to address his pro se assignments of error. This is incorrect. Reddy's first three pro se assignments of error all deal with blood spatter evidence, and therefore, we will address them together.

#### ASSIGNMENT OF ERROR NUMBER ONE

**"THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE PHOTOGRAPHS OF UNTESTED SUSPECTED**

**BLOOD SPATTER AND FINDING APPELLANT GUILTY BASED ON PHOTOGRAPHS OF UNTESTED SUSPECTED BLOOD SPATTER TO THE PREJUDICE OF APPELLANT IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND SECTION 16 ARTICLE 1 OF THE OHIO CONSTITUTION."**

**ASSIGNMENT OF ERROR NUMBER TWO**

**"APPELLANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN [THE] TRIAL COURT EMPHASIZED THAT THE APPELLANT COULD NOT EXPLAIN UNTESTED SUSPECTED BLOOD SPATTER."**

**ASSIGNMENT OF ERROR NUMBER THREE**

**"TRIAL COURT IMPROPERLY ALLOWED QUESTIONING AND TESTIMONY REGARDING UNTESTED SUSPECTED BLOOD SPATTER PHOTOGRAPHS TO THE PREJUDICE OF APPELLANT IN VIOLATION OF DUE PROCESS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE US CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION."**

Essentially, Reddy argues that the trial court erred when it admitted photographs depicting suspected blood spatter, and further, when it allowed the prosecution to state that Reddy was unable to explain the blood spatter. After a review of the record and applicable case law, we disagree.

At trial, several photographs were admitted into evidence depicting what appears to be blood on various places throughout Gloria's house, including the

loveseat, carpeting, hallway, sliding door, bathtub, and Reddy's bedroom. Reddy argues that it was improper to admit the photographs unless the suspected blood spatter in the photographs was actually tested and conclusively determined to be blood.

We review a lower court's ruling on the admission of evidence for an abuse of discretion. *State v. Ray*, 8th Dist. No. 93435, 2010-Ohio-2348, at ¶28, citing *State v. Duncan* (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

"The admission of relevant evidence rests within the sound discretion of the trial court." *State v. Greer*, 8th Dist. No. 92910, 2010-Ohio-1418, at ¶10, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. "Photographs are admissible into evidence as long they are properly identified, are relevant and competent evidence, and are accurate representations of the scene that they purport to portray." *Buchanan v. Spitzer Motor City Inc.* (Feb. 7, 1991), 8th Dist. Nos. 57893 and 58058, citing *Heldman v. Uniroyal, Inc.* (1977), 53 Ohio App.2d 21, 31, 371 N.E.2d 557.

In an analogous case, *State v. Hoop* (1999), 134 Ohio App.3d 627, 731 N.E.2d 1177, photographs were admitted that depicted suspected blood spatter, but the

substance in the photographs had not been tested and, therefore, not conclusively determined to be blood. The *Hoop* court concluded that whether the substance in the photographs was actually blood “went to the probative value of the photographs, not their admissibility.” *Hoop* at 637-638.

It is undisputed that Gloria was killed in her house; therefore, photographs of what appears to be blood in several parts of the house is clearly relevant. Detective Sowa testified that the photographs accurately depicted the scene at the house. Reddy had the opportunity, and did, in fact, cross-examine Detective Sowa regarding why the blood spatter was not tested for DNA evidence. (Tr. 738-748.) Consequently, we find no merit to this argument. We disagree with Reddy’s contention that some explanation is necessary to determine “how or why” photographs of suspected blood spatter at the murder scene are relevant. This is a case in which Reddy repeatedly stabbed his mother after strangling her during a struggle; it is axiomatic that evidence of suspected blood spatter is relevant. In such cases, the probative value of such photographic evidence, whether the substance is tested or not, clearly outweighs the danger of prejudice to the defendant. *Id.* Contrary to Reddy’s argument, their admission, and the trial court’s reliance upon them in convicting Reddy does not “stipulate to the danger of prejudice outweighed by any probative value the photos had to offer.” Merely

because the suspected blood spatter evidence is prejudicial does not mean it is inadmissible.

Reddy also argues that the trial court erred when it allowed the State to comment on the fact that he did not testify, and further, that the trial court itself relied on Reddy's failure to testify as a basis for his conviction.

Reddy does not cite to any portion of the transcript to support his contention that the State commented on the fact that he did not testify. It is well established that an appellant is required to cite to specific portions of the record in order to support his assignments of error. *State v. Howard*, 8th Dist. No. 85500, 2005-Ohio-5135, at ¶17; App.R. 16(D). After a review of the record, we can find no such statement by the State.

Even if the State had commented on Reddy's failure to testify, such a statement would clearly be inadmissible. In a bench trial, the trial court is presumed to have considered only admissible evidence unless the record indicates otherwise. *Cleveland v. Welms*, 8th Dist. No. 87758, 2006-Ohio-6441, 863 N.E.2d 1125, at ¶27, citing *State v. Fautenberry*, 72 Ohio St.3d 435, 1995-Ohio-209, 650 N.E.2d 878.

Reddy argues that the trial court made statements evidencing the fact that it considered Reddy's decision not to testify in support of its verdict. The trial court stated that Reddy failed to explain the evidence against him, meaning his

defense did not adequately address all of the evidence against him. This statement by the trial court did not reference Reddy's decision not to testify.

Reddy's first three assignments of error are overruled.

#### ASSIGNMENT OF ERROR NUMBER FOUR

**“PROSECUTION STACKING INTERFERENCES UPON INFERENCES AND PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANTS [SIC] RIGHT TO A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND SECTION 16 ARTICLE 1 OF THE OHIO CONSTITUTION.”**

At the outset, we note that Reddy never objected during either the State's initial closing argument or its rebuttal. Therefore, Reddy has waived all but plain error. *State v. Salahuddin*, 8th Dist. No. 90874, 2009-Ohio-466, at ¶55, citing *State v. Slagle* (1992), 65 Ohio St.3d 597, 605 N.E.2d 916. Pursuant to Crim.R. 52(B), plain error may be noted and may require reversal even though it was not brought to the attention of the trial court. An appellate court should be cautious in noting plain error and do so only in exceptional circumstances to avoid a miscarriage of justice. *Salahuddin*, at ¶55-58, citing *State v. Long* (1978), 52 Ohio St.2d 91, 94, 372 N.E.2d 804. “Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Moreland* (1990), 50 Ohio St.3d 58, 552 N.E.2d 894, citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

Reddy argues that the State made inferences upon inferences in order to establish its case against him. He further argues that several remarks made by the State constituted prosecutorial misconduct. We find that these arguments are without merit.

Reddy argues that the State concluded its case in closing argument by making inferences upon inferences in order to establish that he acted with prior calculation and design. Reddy also argues that the State committed prosecutorial misconduct by making certain references to the crime in closing argument. However, parties are given wide latitude when making their closing arguments. *State v. Hand*, 107 Ohio St.3d 378, 397, 2006-Ohio-18, 840 N.E.2d 151, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293. The State can summarize the evidence and draw conclusions as to what the evidence shows. *Lott* at 165. "The test for prosecutorial misconduct during closing argument is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights." *State v. Almashni*, 8th Dist. No. 92237, 2010-Ohio-898, at ¶29, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883. We review the record in its entirety to determine whether the defendant was prejudiced. *Lott* at 166.

After reviewing the record, we cannot conclude that any additional statements made by the State during its arguments prejudicially affected Reddy's

substantial rights. As stated above, parties are given wide latitude during closing arguments and may make inferences based upon the evidence. The trial court did not commit plain error in allowing the prosecutor to make the arguments Reddy complains of.

This assignment of error is overruled.

#### ASSIGNMENT OF ERROR NUMBER FIVE

**“APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE US CONSTITUTION AND SECTION 10 ARTICLE 1 OF THE OHIO CONSTITUTION.”**

Although we previously addressed whether the trial court was ineffective in assignment of error number three from the brief prepared by Reddy's counsel, in his pro se brief, Reddy presents several additional arguments for our review. After a review of the record and applicable evidence, we find Reddy's arguments to be without merit.

Reddy argues that trial counsel was ineffective by failing to object to the following: admissibility of the photographs that depicted suspected blood spatter; instances of prosecutorial misconduct; not having the dagger tested for blood; and not requesting a continuance when Hughley did not appear to testify. As we have addressed these issues in previous assignments of error, these issues are moot.

Reddy also argues that trial counsel was ineffective in failing to present evidence that Gloria abused him as a child. However, a review of the record

indicates that is not accurate. The past abuse Reddy suffered was the crux of his defense. In closing argument, Reddy's counsel stated:

**“How could there be any question after all of the people that testified, his girlfriend, Rachel, was the first one, [then] Michelle Dahlberg, and Donna Amato \* \* \* [H]ow could the court believe anything other than the fact that this woman abused her children. \* \* \* Can there be any doubt that after years of abuse, on Christmas Eve when he was attacked by his mother under the influence of sudden passion or a fit of rage, he fought back and attacked her?” (Tr. 806-809.)**

From the record it is clear that trial counsel placed considerable emphasis on the fact that Gloria abused Reddy.

Next, Reddy argues that counsel was ineffective because he failed to file a motion for appointment of an investigator and a motion to suppress Reddy's written confession.

Reddy's contention that his trial counsel failed to file a motion to appoint an investigator is inaccurate. A review of the record demonstrates that on February 4, 2008, trial counsel filed a motion to appoint an investigator. On February 22, 2008, trial counsel filed a renewed motion to appoint an investigator. On February 29, 2008, the trial court granted the motion and appointed the investigator requested by Reddy.

While Reddy argues that trial counsel was ineffective in failing to suppress his written confession, he provides no legal basis that would support a motion to suppress. The written confession signed by Reddy specifically listed all of

Reddy's Miranda rights, including the right to remain silent. As Reddy has alleged no theory under which the confession could be suppressed, we cannot find that he was prejudiced.

Finally, Reddy contends that trial counsel was ineffective in failing to present mitigating circumstances demonstrating that he acted out of sudden passion or in a fit of rage. However, a review of the record reveals that trial counsel's entire trial strategy was based upon this theory. Therefore, this argument lacks merit.

This assignment of error is overruled.

#### ASSIGNMENT OF ERROR NUMBER SIX

**"APPELLANT WAS DENIED HIS RIGHT TO CONFRONTATION OF ADVERSE WITNESSES AS GUARANTEED BY THE CONFRONTATION CLAUSE OF SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 10 ARTICLE 1 OF THE OHIO CONSTITUTION."**

Reddy argues that the trial court erred when it allowed Detective Sowa to testify as to statements made by Gloria's neighbor, Hughley, when Hughley did not appear to testify. Specifically, Reddy objects to Detective Sowa's statement that Hughley stated she heard Gloria yell something to the effect of "you're not going to put your hands on me again, punk." However, the testimony Reddy now challenges was specifically elicited by Reddy during his cross-examination of Detective Sowa.

"A party may not take advantage of an error he invited or induced." *State v. Wilson*, 74 Ohio St.3d 381, 398, 1996-Ohio-103, 659 N.E.2d 292, citing *State v. Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 408. Therefore, we do not reach the question of whether Detective Sowa should have been permitted to testify regarding Hughley's statements to him because this testimony was elicited by Reddy and he cannot now challenge its admission on appeal.

This assignment of error is overruled.

#### ASSIGNMENT OF ERROR NUMBER SEVEN

**"TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO CONSIDER LESSER DEGREE OF HOMICIDE IN VIOLATION OF APPELLANTS [SIC] RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND OHIO CONSTITUTION."**

Reddy argues that the evidence presented at trial was insufficient to demonstrate that he acted with prior calculation and design, and that lesser included offenses should have been considered by the trial court. We agree, and having sustained a similar argument in Reddy's first assignment of error, we modified the judgment accordingly. Although Reddy argues specifically that the trial court committed reversible error by failing to consider convicting him of voluntary manslaughter, we have already found that the evidence in the record, while insufficient for aggravated murder, was sufficient to convict Reddy of murder. We presume the trial court in reaching a verdict considered all lesser

and included offenses as well as inferior degree offenses unless the record shows otherwise. Reddy's seventh assignment of error is overruled.

After a review of the record, we find that the evidence was insufficient to support the prior calculation and design element of aggravated murder. Therefore, Reddy's sentence for aggravated murder is modified to a conviction for murder, pursuant to R.C. 2903.02, and this matter is remanded for sentencing consistent with the conviction as modified.

Conviction modified; sentence vacated, and case remanded for resentencing.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been modified, any bail pending appeal is terminated.

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

  
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MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and  
MARY J. BOYLE, J., CONCUR