

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

vs.

DALE PHILLIPS

Appellant

Case No. C 09 0318

Trial No. B 07 09739

11-0589

MEMORANDUM IN SUPPORT OF JURISDICTION

FILED

APR 11 2011

**CLERK OF COURT
SUPREME COURT OF OHIO**

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SUPREME COURT OF OHIO**

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IN THE SUPREME COURT OF OHIO

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	:		
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	:		
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DALE PHILLIPS	:		
	:		
Appellant	:		

**ISSUES OF THIS CASE RAISE SUBSTANTIAL CONSTITUTIONAL QUESTIONS
AND ARE OF GREAT PUBLIC INTEREST**

Dale Phillips asks this Court to accept jurisdiction of this case because it raises issues of constitutional importance and questions of great public interest, and because the decision rendered by the First District Court of Appeals is erroneous by failing to recognize the assignments of error argued in the appeal violated Phillips' due process rights and is in conflict with other Ohio appellate courts. Thus, this Court needs to adjudicate this appeal to resolve and clarify for all appellate courts the due process questions raised herein.

STATEMENT OF THE CASE AND PROCEDURAL POSTURE

Appellant (Phillips) was indicted by the Hamilton County Grand Jury on charges of aggravated murder with death penalty specification and aggravated robbery. Both charges contained three-year gun specifications. The first jury trial ended in mistrial due to not being able to seat a jury because of deficient numbers of jurors. The case subsequently proceeded to jury trial. Phillips was convicted of all charges. The jury rendered a verdict of life in prison without possibility of parole. The trial court sentenced Phillips to confinement without parole and ten years consecutive for aggravated robbery. Phillips previously entered a guilty plea to other counts of aggravated robbery

as well as weapon under disability for a total sentence of 26 years consecutive to the aggravated robbery with gun specifications. All counts were consecutive to each other, but the gun specifications were merged.

Appellate counsel filed this timely notice of appeal.

On November 17, 2007, Dale Phillips allegedly entered RIL World Clothing store in North College Hill and shot clerk Christopher Spencer two times behind a counter. Spencer was struck in the chest and head and died later at University Hospital from his wounds. The shooting was captured on surveillance tape which was admitted into evidence and played for the jury.

There was no property or money taken or attempted to be taken during the shooting. However, Phillips was eventually arrested and charged with aggravated murder with gun and death penalty specification, as well as aggravated robbery with gun specification.

Although defense counsel made a decision to concede that Phillips was the shooter of Spencer, the State put on their case consisting of witnesses such as police officers who did crime scene investigations, ballistics expert witnesses, medical emergency surgeon personnel, and coroner to establish proximate cause of death. (T.p. 898-1188) The State also repeatedly introduced other acts evidence that Phillips had allegedly robbed at gunpoint the Ameristop located next to RIL World Clothing approximately two weeks prior to Spencer's death.

ARGUMENT

First Proposition of Law: It is prejudicial error for the trial court to deny a defendant's *Batson* challenge when the State excuses a minority member of the jury pool without stating race-neutral reasons.

The government cannot intentionally exercise a peremptory challenge to remove a

prospective juror from the jury pool because of racial reasons.¹ Once the defense has made a *Batson* challenge the burden moves to the State to offer a valid race-neutral explanation for the dismissal.² Where the record reveals no reasonable non-discriminatory reason for the State's peremptory challenge of an African-American member of the jury pool, an inference arises of racially discriminatory motivation arisen which prejudices a defendant's right to a fair trial.³

In the present case, the State exercised a peremptory challenge on an African-American juror (Ms. Edmondson) in the jury pool. (T.p. 627) Mr. Phillips is African-American. Defense counsel objected with a *Batson* challenge stating the juror had given appropriate answers to questions. The State responded with purported non-racial reasons that the juror was reluctant to impose the death penalty. (T.p. 630, 631) The trial court overruled the objection. (T.p. 631)

It was error for the trial court to overrule Phillips' *Batson* challenge when the State did not meet the non-racial reason standard. The record reveals juror Edmondson had given appropriate answers to counsel's questions. (T.p. 581-584) The State also exercised peremptory challenges against another minority jury pool member. (T.p. 632) The State claimed juror Allen had a bias against police and the court overruled the special *Batson* challenge. (T.p. 633, 634) This created a pattern of intentional removal based on race, although the State did leave other minority members on the jury. Phillips was prejudiced by these dismissals because he was ultimately convicted of all charges.

¹*Batson v. Kentucky* (1986), 476 U.S. 79, 90 L.Ed.2d 69, 106 St.Ct.1712

²*Id.*

³*State v. Tuck* (1992), 80 Ohio App.3d 721, 610 N.E.2d 591

Second Proposition of Law: When the prosecutor asks leading questions of his own witnesses it unfairly prejudices a defendant's right to a fair trial.

Ohio Rule of Evidence 611(C) states leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness testimony. Having the prosecutor repeatedly ask witnesses questions by suggesting the desired answer in the question itself clearly violates a defendant rights to a fair trial.

In this case the prosecutor repeatedly asked leading questions of all his witnesses to emphasize in the jury's mind the State's evidence that it needed to elicit from witnesses in order to obtain a conviction of Dale Phillips in this case. (T.p. 722, 742, 820-824, 826, 831, 832, 843, 879, 885, 975, 1007, 1021-1023) The exception to leading questions on direct exam to aid developing testimony from children, mentally infirm, etc., simply did not apply in the present case. Defense counsel objected to some of the improper questions, but failed to object to the majority of the leading questions.

Third Proposition of Law: The trial court commits reversible error by permitting irrelevant and prejudicial evidence to be presented by the State of unrelated alleged bad acts of defendant.

Most evidentiary rulings lie within the discretion of the trial court and will form the basis for reversal on appeal only upon an abuse of that discretion amounting to prejudicial error.⁴ In reviewing the trial court's exercise of discretion in admitting challenged testimony, courts are guided by *Evid.R.* 404(B) and Revised Code §2945.59.

Ohio Evid.R. 404(B) sets forth the rule regarding the admissibility of evidence of previous or subsequent criminal acts that are wholly independent of the offense for which a defendant is on

⁴*Evid.R.* 103(A); *State v. Lowe* (1994), 69 Ohio St.3d 527, 643 N.E.2d 616

trial. The rule provides that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” Essentially “a defendant cannot be convicted of one crime by proving he committed other crimes or is a bad person.”⁵

Evid.R. 404(B) and Revised Code §2945.59 provide an exception where other-act evidence may be admitted in a criminal proceeding if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, Identity, or absence of mistake or accident.⁶ Both prongs must be satisfied for the evidence to be admissible.⁷

Because both Evid.R. 404(B) and Revised Code §2945.59 provide exceptions to the prohibition of other acts rule, they must be strictly construed against admissibility.⁸ Moreover, under Evid.R.403(a), even relevant evidence that would be admissible under ordinary circumstances must be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice. This is necessary to protect a defendant’s fundamental due process rights to a fair trial.

In the present case, the State was erroneously permitted to introduce specific instances of other acts of criminal conduct against Phillips. This occurred when the State presented detailed evidence that Phillips had allegedly robbed a clerk at gunpoint at the adjoining Ameristop

⁵*State v. Jeffers*, 10th Dist. No. 06AP-358, 2007-Ohio-3214, at ¶6

⁶*Lowe*, 69 Ohio St.3d at 530

⁷*See State v. Echols* (1998), 128 Ohio App.3d 677, 692, 716 N.E.2d 728; *State v. Griffin* (2001), 142 Ohio App.3d 65, 753 N.E.2d 967

⁸*State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, paragraph one of the syllabus; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256

convenience store approximately two weeks prior to the instant case. The State accomplished this by arguing that the other act proved intent and plan, and by calling as witnesses the Ameristop clerk (De'Shawn Mann), the police involved in investigating the Ameristop robbery, co-worker of Ameristop clerk, and even a surveillance video of the Ameristop robbery. (T.p. 712-792, 817-910) This accounted for a substantial portion of the trial in this case and was allowed over vigorous and repeated defense counsel objection. Although the Ameristop robbery involved an armed robbery of a clerk with a gun, it was not similar to the instant offense since the clerk was not shot in the Ameristop robbery and money was taken from the Ameristop robbery. Conversely, the clerk in the present was shot to death and no money or personal property was taken. Moreover, there was no evidence that the same gun was displayed or used in both incidents. Since "other acts" evidence must be construed against admissibility, and because the "other act" was not temporally nor circumstantially connected enough to the operative facts of this case, the trial court erred by permitting such evidence to be heard by the jury. The Ameristop robbery and RIL World homicide were not sufficiently related and did not share significant common features since the crimes committed were not the same. The Ameristop other act evidence was extremely prejudicial to Phillips since it allowed the jury to conclude that if he committed one previous bad act, then he was a bad person who committed the crime in the present case. As such, it was reversible error for the trial court to allow the jury to hear such evidence.

Fourth Proposition of Law: The defendant is denied constitutional due process of law by the improper conduct of the prosecution trying their case.

The prosecutor in this case repeatedly elicited from multiple State's witnesses that Dale Phillips had allegedly robbed a clerk at the adjoining Ameristop store two weeks prior to the alleged murder in this case. This misconduct prejudiced Phillips because it referred to another bad act of

aggravated robbery by use of a gun. As discussed in the preceding assignment of error regarding other bad acts, the prejudice to Phillips was inherent in the jury making a determination that if he had committed one prior robbery, he was a bad person who must, therefore, have committed the robbery and murder of Christopher Spencer. The testimony from all the State's witnesses about the Ameristop robbery was irrelevant and prejudicial. Defense counsel vigorously objected during the entire trial to this other acts evidence but the trial court erred by allowing that prejudicial testimony to be admitted into evidence.

The prosecutor violated Phillips' due process right to a fair trial by his improper statements during opening statement and closing argument. It has been consistently held that a defendant's conviction can be reversed for prosecutorial misconduct if a review of court finds that the prosecutor's remarks were improper and that they prejudicially affected the due process rights of the accused.⁹ It is clearly improper for the prosecutor to denigrate defense counsel or defense strategy.¹⁰ It is also improper to misstate or mis-characterize the evidence presented at trial.¹¹ Finally, it is clearly improper for the prosecutor to inflame the passion of a jury by telling them it is their duty to convict the defendant.

In the present case, there were many instances of prosecutorial misconduct during opening statement and closing argument which constituted inflammatory remarks to Phillips' prejudice. In opening statement and closing argument, the State improperly referred to the alleged prior bad act of robbing an Ameristop clerk at gunpoint two weeks prior to the death of Christopher Spencer.

⁹*State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883; *State v. Freeman* (June 9, 2000), First District Court of Appeals, Case No. C 99 0213, unreported

¹⁰*Id.*

¹¹*State v. Braxton* (1995), 102 Ohio App.3d 28, 656 N.E.2d 970

(T.p. 1258-1261, 1264, 1265, 1321-1328) This was prejudicial based on the elicitation of prohibited other acts testimony. (See Assignment of Error 3, Other Bad Acts)

During the State's closing argument, the prosecutor also committed misconduct which prejudiced Phillips by (1) improperly shifting the burden of proof to Phillips when he commented:

The first, Mr. Ancona says, very emphatically to you, this is not a robbery. Well, that begs the question, okay, it's not a robbery, what is it? What is it, if not a robbery? Now I listened all through his closing argument. I was hoping I would hear that answer. If it's not a robbery, what is it? Why did he take that gun to the RIL World, to shop? Why is Christopher Spencer dead today?

Defense counsel promptly objected and asked for a mistrial, which was erroneously overruled by the trial court. (T.p. 1307-1310) Phillips was prejudiced by these remarks because the jury was left with an impression the defense had a burden to answer a key question, which it didn't do. Second, the prosecutor committed misconduct by misstating the evidence in two instances. In discussing the fact that the surveillance video did not have audio, the prosecutor improperly stated:

... And I guess because you can't hear the words, give it up, or give me your money, or give me what you've got, you can't conclude this is a robbery. (T.p. 1315)

Defense counsel objected which was overruled by the trial court. This comment was not an accurate or reasonable comment on the evidence to Phillips' prejudice. The prosecutor also misstated the evidence by claiming that Phillips only lived a block away from the scene of the crime. (T.p. 1328) This was a gross misstatement of evidence which defense counsel objected to, and even the other assistant prosecutor conceded it was not in evidence. (T.p. 1328-1330) The objection was sustained but the cumulative effect nonetheless prejudiced Phillips in the eyes of the jury.

Finally, the prosecutor committed misconduct by inflaming the jurors' passion and prejudice by telling them, in essence, it was their duty as a good citizen to convict Dale Phillips of aggravated

murder and aggravated robbery in order to achieve justice. (T.p. 1340-1341) Phillips' due process rights were prejudiced by these comments that were obviously aimed at placing fear in the jurors, or shame in their hearts were they to acquit Dale Phillips of any charge.

All of the prosecutor's improper comments, taken in their totality, prejudiced Dale Phillips' right to a fair trial. Phillips' conviction should therefore be reversed.

Fifth Proposition of Law: When convictions are not supported by sufficient evidence and against the manifest weight of the evidence, it constitutes reversible error.

The test for determining whether the evidence is sufficient to support a criminal conviction is whether "any reasonable trier of fact could have found defendant guilty beyond a reasonable doubt . . . whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."¹² It is a violation of a person's due process rights to be convicted except upon sufficient proof.¹³ It was error for the trial court to overrule the Rule 29 motion challenging the sufficiency of evidence since it is clear error for the conviction to stand due to the insufficiency of evidence as indicated herein.

Further, Phillips claims that the conviction was against the manifest weight of the evidence. In determining whether the judgment was against the manifest weight of the evidence, the reviewing court must review the "entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in solving conflict in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must

¹²*State v. Jenks* (1991), 61 Ohio St.3d 259, 273; see also *State v. Coach* (May 5, 2000), 1st District No. C990349

¹³*State v. Eley* (1978), 56 Ohio St.2d 169, 283 N.E.2d 132; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781

be reversed and a new trial ordered.¹⁴

A. Aggravated Murder

The State failed to prove beyond a reasonable doubt that Dale Phillips purposely caused the death of Christopher Spencer while committing or attempting to commit an aggravated robbery, and that Phillips was the principal offender. O.R.C. §2903.01(B) There was absolutely no evidence presented that Phillips ever tried to, or took anything from Christopher Spencer or the store during the shooting. Not one police witness, nor the surveillance videotape ever displayed a robbery or robbery attempt. No items were missing or taken from the store, and Phillips never approached the open cash register. Because there was no evidence that Phillips committed an aggravated robbery during the shooting, it was prejudicial error for the jury to have found Phillips guilty of aggravated murder. Since the element of aggravated robbery during the homicide was not proven beyond a reasonable doubt, Phillips submits the evidence clearly shows not that he committed an aggravated murder under the law, but rather murder at most based on the evidence and lack of proof of aggravated robbery. Thus he should only have been sentenced to a possible maximum of ten years imprisonment with gun specification.

B. Aggravated Robbery

Dale Phillips incorporates his argument that there was no evidence that he committed an aggravated robbery in the instant case as set forth in this assignment of error. For all the reasons set forth herein, Phillips submits that his convictions for aggravated murder with specifications and aggravated robbery with specifications were based upon insufficient evidence and/or the convictions were against the manifest weight of the evidence.

¹⁴*State v. Thompkins* (1977), Ohio St.3d 380, 678 N.E.2d 541

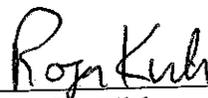
Sixth Proposition of Law: When the trial court errs and fails to grant a mistrial, combined with prosecutorial misconduct, it deprives a defendant of due process.

Mr. Phillips incorporates by reference the arguments regarding trial court errors in not granting the defense requests for mistrial, in conjunction with the prosecutorial misconduct referenced herein, to establish Dale Phillips did not receive constitutional due process in this case. Although individually, the trial court's errors and prosecutorial misconduct may not have warranted a mistrial, certainly taken cumulatively, such acts prejudicially affected his constitutional rights and deprived him of the right to a fair trial.

CONCLUSION

For the foregoing reasons, Dale Phillips respectfully requests that this Court take jurisdiction of this matter.

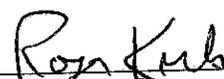
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was hand-delivered to the office of the Hamilton County Prosecutor on April 7, 2011.



Roger W. Kirk
Attorney for Defendant-Appellant

APPENDIX

Judgment Entry of the First District Court of Appeals

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

**ENTERED
FEB 25 2011**

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DALE PHILLIPS,

Defendant-Appellant.

APPEAL NO. C-090318
TRIAL NO. B-0709739

JUDGMENT ENTRY.

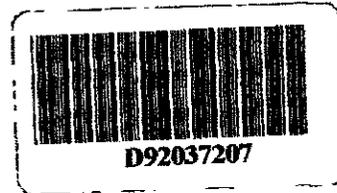
We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Dale Phillips appeals from the judgment of the Hamilton County Court of Common Pleas, entered May 5, 2009, convicting him of aggravated felony murder² and aggravated robbery.³

Christopher Spencer, a store clerk at RIL World clothing store, was shot and killed in the store shortly after 3:00 p.m. on November 17, 2007. Video surveillance from the store captured the shooter casing the store from the outside, then entering and greeting Spencer, "shopping" for about 15 minutes while continually checking the front window of the store, piling a mound of merchandise on the sales counter, looking again towards the front window and ducking down as Spencer totaled the items, then rising up with a gun pointed at Spencer, and ultimately firing at Spencer across the counter when Spencer

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2903.01(B).



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began to duck. After that, the shooter came around the side of the counter and fired additional shots at Spencer, who had retrieved his own gun. Spencer fired several shots but did not strike his shooter. The shooter fled from the store without taking any property. The video surveillance did not capture any audio.

Two weeks before the shooting at RIL World, Phillips had robbed the adjacent Ameristop store. During that robbery, Phillips had brandished a gun and taken money from two cash registers. Phillips pleaded guilty to committing the aggravated robbery at Ameristop before his trial for the offenses committed at RIL World.

At his trial for the RIL World crimes, Phillips stipulated that he was the individual seen in RIL World's surveillance footage that had captured the shooting. The disputed issue at trial was whether Phillips had the intent to commit an aggravated robbery inside RIL World when he shot Spencer. The court allowed the state, over Phillips's objection, to introduce evidence of the Ameristop robbery to show Phillips's motive and intent with respect to the crimes committed at RIL World.

The jury found Phillips guilty of aggravated murder with a death-qualifying specification—that the offense had been committed while Phillips was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery—but it rejected the death penalty after finding that the aggravating circumstance did not outweigh the mitigating factors. Instead, the jury recommended a life sentence without the possibility of parole. The court imposed the jury's recommended life sentence for Spencer's murder and a ten-year term of incarceration for the aggravated robbery.

³ R.C. 2911.01(A)(1).

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We overrule Phillips's first assignment of error, which challenges the trial court's denial of his *Batson*⁴ challenges, because Phillips has failed to demonstrate that the trial court's finding of no discriminatory intent was clearly erroneous.⁵

Phillips second assignment of error, alleging that the prosecutor's use of leading questions during direct examination was misconduct that requires a reversal, is meritless. Leading questions are generally prohibited on direct examination unless used to move the trial forward without influencing the witness's testimony.⁶ But to obtain a reversal on the basis of improper leading questions by the state, the defendant must demonstrate not only that the questioning was improper, but that it affected the outcome of the trial.⁷ In this case, Phillips only objected to one of the questions he challenges on appeal, and the trial court sustained his objection and struck the answer, eliminating any prejudice. With respect to the other questions, Phillips has waived all but plain error, and he has failed to demonstrate that the prosecutor's line of questioning was conduct that rose to the level of error, much less plain error.⁸ Accordingly, we overrule the second assignment of error.

In his third assignment of error, Phillips challenges the trial court's admission of evidence of his robbery of the Ameristop store. He contends that the evidence amounted to other-bad-acts testimony prohibited by Evid.R. 404(B) and R.C. 2945.59. But the trial court reasonably found that the Ameristop robbery was relevant to establish Phillips's intent to rob RIL World and his motive for the murder. Because Phillips's motive and intent were specifically at issue in the case, and because Evid.R. 404(B) and R.C. 2945.59 both specifically provide for the admission of other bad acts to establish motive and intent,

⁴ *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712.

⁵ *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310, following *Hernandez v. New York* (1991), 500 U.S. 352, 111 S.Ct. 1859.

⁶ See Evid.R. 611(C); *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038.

⁷ See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶205.

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we cannot say that the trial court's decision to allow the evidence for those purposes was an abuse of the trial court's discretion.⁹ We note also that the jury was repeatedly reminded of the limited relevance of this evidence.

In his fourth assignment of error, Phillips contends that prosecutorial misconduct denied him a fair trial. In particular, Phillips argues that the prosecutor elicited testimony about Phillips's prior bad conduct, namely, the aggravated robbery of Ameristop, and also referred to this testimony in opening statement and closing argument. But the testimony concerning the Ameristop aggravated robbery was admissible to show Phillips's motive and intent. Thus, Phillips has demonstrated no misconduct by the prosecutor in these respects.

Phillips argues also that the prosecutor committed misconduct during closing argument by improperly shifting the burden of proof to him. Even if we agree with Phillips's characterization of the prosecutor's comment as burden-shifting, the record demonstrates no prejudice to Phillips because the trial court not only sustained his objection to the comment, but it gave a curing instruction.

Phillips contends that the prosecutor misstated the evidence in two instances. But Phillips cannot demonstrate prejudicial error from these comments because any misstatement was corrected by the trial court after Phillips's objection.

Finally, Phillips challenges the prosecutor's statement urging the jurors to "do justice" in the case. But Phillips failed to object to this comment, and Phillips cannot show that this isolated comment was so inflammatory that it rendered the jury's verdict a

⁸ See Crim.R. 52(B); *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

⁹ See *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶96-97 (admission of nonfatal robberies committed by the defendant admissible to show the defendant's intent to kill in a trial for a fatal robbery).

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product solely of passion and prejudice, not one based on an appropriate assessment of the evidence.¹⁰ Accordingly, we overrule the fourth assignment of error.

In his fifth assignment of error, Phillips argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. Essentially, Phillips contends that the state failed to present evidence that he had intended to take anything from the store or Spencer—the attempted theft-offense element¹¹ necessary for his aggravated-robbery and aggravated-murder convictions.

We overrule this assignment of error. First, upon the evidence adduced at trial, reasonable minds could have reached different conclusions as to whether each element of the offenses—including Phillips's intent to commit a theft offense—had been proved beyond a reasonable doubt.¹² The state was not required to present evidence that Phillips had said "give it up" for the jury to conclude that Phillips's purpose was to deprive the store or Spencer of property when he rose up to the checkout counter and brandished his handgun. Further, Phillips's failure to take the time to grab cash or merchandise after firing seven shots in the middle of a Saturday afternoon at a store that was in proximity to other open and busy establishments did not demonstrate that there was no robbery, but it did demonstrate that there was a botched robbery. Circumstantial evidence possesses the same probative value as direct evidence, and thus the state can establish any element of any crime through circumstantial evidence.¹³

Second, we find nothing in the record of the proceedings below to suggest that the jury, in reviewing the evidence on the charged offenses, lost its way or created such a

¹⁰ See *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶113.

¹¹ See R.C. 2913.01(K); R.C. 2913.02.

¹² See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

¹³ See *Jenks*, supra, paragraph one of the syllabus.

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manifest miscarriage of justice as to warrant the reversal of Phillips's convictions.¹⁴ We note that the weight of the evidence was primarily for the trier of fact.¹⁵

Finally, in his sixth assignment of error, Phillips contends that the cumulative effect of errors deprived him of a fair trial. But under the circumstances of this case, including the substantial evidence of guilt, Phillips has fallen far short of demonstrating that, but for the combination of any separately harmless errors, there is a reasonable probability that the outcome of the trial would have been different.¹⁶ Accordingly, we overrule the assignment of error, and we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., SUNDERMANN, and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 25, 2011
per order of the Court 
Presiding Judge

¹⁴ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

¹⁵ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

¹⁶ See *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus; *State v. Dieterle*, 1st Dist. No. C-070796, 2009-Ohio-1888, at ¶38-39.