

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CURTIS YOUNG

DEFENDANT-APPELLANT

Case No. 11-1176

On Appeal from the Mahoning County
Court of Appeals Seventh Appellate District

Court of Appeals
Case No. 09 MA 100

MEMORANDUM IN SUPOPORT OF JURISDICTION OF
DEEFENDANT-APPELLANT, CURTIS YOUNG

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

This court must review the applicable standards for permitting criminal prosecutors to plead cases in the alternative and force a criminal defendant to defend an aggravated murder charge for one (1) decedent in two (2) different counts, prejudicing Appellant's trial. The Seventh District Court of Appeals agreed the trial court should not have sentenced Appellant for both charges and remanded the case back to the trial court for appropriate sentencing.

The additional claimed errors assigned in this case once again afford this Honorable Court with an opportunity to review, update and clearly articulate the Appellant Review Standards involving an appellate court's review and determination of the appropriate standards for prosecutorial misconduct and Appellant's evidence herein being against the manifest weight of the evidence. Finally, this Court has the opportunity to correct the mistake of the trial court and the Seventh District Court of Appeals by granting Appellant a new trial due to the improper requirement of the playing of a witnesses' entire police interview for impeachment, improperly putting redundant and cumulative evidence before the jury, which unfairly prejudiced Appellant's right to a fair trial.

STATEMENT OF THE FACTS AND CASE

On August 9, 2007, the Appellant was indicted by secret indictment by the Mahoning County Grand Jury for two (2) counts of aggravated murder, pursuant to R.C. 2903.01(A)(F), felony/life/death specifications for the purposeful killing of two (2) or more persons pursuant to R.C. 2929.04(A)(5) and two (2) counts of aggravated murder, pursuant to R.C. 2903.01(C)(F), felony/life/death specifications for the purposeful death of two (2) or more persons, pursuant to R.C. 2929.04(A)(5) and for purposely causing the death of another under the age of thirteen (13) years old, pursuant to R.C. 2929.04(A)(9); Appellant was also indicted for firearm specifications, pursuant to R.C. 2941.145(A), attached to each of the four (4) counts of aggravated murder. (R-1).

Thereafter, on March 27, 2009, the State of Ohio (hereinafter referred to as Appellee) filed a Criminal Rule 7(D) Motion to Amend the Indictment herein moving to amend the second death penalty specification in counts Three (3) and Four (4) to include the language "and either was the principal offender in the commission of the offense, or if not the principal offender, committed the offense with prior calculation and design," (R-71), which motion was granted by the trial court in a Judgment Entry dated April 13, 2009. (R-89).

On April 10, 2009, counsel for Appellant filed two (2) Motions to Dismiss Counts Two (2) and Three (3) of the indictment, claiming that having to defend two (2) counts of aggravated murder for the death of Helen Moore's unborn child violated Due Process. (R-84-85).

On April 15, 2009, Appellee filed a Memorandum in Response to Appellant's Motion to Dismiss. (R-96). The trial court conducted a hearing on Appellant's Motions to Dismiss Counts Two (2) and Three (3) of the indictment on April 17, 2009 and overruled Appellant's Motions. (R-102,103). Finally, on April 27, 2009, counsel for Appellant filed a Supplemental Motion to Dismiss Counts Two (2) and Three (3) of the indictment arguing Appellee should be made to elect which of the two (2) counts relating to the unborn child Appellee should proceed with since having Four (4) counts of aggravated murder to defend, when there are only three (3) deceased people was extremely prejudicial to Appellant. However, the trial court summarily dismissed Appellant's motion after argument. (R-126).

Thereafter, on April 27, 2009, a jury of twelve (12) jurors and three (3) alternates was impaneled and Appellant's jury trial began on May 4, 2009. During the trial, the Appellee presented the testimony of twelve (12) witnesses against Appellant, including four (4) witnesses to the incident between Appellant and the decedent, family members, police officers and detectives investigating the crime and scene, BCI lab personnel and the physician who examined the deceased victims. At the conclusion of Appellee's case in chief, Appellant presented the testimony of his own two (2) witnesses of the incident between Appellant and the decedents, as well as the testimony of Appellant himself and subsequently rested.

At the conclusion of the testimony and evidence offered, the jury deliberated and on May 8, 2009, the jury returned verdicts of guilty against Appellant on Court One (1) the aggravated murder of Helen Moore with prior calculation and design, the death penalty specification that the offense was part of a course of conduct involving the

purposefully killing of two or more persons; Count Two (2), the aggravated murder of Helen Moore's pregnancy with prior calculation and design, the death penalty specification that the offense was part of a course of conduct involving the purposeful killing of two (2) or more persons; Count Three (3) the aggravated murder of Baby Moore, the death penalty specification that the offense was part of a course of conduct involving the purposeful killing of two (2) or more persons and the death penalty specification of purposefully causing the death of another who was under the age of thirteen (13) years of age at the time of the commission of the offense; and Count Four (4) the aggravated murder of Ceoni Moore, the death penalty specification that the offense was part of a course of conduct involving the purposeful killing of two (2) or more persons, the purposeful killing of two (2) or more persons specification and the death penalty specification of purposefully causing the death of another who was under the age of thirteen (13) years of age at the time of the commission of the offense. The jury found Appellant guilty of each of the four (4) firearm specifications associated with each count of aggravated murder of the indictment. (R-169-182).

On May 18, 2009, the trial court conducted Appellant's mitigation hearing, and thereafter, the jury deliberated and unanimously returned a verdict recommending that Appellant be sentenced to a term of life imprisonment without the possibility of parole eligibility on Counts One (1) through Four (4) of the indictment for the charges of aggravated murder. The trial court thereafter set Appellant's case for sentencing on May 22, 2009.

At the sentencing hearing, Appellant was thereafter sentenced on:

Count one (1) aggravated murder of Helen Moore, a term of

life imprisonment without parole eligibility;

Count two (2) aggravated murder of Helen Moore's pregnancy, a term of life imprisonment without parole eligibility to be served consecutively;

Count three (3) aggravated murder of Baby Moore, a term of life imprisonment without parole eligibility to be served consecutively;

Count four (4) aggravated murder of Ceoni Moore, a term of life imprisonment without parole eligibility to be served consecutively.

The trial court judge merged the sentences for Counts Two (2) and Three (3) by operation of law and sentenced Appellant to a term of incarceration of three (3) years incarceration on each of the four (4) firearm specifications attached to and consecutive to each of the counts of aggravated murder, and subsequently merged the sentences by law. (Attached hereto as Appellant's Exhibit "A").

On May 25, 2011, the Seventh District Court of Appeals rendered its Opinion affirming Appellant's conviction but remanded the case back to the trial court for a new sentencing hearing to eliminate post-release control and only sentence Defendant-Appellant on one of the two (2) merged counts of aggravated murder. (Attached hereto as Appellant's Exhibit "B" and "C").

ARGUMENT IN SUPPORT OF PROPOSITIO OF LAW

PROPOSITION OF LAW NO. 1

THE TRIAL COURT AND THE SEVENTH DISTRICT COURT OF APPEALS ERRED TO THE PREJUDICE OF APPELLANT BY OVERRULING HIS MOTIONS TO DISMISS COUNTS TWO (2) AND THREE (3) OF THE INDICTMENT REFERRING TO DEATH OF THE UNBORN CHILD.

A review of the indictments in the instant case reflect Appellant was indicted for Four (4) Counts of aggravated murder with death penalty specifications. Under Count Two (2) of the indictment, Appellant argues Appellee should not have been permitted to charge and proceed to trial under both counts two (2) and three (3) relating to the unlawful termination of Helen Moore's pregnancy and for the death of Baby Moore for the same death and prejudicially force Appellant to defend against two (2) counts of aggravated murder for the same victim herein. Pursuant to R.C. 1.51, the more precise statute or charge of aggravated murder shall be applicable when cited for a violation of two (2) or more statutes. State v. Conyers (1999) 87 Ohio St. 3d 246. State v. Chippendale (1990) 52 Ohio St. 3d 118

Secondly, in order to review the underlying basis of Appellant's assigned error, the aggravated murder statute and the unlawful termination of another's pregnancy statute must be reviewed in order to show that Appellant's contention that Counts Two (2) and Three (3) of Appellant's indictment violate the Equal Protection and Due Process Clauses of the United States Constitution. It appears this argument is a case of first impression as there do not appear to be any previous court decision directly on point. The purpose of both statutes is the State's interest in the protection of the potential for human life, but disparity lies where Appellant is charged under R.C. 2903.01 for a capital

crime, when the worst form of the offense under R.C. 2919.17 is a felony of the fourth degree. Under an equal protection claim, a criminal defendant must show that he is similarly situated to a person who performs an unlawful abortion, which Appellant did by putting his evidence at trial of acting in self-defense to being run over by Helen Moore prior to firing one (1) shot at Helen Moore (hereinafter referred to as Helen), compared to a person performing a consensual, yet unlawful abortion. This sentencing disparity is improper and leads to arbitrary and discriminatory enforcement that is in violation of the Due Process Clause of the United States Constitution.

Finally, Appellant contends overruling his pre-trial Motion to Dismiss was particularly prejudicial to the Appellant in that Counts Two (2) and Three (3) were both permitted to exist since neither of the counts themselves could support all the death specifications requested, but could only be supported if both counts of the indictment were permitted to remain for trial. By allowing Appellee to plead this case in this manner was extremely prejudicial to Appellant because it gives a basis for Appellee to add capital specifications which would not otherwise exist. Therefore, Appellant argues that to allow Appellee to proceed as was done herein by the trial court, to say Appellant committed capital murder against a viable fetus, which is also the same person as the Baby Moore described in the other allegations of the indictment, resulted in substantial prejudice to Appellant and a denial of his right to a fair trial set forth in the Sixth and Fourteenth Amendments to the United States Constitution as applied to Article I Sections 16 and 20 of the Ohio Constitution.

The trial court erroneously overruled Appellant's Motion to Dismiss both courts of the indictment by judgment entries (R-102, 103,126) to Appellant's prejudice, which ruling should be overruled and Appellant offered a new trial.

PROPOSITION OF LAW NO. 2

THE TRIAL COURT AND THE SEVENTH DISTRICT COURT OF APPEALS ERRED TO THE PREJUDICE OF THE APPELLANT BY REQUIRING, AT THE INSISTENCE OF APPELLEE, THE ENTERING INTO EVIDENCE AND PLAYING OF THE VIDEO TAPE STATEMENT OF APPELLEE'S WITNESS ASHLEY MOORE IN ITS ENTIRETY FOR IMPEACHMENT PURPOSES OVER THE OBJECTION OF APPELLANT DURING TRIAL.

During the trial of the instant matter, Appellee presented the testimony of Ashley Moore, (hereinafter referred to as Ashley), the eleven (11) year old daughter of the decedent, Helen Moore, who was present in the vehicle when Helen was fatally injured on July 31, 2007. Ashley testified on direct to the events which took place and part of her testimony indicated that she was interviewed by the Youngstown Police Department after the incident. (TR 502, 517). On cross examination, Appellant's counsel asked Ashley whether she made the statement to Detective Martin during her interview that she saw Appellant run in front of Helen's car and that Helen tried to drive up and run him over before the shooting. (TR 518). Eventually, Ashley ultimately denied making the statement. (TR 522). Counsel for Appellant then properly asked to play the part of Ashley's statement to the jury which contradicted her trial testimony, but at the insistence of the state, the trial court erroneously and to the prejudice of Appellant made Appellant's counsel play the entire interview, instead of only the contradictory statement by Ashley. (TR 523).

The decision whether to admit a prior inconsistent statement which is collateral to the issue being tried and pertinent to the credibility of a witness is a matter within the sound discretion of the trial judge. State v. Cornett (1992) 82 Ohio App. 3d 624, State v. Bobo (1985) 65 Ohio App. 3d 685, State v. Sage (1987) 31 Ohio St. 3d 173. Because of the broad discretion of the trial court, an appellate court should not reverse on appeal unless the trial court so abused its discretion that prejudicial error intervened. State v. Nichols (1993) 85 Ohio App. 3d 65, State v. Graham (1979) 58 Ohio St. 2d 350. Therefore, an appellate court should not disturb a trial court's evidentiary ruling unless the appellate court finds the trial court's ruling to be an abuse of discretion, is unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. Stat v. Moreland (1990) 50 Ohio St. 3d 58, State v. Adams (1980) 62 Ohio St. 2d 151.

In the instant case, the trial court judge abused her discretion by granting Appellee's request to play the entire police interview of the witness, Ashley, to the jury during trial for capital murder offenses, when the only issue which necessitated playing the videotape of the interview or the transcripts, was the impeachment of the witness on one statement of her trial testimony; that is, did she originally tell police she saw Appellant run in front of Helen's car and that Helen tried to drive up and run over Appellant before the shooting. This was the only issue in question requiring cross-examination from the interview. The witness had previously testified as to her version of the events, there were no other inconsistent statements or testimony in question. The playing of Ashley's video in its entirety permitted a rehashing and improper emphasis on Ashley's testimony of events which was not relevant for impeachment purposes. The relevant portion of the interview for impeachment purposes only constituted a very

minute portion of the interview. Requiring the entire interview to be played in the jury's presence improvidently permitted extraneous matter to be disseminated to the jury including hearing testimony which should not have been relevant under Rule 403 of the Ohio Rules of Evidence.

Clearly, the trial court judge should have restricted the usage of Ashley's interview to the relevant portion relating to her prior statement regarding Helen trying to run over Appellant immediately preceding the shooting, contrary to her in court testimony. Allowing the jury to hear Ashley's interview in its entirety improperly encouraged the jury to treat the interview as evidence for consideration and erroneously admitted redundant and cumulative evidence which unfairly prejudiced Appellant and mislead the jury.

Accordingly, the Appellant's second proposition of law should be sustained and Appellant afforded a new trial.

PROPOSITION OF LAW NO. 3

**INSTANCES OF PROSECUTORIAL MISCONDUCT
THROUGHOUT THE COURSE OF APPELLANT'S
CRIMINAL TRIAL DEPRIVED HIM OF HIS RIGHT
TO A FAIR TRIAL.**

A prosecutor's constant pattern of misconduct including denigrating defense counsel in the jury's presence, misconstruing evidence to the jury, referring to Appellant as a liar, commenting on Appellant's post-arrest silence and acting enraged and pointing at Appellant's counsel during examination of a witness, throughout much of the trial and during closing argument deprived Appellant of a fair trial. State v. Keenan (1993) 66

Ohio St. 3d 402. Unfortunately, flagrant misconduct on the part of the Appellee deprived Appellant of his right to a fair trial herein.

The record is replete with instances of prosecutorial misconduct throughout the trial. Initially, counsel for Appellant had to interrupt jury questioning during general voir dire because the prosecutor was questioning potential jurors of the effect of Appellant's post-arrest silence. (Volume II, Jury Trial dated April 27, 2009 pp. 278, 279). This is further exasperated in viewing the prosecutor's reference to a "confession" during closing argument, which Appellant did not make. Counsel for Appellant objected to said reference and the trial court instructed the prosecutor to "stay away from the word confession" during argument. (Volume V, Jury Trial dated April 27, 2009 pp. 971-973). Secondly, during the questioning of a defense witness on cross-examination, the prosecutor stood up in front of the jury, acted like he was enraged about the proceedings and pointed his finger at counsel; causing Appellant's counsel to move for a mistrial on the record. The prosecutor's antics were so blatant and evident to the jury, the prosecutor apologized as did the trial court judge to the jury for the prosecutor's emotional outburst. (Volume IV, Jury Trial dated April 27, 2009 pp. 874, 875). Further, the prosecutor was admonished by the trial court judge for telling the Appellant to answer his questions and telling Appellant not to look at counsel during his cross-examination as follows: (Volume V, Jury Trial dated April 27, 2009 pp. 874, 875, 919).

Throughout his closing argument, the prosecutor constantly disparaged Appellant and his counsel characterizing counsel as trying to twist words and manipulate an eleven (11) year old girl. (Volume V, Jury Trial dated April 27, 2009 p. 961). The prosecutor continued by arguing that during cross-examination of Mary Moore, counsel

repeatedly referred to her answering questions of counsel deliberately to prevent the defense lawyers from “tricking her” with their questions. These comments of the prosecutor were properly objected to by counsel and the objection sustained by the trial court. (Volume V, Jury Trial dated April 27, 2009 pp. 966, 967).

Appellate courts traditionally look with disfavor on remarks that denigrate defense counsel for doing their job and thereby denigrate the Defendant. Keenan, supra, State v. Getsy (1998) 84 Ohio St. 3d 180. Additionally on two (2) occasions, the prosecutor blatantly misconstrued the evidence by telling the jury during closing argument that Appellant admitted to the aggravated murders. (Volume V, Jury Trial dated April 27, 2009 p. 980, 987).

Finally, the prosecutor expanded his attack to Appellant himself and commented during closing argument of his opinion that Appellant was a liar. (Volume V, Jury Trial dated April 27, 2009 pp. 985, 1031, 1037). Referring to a criminal defendant as a liar, is extremely improper as it conveys to the jury the prosecutor’s personal belief. State v. Clemons (1998) 82 Ohio St. 3d 438, State v. Watson (1991) 61 Ohio St. 3d 1.

Clearly, the record on appeal indicates Appellee engaged in improper comments, allegations and behavior during trial which deprived Appellant of his right to a fair trial. Accordingly, Appellant’s Third Proposition of Law should be sustained and Appellant afforded a new trial.

PROPOSITION OF LAW NO. 4

APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF SECTION 3(B)(3), ARTICLE IV OF THE OHIO CONSTITUTION, THUS CREATING A MANIFEST MISCARRIAGE OF JUSTICE BECAUSE THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATED APPELLANT DID NOT COMMIT THE OFFENSES

This court set forth the following standard for evaluating whether a verdict is against the manifest weight of the evidence stating a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. State v. Thompkins (1997) 78 Ohio St. 3d 380, State v Parker 2008 Ohio 3538, State v. Peterson 2007 Ohio 4980.

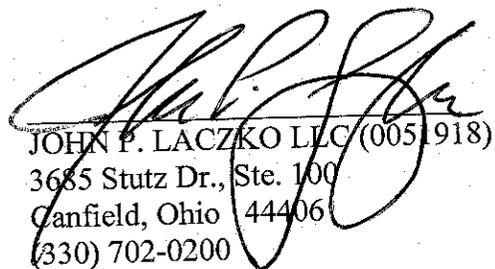
Clearly, a review of all the evidence adduced at trial failed to substantiate the requisite evidence needed to fulfill the requirement of proving the material elements of prior calculation and design. At trial, Appellee presented testimony from four (4) alleged eyewitnesses to the incident, whose testimony leading up to the decedent's shooting are fairly consistent, same and except for who was pursuing whom from place to place until the parties reached 72 N Center St., where the shooting occurs. The witnesses' versions of the events are different and in some cases self-serving and biased (testimony of Mary Moore) completely contradicting the testimony of other witnesses. Appellant's own testimony corroborated by other witnesses established the basis that he was pursued by the decedent leading up to the shooting and aided his claim of self-defense as provocation to fire one (1) shot towards the vehicle to avoid being run over by the decedent's vehicle.

(Vol. V, Jury trial dated April 27, 2009, pp 899, 900, 901, 903). A thorough review of the trial testimony looking at witness credibility will demonstrate inconsistencies and impeachment, the basis for self-defense and the testimony of the events which led up to the shooting were too spontaneous to support a finding of prior calculation and design and Appellant's were momentary deliberation before firing the single shot at the vehicle was insufficient to establish prior calculation and design.

Accordingly, Appellant contends his proposition of law should be sustained and Appellant's case remanded to the trial court.

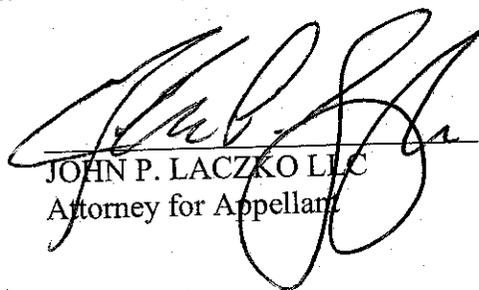
CONCLUSION

Based upon the preceding case law and the argument, Appellant's Propositions of Law should be sustained and Appellant afforded a new trial.


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CERTIFICATE OF SERVICE

A copy of the foregoing Brief has been mailed this 8th day of July, 2011, to Ralph Rivera, Asst. Prosecutor, Prosecutor's Office, 21 West Boardman St., Youngstown, Ohio 44503, Attorney for Appellee.


JOHN P. LACZKO LLC
Attorney for Appellant

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

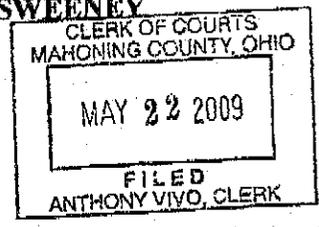
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STATE OF OHIO)
)
 Plaintiff)
)
 -vs-)
)
 CURTIS YOUNG)
)
 Defendant)

CASE NO. 07 CR 1000

JUDGE MAUREEN A. SWEENEY

JUDGMENT ENTRY



This case was called for Trial on the 17th day of April, 2009. The Court conducted its jury orientation.

Individual voir dire began on April 20, 2009 and continued through April 22, 2009. On April 27, 2009 a general voir dire was conducted and a panel of twelve (12) jurors plus three (3) alternates were seated and sworn.

On April 29, 2009, a jury view was conducted.

On May 4, 2009, opening statements were delivered by Attorney Martin Desmond, on behalf of the State. On behalf of the Defendant, Curtis Young, Attorney Douglas Taylor delivered the opening statement.

Also representing the State was Attorney Robert Andrews along with Attorney Thomas E. Zena for the Defendant, Curtis Young.

On May 4, 2009, the State presented its Case in Chief and continued through May 5, 2009 with testimony. On May 5, 2009 the State rested their case.

The Defendant Curtis Young's Motion for Acquittal, pursuant to Criminal Rule 29(A), was overruled.

On May 6, 2009, the Defendant presented its Case and rested on May 6, 2009.

Exhibit 'A'

There was no rebuttal evidence presented by the State.

The Defendant Curtis Young's Motion for Acquittal, pursuant to Criminal Rule 29(A), was again overruled.

On May 7, 2009, closing arguments were delivered by Attorney Martin Desmond on behalf of the State; on behalf of the Defendant, Curtis Young, Attorney Thomas E. Zena delivered the closing argument.

On May 7, 2009 the jury was charged and sequestered.

On May 8, 2009 the jury reached a unanimous verdict and found as follows:

1. The Defendant, Curtis Young, GUILTY of the crime of Aggravated Murder of Helen Moore, with prior calculation and design, a felony in violation of R.C. 2903.01(A)(F);
2. The Defendant, Curtis Young, GUILTY of the Firearm Specification in violation of R.C. 2941.145(A);
3. The Defendant, Curtis Young, GUILTY of the Death Penalty Specification in violation of R.C. 2929.04(A)(5);
4. The Defendant, Curtis Young, GUILTY of the crime of Aggravated Murder of Helen Moore's pregnancy, with prior calculation and design, a felony in violation of R.C. 2903.01(A)(F);
5. The Defendant, Curtis Young, GUILTY of the Firearm Specification in violation of R.C. 2941.145(A);
6. The Defendant, Curtis Young, GUILTY of the Death Penalty Specification in violation of R.C. 2929.04(A)(5);
7. The Defendant, Curtis Young, GUILTY of the crime of Aggravated Murder of Baby Moore, a felony in violation of R.C. 2903.01(C)(F);
8. The Defendant, Curtis Young, GUILTY of the Firearm Specification in violation of R.C. 2941.145(A);
9. The Defendant, Curtis Young, GUILTY of the Death Penalty Specification in violation of R.C. 2929.04(A)(5);

10. The Defendant, Curtis Young, **GUILTY** of the Death Penalty Specification in violation of R.C. 2929.04(A)(9);
11. The Defendant, Curtis Young, **GUILTY** of the crime of Aggravated Murder of Ceonei Moore, a felony in violation of R.C. 2903.01(C)(F);
12. The Defendant, Curtis Young, **GUILTY** of the Firearm Specification in violation of R.C. 2941.145(A);
13. The Defendant, Curtis Young, **GUILTY** of the Death Penalty Specification in violation of R.C. 2929.04(A)(5);
14. The Defendant, Curtis Young, **GUILTY** of the Death Penalty Specification in violation of R.C. 2929.04(A)(9);

The Court, having examined the May 8, 2009 verdict of the jury and finding the same regular as to its form, hereby renders judgment on the verdict.

The Court hereby finds as follows:

1. The Defendant, Curtis Young, **GUILTY** of the crime of Aggravated Murder of Helen Moore, with prior calculation and design, a felony in violation of R.C. 2903.01(A)(F);
2. The Defendant, Curtis Young, **GUILTY** of the Firearm Specification in violation of R.C. 2941.145(A);
3. The Defendant, Curtis Young, **GUILTY** of the Death Penalty Specification in violation of R.C. 2929.04(A)(5);
4. The Defendant, Curtis Young, **GUILTY** of the crime of Aggravated Murder of Helen Moore's pregnancy, with prior calculation and design, a felony in violation of R.C. 2903.01(A)(F);
5. The Defendant, Curtis Young, **GUILTY** of the Firearm Specification in violation of R.C. 2941.145(A);
6. The Defendant, Curtis Young, **GUILTY** of the Death Penalty Specification in violation of R.C. 2929.04(A)(5);
7. The Defendant, Curtis Young, **GUILTY** of the crime of Aggravated Murder of Baby Moore, a felony in violation of R.C. 2903.01(C)(F);
8. The Defendant, Curtis Young, **GUILTY** of the Firearm Specification in violation of R.C. 2941.145(A);

9. The Defendant, Curtis Young, GUILTY of the Death Penalty Specification in violation of R.C. 2929.04(A)(5);
10. The Defendant, Curtis Young, GUILTY of the Death Penalty Specification in violation of R.C. 2929.04(A)(9);
11. The Defendant, Curtis Young, GUILTY of the crime of Aggravated Murder of Ceonei Moore, a felony in violation of R.C. 2903.01(C)(F);
12. The Defendant, Curtis Young, GUILTY of the Firearm Specification in violation of R.C. 2941.145(A);
13. The Defendant, Curtis Young, GUILTY of the Death Penalty Specification in violation of R.C. 2929.04(A)(5);
14. The Defendant, Curtis Young, GUILTY of the Death Penalty Specification in violation of R.C. 2929.04(A)(9);

Prior to the beginning of the sentencing phase, the Defendant, Curtis Young, was advised of his right to the appointment of appellate counsel, his right to a pre-sentence investigation and report prepared by the Court, his right to a mental/psychological examination conducted by the Court, and his right to make a statement either sworn or unsworn. Defendant Young acknowledged he understood these rights and declined the opportunity for the court to prepare any reports and declined to make any statement prior to the beginning of the sentencing phase.

The court reviewed with the Defendant and his Defense Counsel that they had met with the Defendant regarding these issues and reviewed the fact that they have been working with their own team of investigators, psychologist and mitigation experts and had prepared their own pre-sentence investigation findings and mental health examination findings. The Court also confirmed with Defendant Young and his Defense Counsel that they had sufficient time to prepare for the second phase of the trial.

Upon request of Defense Counsel, and with Defendant Young's agreement the sentencing phase of the trial began on May 18, 2008. The State read a proffer of evidence for the jury to consider and then moved for the admission of certain photographs from the trial phase which was granted over Defense Counsel's objection. The photographs were State's Exhibit 1, Helen Moore, alive, State's Exhibit 2, Ceonei Moore, alive, State's Exhibit 21, autopsy photograph of Helen Moore, State's exhibit 27, autopsy photograph of baby Moore, State's Exhibit 30, autopsy photograph of Ceonei Moore, and State's Exhibit 73, birth certificate of Ceonei Moore.

The defense presented the testimony of several witnesses in mitigation. Those witnesses included, Kilan Young, his younger brother, Reginald Young, his younger brother, Deangelo Young, his older brother, Catherine Young, his mother, and Dr. John Fabian, Defendant Young's forensic psychologist hired for this case. The Defendant, Curtis Young, made an unsworn statement. The defense also submitted three exhibits during mitigation which were submitted to the jury for consideration. These were two incident reports from the Mahoning County Justice Center and Dr. John Fabian's C.V.

The jury began their deliberations at 10:00 a.m. and continued until 6:00 p.m. They then were sequestered for the evening. The jury returned to Court at 9:00 a.m. and the Court inquired if they had been sequestered the whole time to which they answered affirmative. The Court further inquired if they were exposed to any media coverage of this matter, or if anyone had approached them concerning this matter, which they denied. The Court then allowed the jury to continue their deliberations. The jury came to its verdict at 4:00 p.m.

On May 19, 2009, after deliberations the jury returned to open court with their unanimous findings that the aggravating circumstances Defendant was found guilty of committing do not outweigh the mitigating factors in this case by proof beyond a reasonable doubt, and the sentence of life imprisonment without parole should be imposed upon the Defendant.

On May 22, 2009, Defendant, Curtis Young's, sentencing hearing was held pursuant to O. R.C. 2929.19. Present in open Court were the Defendant, Curtis Young, and his defense counsel, Attorney Thomas Zena and Attorney Douglas Taylor. Attorney Martin Desmond and Attorney Roberts Andrews were present to represent the State of Ohio.

The State of Ohio informed the Court that three members of the victims' family were notified of today's hearing. A letter written by Ashley Moore was read to the Court by Mary Moore. Mary Moore also made a statement to the Court.

The State of Ohio addressed the Court regarding sentencing. The State of Ohio recommended a sentence of life imprisonment without parole for each of the four counts charged in the indictment to run consecutive to one another in the Department of rehabilitation and Corrections, consecutive to the mandatory three year gun specification. Further the State of Ohio conceded that counts two and three would merge as would the four gun specifications.

Defense Counsel, Attorney Tom Zena, also addressed the Court. Attorney Zena asked the court to consider the support the Defendant's family and the victim's family provided to each other. He also asked the Court to consider the Defendant's lack of

criminal history and his upbringing. The Defendant addressed the Court and apologized to the victim's family.

The Court has considered separately and only the aggravating circumstances as to each individual and specific charge of the aggravated murders of which Defendant Young was convicted.

The Court is required to make specific findings as to the existence of any of the mitigating factors set forth in O.R.C. 2929.04(B). If one or more of the aggravating circumstances listed in O.R.C. 2929.04(A) is specified and proved beyond a reasonable doubt the trial jury and later the Court shall consider and weigh against the aggravating circumstances proved beyond a reasonable doubt against any mitigating factors presented by the Defendant.

In the current matter, the Court finds the Defendant presented the following mitigating factors:

- 1). **THE YOUTH OF THE OFFENDER;** The Court has considered that Defendant Young was 24 years of age at the time of the commission of the offense;
- 2). **THE OFFENDER'S LACK OF A SIGNIFICANT HISTORY OF PRIOR CONVICTIONS AND DELINQUENCY ADJUDICATIONS;** The Court has considered Defendant Young's prior criminal conviction and delinquency adjudication and specifically finds that there is only one prior conviction and that was for domestic violence and that the victim of that crime was not the same victim in this matter.
- 3). **ANY OTHER FACTORS THAT ARE RELEVANT TO THE ISSUE OF WHETHER THE OFFENDER SHOULD BE SENTENCED TO DEATH** Although the Court is not permitted to impose the death penalty based upon the jury's recommendation,

the Court is still considering any other factors in order to determine if it should accept the jury's recommendation or impose a lesser sentence. The Court has considered that the Defendant came from a very large family, raised by a single parent, and was separated from his mother at a young age. The Court has furthered considered the economic challenges the family faced and the lack of a paternal figure in the Defendant's upbringing.

For purposes of sentencing, the Court has reviewed the mitigating evidence for any and all relevant factors as to why Defendant Young should not be ordered to serve a term of life imprisonment without the possibility of parole in the Department of Rehabilitation and Corrections on each of the four counts of Aggravated Murder and the accompanying specifications. The court has spent a significant amount of time review the Court's notes, the Defendant's post mitigation hearing and all the mitigating factors known at the time of this opinion.

As to the Aggravated Murder convictions, the Court has separately and specifically considered each of the remaining three sentencing options allowable in this case: a) life imprisonment without the possibility of parole; b) life imprisonment with the possibility of parole eligibility after serving thirty full years; and c) life imprisonment with the possibility of parole eligibility after serving twenty-five full years.

The court did not in any way consider any cumulative effect of Defendant Young being convicted of multiple counts of aggravated murder or having been convicted of multiple counts of capital specifications. Each count was considered separately and each aggravating circumstance connected to that count, and that count only, was considered separately and independently of all other counts and circumstances.

For the purposes of the Court's consideration of mitigation and sentencing, victim impact statements were not considered in any way against Defendant Young.

In consideration of all that is articulated in this opinion, the Court cannot see any reason to set aside the recommendation by the Jury by way of any mitigation evidence, legal authority, or otherwise. Therefore the Court concurs with the jury's sentence and it is hereby Ordered :

as to Count One - hereby sentences Defendant Curtis Young to life imprisonment without the possibility of parole for the aggravated murder of Helen Moore in violation of O.R.C. 2903.01(A)(F), an unclassified felony;

as to Count Two - hereby sentences Defendant Curtis Young to life imprisonment without the possibility of parole for the aggravated murder for the unlawful termination of Helen Moore's pregnancy, in violation of O.R.C. 2903.01(A)(F), an unclassified felony;

as to Count Three - hereby sentences Defendant Curtis Young to life imprisonment without the possibility of parole for the aggravated murder of Baby Moore in violation of O.R.C. 2903.01(C)(F), an unclassified felony;

as to Count Four - hereby sentences Defendant Curtis Young to life imprisonment without the possibility of parole for the aggravated murder of Ceonei Moore in violation of O.R.C. 2903.01(C)(F), an unclassified felony;

The court further sentenced the Defendant, Curtis Young to three years on the gun specification in violation of O.R.C. 2941.145(A), to be served consecutive to Counts One, Two, Three and Four. The Court finds that the gun specifications attached to each count merge as a matter of law.

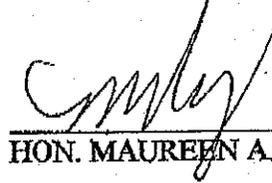
The sentences in counts one, two three and four are ordered to be served consecutively to each other. The Court further finds that Counts two and three merge as a matter of law.

The Defendant is hereby notified, pursuant to O.R.C. 2929.19(B) and O.R.C. 2953.08 and Criminal Rule 32(B) of his appellate rights. Defendant was also advised of post release control pursuant to O.R.C. 2967.28 during his sentencing hearing.

The Defendant's oral motion to find the Defendant indigent for the appointment of appellate counsel is sustained. The Court finds Defendant indigent and hereby appoints John Paul Laczko as counsel for Defendant.

Pursuant to O.R.C. 2967.19.1, the Defendant shall receive 659 days of jail time credit as of May 22, 2009. Further, the Defendant shall be given credit for any future days he remains in custody awaiting transportation to the appropriate State institution.

5/22/09
DATE


HON. MAUREEN A. SWEENEY

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)

PLAINTIFF-APPELLEE,)

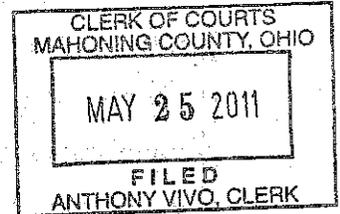
- VS -)

CURTIS YOUNG,)

DEFENDANT-APPELLANT.)

CASE NO. 09 MA 100

OPINION



CHARACTER OF PROCEEDINGS:

Criminal Appeal from Common Pleas Court, Case No. 07CR1000.

JUDGMENT:

Affirmed in part; Reversed and Remanded in part.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul Gains
Prosecuting Attorney
Attorney Ralph Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Attorney John Laczko
3685 Stutz Drive, Suite 100
Canfield, Ohio 44406

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 25, 2011

Exhibit "B"

26.



and design causing the death of Helen Moore in violation of R.C. 2903.01(A). Count two alleged that appellant purposely and with prior calculation and design caused the unlawful termination of Helen's pregnancy in violation of R.C. 2903.01(A). Count three alleged that appellant purposely caused the death of a child under thirteen in violation of R.C. 2903.01(C), referring to Helen's unborn child. Count four entailed purposely causing the death of Helen's son, a child under thirteen, in violation of R.C. 2903.01(C).

¶{5} At trial, the parties stipulated that Helen and appellant had an intermittent relationship from 2001 through the date of the incident and that the relationship was fraught with physical and verbal abuse by both parties. (Tr. 610). Helen's daughter, who was eleven years old and riding in the backseat of her mother's vehicle at the time of the incident, testified. She stated that Helen hung up on appellant each time he called her that morning. (Tr. 482). Appellant then came to their house and started to argue with Helen. (Tr. 480).

¶{6} The daughter testified that appellant drove away, Helen followed him, and both parties were trying to hit each other's vehicles. (Tr. 485). She used her cellular telephone to report where they were traveling to her aunt, who was following them. (Tr. 486-487). Her aunt kept telling her to beg her mother to stop. (Tr. 512-513). They followed appellant to a convenience store, then to a shopping plaza (where her mother attempted to block appellant's vehicle), and then to his house. (Tr. 487, 508, 510).

¶{7} She stated that her mother parked in front of appellant's house, and appellant ran into his house momentarily. (Tr. 490-492). He then ran out of the house to their vehicle with something in his hand; as he approached the car, she noticed that he was holding a gun. (Tr. 493-494). She testified that appellant came to the front side of the car, argued with her mother briefly while pointing the gun at her, and then shot her. (Tr. 497). The car then rolled off the road, hit a tree, and flipped over on its side. (Tr. 499-500).

¶{8} A portion of the child's statement to police immediately after the incident related that her mother tried to run appellant over. (Tr. 518, 524). She clarified at trial that because appellant was on the side of the vehicle by her mother's window when he fired the shot, her mother could not have actually run him over. (Tr. 527, 529).

¶(13) Appellant then testified in his own defense. He stated that he argued with Helen at her house and then drove to the convenience store where Helen and her sister blocked his vehicle in, requiring him to drive over a curb. (Tr. 888-889). A defense witness, who came forward just prior to trial, confirmed this. (Tr. 866, 870). Appellant testified that Helen then pulled in front of him requiring him to drive around her vehicle. He said that when he stopped at the shopping plaza, Helen approached him yelling. (Tr. 890-891). He denied telling anyone on his phone to get his gun. (Tr. 923). In fact, he testified that he had the gun on him all day. (Tr. 901).

¶(14) Appellant testified that after a few minutes at the shopping plaza, he drove home with Helen following him. (Tr. 892, 896). He did not believe that she was trying to hit his vehicle. (Tr. 933). Appellant testified that upon arriving at home, he entered the house for a moment to see if his girlfriend was ready to leave. (Tr. 897-898). He said that he walked to the middle of the street to tell Helen to leave but she stepped on the gas and tried to run him over. (Tr. 899). He said he started to run, pulled his gun out, and fired a shot behind him. (Tr. 901, 929). He then left the scene and turned himself in some days later.

¶(15) A jury found appellant guilty of all four counts of aggravated murder with their attendant death and gun specifications. Counts two and three were merged as were the gun specifications. After the mitigation hearing, the jury recommended life without the possibility of parole, and the court concurred in imposing this sentence plus three years for the remaining gun specification. Appellant filed a timely notice of appeal from the court's May 22, 2009 sentencing entry.

ASSIGNMENT OF ERROR NUMBER ONE

¶(16) Appellant's first assignment of error contends:

¶(17) "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY OVERRULING HIS MOTIONS TO DISMISS COUNTS TWO (2) AND THREE (3) OF THE INDICTMENT REFERRING TO DEATH OF THE UNBORN CHILD."

¶(18) Counts two and three both referred to Helen's unborn child. Count two alleged that appellant purposely and with prior calculation and design caused the unlawful termination of Helen's pregnancy in violation of division (A) of R.C. 2903.01. The aggravated murder in count three deals with division (C) of R.C. 2903.01, which

v. Whitfield, 124 Ohio St.3d 319, 2010-Ohio-2, ¶17. See, also, R.C. 2941.04. Thus, the trial court was not required to dismiss count three prior to trial.

¶{22} Appellant's next argument coincides with another motion to dismiss filed before trial, wherein he argued that both counts two and three should be dismissed. Specifically, he argues that charging him with aggravated murder for the death of an unborn child is an Equal Protection violation, alleging that those charged under R.C. 2919.17, the unlawful abortion statute, are similarly situated defendants but are only subject to the maximum penalty of a fourth-degree felony. See R.C. 2919.17(D).

¶{23} There is a presumption that statutes are constitutional, and the challenger has the burden to establish a statute's interaction with another statute is unconstitutional. *State v. Gill* (1992), 63 Ohio St.3d 53, 55. The Equal Protection clause does not prevent all classifications; it merely prohibits laws from treating persons differently when they are alike in all relevant respects. *Huntington Natl. Bank v. Limbach* (1994), 71 Ohio St.3d 261, 262. Statutes that do not discriminate based upon a "suspect classification" and do not deprive a certain class of individuals of a fundamental right must only be rationally related to some legitimate government interest. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 289.

¶{24} As aforementioned, R.C. 2919.17 deals with the offense of terminating a human pregnancy after viability. Division (A) provides that no person shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman if the unborn human is viable, unless two exceptions dealing with physicians apply.

¶{25} The definition statute referenced supra provides that the word "person" shall not be construed so that an offense prohibits any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman. R.C. 2901.01(B)(2)(a). The statute continues by stating that an abortion that violates any of these terms can be punished under R.C. 2903.01 (the aggravated murder statute) if applicable. *Id.* An abortion that does not violate any of these terms but violates R.C. 2919.17, for instance, may be punished as a violation of R.C. 2919.17. *Id.* See, also, R.C. 2903.09(C)(1).

¶{29} Appellant's last argument under this assignment is difficult to understand. He reiterates that he was prejudiced by the existence of both counts concerning the fetus. This argument was addressed above, where it was pointed out that multiple pertinent counts can exist at trial as merger after trial is the only right of the defendant. Combined with this contention, appellant states that the addition of a charge which will be merged later is even more prejudicial in capital cases where additional death specifications will exist. However, there is no separate rule in capital cases that requires the state to elect which charge to proceed on before trial. See *State v. Jenkins* (1984), 16 Ohio St.3d 164, 195 (the presentation of overlapping aggravating circumstances at the guilt phase of a capital trial is allowable).

¶{30} Appellant's argument here becomes even more unclear when considering that he also briefly contends, without explanation, that neither count two or three could support a death specification on its own. It seems he may be attempting to argue that the jury could use the fetus twice to find him guilty of the death specification which alleged that the offense was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons. However, it is clear that the jury was aware that counts two and three involved the same fetus. Regardless, the jury found him guilty of this death specification on count one (corresponding to Helen) and count four (corresponding to the eight-year-old child) as well. Thus, the existence of counts two and three did not factor into the jury's decision to convict him of this death specification. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

¶{31} Appellant's second assignment of error alleges:

¶{32} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY REQUIRING, AT THE INSISTENCE OF APPELLEE, THE ENTERING INTO EVIDENCE AND PLAYING OF THE VIDEOTAPE STATEMENT OF APPELLEE'S WITNESS [HELEN'S DAUGHTER, named omitted] IN ITS ENTIRETY FOR IMPEACHMENT PURPOSES OVER THE OBJECTION OF APPELLANT DURING TRIAL."

¶{33} On direct examination, Helen's daughter testified that the car was not moving when appellant ran to it and that it did not move until he fired the gun. (Tr. 498-499). On cross-examination, she stated that she did not remember making the

or the statement is one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification. Evid.R. 801(D)(1)(b), (c). Here, part of the interview consisted of the child identifying appellant as the shooter, and thus, these parts are not hearsay. See Evid.R. 801(D)(1)(c). Moreover, one could conclude that the defense was implying that the child was fabricating parts of her story or that someone influenced her to say that the car did not move prior to the shot in order to ruin appellant's claim of self-defense. See Evid.R. 801(D)(1)(b). Thus, upon the defense's entry of part of it into evidence, the trial court could have rationally used its discretion to allow the interview into evidence in order to rehabilitate the witness. See *id.* See, also, Staff Note to Evid.R. 801(D)(1)(b) (1980).

¶{38} We also note the state's response that the content of the interview is admissible as a past recorded recollection. That is, a matter is not hearsay if it is:

¶{39} "A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." Evid.R. 803(5).

¶{40} Notably, there is no limitation in this rule upon which parts of the memorandum can be read. See *id.*

¶{41} Appellant then argues that the interview should have been excluded under Evid.R. 403. This rule makes the exclusion of relevant evidence mandatory if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury and makes such exclusion discretionary if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence. Evid.R. 803(A), (B).

¶{42} There is no per se prejudice in presenting the remainder of an interview after presenting the prior inconsistent statement part of it where it merely recites testimony that the jury already heard. See *State v. Blanks* (Jan. 14, 1988), 8th Dist. No. 52543 (technical error in providing entire statement was not prejudicial where it did not provide jury with anything they had not already heard). The trial court could rationally find that the probative value of the interview was not substantially

arrest silence. (Tr. 278-279). However, the statement contested here was a generic exploration of how a potential juror would view the credibility of a witness who did not come forward when they had information. (Tr. 277-278). Specifically, the state used an example of a coworker sitting back while another coworker lost his job based upon an employer's mistaken belief. (Tr. 278). It was not a reference to the defendant. As the state argued in a sidebar, the witnesses it had in mind were appellant's girlfriend and a relative. (Tr. 280). The court then asked the state to use a different line of questioning to explore the topic. (Tr. 281). This is a rational response to the situation. There is no indication that appellant's substantial rights were affected by this innocuous question to an individual juror in voir dire.

¶{48} Appellant also takes issue with the prosecutor's attitude while questioning a defense witness regarding why the state was not informed of the witness until four days after the commencement of trial even though the witness apparently spoke with the defense "well before that * * *." (Tr. 871). During a sidebar where the court was questioning defense counsel about when he discovered the witness, the defense moved for a mistrial, relating that the prosecutor had acted like he was enraged at defense counsel by pointing his finger. (Tr. 875). The prosecutor urged that he was not pointing but was just motioning to the defense. (Tr. 876). The court stated to the jury: "[O]n behalf of the attorneys, I am going to apologize for the outburst you just witnessed. You know that this is a very serious matter and that nerves are almost frazzled. So I am sure they apologize for any emotional outbursts that they showed to you." (Tr. 875). Thus, the jury was aware that the prosecutor should not have acted so emotionally. Moreover, the defense stated that it was satisfied with the admonition. (Tr. 877). As such, the court reasonably handled the situation.

¶{49} The next instance raised by appellant here is that while cross-examining appellant, the prosecutor told him to stop looking at his counsel. (Tr. 919). The defense objected, the court sustained the objection, and the court instructed the jury to disregard the prosecutor's comment about appellant looking at his attorneys and to not consider the comment for any matter. (Tr. 919). We presume that the jury followed the court's curative instruction. See *State v. Garner* (1995), 74 Ohio St.3d 49, 59.

break. She's 11 years old." (Tr. 961). Absent the manipulation comment, the statement is a proper comment upon the evidence. See *State v. Hill*, 8th Dist. No. 80582, 2002-Ohio-4585, ¶35. The manipulation comment, although overly harsh, did not appear to deprive appellant of a fair trial. See *id.* (state's comment that defense counsel twisted evidence around did not rise to a level of insinuating that defense counsel was untruthful); *State v. Prysock*, 10th Dist. No. 86AP-492 (substantial rights not affected where prosecutor said defense twisted things around, cooked up some scheme, and threw in "imaginary things.").

¶{53} Thereafter, the state opined that the testimony of Helen's sister may have sounded overly deliberate because she was asked compound questions and "wasn't going to let the defense counsel trick her." (Tr. 966). The defense objected, and the court instructed the state to stop using the word "tricked." (Tr. 967). Where a witness is asked a two-part question requiring the witness to answer yes to one part and no to the other part, it could be considered a strategy to try to "trick" the witness into answering only the last part of the question so that it sounds like the witness is providing the same answer to both parts of the question. The state was trying to explain why the witness may have sounded overly deliberate while testifying and why she was upset on the stand. It appeared the defense was satisfied with the court's admonition to counsel, and it does not appear that the statements were outcome determinative.

¶{54} Appellant also takes issue with the statements: "The defendant is doing what I like to call the spaghetti approach, the shotgun approach. Some people call it the BS approach where you just kind of throw everything out there, hope something sticks, hope you get some - somebody confused in the law." (Tr. 981). These statements were made after the state noted that appellant was raising the affirmative defense of self-defense and in the alternative was claiming that his actions only constituted voluntary manslaughter due to sudden passion or serious provocation. (Tr. 980). However, no objection was entered, and plain error is not apparent. That is, the Supreme Court has allowed the state to describe a defense as "baloney" and a "dartboard approach." *State v. Brown* (1988), 38 Ohio St.3d 305, 317.

¶{55} Finally, appellant complains that the state's closing opined that appellant was lying. (Tr. 985, 1031, 1037). The defense did not object to any of these

Constitution (and noting that the power of the court of appeals is limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses).

¶{60} In conducting our review, we proceed under the theory that when there are two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore* (1999), 131 Ohio App.3d 197, 201. Rather, we defer to the jury who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying before it, including appellant himself. See *Seasons Coal Co. v. Cleveland* (1994), 10 Ohio St.3d 77, 80; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

¶{61} Appellant states that he did not act with prior calculation and design because the shooting was a spontaneous response to Helen's attempt to run him over. He argues that he was justified in shooting Helen because the car was coming toward him, because he did not create the violent situation, and because he did not violate any duty to retreat. See *State v. Williford* (1990), 49 Ohio St.3d 247, 249 (the affirmative defense of self-defense has three elements: (1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that he or she was in imminent danger of death or great bodily harm and that his or her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger).

¶{62} However, the testimony established that appellant threatened to kill Helen and her children twenty minutes prior to the shooting, simultaneously expressing that he did not care about the baby. (Tr. 548, 607). At one point, he called his girlfriend and asked her to get his gun. (Tr. 554, 616, 777). One witness heard him tell his girlfriend that the reason he needed his gun was to kill someone. (Tr. 616). The testimony shows that appellant then drove home, approached his girlfriend, and entered his house. A reasonable inference can be drawn that appellant either received his gun from her or retrieved it from the house. (Tr. 490-492, 560). The jury need not believe that appellant had his gun on him all day as he claimed.

¶{63} Appellant then deliberately walked to the vehicle on the street containing Helen and her three children. Helen's daughter testified that he argued with her mother while pointing the gun at her. (Tr. 497). There is some evidence that the car

at sentencing that appellant was subject to up to five years of post-release control and by attempting to impose post-release control in its sentencing entry.

¶{69} Appellant states that we must remand for a new sentencing hearing. The state believes that we choose whether to vacate the post-release control portion of the sentencing entry or that we can remand for a new sentencing hearing before the trial court. On this issue, this court has held:

¶{70} "Based on this statutory scheme, the trial court was not authorized to impose post-release control as part of Crockett's sentence. When a trial court imposes a sentence that is unauthorized by law, the sentence is unlawful. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶21. An unlawful act is not merely considered erroneous or voidable, but it is wholly unauthorized and void. *Id.* A void sentence must be vacated, placing the parties in the same position they would have been in had there been no sentence. *Id.* at ¶22. Thus, the trial court must conduct a new sentencing hearing." *State v. Crockett*, 7th Dist. No. 07MA233, 2009-Ohio-2894, ¶9.

¶{71} As we are remanding for a new sentencing hearing by the trial court, we have decided to recognize plain error on a merger issue. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court or this court. See Crim.R. 52(B); *State v. Slagle* (1992), 65 Ohio St.3d 597, 604 (appellate court can sua sponte consider unobjected to errors). Plain error can be recognized to prevent a manifest miscarriage of justice where, but for the error, the outcome of the proceeding clearly would have been otherwise. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, ¶61.

¶{72} Here, the court sentenced appellant to consecutive sentences on all four counts. However, the court found that counts two and three, the counts dealing with the unborn child, merged as a matter of law. Sent. Tr. 13; 05/22/09 J.E. p. 10. Upon this merger, the court was only permitted to sentence appellant to one of the merged offenses. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶17-18 (when two counts are merged, a sentence can only be entered on one). A court cannot even enter concurrent sentences on merged offenses, let alone consecutive sentences as the court did here. See *id.* The proper remedy for this error is to remand for a new sentencing hearing where the state shall choose which of the merged counts on which it wishes the court to enter a sentence. See *id.* at ¶21-25 (state's right to elect which

