

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| State of Ohio, | : | S. Ct. Case No. 11-1912 |
| | : | C.A. Case No. E-10-022 |
| Appellee | : | C.P. Case No. 2008-CR-282 |
| v. | : | |
| Thomas J. Ricks, | : | |
| Appellant | : | |

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APPEAL FROM THE SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO

RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION

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MEMORANDUM

STATEMENT OF THE CASE

Appellant was indicted on or about May 9, 2008, by the Erie County Grand Jury on two counts of aggravated murder with prior calculation and design, one count of aggravated robbery, a felony of the first degree, one count of trafficking in marijuana, a felony of the first degree and one count of trafficking in cocaine, a felony of the first degree. Further, the counts of aggravated murder and aggravated robbery carried firearm specifications.

On April 27, 2010, appellant was found guilty by a jury of his peers on both counts of aggravated murder with the firearm specifications, one count of aggravated robbery with the firearm specification, one count of complicity to trafficking in marijuana, and one count of complicity to trafficking in cocaine. Further, the parties had stipulated that the offenses of trafficking were committed within one thousand feet of the boundaries of a school premise.

On May 3, 2010, appellant was sentenced to a total of one life sentence without the possibility of parole in addition to twenty six years as evidenced by the entry filed May 4, 2010. Appellant filed a notice of appeal in The Sixth District Court of Appeals on the entry filed May 4, 2010.

On September 30, 2011, the Sixth District Court of Appeals vacated appellant's convictions for complicity to trafficking in cocaine and complicity to trafficking in marijuana, and remanded for resentencing. The remainder of the judgment against appellant was affirmed. State v. Ricks, 2011 Ohio App. LEXIS 4157, 2011-Ohio-5043 (Ohio App. 6 Dist.).

Appellant filed his notice of appeal with the Supreme Court of Ohio on November 10, 2011, on the judgment rendered by the Sixth District Court of Appeals filed September 30, 2011.

On November 29, 2011, appellant's resentencing hearing was ordered stayed by the trial court pending the outcome of appellant's appeal to the Supreme Court of Ohio.

This Honorable Court denied appellant's leave to appeal and dismissed the appeal in the above-captioned case as not involving any substantial constitutional question on February 22, 2012.

Appellant filed his motion for reconsideration on March 2, 2012.

ARGUMENT

The admission or exclusion of evidence rests within the sound discretion of the trial court. A reviewing court will not disturb a trial court's ruling absent an abuse of discretion. State v. Cody, 2007 Ohio App. LEXIS 5938, 2007-Ohio-6776, 7 (Ohio App. 10 Dist.). The Sixth Amendment to the United States Constitution provides that an accused has the right to confront witnesses against him. In Crawford v. Washington (2004), 541 U.S. 36, the United States Supreme Court held that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to *afford the States flexibility in their development of hearsay law*-as does Ohio v. Roberts [(1980), 448 U.S. 56], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (Emphasis added) Crawford, 541 U.S. at 68. "Thus, Crawford only applies to hearsay statements that are not subject to any hearsay exceptions." State v. Goza, 2007 Ohio App. LEXIS 5982, 2007-Ohio-6837, 14 (Ohio App. 8 Dist.) citing State v. Banks, 2004 Ohio App. LEXIS 5957, 2004-Ohio-6522 (Ohio App. 10 Dist.).

The general rule is that a codefendant's statements implicating the other defendant are not admissible and violates a defendant's right to confrontation when the codefendant does not testify. **Bruton v. United States** (1968), 391 U.S. 123, syllabus. However, "[n]ot all out-of-court statements are hearsay, *e.g.*, some statements are merely verbal parts of acts and are, as the acts are themselves, admissible. However, in a criminal case, the potential for abuse in admitting such statements is great where the purpose is merely to explain an officer's conduct during the course of an investigation. Therefore, in order to admit out-of-court statements which explain an officer's conduct during the course of a criminal investigation, the conduct to be explained must be relevant, equivocal and contemporaneous with the statements. In addition, the statements must meet the standard of Evid.R. 403(A)." **State v. Kobi** (1997), 122 Ohio App.3d 160, 173, quoting **State v. Blevins** (1987), 36 Ohio App.3d 147, paragraph one of the syllabus.

Statements are not hearsay when they are admitted to explain why officers took certain steps throughout their criminal investigation. **Id.** See also, **State v. Thomas** (1980), 61 Ohio St.2d 223, 232; **State v. Willis**, Case No. 81AP-508, 1981 Ohio App. LEXIS 10333, (Ohio App. 10 Dist. Dec. 15, 1981); **State v. Robertson**, Case No. 78AP-584, 1979 Ohio App. LEXIS 10943, (Ohio App. 10 Dist. July 31, 1979).

In the case at bar, the probative value of the statements clearly outweighed the potential for prejudice. The statement of the codefendant identifying appellant as the person known as "Peanut" was essential to explain officers' testimony as to how they came to know appellant and to explain the officers' conduct of including appellant in the photo array in which appellant was identified. See **Blevins, supra.** See also, **State v. Williams**, 2003 Ohio App. LEXIS 4661, 2003-Ohio-5204, (Ohio App. 10 Dist.); **State v. Alexander**, Case No. E-91-86, 1993 Ohio App. LEXIS 3861, (Ohio App. 6 Dist. Aug. 6, 1993); **State v. Davis** (2006), 947 So.2d 48. Contrary

to appellant's assertion, at no time was testimony introduced indicating that appellant was identified by the codefendant as the person who committed the murder. The record demonstrates that the Sandusky Police Department was told by witnesses that the codefendant was in Sandusky and that he came with a person only known as "Peanut." The Sandusky Police Department notified Canton, Michigan, where the codefendant was incarcerated. The codefendant identified "Peanut" by taking Canton Police Officers to where "Peanut" lived.

Codefendant's statement identifying appellant as "Peanut" is not incriminating on its face and only became so when linked with the evidence of appellant's identification, which identification was determined by further police investigation. **Richardson v. Marsh** (1987), 481 U.S. 200, 203. Where such a link is required to incriminate defendant, a limiting instruction to the jury is sufficient to satisfy **Bruton. Com. v. Travers** (2001), 768 A.2d 845, 848, citing **Gray v. Maryland** (1998), 523 U.S. 185. A limiting instruction was given by the trial court in the case at bar and was duly noted and quoted by the appellate court. **Ricks**, 2011-Ohio-5043 at 22-23, ¶¶62-63. Specifically, the court stated that "[s]o understand when you're hearing this testimony that it's to describe this officer and that department's investigation in conjunction with the Sandusky Police Department." **Id.** at 23, ¶63. "[A] jury is presumed to follow the instructions of the court." **Blevins**, 36 Ohio App.3d at 150, citing **Lakeside v. Oregon** (1978), 435 U.S. 333. See **State v. Mason** (1998), 82 Ohio St.3d 144, 157, **recon. den.**, 82 Ohio St.3d 1483, **cert. den.**, 525 U.S. 1057. Therefore, there is no demonstration that the trial court abused its discretion in allowing the codefendant's statements, as the statements explained the police investigation of appellant, and a limiting instruction was given to the jury.

Finally, the appellate court noted that:

In the present case, we have a co-defendant who identified an individual he believed to be Peanut. There is no evidence that Gipson used the opportunity to

exonerate himself and implicate appellant. Once Peanut was identified as appellant, the Sandusky officers were able to compile a photo array. Further, the court issued a lengthy curative instruction to ensure that the jury properly interpreted the testimony. Finally, Gipson was made available for questioning but appellant declined. Based on the foregoing, we find that the trial court did not err in allowing the testimony. Appellant's third assignment of error is not well-taken.

Ricks, 25-26, ¶69.

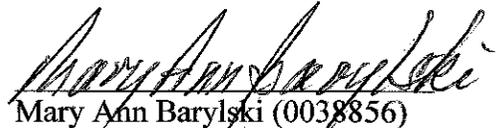
In appellant's motion for reconsideration, appellant relies heavily on this Honorable Court's decisions in **State v. Thomas** (1980), 61 Ohio St.2d 223, and **State v. Issa**, 93 Ohio St.3d 49, 2001-Ohio-1290, to support his argument that his appeal involves a substantial constitutional question; specifically, that a non-testifying codefendant's incriminating statement may not be admitted at a defendant's trial through the testimony of an investigating officer as non-hearsay for the purpose of explaining the officer's conduct during the course of an investigation without violating a defendant's Constitutional rights. However, appellant failed to cite to **Thomas** or **Issa** in his Memorandum in Support of Jurisdiction filed November 10, 2011.

Appellant also relies on **Lee v. Illinois** (1986), 476 U.S. 530, in his motion for reconsideration to support his argument that curative instructions given to a jury are insufficient to cure any Confrontation Clause violations. However, appellant's argument was already considered and rejected by this Honorable Court as appellant presented this argument and cited **Lee** in appellant's Memorandum in Support of Jurisdiction filed November 10, 2011, at 13. As noted above, this Honorable Court denied appellant's leave to appeal and dismissed the appeal in the above-captioned case as not involving any substantial constitutional question.

CONCLUSION

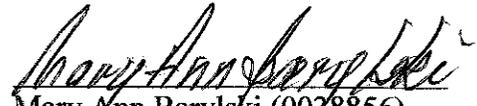
Appellee respectfully requests that this Honorable Court deny appellant's motion for reconsideration as the motion does not call to the attention of this Court an obvious error in its decision. Further, appellant has failed to raise an issue for this Court's consideration that was not considered at all or was not fully considered by this Court when it should have been. **Matthews v. Matthews** (1981), 5 Ohio App.3d 140. Therefore, appellant's motion for reconsideration should be denied and dismissed.

Respectfully submitted,


Mary Ann Barylski (0038856)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing response was mailed to Kristopher A. Haines, Assistant State Public Defender, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215, on this 9th day of March, 2012, by regular U.S. mail.


Mary Ann Barylski (0078856)
Assistant Prosecuting Attorney