ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2011-1912
Plaintiff-Appellee,	:	
	:	On Appeal from the Erie
vs.	:	County Court of Appeals,
	:	Sixth Appellate District
THOMAS J. RICKS,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. E-10-022

MERIT BRIEF OF APPELLANT THOMAS J. RICKS

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 7

Proposition of Law: A non-testifying codefendant's inculpatory, testimonial, out-of-court statements 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. The admission of a codefendant's statements in that regard violates the defendant's right to confront the State's evidence against the defendant, in violation of the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution. 7

CONCLUSION 18

CERTIFICATE OF SERVICE 20

APPENDIX:

Notice of Appeal to the Supreme Court of Ohio (Nov. 10, 2011) A-1

Decision and Judgment of the Sixth District Court of Appeals, Erie County (Sept. 30, 2011) A-4

State of Ohio v. Thomas J. Ricks, Erie County Court of Common Pleas Case No. 2008-CR-282, Judgment Entry (May 4, 2010) A-43

Sixth Amendment, United States Constitution A-51

Fourteenth Amendment, United States Constitution A-52

Article I, Section 10, Ohio Constitution A-53

Article I, Section 16, Ohio Constitution A-54

R.C. 2903.01 ..... A-55

R.C. 2911.01 ..... A-57

R.C. 2925.03 ..... A-59

TABLE OF CONTENTS

Page No.

APPENDIX:

Evid.R. 403 ..... A-72

Evid.R. 801 ..... A-73

Evid.R. 802 ..... A-75

Evid.R. 803 ..... A-76

Evid.R. 804 ..... A-80

TABLE OF AUTHORITIES

Page No.

CASES:

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) 10

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 17,18

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354,
158 L.Ed.2d 177 (2004) 9,10,12,16

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) 10,16

Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) 10,18

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) 5,11,15

Maryland v. *Craig*, 497 U.S. 836, 111 L.Ed.2d 666, 110 S.Ct. 3157 (1990) 5,15

Pointer v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 10

State v. Blanton, 184 Ohio App.3d 611, 2009-Ohio-5334,
921 N.E.2d 1103 (10th Dist.) 8,9

State v. Blevins, 36 Ohio App.3d 147, 521 N.E.2d 1105 (1987) 1,5,8,9,13

State v. Conway, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996 (2006) 17

State v. Humphrey, 10th Dist. No. 07AP-837, 2008-Ohio-6302,
2008 Ohio App. LEXIS 5260 8,9

State v. Issa, 93 Ohio St.3d 49, 752 N.E.2d 904 (2001) 11,16

State v. Lewis, 22 Ohio St.2d 125, 258 N.Ed. 2d 445 (1970) 8

State v. Maurer, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984) 8

State v. Ricks, 196 Ohio App.3d 798, 2011-Ohio-5043,
965 N.E.2d 1018 (6th Dist.) ..... *passim*

State v. Sinkfield, 2d Dist. No. 16277, 1998 Ohio App. LEXIS 4644 (Oct. 2, 1998) 8,9

State v. Thomas, 61 Ohio St.2d 223, 400 N.E.2d 401 (1980) 7,8,12,16,18

TABLE OF AUTHORITIES

Page No.

CASES:

State v. Williams, 10th Dist. Nos. 02AP-730, 02AP-731, 2003-Ohio-5204, 2003 Ohio App. LEXIS 4661 5,8

Tennessee v. Street, 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) 7,10,12

Williams v. Illinois, 567 U.S. ___, 2012 U.S. LEXIS 4658 (2012) 7,10,12,16

CONSTITUTIONAL PROVISIONS:

Sixth Amendment, United States Constitution 7,10,16,17

Fourteenth Amendment, United States Constitution 7

Article I, Section 10, Ohio Constitution 7

Article I, Section 16, Ohio Constitution 7

STATUTES:

R.C. 2903.01 4

R.C. 2911.01 4

R.C. 2925.03 4,5

RULES:

Evid.R. 403 9

Evid.R. 801 7,8,14,15

Evid.R. 802 8,15

Evid.R. 803 8,15

Evid.R. 804 8,16

STATEMENT OF THE CASE AND FACTS

Calvin Harper was robbed and murdered in his apartment in Sandusky, Ohio. (May 9, 2008, Indictment; Tr. 366-78, 402-06, 566-69, 633-60). The State of Ohio alleged that Aaron Gipson and Thomas J. Ricks planned and committed the robbery and murder. Mr. Ricks and Mr. Gipson were tried separately, and Mr. Gipson did not testify during Mr. Ricks's trial.

Mr. Gipson was known to Mr. Harper's family and friends, and like Mr. Harper, was known to be a drug dealer. (Tr. 402-06, 498-605). The State alleged that Mr. Ricks traveled with Mr. Gipson from Michigan to the Sandusky, Ohio, area on the night before the murder, and that the pair spent time with the victim's sister, Chanel Harper, and her friend, Crystal Poole. (Tr. 492-553). Mr. Gipson and his companion left the area that night, and Mr. Harper was murdered during the next day or night. (May 9, 2008, Indictment; Tr. 366-78, 402-06, 492-553, 566-69, 633-60, 825-87).

Soon thereafter, the police investigated Mr. Gipson's involvement in the robbery and murder. (Tr. 425-50). That investigation, and Mr. Gipson's testimonial statements to the police regarding Mr. Ricks's involvement in the offenses, are at the heart of this appeal. Again, Mr. Gipson did not testify during Mr. Ricks's trial.

Prior to trial, Mr. Ricks expressed concern regarding the State's potential use of Mr. Gipson's assertions that Mr. Ricks was involved with the crimes, and that Mr. Gipson had identified Mr. Ricks for the police. (Tr. 317-24). The trial court stated that "definitely the statements are concerning," but then cited to *State v. Blevins*, 36 Ohio App.3d 147, 149, 521 N.E.2d 1105 (1987), and ruled that the statements were admissible because they merely explained an officer's conduct during the investigation. (Tr. 317-24).

During the State's opening statement, the prosecutor told the jury that Mr. Gipson had been a "suspect"; that Mr. Gipson was questioned by the police; that the interviewing detectives wondered who was with Mr. Gipson on the night before the shooting; that they "tried to identify" that person; that the detectives drove Mr. Gipson to the area where Mr. Ricks had been staying; that Mr. Gipson pointed out Mr. Ricks; that Mr. Gipson became visibly scared; that the detectives obtained a photograph of Mr. Ricks soon thereafter; and that when the photograph was shown to Mr. Gipson, Mr. Gipson said "that's him." (Tr. 340-42). Mr. Ricks's objections were overruled. (Tr. 340-42).

During the State's presentation of evidence, Officer Michael Steckel testified that he spoke with Mr. Gipson about the crimes; that he had learned that there were *two* suspects; that he had been told by the Sandusky police that the other suspect was called "Peanut"; that he spoke with Mr. Gipson for the purpose of determining who Peanut was; that Mr. Gipson provided a description of Peanut; that the officer drove Mr. Gipson to the area of where Mr. Ricks was staying because Mr. Gipson knew Peanut; that they were trying to make an identification of Peanut; *that Mr. Gipson pointed out Peanut and said "that's Peanut"*; that they went back to the police station and came up with the name Thomas Ricks; that Officer Steckel obtained a photograph of Mr. Ricks; that he showed that photograph to Mr. Gipson; *and that Mr. Gipson said "that's Peanut."* (Emphasis added.) (Tr. 432-50). Mr. Ricks's objections were overruled under the authority of *Blevins* and its progeny and a curative instruction was given. (Tr. 432-50).

After the presentation of evidence, Mr. Ricks renewed his motion for a mistrial. (Tr. 1220). During the State's closing argument, the prosecutor highlighted Mr. Gipson's out-of-court statements in arguing to the jury that Mr. Ricks was guilty of the charged offenses. (Tr. 1238-40).

Rhonda Farris, Mr. Harper's next-door neighbor, assisted him with his drug trafficking enterprise. (Tr. 560-62, 574-80). According to her, she saw a man walk up to her apartment soon before the victim was killed. (Tr. 563-68). The man expressed surprise and then walked to Mr. Harper's apartment. (Tr. 563-68). According to Ms. Farris, she called Mr. Harper to inform him that a strange man was looking for him, but was assured that the unknown man was "his dude." (Tr. 565). Ms. Farris found Mr. Harper's body the next day. (Tr. 567-69).

Eventually, the police prepared a photographic array which included a photograph of Mr. Ricks, and showed the array to Ms. Harper, Ms. Poole, and Ms. Farris. (Apr. 23, 2009, Suppression Hearing Tr. 55-68). Ms. Harper and Ms. Poole identified Mr. Ricks as the person who accompanied the codefendant on the night before the murder. (Apr. 23, 2009, Suppression Hearing Tr. 4-68). Ms. Farris likewise believed that Mr. Ricks was the man who had approached her door before the murder occurred. (See Apr. 23, 2009, Suppression Hearing Tr. 71-88). But after Mr. Ricks filed a motion to suppress the identification procedures, it was revealed that Ms. Poole knew or recognized five of the seven other individuals depicted in the array. (Apr. 23, 2009, Suppression Hearing Tr. 39-41). Ms. Farris disclosed that one of the individuals who was depicted in the array was her cousin, and that she knew every other person in the array. (Apr. 23, 2009, Suppression Hearing Tr. 84-85). Ms. Harper admitted that she knew "mainly all of them," and that she "went to school with some of them and stuff." (Apr. 23, 2009, Suppression Hearing Tr. 90, 97-98). Mr. Ricks's motions to suppress the unduly suggestive eyewitness identifications were overruled and the identifying witnesses testified regarding their identifications at trial. (Sept. 30, 2009, Judgment Entry, at p. 13; Tr. 498-514, 528-40, 560-73).

The police eventually talked to Mr. Ricks while he was incarcerated in Georgia. (Tr. 684-87). Mr. Ricks denied having been to Ohio, knowing the codefendant, and any involvement

with the robbery or murder. (Tr. 684-87). The police found in Mr. Ricks's possessions a bus ticket from Michigan to Atlanta dated March 28, 2008, and Mr. Ricks had made a series of telephone calls to his girlfriend while he was incarcerated. (Tr. 850-1033). In those calls, Mr. Ricks made cryptic statements which indicated that he had some knowledge of the offenses. (Tr. 908-1033); *see also State v. Ricks*, 196 Ohio App.3d 798, 2011-Ohio-5043, 965 N.E.2d 1018, ¶ 11 (6th Dist.). At no point during those conversations did Mr. Ricks state that he was directly involved in the offenses. (Tr. 908-1033).

Cell phone records indicated that Mr. Gipson had traveled from Michigan, where he lived, to Sandusky, Ohio, on the day that the murder occurred, and then traveled back to Michigan soon after the victim stopped accepting phone calls. (Tr. 825-87). The State suggested that Mr. Ricks was with Mr. Gipson because Mr. Gipson drove near the home where Mr. Ricks was believed to stay. (Tr. 825-87). Mr. Dewon Smith, Mr. Ricks's brother-in-law, who looked similar to Mr. Ricks, testified that he saw Mr. Ricks with Mr. Gipson around the time of the murder. (Tr. 1072-74).

Mr. Gary Munn, who was not indicted, admitted to having been at the victim's apartment and having direct knowledge of the murder. (Tr. 708-10, 735-37). He seemed distraught and intent on avoiding the victim's family after the murder. (Tr. 708-10, 735-37). But according to Detective Helen Prosowski, Mr. Munn was eliminated as a suspect after he told the police that he had lied regarding his knowledge of the murder to impress a woman. (Tr. 724-26).

The jury found Mr. Ricks guilty of one count of aggravated murder, a violation of R.C. 2903.01(A); one count of aggravated murder, a violation of R.C. 2903.01(B); one count of aggravated robbery, a violation of R.C. 2911.01(A)(1); one count of trafficking in marijuana in the vicinity of a school premise, a violation of R.C. 2925.03(A)(1) and R.C. 2925.03(C)(3)(C);

and one count of trafficking in cocaine in the vicinity of a school premise, a violation of R.C. 2925.03(A)(1) and R.C. 2925.03(C)(4)(e). (May 4, 2010, Sentencing Entry). Mr. Ricks was sentenced to an aggregate term of imprisonment of life without the possibility of parole plus twenty-six years. (May 4, 2010, Sentencing Entry). He filed a timely notice of appeal of his convictions and sentence.

On September 30, 2011, the court of appeals released its decision. *See generally Ricks.* The court of appeals vacated Mr. Ricks's cocaine-trafficking and marijuana-trafficking convictions because there was insufficient evidence to support Mr. Ricks's complicity regarding those charges. *Id.* at ¶ 70-96, 102. And the court of appeals approved the State's concession that Mr. Ricks's firearm-specification convictions should have been merged for the purpose of sentencing. *Id.* at ¶ 97, 102.

In a split decision, the court of appeals overruled Mr. Ricks's confrontation-based claims regarding the trial court's admission of Mr. Gipson's hearsay statements through the testimony of Officer Steckel. In its majority opinion, the appellate court quoted from two decisions of the Supreme Court of the United States, *Lilly v. Virginia*, 527 U.S. 116, 123-24, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), and *Maryland v. Craig*, 497 U.S. 836, 845, 111 L.Ed.2d 666, 110 S.Ct. 3157 (1990), both of which analyzed the Confrontation Clause. But regarding analysis under the Confrontation Clause, the appellate court went no further than that. Instead, the court of appeals shifted its focus to *Blevins*, and *State v. Williams*, 10th Dist. Nos. 02AP-730, 02AP-731, 2003-Ohio-5204, 2003 Ohio App. LEXIS 4661 (another *Blevins*-based case of the Tenth District Court of Appeals), and quickly overruled Mr. Ricks's confrontation claims. Further, the court of appeals claimed that Mr. Gipson's out-of-court statements did not evince that Mr. Gipson attempted to exonerate himself or implicate Mr. Ricks, when Mr. Gipson, to whom most of the

prejudicial evidence which was submitted at Mr. Ricks's trial pointed, identified Mr. Ricks and essentially made Mr. Ricks the gunman. *Ricks* at ¶ 69.

The dissenting judge provided a detailed (but non-confrontation-based) analysis regarding the danger of holding that Mr. Gipson's inculpatory statements were admissible, particularly when the statements were hearsay and the prosecutor used those hearsay statements for substantive purposes during his closing arguments to the jury. *Id.* at ¶ 103-35 (Yarbrough, J., dissenting). The dissenting judge opined that Mr. Ricks was entitled to a new trial on the aggravated robbery and aggravated murder charges. *Id.* at ¶ 134-35 (Yarbrough, J., dissenting). He stated:

> However, the testimony of these witnesses only established appellant's *presence* in the neighborhood on the day of the crimes, whereas the content of Gipson's statements involved him directly *in* the crimes. The statements were, moreover, facially incriminating, given the source. In using them in closing argument, the prosecutor was not merely summarizing what the investigating officers did, or where they went, or why. He was suggesting the jury infer guilt from Gipson having identified appellant as "Peanut," thereby using Officer Steckel's testimony about what Gipson said for its truth-value, precisely contrary to the basis on which it was admitted.
>
> In assessing the impact of this testimony, and despite the limiting instruction, I cannot say conclusively that the jury focused *only* on the other witnesses' testimony to support conviction. Indeed, there is more than a reasonable possibility that the erroneously admitted hearsay—and its misuse—contributed to appellant's murder and robbery convictions.

(Emphasis sic.) *Id.* at ¶ 134-35 (Yarbrough, J., dissenting).

Other pertinent facts will be presented in the argument below.

ARGUMENT

Proposition of Law: A non-testifying codefendant's inculpatory, testimonial, out-of-court statements 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. The admission of a codefendant's statements in that regard violates the defendant's right to confront the State's evidence against the defendant, in violation of the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

I. Introduction.

This case is about the proper coexistence of the State of Ohio's hearsay-related rules of evidence and case law and an accused's right to confront the witnesses against him at trial. Specifically, it is about *genuine* consideration by Ohio's trial courts of whether evidence is truly offered for not-for-the-truth-of-the-matter purposes. *See Tennessee v. Street*, 471 U.S. 409, 417, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985); *Williams v. Illinois*, 567 U.S. ___, 2012 U.S. LEXIS 4658, *90-98 (2012) (Thomas, J., concurring). Here, the evidence in question consists of testimonial, out-of-court statements by Mr. Gipson, who was never subjected to cross-examination, and whose statements directly incriminated Mr. Ricks.

Certainly, if a statement is not introduced for the truth of the matter asserted, it is not hearsay. *See* Evid.R. 801(C). In *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980), this Court determined that when out-of-court statements are offered merely to explain an officer's conduct while investigating a crime, those statements are not offered for the truth of the matters asserted. But this Court's holding in *Thomas* was made without the benefit of recent Confrontation Clause authority, and has been greatly overextended. That is, the misapplication of the rules of evidence and this Court's jurisprudence interpreting those rules has created a transparent end-run around the Sixth Amendment's right to confrontation. That is what

happened in Mr. Ricks's case, and the court of appeals gave short shrift to Mr. Ricks's confrontation-based claims. This Court must tell the lower courts that the rules of evidence must not be construed in a manner that undermines the Sixth Amendment.

II. The trial court's erroneous decision to admit Mr. Gipson's out-of-court statements as non-hearsay, and the appellate court's approval of that decision, cannot be reconciled with Mr. Ricks's right to confrontation.

A. Applicable law regarding the identification of hearsay and limitations on the use of supposed non-hearsay during a criminal trial.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted.*" (Emphasis added.) Evid.R. 801(C). "Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." Evid.R. 802; *see also* Evid.R. 803, Evid.R. 804.

In *Thomas*, this Court held that when a non-testifying witness's out-of-court statement is disclosed by an investigating officer at trial—*for the purpose of merely explaining the officer's conduct during the course of investigation*—the statement is not offered for the truth of the matter asserted. *Thomas*, 61 Ohio St.2d at 232. As such, the statement is not hearsay. Evid.R. 801(C); *see also Blevins*, 36 Ohio App.3d at 149; *State v. Blanton*, 184 Ohio App.3d 611, 2009-Ohio-5334, 921 N.E.2d 1103, ¶ 28-49 (10th Dist.); *State v. Humphrey*, 10th Dist. No. 07AP-837, 2008-Ohio-6302, 2008 Ohio App. LEXIS 5260, ¶ 9-13; *Williams* at ¶ 46-50; *State v. Sinkfield*, 2d Dist. No. 16277, 1998 Ohio App. LEXIS 4644, *14-20 (Oct. 2, 1998); *State v. Maurer*, 15 Ohio St.3d 239, 262-64, 473 N.E.2d 768 (1984); *State v. Lewis*, 22 Ohio St.2d 125, 131-32, 258 N.Ed. 2d 445 (1970).

But purported not-for-the-truth-of-the-matter statements carry great potential for abuse. Accordingly, the admission of such statements must be tempered based on whether they were truly admitted and considered for proper non-hearsay purposes, whether the police conduct to be explained was relevant, equivocal, and contemporaneous with the out-of-court statements, and the statements' likelihood of causing undue prejudice to the defendant. *See, e.g.*, *Blevins* at 149-50; *Blanton* at ¶ 37-40; *Humphrey* at ¶ 11; *Sinkfield* at *14-20; *Ricks* at ¶ 111-26 (Yarbrough, J., dissenting); Evid.R. 403(A). Further, a prosecutor may not use statements which were admitted for not-for-the-truth purposes as substantive evidence of the accused's guilt. *See, e.g.*, *Humphrey* at ¶ 11; *Ricks* at ¶ 111-35 (Yarbrough, J., dissenting). Such statements should not be admitted when they tend to incriminate the accused and provide substantive evidence of guilt. *See, e.g.*, *Blevins* at 149-50; *Blanton* at ¶ 38-39; *Humphrey* at ¶ 11.

B. <u>Applicable law regarding an accused's right to confront the State's witnesses at trial.</u>

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." Sixth Amendment to the U.S. Constitution. In *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court of the United States explained the proper relationship of the Confrontation Clause to state rules of evidence: "Where 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 *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." But regarding testimonial statements, the Court explained:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at

> odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.*

(Emphasis added.) *Id.* at 61.

The right to confrontation applies to both federal and state prosecutions. *Id.* at 42, citing *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The Confrontation Clause bars admission of testimonial hearsay statements absent the declarant's unavailability *and* the defendant's prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. "Testimonial statements" include statements which were made during a police interrogation. *Id.*; *see also Williams*, 2012 U.S. LEXIS 4658 at *82-83 (Breyer, J., concurring) ("As the plurality notes, in every post-*Crawford* case in which the Court has found a Confrontation Clause violation, the statement at issue had the primary purpose of accusing a targeted individual."); *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

The Confrontation Clause does not bar the admission of testimonial statements for purposes other than establishing the truth of the matter asserted. *Crawford*, 541 U.S. at 59, fn. 9, citing *Street*, 471 U.S. at 409. That holding was recently affirmed in *Williams*, 2012 U.S. LEXIS 4658 at *15-16, 35-36. But if the testimonial statements are admitted for truth-of-the-matter purposes, the Sixth Amendment's guarantee of confrontation applies. *See Crawford*, 541 U.S. at 61; *Williams*, 2012 U.S. LEXIS 4658 at *15-16, 35-36.

In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Court held that the admission of a codefendant's confession during a joint trial deprives a defendant of his right to confrontation when the codefendant does not take the stand and face cross-examination. The Court explained its confrontation-based concerns in *Lee v. Illinois*, 476 U.S. 530, 542, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986):

> Our ruling in *Bruton* illustrates the extent of the Court's concern that the admission of this type of evidence will distort the truthfinding process. In *Bruton*, we held that the Confrontation Clause rights of the petitioner were violated when his codefendant's confession was admitted at their joint trial, despite the fact that the judge in the case had carefully instructed the jury that the confession was admissible only against the codefendant. We based our decision in *Bruton* on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied.

And in *State v. Issa*, 93 Ohio St.3d 49, 60, 752 N.E.2d 904 (2001), this Court noted the inherent constitutional flaw in allowing an alleged accomplice's inculpatory, out-of-court statement into evidence, absent the accused's ability to cross-examine:

> In *Lilly v. Virginia* (1999), 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (plurality opinion), the lead opinion recognized that the type of hearsay statement challenged herein, *i.e., an out-of-court statement made by an accomplice that incriminates the defendant, is often made under circumstances that render the statement inherently unreliable.* For example, when a declarant makes such a statement to officers while he is in police custody, *the declarant has an interest in inculpating another so as to shift the blame away from himself. In that situation, a declarant will often admit to committing a lesser crime and point to an accomplice (the defendant) as the culprit in a more serious crime.* While the statement is technically against the declarant's penal interest, *it is also self-serving and, for that reason, particularly deserving of cross-examination when used as evidence against the defendant.*

(Emphasis added.) *Id.* Moreover, this Court acknowledged the fact that "the Confrontation Clause may bar the admission of evidence that would otherwise be admissible under an exception to the hearsay rule." *Issa* at 59-60.

C. <u>The officer's-conduct-during-an-investigation doctrine must not be used as an end-run around the Confrontation Clause.</u>

While the state evidence rules attempt to quell the undue prejudicial impact of certain trial evidence, the protections afforded by those rules do not give full meaning to the Sixth Amendment's guarantee that an accused has the right to in-court confrontation. That is, if the State wishes to introduce a non-testifying codefendant's out-of-court, testimonial statements at

trial, a genuine inquiry must be made into whether the statements comply with constitutional mandates. *See Street*, 471 U.S. at 417; *Williams*, 2012 U.S. LEXIS 4658 at *90-98 (Thomas, J., concurring). Constitutional mandates must preempt evidentiary rules.

In Mr. Ricks's case, the supposed not-for-the-truth statements were made by Mr. Gipson, Mr. Ricks's alleged partner-in-crime. Those statements were used for truth-of-the-matter purposes, directly implicated Mr. Ricks, and provided substantive evidence of Mr. Ricks's guilt. (Tr. 340-42, 432-50); *see also Ricks* at ¶ 126-35 (Yarbrough, J., dissenting). But because the trial court purported to find *some* not-for-the-truth-of-the matter component to the statements, it improperly excused the severe Confrontation Clause violation that occurred when Mr. Gipson's statements were disclosed to the jury. This Court's holding in *Thomas* was limited (and considerably pre-dates *Crawford*). Its progeny was overextended in derogation of Mr. Ricks's right to confront the witnesses against him.

Again, this case is about legitimate consideration by Ohio's courts of whether evidence is truly offered for not-for-the-truth purposes. *See Street*, 471 U.S. at 417; *Williams*, 2012 U.S. LEXIS 4658 at *90-98 (Thomas, J., concurring). Here, the trial court did not make a considered, proper determination regarding the substantive nature of Mr. Gipson's assertions. By failing to properly consider Mr. Ricks's right to confrontation, the lower courts erred, and this Court should reject the rationale that those courts used to allow the patent violation of Mr. Ricks's constitutional rights.

Again, the following happened during Mr. Ricks's trial court proceedings:

- Mr. Ricks expressed his concern that the State would use Mr. Gipson's assertions that Mr. Ricks was involved in the crimes, and that Mr. Gipson had identified Mr. Ricks for the police. (Tr. 317-24). The trial court stated that "definitely the statements are

concerning," but cited to *Blevins*, 36 Ohio App.3d at 149, and its progeny, and ruled that the statements could be admitted because they explained an officer's conduct during an investigation.

- The prosecutor told the jury that Mr. Gipson had been a "suspect"; that Mr. Gipson was pulled in for questioning; that the police wondered who was with Mr. Gipson on the night before the shooting; that they "tried to identify" that person; that the police drove Mr. Gipson to the area where Mr. Ricks had been staying; that Mr. Gipson pointed out Mr. Ricks; that Mr. Gipson became visibly scared; that the police thereafter obtained a photograph of Mr. Ricks; and that when Mr. Gipson looked at the photograph, he said "that's him." (Tr. 340-42). Mr. Ricks's objections were overruled. (Tr. 340-42).
- During the State's presentation of evidence, Officer Steckel told the jury that he spoke with Mr. Gipson about the crimes; that he had learned that there were *two* suspects (including Mr. Gipson); that he was told that the other suspect was called "Peanut"; that he spoke with Mr. Gipson for the purpose of determining who Peanut was; that Mr. Gipson provided a description of Peanut; that the officer drove Mr. Gipson to the area where Peanut (Mr. Ricks) was staying because Mr. Gipson knew Peanut; that they were trying to make an identification of Peanut; that Mr. Gipson *pointed out Peanut and said "that's Peanut"*; that they went back to the police station and came up with the name Thomas Ricks; that Officer Steckel obtained a photograph of Mr. Ricks; that he showed that photograph to Mr. Gipson; and that Mr. Gipson identified Mr. Ricks and said "*that's Peanut*." (Emphasis added.) (Tr. 432-50). Mr. Ricks's objections were overruled under the authority of *Blevins* and its progeny, and a curative instruction was given. (Tr. 432-50).

- Mr. Ricks renewed his motion for a mistrial. (Tr. 1220). During the State's closing argument, the prosecutor highlighted Mr. Gipson's out-of-court statements in arguing that Mr. Ricks committed the crimes. (Tr. 1238-40).

Mr. Gipson's out-of-court statements asserted a proposition that was essential to the State's case. Simply put, Mr. Gipson's statements were offered to establish that Mr. Ricks participated in the robbery and murder. *See* Evid.R. 801(C). That is apparent from what Mr. Gipson said, how his assertions were used, and the fact that the assertions were wholly unnecessary to merely explain the officer's conduct during the investigation.

If Mr. Gipson's statements were introduced to simply explain where the police went and why, the inculpatory details within the statements were unnecessary. An indication that the investigation into Mr. Gipson's involvement led to Mr. Ricks might have been permissible. But that is not all that happened. Instead, Officer Steckel told the jury that Mr. Gipson, who was obviously a suspect when the police spoke to him, pointed to Mr. Ricks and said "that's him." That is, Mr. Gipson's verbal and non-verbal indications identified Mr. Ricks as having been involved. *See* Evid.R. 801(A). His statements were used to imbed in the jurors' minds the truth of the matters asserted—that Mr. Ricks was also involved in the crimes, and Mr. Gipson knew that he was involved in the crimes. As noted by the dissenting judge in *Ricks*: "Under the hearsay rule Gipson's disputed statements were functionally indistinguishable from those of the paradigm out-of-court declarant." *Ricks* at ¶ 110 (Yarbrough, J., dissenting). That is, the facts that the State sought to prove at trial and the substantive content of Mr. Gipson's out-of-court statements coincided. Those statements told the jury that Mr. Ricks was not only in the crime-scene area on the night before the victim was robbed and murdered, but that he committed the robbery and murder along with Mr. Gipson.

Further, the impact of Mr. Gipson's non-verbal and verbal assertions was strategically used by the State during its arguments to the jury. (Tr. 1238-40). The prosecutor did not just tell the jury what the police had done. He told the jury that a person who was clearly involved in the offenses had directly incriminated Mr. Ricks, and had identified Mr. Ricks as the man who acted in concert with him.

Neither lower court accurately addressed whether Mr. Gipson's out-of-court statements were offered at trial for the truth of the matters asserted by the State. Moreover, the court of appeals wholly failed to consider the statements in the context of Mr. Ricks's rights under the Confrontation Clause. *See Ricks* at ¶ 59-69. In its majority opinion, the appellate court quoted from two decisions of the Supreme Court of the United States—*Lilly*, 527 U.S. at 123-24, and *Craig*, 497 U.S. at 845—both of which involved the Confrontation Clause. *Ricks* at ¶ 66. But the court of appeals went no further than mentioning those cases, and it swiftly shifted its focus to *Blevins* and its officer's-conduct-during-an-investigation analysis. *Id.* at ¶ 67-69. The Court summarily rejected Mr. Ricks's confrontation-based claims and stated its belief that Mr. Gipson's out-of-court statements did not involve any attempt to exonerate himself or implicate Mr. Ricks. *Id.* The court ignored the fact that Mr. Gipson pointed to Mr. Ricks and identified Mr. Ricks as having been involved. And it failed to recognize that Mr. Gipson's assertions were unnecessary to, and went far beyond, the explanation of police conduct.

The Confrontation Clause applies to this case. Mr. Gipson's out-of-court statements were submitted and used for the truth of the matters asserted. They were not subject to any exception to the general rule against the admission of hearsay. *See* Evid.R. 801; Evid.R. 802; Evid.R. 803; Evid.R. 804. Moreover, Mr. Gipson's statements were testimonial under any fair reading of Confrontation Clause jurisprudence. They came in response to questions asked by the police

during the course of the criminal investigation. Further, they functioned to accuse a target of the investigation. *See Crawford*, 541 U.S. at 68; *see also Williams*, 2012 U.S. LEXIS 4658 at *82-83 (Breyer, J., concurring); *Davis*, 547 U.S. at 822. Accordingly, if the State wished to use Mr. Gipson's incriminations against Mr. Ricks at trial, the reliability of those implications had to be "assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. That did not happen.

The dissenting judge correctly stated that Mr. Ricks's convictions for aggravated robbery and aggravated murder were reversible under the rules of evidence and case law addressing the introduction and use of out-of-court statements. But as a whole, the court failed to consider Mr. Ricks's claims under the Confrontation Clause. This Court's limited holding in *Thomas* was transformed from one which addressed the proper functioning of the hearsay rule. Instead, it was relied on to thwart Mr. Ricks's Sixth Amendment right to confrontation, and this Court's confrontation-based cautions, *see Issa* at 59-60, were brushed aside. The hearsay-based holding in *Thomas* only makes sense if the introduction at trial of contested out-of-court statements does not conflict with the Sixth Amendment.

Finally, even if Mr. Gipson's statements were necessary to complete the State's case against Mr. Ricks, they were still barred by the Confrontation Clause. Considered inquiry into whether a statement is actually offered for not-for-the-truth purposes cannot be replaced with a doctrine that amounts to default admissibility. If the State needed Mr. Gipson's inculpatory testimony to link Mr. Ricks to the offenses, Mr. Ricks was entitled to place those statements in the time-honored crucible of cross-examination in front of the jury. Again, that did not happen.

III. The trial court's error was not harmless beyond a reasonable doubt. Mr. Ricks's case must be remanded for a new trial on the charges of aggravated robbery and aggravated murder.

This was an identity case. For the most part, the State sought to connect Mr. Ricks to Mr. Gipson. The eyewitness identifications of Mr. Ricks by Ms. Harper, Ms. Poole, and Ms. Farris, were obtained under profoundly suggestive conditions, as determined by the trial court. (*See* Sept. 30, 2009, Judgment Entry, at p. 13). That is, those witnesses recognized all, or nearly all, of the *other* individuals who were depicted in the photographic array. (Apr. 23, 2009, Suppression Hearing Tr. 39-41, 84-85, 90, 97-78; Tr. 498-514, 528-40, 560-73). The appellate court admitted that "there [was] not a significant amount of corroborating evidence." *See Ricks* at ¶ 48.

Mr. Ricks repeatedly objected to the introduction of Mr. Gipson's hearsay statements. (Tr. 317-24, 432-50). When those erroneously admitted statements are compared to other inculpatory evidence which was brought forth against Mr. Ricks—i.e., Mr. Ricks's recorded telephone calls, the bus ticket, or his statements to the police in which he denied his past presence in Ohio, (Tr. 850-1033)—and the fact that no physical evidence linked Mr. Ricks to the crime scene, it cannot be said that the trial court's error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996 (2006), ¶ 74 ("Whether a Sixth Amendment error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.").

While the appellate court's majority noted the lack of evidence supporting the flawed eyewitness identifications, the dissenting judge provided a good explanation of why those

identifications had limited inculpatory value in comparison to Mr. Gipson's statements: "[T]he testimony of these witnesses only established appellant's *presence* in the neighborhood on the day of the crimes, whereas the content of Gipson's statements involved him directly *in* the crimes. . . ." (Emphasis sic.) *Ricks* at ¶ 134 (Yarbrough, J., dissenting). He further stated:

> In assessing the impact of this testimony, and despite the limiting instruction, I cannot say conclusively that the jury focused *only* on the other witnesses' testimony to support conviction. Indeed, there is more than a reasonable possibility that the erroneously admitted hearsay—and its misuse—contributed to appellant's murder and robbery convictions.

(Emphasis sic.) *Id.* at ¶ 134-35 (Yarbrough, J., dissenting).

Indeed, as expressed by the Supreme Court of the United States in *Lee,* when a codefendant's unchecked incrimination of the accused is admitted through hearsay, the ordinary presumption that a jury will follow a trial court's curative instruction does not apply. *Lee*, 476 U.S. at 542-43. Mr. Ricks is entitled to a new trial. *See Chapman*, 386 U.S. at 24.

CONCLUSION

In *Thomas*, this Court provided guidance regarding the proper function of Ohio's hearsay rules as related to police testimony in a criminal trial. That guidance has been misused to create an impermissible end-run around an accused's right to confrontation. Although the Confrontation Clause does not bar the admission of an out-of-court, testimonial statement if that statement is not offered for the truth of the matter asserted (i.e., if the statement is not hearsay), here Mr. Ricks's non-testifying codefendant, Mr. Gipson, made testimonial, incriminating statements that *were* offered for the truth of the matters asserted. Those statements were hearsay not subject to any exception, and the State relied on them to make their case against Mr. Ricks.

The premise that statements are not offered for the truth of the matters asserted if they are merely offered to explain police conduct during an investigation was abused. Indeed, when a

trial court is tasked to address such a situation, confrontation-based concerns must be given paramount consideration, and cannot be shrugged off in favor of default admissibility. Because Mr. Gipson's statements were submitted through an investigating officer, and because Mr. Gipson did not take the stand and detail his statements himself, Mr. Ricks was denied his right to test Mr. Gipson's accusations in the crucible of cross-examination.

Given the impact of Mr. Gipson's inculpatory statements under the facts of Mr. Ricks's case, the trial court's errors were not harmless beyond a reasonable doubt. And given the fact that the State did not limit its use of those statements to not-for-the-truth-of-the-matter purposes—rather, the State used the statements to link Mr. Ricks to Mr. Gipson and argue that Mr. Ricks was guilty of the offenses—no curative instruction could right the trial court's error.

Mr. Ricks's rights to due process and a fair trial were violated. This Court must reverse the judgment of the court of appeals and remand Mr. Ricks's case for a new trial on the charges of aggravated murder and aggravated robbery.

Respectfully submitted,

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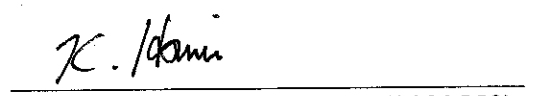
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLANT THOMAS J. RICKS was forwarded by regular U.S. Mail on this 9th day of July, 2012, to Kevin J. Baxter, Erie County Prosecuting Attorney, Erie County Prosecutor's Office, 247 Columbus Avenue, Suite 319, Sandusky, Ohio 44870.



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#371394

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2011-1912
Plaintiff-Appellee,	:	
	:	On Appeal from the Erie
vs.	:	County Court of Appeals,
	:	Sixth Appellate District
THOMAS J. RICKS,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. E-10-022

APPENDIX TO

MERIT BRIEF OF APPELLANT THOMAS J. RICKS

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 11-1912
Plaintiff-Appellee,	:	
vs.	:	On Appeal from the Erie County Court of Appeals, Sixth Appellate District
THOMAS J. RICKS,	:	
Defendant-Appellant.	:	Court of Appeals Case No. E-10-022

NOTICE OF APPEAL OF APPELLANT THOMAS J. RICKS

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FILED
NOV 10 2011
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT VINCENT D. WILLIAMS

Appellant Thomas J. Ricks hereby gives notice of his appeal to the Supreme Court of Ohio from the judgment of the Erie County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case E-10-022 on September 30, 2011.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF APPEAL OF APPELLANT THOMAS J. RICKS was forwarded by regular U.S. Mail on this 10th day of November, 2011, to Kevin J. Baxter, Erie County Prosecuting Attorney, Erie County Prosecutor's Office, 247 Columbus Avenue, Suite 319, Sandusky, Ohio 44870.

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[Cite as *State v. Ricks*, 196 Ohio App.3d 798, 2011-Ohio-5043.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

The State of Ohio,

Appellee,

v.

Ricks,

Appellant.

Court of Appeals No. E-10-022

Trial Court No. 2008-CR-282

DECISION AND JUDGMENT

Decided: September 30, 2011

* * * * *

Kevin J. Baxer, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio Public Defender, and
Kristopher A. Haines, Assistant Public Defender, for appellant.

* * * * *

PIETRYKOWSKI, Judge.

{¶ 1} Defendant-appellant, Thomas Ricks, appeals the May 4, 2010 judgment entry of the Erie County Court of Common Pleas that, following a jury trial convicting him of aggravated murder, aggravated robbery, complicity to trafficking in marijuana, and complicity to trafficking in cocaine, sentenced appellant to life imprisonment without the possibility of parole plus 26 years. For the reasons that follow, we affirm in part, reverse in part, and remand for resentencing.

{¶ 2} The relevant facts of this case are as follows. On May 9, 2008, appellant was indicted on two counts of aggravated murder, R.C. 2903.01(A) and 2903.01(B), with gun specifications, one count of aggravated robbery, R.C. 2911.01(A)(1), one count of trafficking in marijuana, R.C. 2925.03(A)(1) and 2925.03(C)(3)(c), and one count of trafficking in cocaine, R.C. 2925.03(A)(1) and 2925.03(C)(4)(e). The aggravated-murder charge included a death-penalty specification. R.C. 2929.04(A)(7). The charges stemmed from the March 11, 2008 murder and robbery of Calvin Harper Jr. in Sandusky, Erie County, Ohio. Appellant entered not-guilty pleas to the counts.

{¶ 3} On January 12, 2009, appellant filed a motion to suppress the identification of appellant, by three witnesses, by use of a photo array that he claimed was unduly suggestive. Specifically, appellant argued that the lighting and the angle of his photograph "overtly or subliminally" pointed to him as the suspect. During the April 23, 2009 suppression hearing, it was also discovered that the eyewitnesses knew several of the other individuals placed in the array.

{¶ 4} On June 3, 2009, the trial court denied appellant's motion to suppress. Appellant requested findings of fact and conclusions of law, and on September 30, 2009, the court issued a detailed, 13-page judgment entry that analyzed the identification procedure under the test set forth in *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401. In its entry, the trial court found that the identification procedure was not unduly suggestive and also rejected the argument that the differences in the photo itself made the array unduly suggestive. However, the court found that considering the subtle differences in the photo and because the witnesses knew the other individuals in the array, the array was unduly suggestive. The court ultimately

concluded that the reliability of the identifications outweighed any likelihood of misidentification.

{¶ 5} In the interim, on June 25, 2009, appellant filed a motion for court funds to appoint an identification expert. Appellant argued that because identification was a key component in the case, appointment of an expert was necessary to explain the difficulties inherent in the identification-array procedure. On February 1, 2010, the motion was denied. On April 5, 2010, appellant orally renewed the motion, stating that he had contacted an expert in Ohio who would cost less. On April 12, 2010, the court summarily denied the motion, noting that no new arguments were presented.

{¶ 6} On October 15, 2009, the court granted the state's motion to dismiss the death-penalty specification and to join the two defendants for trial. Appellant opposed the joinder and, on February 1, 2010, separate trials were ordered.

{¶ 7} On April 20, 2010, appellant's jury trial commenced. According to the state's testimony, on March 10, 2008, appellant and his co-defendant, Aaron Gipson, drove down from the Canton, Michigan area; the two played cards at witness Crystal Harris's apartment with the victim's sister, Chanel Harper. Co-defendant Aaron Gipson was a reputed drug dealer and known to the victim's family and friends.

{¶ 8} Witnesses testified that the victim had a large sum of money in his apartment and planned to purchase drugs from Gipson, a supplier, and then sell the drugs. The victim's neighbor and confidant, Rhonda Farris, testified that between 4:00 and 5:00 p.m., a man she later identified as appellant mistakenly knocked on her door. Farris immediately called Harper to tell

him that someone was looking for him. According to Farris, the victim indicated that he was expecting the man. Farris never spoke to the victim again and, the next day, discovered his body.

{¶ 9} Three eyewitnesses identified appellant from a photo array. Farris, as stated above, Crystal Pool, and Chanel Harper each identified appellant as the man with Aaron Gipson on March 10, 2008. All three women knew either a few or all of the other individuals in the photo array.

{¶ 10} The state focused, in depth, on the cellular telephone records of Gipson from March 10 through March 11, 2008. Depending on how rural or urban the area, the records were able to show, within a ten-mile to two-block radius, which cell tower the cell phone was transmitting from. The evidence showed that on March 10, 2008, returning to Canton, Michigan, from Sandusky, Gipson drove north, past the Canton area to the area where appellant had been living, and then proceeded back south to home. On March 11, 2008, prior to proceeding to Sandusky, Gipson again drove north from his home to the area where appellant lived. Further, after the time of Harper's murder, Gipson again went north, then turned back south and went to a casino in Detroit. Appellant did not have a cellular telephone, but there were calls made from Gipson's number to Deotis Sears's cell phone. Sears was appellant's uncle, and he had been living with him.

{¶ 11} There was also testimony that appellant denied knowing Gipson. Further, appellant stated to police that he was living in Atlanta, Georgia (where he was ultimately arrested) and that he had returned to Atlanta on February 19, 2008. However, police found a bus ticket from Michigan to Atlanta dated March 28, 2008. There were also incriminating, though cryptic, statements recorded in jail telephone conversations from appellant to his girlfriend.

{¶ 12} Police testified, over objection, that appellant's co-defendant, Gipson, pointed him out to police while they drove him by where he was residing. Further, appellant's former brother-in-law, Dewon Smith, testified that Aaron Gipson is a friend of the Hicks family and that appellant knew him. Smith testified that on March 10, 2008, Gipson picked up appellant at his home; he returned later that night.

{¶ 13} Following the presentation of evidence, the jury found appellant guilty of aggravated murder, aggravated robbery, and the drug charges. This appeal followed.

{¶ 14} Appellant now raises the following seven assignments of error for our review:

{¶ 15} "Assignment of Error I: The trial court committed reversible error when it allowed into evidence at Mr. Ricks' trial unreliable eyewitness identification evidence, in violation of Mr. Ricks' Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

{¶ 16} "Assignment of Error II: The trial court abused its discretion and denied Mr. Ricks the ability to present a complete defense to the State's charges when it denied his motions for a court-appointed expert regarding eyewitness identification, in violation of Mr. Ricks' rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

{¶ 17} "Assignment of Error III: Mr. Ricks was denied his right to confront the evidence against him at trial, in violation of his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶ 18} "Assignment of Error IV: The cumulative nature of the trial court's errors during Mr. Ricks' trial, as presented within Assignments of Error I, II, and III, denied Mr. Ricks' rights

to a fair trial and due process of law, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

{¶ 19} "Assignment of Error V: The trial court violated Mr. Ricks' rights to due process and a fair trial when, in the absence of sufficient evidence, the trial court convicted Mr. Ricks of complicity to trafficking in marijuana and complicity to trafficking in cocaine, in violation of Mr. Ricks' Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

{¶ 20} "Assignment of Error VI: The trial court committed plain error when it failed to merge the firearm specifications regarding Mr. Ricks' convictions for aggravated murder and aggravated robbery, in violation of R.C. 2929.14(D)(1)(b), and in violation of Mr. Ricks' rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

{¶ 21} "Assignment of Error VII: Defense counsel rendered ineffective assistance of counsel in violation of Mr. Ricks' rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution."

{¶ 22} In appellant's first assignment of error, he asserts that the trial court erred in denying his motion to suppress the photo-array identifications where the size and lighting of appellant's photo, combined with the fact that the witnesses knew many of the individuals in the lineup, were so unduly suggestive that the reliability of the identifications could not outweigh the prejudicial effect.

{¶ 23} Initially we note that review of a trial court's grant or denial of a motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-

Ohio-5372, 797 N.E.2d 71, ¶ 8. An appellate court defers to a trial court's factual findings made with respect to its ruling on a motion to suppress when the findings are supported by competent, credible evidence. Id.; *State v. Brooks* (1996), 75 Ohio St.3d 148, 154, 661 N.E.2d 1030. "[T]he appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside* at ¶ 8, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 24} The United States Supreme Court has considered due process limitations on the use of evidence derived through suggestive identification procedures. The court used a two-prong analysis: "When a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances." *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, 588 N.E.2d 819, superseded by constitutional amendment on other grounds, citing *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401; *Manson v. Brathwaite* (1977), 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140. The first question is whether the identification procedure was unnecessarily suggestive of the defendant's guilt. *Id.* The second is "whether, under all the circumstances, the identification was reliable, *i.e.,* whether suggestive procedures created 'a very substantial likelihood of irreparable misidentification.' " *Id.* at 439, quoting *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247.

{¶ 25} On April 23, 2009, a suppression hearing was held. Sandusky Police Detective Gary Wichman testified that after interviewing appellant's co-defendant, Aaron Gipson, in Canton, Michigan, appellant was identified as a suspect in the death of Calvin Harper. A

photograph was obtained from Cobb County, Georgia, and was e-mailed to Sandusky County. Using the photograph, a photo array was developed. Appellant's photograph was placed in slot six (out of eight).

{¶ 26} Detective Wichman testified that he was present when the array was shown to two of the three witnesses. Rhonda Farris, the victim's neighbor, was told that the police had a suspect and that he was in the array. Farris identified appellant as the individual who mistakenly knocked on her door just prior to the murder. According to Wichman, Chanel Harper, the victim's sister, identified appellant after she played cards for a few hours with him and Gipson. That was the first occasion she had met appellant.

{¶ 27} During cross-examination, Wichman was questioned regarding the reflection on appellant's face in the photograph. Wichman said that he had not noticed it until defense counsel pointed it out.

{¶ 28} Detective Eric Graybill testified that he compiled the photo array. Graybill stated that in compiling the array, he looked for photographs with similar backgrounds and individuals with similar physical characteristics. Detective Graybill stated that the photographs were selected from those already in the department's system. Graybill said that he did not know where the other individuals in the array lived.

{¶ 29} The three witnesses who identified appellant testified. Crystal Pool testified that on March 10, 2008, she spent a few hours with appellant at her friend's house. That was the first time she had met appellant. Regarding the photo array, Pool admitted that she knew "just about everybody in the picture," but that she recognized appellant, too. Pool testified that she would never forget his eyes.

{¶ 30} Chanel Harper testified that the victim was her brother. Harper stated that Gipson and appellant were at her home on March 10, 2008. Regarding the photo array, Harper testified that she knew "mainly all of" the individuals in the array and went to school with some of them. Harper stated that she was "very sure" of her identification.

{¶ 31} Rhonda Farris testified that she lived next door to the victim and that just before the murder, a man mistakenly knocked on her door. Farris testified that they were approximately six inches apart. Farris testified that she was "very sure" that the individual was appellant, and she picked him out of the photo array. Farris stated that her cousin was in the array and that she knew all the others. Farris stated that she "picked him out first" before she even looked at the other photos.

{¶ 32} Detective Helen Prosowski testified that she presented the photo array with Detective Wichman, separately, to Chanel Harper and Rhonda Farris. It was presented approximately ten days after the murder. Prosowski testified that both women immediately identified appellant.

{¶ 33} As set forth above, the trial court found that the subtle differences in the photograph, combined with the fact that the witnesses knew some or all of the individuals in the array, made the array unduly suggestive. However, the court ultimately concluded that their certainty in identifying appellant combined with the relatively short length of time between the crime and the array negated any likelihood of misidentification.

{¶ 34} Appellant's chief argument is that because the witnesses knew the other individuals in the array, they would, by process of elimination, be more likely to identify

appellant as the alleged perpetrator. Ohio courts have not squarely addressed this issue; however, it has been dealt with in other jurisdictions.

{¶ 35} In *State v. Battle* (2008), 312 Wis.2d 481, 751 N.W.2d 903, the victim was shot multiple times by a group of four men, including the appellant. The victim identified appellant from a photo array. Defense counsel moved to suppress the identification. The motion was denied.

{¶ 36} At some point it was revealed that the victim knew all of the people in the six-person photo array. The court concluded that the appellant failed to demonstrate that the array was unduly suggestive. The court noted that the detective did not suggest to the victim who to pick and that the victim immediately recognized and identified the appellant. The court noted that "[t]he fact that [the victim] recognized all of the people depicted in the array from the neighborhood" did not affect the reliability of the identification.

{¶ 37} Similarly, in *State v. Stokes* (Kan.App.2004), 87 P.3d 375, an unknown passenger in a vehicle shot another passenger and stole his money. The victim identified the appellant from a six-person photo array. Though he quickly identified the appellant, he admitted that he knew four of the individuals in the array.

{¶ 38} In its analysis, the court noted that prior to the identification, the detective did not know that the victim knew the other individuals. Further, there was no evidence that the detective suggested the appellant's photo to the victim. The court concluded that even if the array was suggestive, the identification was reliable.

{¶ 39} Finally, in *People v. James* (1963), 218 Cal.App.2d 166, 32 Cal.Rptr. 283, and *Younger v. Delaware* (Del.1985), 496 A.2d 546, ununiformed police officers were placed in the

lineups. Some of the witnesses knew one or more of the individuals. The courts allowed the identifications focusing on the certainty of the identification.

{¶ 40} Appellant also argued that Detective Wichman's statement that a suspect was included in the photo array was unduly suggestive. In *State v. Starks*, 6th Dist. Nos. L-05-1417 and L-05-1419, 2007-Ohio-4897, 2007 WL 2745360, this court noted that a police officer's statement that a suspect was included among those in the array, without more, was not impermissibly suggestive. We noted that "[i]t seems not unreasonable for a witness to assume that any time police show a photo array, one of the pictures there is of an individual of police interest." *Id.* at ¶ 33.

{¶ 41} In the present case, we cannot say that the trial court erred when, despite finding the array unduly suggestive, it denied appellant's motion to suppress the identifications. First, Chanel Harper and Crystal Pool spent an extended period of time with the suspect and were very certain that appellant was the individual with Gipson. Farris, although she only saw appellant for a brief period of time, was also very certain in her identification. The suspect was approximately six inches from her face and it was still light outside. Next, the identification was made within a short period of time. Further, the officers testified that they did not intend to put known individuals in the array and, in fact, only learned of this fact at the hearing. In its September 30, 2009 judgment entry, the court thoroughly addressed all the relevant factors in assessing the reliability of the identification. Thus, under the totality of the circumstances, we find that the identifications were reliable and there was no likelihood of misidentification. Appellant's first assignment of error is not well taken.

{¶ 42} In appellant's second assignment of error, he contends that the trial court erred when it denied his request for a court-appointed identification expert. Specifically, appellant argues that an expert was necessary because the eyewitness identifications were critical in his case due to the lack of physical evidence linking him to the crime. Conversely, the state argues that the case law relied upon by appellant is distinguishable in that multiple witnesses identified appellant and there was additional evidence linking him to the crime. Thus, the jury was capable of assessing the witnesses' ability to observe and remember.

{¶ 43} R.C. 2929.024 requires the trial court to grant funds in aggravated-murder cases for investigative services and experts when "reasonably necessary for the proper representation" of indigent defendants. In *State v. Mason* (1998), 82 Ohio St.3d 144, 694 N.E.2d 932, syllabus, the Supreme Court of Ohio held that due process "requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." See also Evid.R. 702.

{¶ 44} In addition, such testimony is generally admissible only as to factors that may affect the accuracy of a typical, not a particular, eyewitness identification. *State v. Dewitt*, 2d Dist. No. 21620, 2007-Ohio-3437, 2007 WL 1934335, ¶ 67, citing *State v. Buell* (1986), 22 Ohio St.3d 124, 131, 489 N.E.2d 795. This is so because it is the jury's role to assess the credibility of the witness. *Id.* at 132.

{¶ 45} Relied on by appellant, in *State v. Bradley*, 181 Ohio App.3d 40, 2009-Ohio-460, 907 N.E.2d 1205, the court concluded that an eyewitness-identification expert was necessary to

the appellant's defense where his identity hinged on the identification of the sole witness and victim, the victim had been subjected to a stressful event, the identification was cross-racial, and the identification was made 30 days after the incident. Similarly, in *State v. Sargent*, 169 Ohio App.3d 679, 2006-Ohio-6823, 864 N.E.2d 155, the victim, robbed at gunpoint, was the sole witness. The court determined that under the circumstances, because the identification may be unreliable, the court abused its discretion in denying the motion for an identification expert. *Id.* at ¶ 13.

{¶ 46} Distinguishing *Bradley*, in *State v. Clark*, 8th Dist. No. 94406, 2010-Ohio-5600, 2010 WL 4684471, the Eighth Appellate District found that the trial court did not abuse its discretion in denying a motion to allow expert testimony. Though a relevancy, not a funding, issue, the court denied the expert, noting that the identification was made just days after the crime and that the identification was not cross-racial. *Id.* at ¶ 23.

{¶ 47} In *State v. Gray*, 8th Dist. No. 92303, 2010-Ohio-240, 2010 WL 320481, although the circumstances of the identification were similar to *Bradley* and *Sargent*, the court held that the trial court did not err when it denied the defendant's request for an eyewitness-identification expert. Unlike those cases, the court concluded that because there was an abundance of corroborating evidence, there was no reasonable probability that an identification expert would aid in his defense. *Id.* at ¶ 51.

{¶ 48} The present case is distinguishable from *Bradley* and *Sargent* in that the identifications were not made while the eyewitnesses were under stress and they were not cross-racial. In addition, the identifications were made approximately ten days after the murder. Admittedly, unlike *Gray*, there is not a significant amount of corroborating evidence.

{¶ 49} During appellant's trial, the witnesses were thoroughly questioned about their identification of appellant. Chanel Harper testified that she was 100 percent sure that appellant was the individual at her home with Gipson. Harper stated that even though she recognized others in the array, her eyes went directly to appellant's photo. Similarly, Crystal Pool stated that she remembered appellant's eyes and that she was 100 percent sure of her identification. Harper admitted to knowing some of the other people in the array, but stated that it did not affect her certainty that she had correctly identified appellant.

{¶ 50} Rhonda Farris testified that her knowledge of the individuals in the photo array (including her cousin) did not affect her certainty that on March 11, 2008, appellant was the individual who knocked on her door. Farris stated that she did not identify the other individuals in the array until she pointed out appellant.

{¶ 51} At the conclusion of the trial, the court instructed the jury as to the *Neil v. Biggers* factors to consider in weighing the identifying witness testimony. The court stated:

{¶ 52} "Number One. Capacity of the witness, that is, the age, intelligence, defective senses, if any, and the opportunity of the witness to observe.

{¶ 53} "Two. The witness' degree of attention at the time he or she observed the subject.

{¶ 54} "Three. The accuracy of witness' prior description or identification, if any.

{¶ 55} "Four. Whether witness had occasion to observe defendant in the past.

{¶ 56} "Five. The interval of time between the event and the identification.

{¶ 57} "Six. All surrounding circumstances on which witness had identified defendant, including deficiencies, if any, in any lineup, photo display, or one-on-one."

{¶ 58} Based on the foregoing, we cannot say that the trial court abused its discretion when it denied appellant's request for an identification expert. Appellant's second assignment of error is not well taken.

{¶ 59} Appellant's third assignment of error asserts that the trial court denied his right to confront witnesses by allowing, over objection, the introduction of inculpatory statements by appellant's nontestifying co-defendant. Specifically, appellant objected to testimony that co-defendant Gipson identified him for the police. Conversely, the state contends that the testimony was offered only to explain the officers' conduct during the course of the investigation.

{¶ 60} The testimony at issue was elicited during the direct examination of Canton, Michigan, police officer Michael Steckel. Officer Steckel testified that he was contacted by the Sandusky Police Department regarding shooting suspects Aaron Gipson and an individual nicknamed "Peanut." In order to identify Peanut, Steckel and another officer drove Gipson to Strathmoor Street, on the west side of Detroit, where Gipson said that Peanut lived. Over objection, Steckel stated that Gipson identified Peanut, who was standing in front of the residence.

{¶ 61} Once Gipson identified Peanut, further investigation revealed appellant's name. Steckel testified that they were able to obtain a photograph from another state, which was forwarded to Sandusky. The officers then showed Gipson the photograph of appellant and asked him if it was Peanut. Defense counsel objected, and a bench conference was held. Thereafter, the court issued the following curative instruction:

{¶ 62} "Ladies and gentlemen of the jury, one of the things that you just heard a few seconds ago from the State was – was hearsay, and there's a concern all the time that statements

are made outside of Court and that actual person doesn't come into Court and testify and is not subject to cross examination. There are certain exceptions in the law and that deals with the Evidence Rules that I spoke about yesterday, that we have to comply with those rules.

{¶ 63} "Sometimes in allowing in information such as that, information that comes in from someone that (inaudible) testify in open Court, there's a purpose for that, and in this case the evidence about Mr. Gipson going with police detectives and, first off, pointing out a residence; second, pointing out the person on the street known as Peanut, and saying that's Peanut, and then later showing the photograph to Mr. Gipson and him saying that's Mr. Ricks, all those are not for the truth of the matter asserted. In other words, they don't necessarily mean that that was Peanut, that man walking down the street, that that was the residence he lived at or that's the photograph, but they're really brought in for the purpose to explain this officer or that department's investigation, why they were doing what they were doing, and the State has laid a foundation, what was your purpose of going out there and those kinds of things. So 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."

{¶ 64} Questioning continued. Officer Steckel testified that he showed Gipson the photograph of appellant and that Gipson stated it was Peanut. At the close of the state's case, the state indicated that Gipson was available to testify per defense counsel's request. Counsel stated that after speaking with appellant, they did not wish to call Gipson as a witness.

{¶ 65} Appellant now argues that the testimony regarding what Gipson told police was hearsay and violated his right to confront Gipson on cross-examination. We first note that the admission or exclusion of evidence rests within the sound discretion of the trial court and,

therefore, such decisions will not be reversed on appeal absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343.

{¶ 66} In all criminal prosecutions, the defendant has a constitutional right to confront the witnesses against him. *Lilly v. Virginia* (1999), 527 U.S. 116, 123, 119 S.Ct. 1887, 144 L.Ed.2d 117. " 'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' " *Id.* at 123-124, quoting *Maryland v. Craig* (1990), 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666.

{¶ 67} Appellant argues that the trial court's reliance on *State v. Blevins* (1987), 36 Ohio App.3d 147, 521 N.E.2d 1105, in allowing the testimony, was in error. In *Blevins*, the court considered the admissibility of an officer's testimony regarding statements of a drug purchaser. The court concluded that the statements were not hearsay; rather, they were offered to show how the officers came to know the defendant. *Id.* at 149. The court noted that the statements "neither implicated nor cleared defendant." *Id.*

{¶ 68} Following *Blevins*, in *State v. Williams*, 10th Dist. Nos. 02AP-730 and 02AP-731, 2003-Ohio-5204, 2003 WL 22232921, a police officer testified that he stopped a vehicle suspected of being used in a robbery. One of the occupants informed the officer that a family member had used the van earlier that day and revealed the family member's location. *Id.* at ¶ 46. The court concluded that there was no hearsay violation and that the officer's testimony was given to explain his conduct during the course of the investigation. *Id.* at ¶ 49.

{¶ 69} 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.

{¶ 70} Appellant's fourth assignment of error contends that based on the cumulative errors set forth above, appellant was denied his right to a fair trial and due process of law. We have stated that "although a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, 2003 WL 22233792, ¶ 32, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus. " 'However, in order even to consider whether "cumulative" error is present, we would first have to find that multiple errors were committed in this case.' " *Hemsley* at ¶ 32, quoting *State v. Madrigal* (2000), 87 Ohio St.3d 378, 398, 721 N.E.2d 52.

{¶ 71} Upon review of appellant's preceding three assignments of error, we cannot say that there were multiple instances of harmless error; accordingly, there can be no cumulative error. Appellant's fourth assignment of error is not well taken.

{¶ 72} In appellant's fifth assignment of error, he argues that his convictions for complicity to trafficking in marijuana and complicity to trafficking in cocaine were not supported by sufficient evidence. In reviewing a claim of sufficiency of the evidence, the relevant inquiry is whether any rational factfinder, viewing the evidence in a light most favorable to the state, could have found all the essential elements of the crime proven beyond a reasonable

doubt. *State v. Jones* (2000), 90 Ohio St.3d 403, 417, 739 N.E.2d 300, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560, and *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (Cook, J., concurring).

{¶ 73} Appellant was convicted of complicity to trafficking in marijuana in the vicinity of a school in an amount greater than 200 grams but less than 1,000 grams, R.C. 2925.03(A)(1) and (C)(3)(c), and 2923.03(A)(2). Appellant was also convicted of complicity to trafficking in cocaine in the vicinity of a school in an amount greater than 100 grams but less than 500 grams, R.C. 2925.03(A)(1) and (C)(4)(e), and 2925.03(A)(2).

{¶ 74} R.C. 2923.03, the complicity statute, provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: * * * (3) Conspire with another to commit the offense in violation of R.C. 2923.012 of the Revised Code * * *."

{¶ 75} The trafficking statute, R.C. 2925.03, provides:

{¶ 76} "(A) No person shall knowingly do any of the following:

{¶ 77} "(1) Sell or offer to sell a controlled substance;

{¶ 78} "* * *

{¶ 79} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶ 80} "* * *

{¶ 81} "(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of trafficking in marihuana. The penalty for the offense shall be determined as follows:

{¶ 82} "* * *

{¶ 83} "(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

{¶ 84} " * * *

{¶ 85} "(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

{¶ 86} " * * *

{¶ 87} "(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, trafficking in cocaine is a felony of the second degree, and the court shall impose

as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree."

{¶ 88} In *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus, the Supreme Court of Ohio held:

{¶ 89} "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime."

{¶ 90} This court has examined Ohio cases where the reviewing court has found sufficient evidence to support a conviction for complicity to drug trafficking. In *State v. McGowan*, 7th Dist. No. 04 JE 6, 2005-Ohio-1335, 2005 WL 67864, the court upheld a conviction where the defendant was driving the drug dealer and, due to a change in location, charged an extra $10 out of the total drug transaction for the extra driving. *Id.* at ¶ 21. Similarly, in *State v. Anderson*, 12th Dist. No. CA2008-07-026, 2009-Ohio-2521, 2009 WL 1515370, the defendant was driving a vehicle in which cocaine and crack cocaine were found. The court found that there was sufficient evidence to support her conviction when testimony was presented to show that she was aware of the drugs in the vehicle and that when stopped by police, she attempted to conceal them. *Id.* at ¶ 30. See *State v. Tapp*, 5th Dist. No. 2006-CAA-090058,

2007-Ohio-2959, 2007 WL 1720501 (sufficient evidence was presented showing that the passenger in a vehicle assisted the seller by making telephone calls and got into the buyer's vehicle).

{¶ 91} Conversely, in *State v. Jordan*, 168 Ohio App.3d 202, 2006-Ohio-538, 859 N.E.2d 563, the court vacated a drug-trafficking conviction, finding that the evidence was insufficient. In *Jordan*, a confidential informant approached the defendant in a convenience store. The two spoke briefly and left the store. The defendant stood by while the confidential informant purchased drugs from a man standing outside. The court concluded that because there was no evidence as to what the defendant and the confidential informant discussed in the store, there was nothing to support the assertion that the defendant somehow assisted in the sale. *Id.* at ¶ 12. See also *State v. Stephens*, 8th Dist. No. 92430, 2009-Ohio-6305, 2009 WL 4406128 (evidence insufficient to support a conviction for aiding and abetting an attempted murder); *State v. Buelow*, 10th Dist. Nos. 07AP-317 and 07AP-318, 2007-Ohio-5929, 2007 WL 3257247 (insufficient evidence to support a theft conviction where the defendant merely accompanied the thief).

{¶ 92} In the present case, the following testimony was presented as to the charges of complicity to trafficking cocaine and marijuana. First, the victim's sister stated that on March 10, 2008, Gipson told her that he had marijuana in the trunk of his car. The victim's mother, Queen Amison, testified that she was "somewhat" familiar with the relationship between her son and Gipson. Amison testified that on March 11, 2008, the victim came to her house and retrieved $3,000 that she was holding for him. Amison testified that her son told her that he knew an individual who had some "keys," meaning cocaine.

{¶ 93} The victim's neighbor, Rhonda Farris, testified that she was in the victim's apartment on March 11, 2008. Farris stated that she observed two stacks of bills totaling $20,000. Farris stated that she knew he was going to make a drug transaction that day and that he dealt only with crack cocaine. Farris had not met any of the victim's suppliers.

{¶ 94} Finally, Sandusky Police Sergeant John Orzech testified regarding the street value of cocaine. Orzech testified that for $20,000 an individual could buy anywhere from a half to a full kilo of cocaine (more than 100 grams). Orzech stated that a pound of marijuana (453 grams) would cost about $1,000. According to Orzech, through their investigation police learned that Gipson was bringing a pound of marijuana to Sandusky to sell. Orzech testified that the victim's home was within 1,000 feet of school property.

{¶ 95} Orzech further testified that at the crime scene they recovered a digital scale and Pyrex dish, items that are often used during drug transactions. There was also testimony regarding multiple phone calls between Gipson and the victim leading up to the murder. It is undisputed that no drugs or money were ever recovered.

{¶ 96} Upon review of the evidence presented at trial, we find that it was insufficient to establish the elements of the crimes beyond a reasonable doubt. As set forth above, a defendant's presence at the crime does not, without more, impute the criminal intent of the principal to the defendant. Appellant was placed at the scene, but there was no evidence that he was involved in the alleged drug transaction. Gipson was a known drug dealer. He allegedly had the drugs in his vehicle and spoke with the victim multiple times. There is no evidence that appellant had control over the drugs or participated in setting up the alleged transaction with the victim. In addition to

the fact that no drugs were recovered, the amount of the drugs, as charged in the indictment, was purely speculative. Appellant's fifth assignment of error is well taken.

{¶ 97} In appellant's sixth assignment of error, he contends that the trial court erred by failing to merge the gun specifications for aggravated murder and aggravated robbery. In response, the state concedes that the specifications should have been merged. Appellant will be resentenced as to the gun specifications. Appellant's sixth assignment of error is well taken.

{¶ 98} In appellant's seventh and final assignment of error, he argues that he was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. Further, debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, 656 N.E.2d 643.

{¶ 99} In this assignment of error, appellant argues that trial counsel was ineffective by failing to raise a Crim.R. 29 motion as to the charges of complicity to trafficking in marijuana and cocaine and when counsel failed to object to the court's failure to merge the gun specifications at sentencing.

{¶ 100} At the close of the state's case-in-chief, appellant's counsel did make a Crim.R. 29 motion for acquittal as to all the counts. Counsel did, however, focus on the aggravated-murder charge and, specifically, the "prior calculation and design" element. We cannot say that counsel's failure to argue the drug charges was constitutionally ineffective. Counsel was aware that the murder conviction would result in a sentence of life imprisonment.

{¶ 101} Reviewing counsel's performance before and during the trial, counsel filed several pretrial motions and participated in multiple oral hearings. Counsel also made numerous objections during the trial and vigorously cross-examined the state's witnesses. Because it was plain error, counsel's failure to object to the error at sentencing did not, ultimately, prejudice appellant, who is serving a life term. Appellant's seventh assignment of error is not well taken.

{¶ 102} On consideration whereof, we find that appellant was prejudiced and prevented from having a fair trial. Appellant's convictions for complicity to trafficking in cocaine and complicity to trafficking in marijuana are vacated. The matter is remanded for resentencing in accordance with this decision. Pursuant to App.R. 24, the state is ordered to pay the costs of this appeal.

Judgment affirmed in part
and reversed in part,
and cause remanded.

SINGER, J., concurs.

YARBROUGH, J., concurs in part and dissents in part.

YARBROUGH, Judge, concurring in part and dissenting in part.

{¶ 103} I concur in the majority's opinion and judgment regarding the disposition of the first, second, fifth, and sixth assigned errors. I respectfully dissent, however, regarding the third assigned error. For the reasons that follow, I would find the third assignment well taken and reverse and remand this case for a new trial on the aggravated-murder and aggravated-robbery charges. That disposition would render the fourth and seventh assignments moot. App.R. 12(A)(1)(c).

{¶ 104} The third assignment raises a critical hearsay issue having two components: first, the correct admissibility analysis for certain out-of-court statements not offered for their truth and, second, if the statements are admitted for a nonhearsay purpose, the proponent's use of those statements during trial. Further, in reviewing the third assignment as a hearsay issue, I find it unnecessary to address appellant's constitutional arguments under *Bruton* and its federal and Ohio progeny. It is sufficient to review the disputed statements here under the standards that the Tenth Appellate District currently applies to the class of extrajudicial statements offered to explain police conduct during a criminal investigation. The *Bruton* issue need not be reached because exclusion follows from a hearsay analysis involving the derivative use of Evid.R. 403(A).

{¶ 105} The core facts are relatively few. The disputed hearsay statements originated from appellant's nontestifying co-defendant, Gipson. In the course of their murder and robbery investigation, the officers had located and questioned Gipson first. From him they learned about a second suspect involved in the crimes, possibly the shooter, who had traveled with Gipson to

Sandusky, Ohio, on the day before the murder. This suspect was known only by his sobriquet, "Peanut." It was his identity the officers were attempting to ascertain when Gipson accompanied them by car to Detroit.

{¶ 106} At trial, Officer Steckel testified that as they drove along a particular street, Gipson pointed out a residence where Peanut was believed to be. Over objection, Steckel related that as they passed the residence, Gipson pointed to an individual standing in front and stated, "That's Peanut." Over further objection, Steckel testified that once back at the police station, Gipson confirmed that appellant was Peanut when shown appellant's photograph, stating, "That's him." In responding to these objections, the prosecutor represented that Gipson's out-of-court statements were not being offered for their substantive truth (i.e., to prove that appellant was "Peanut"), but merely to explain the officers' actions in hunting for the second suspect. The trial court overruled the objections, but instructed the jury that the purpose of the testimony recounting Gipson's statements was "to describe this officer and that department's investigation." The photograph was later used in a photo array from which three other witnesses identified appellant. These witnesses testified at trial while Gipson did not.

(1) Standard of Review

{¶ 107} The applicable standard for reviewing challenged hearsay is not "abuse of discretion." While there is discretion to admit or exclude relevant evidence, there is no "discretion" to admit hearsay. *State v. Sutorius* (1997), 122 Ohio App.3d 1, 7, 701 N.E.2d 1; *State v. Sorrels* (1991), 71 Ohio App.3d 162, 593 N.E.2d 313. In *Sorrels*, the First Appellate District delineated the correct standard, stating:

{¶ 108} "[T]he trial court's decision to admit hearsay is not governed by the test of abuse of discretion, which the Supreme Court applies to instances where the trial court's evidentiary rulings relate to matters expressly or implicitly within its discretion, as in rulings on relevancy (Evid.R. 402 and 403) or expert testimony (Evid.R. 702). * * * Instead, errors relating to the trial court's admission of hearsay must be reviewed in light of Evid.R. 103(A) and the standard established in Crim.R. 52(A), providing that such errors are harmless unless the record demonstrates that the errors affected a party's substantial right." *Id.* at 165.

{¶ 109} Thus, on appeal, challenged hearsay is subject to de novo review under the applicable hearsay rule (or its exceptions), rather than the more deferential review employed for discretionary rulings. *Id.* In *State v. Kidder* (1987), 32 Ohio St.3d 279, 513 N.E.2d 311, the Ohio Supreme Court established the standard for appellate courts to employ in criminal cases for assessing the effect of improperly admitted hearsay: "In the final analysis, the evidence in favor of conviction, absent the hearsay, must be so overwhelming that the admission of those statements was harmless beyond a reasonable doubt." *Id.* at 284.

(2) Analysis

{¶ 110} Evid.R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible under Evid.R. 802, unless a particular statement fails to meet the two-part definition in Evid.R. 801(C), fully satisfies the conditions for nonhearsay prior statements under Evid.R. 801(D)(1) or (2), or falls within one of recognized exceptions under Evid.R. 803 or 804. Under the hearsay rule, Gipson's disputed statements were functionally indistinguishable from those of the paradigm out-of-court declarant.

{¶ 111} Generally, when the facts to be proven at trial and the substantive content of an out-of-court statement coincide, it can be presumed that the proponent is offering the statement for its truth. Facially, therefore, it meets the two-part hearsay definition. If, however, the statement is explicitly offered without reference to its truth, then under Evid.R. 801(C) it is not hearsay. *State v. Lewis* (1970), 22 Ohio St.2d 125, 132-133, 258 N.E.2d 445; *State v. Clay*, 187 Ohio App.3d 633, 2010-Ohio-2720, 933 N.E.2d 296, ¶ 27. The statement's admissibility is then evaluated by the standard of relevancy balanced against unfair prejudice, which is the province of Evid.R. 403(A). See *State v. Maurer* (1984), 15 Ohio St.3d 239, 263, 473 N.E.2d 768. If germane for some valid nonhearsay purpose (e.g., to prove notice, to show the declarant's state of mind, etc.), the statement typically would be admissible for that purpose. See, e.g., *State v. Rice*, 11th Dist. No. 09-A-0034, 2010-Ohio-1638, 2010 WL 1444519, ¶ 22; *State v. Hawthorne*, 6th Dist. L-03-1120, 2005-Ohio-1553, 2005 WL 736994, ¶ 35-37.

{¶ 112} However, admissibility is not automatic in the case of a "dual use" statement. This is an out-of-court statement having an ostensibly nonsubstantive use, but whose content carries substantive import because it relates to an element of the crime or implicates the defendant directly. This problem frequently arises during a police officer's testimony relating what he learned from victims or witnesses while investigating a crime. Despite a professed nonhearsay use, if the statement's content could also cut toward proof of guilt, the risk of prejudicial misuse is great. See *State v. Blanton*, 184 Ohio App.3d 611, 2009-Ohio-5334, 921 N.E.2d 1103, ¶ 38-39, and *State v. Blevins* (1987), 36 Ohio App.3d 147, 149-150, 521 N.E.2d 1105.

{¶ 113} This risk was well described by the Tenth Appellate District. "[W]here statements are offered into evidence to explain an officer's conduct during the course of investigating a crime, such statements are generally not hearsay. * * * There are limits, however, to this general rule because of the great potential for abuse and potential confusion to the trier of fact. * * * *For example, a prosecutor may attempt to use a police officer's testimony regarding his investigative activities as a pretext to introduce highly prejudicial out-of-court statements, while claiming the statements are being offered merely to explain the police officer's conduct, rather than for their truth.*" (Emphasis added.) *State v. Humphrey*, 10th Dist. No. 07AP-837, 2008-Ohio-6302, 2008 WL 5104775, ¶ 11.

(3) *Blevins-Blanton* rules for statements offered "to explain police conduct"

{¶ 114} In *Blevins*, cited by the majority, the Tenth District held that because out-of-court statements purportedly offered to explain police conduct carry the potential for abuse, two requirements must be met before admitting them: first, "[t]he conduct to be explained should be relevant, equivocal and contemporaneous with the statements. * * * [Second], *such statements must meet the standard of Evid.R. 403(A).*" (Emphasis added.) *Id.*, 36 Ohio App.3d at 149, 521 N.E.2d 1105. For extrajudicial statements of this type, the last requirement—assessment under Evid.R. 403(A)—is critical. The trial court must consider whether the risk that the jury will prejudicially misuse the substantive content for its truth exceeds the probative value of the statement for the nonhearsay purpose. *Blanton* at ¶ 39; *Humphrey* at ¶ 11; *Blevins* at 149-150. In other words, the court must look carefully at the statement's substantive content, find it to be innocuous or, at best, only minimally prejudicial, and conclude that the danger of prejudice does not substantially outweigh the statement's probative value "to explain conduct." Evid.R. 403(A).

See *State v. Sinkfield* (Oct. 2, 1998), 2d Dist. No. 16277, 1998 WL 677413. If the court admits the statement after this weighing, an appropriate limiting instruction must be given to the jury. *Blevins* at 150; Evid.R. 105.[1]

{¶ 115} The majority cites *Blevins* for its conclusion that the nonhearsay use of Gipson's statements to explain the investigating officers' actions rendered them admissible. However, in *Blanton*, the Tenth District expanded on *Blevins* by adding a third requirement for statements offered to explain police conduct, holding:

{¶ 116} "Specifically, the conduct to be explained must be relevant, equivocal, and contemporaneous with the statements.* * * Further, the statements must meet the standard of Evid.R. 403(A). Id. *Finally, 'when the statements connect the accused with the crime charged, they should generally be excluded.'*" (Emphasis added.) *Blanton* at ¶ 38-39, quoting *Humphrey*, 2008-Ohio-6302, 2008 WL 5104775, ¶ 11.

{¶ 117} Carefully comparing the nature of the hearsay statements admitted in *Blevins* to those excluded in *Blanton* reveals why the Tenth District adopted a rule of presumptive inadmissibility for statements that "connect the accused with the crime."

{¶ 118} In *Blevins*, 36 Ohio App.3d 147, 521 N.E.2d 1105, the court found that the offered statements met the first requirement: "Detective Kerins related at trial that [the hearsay declarant] Dyer made a phone call." *Id.* at 149. The purpose of the call was to set up a drug buy, with undercover officers posing as the buyers. Thus, "Dyer's statements in this regard aided in

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[1]A limiting instruction is particularly critical when the statement's content might imply guilt. It is the court's instruction that operates to contain the statement to its nonhearsay character and function. See Weissenberger, Ohio Evidence Treatise (2010), Section 801.10. See also *State v. Kelly,* 8th Dist. No. 85662, 2006-Ohio-5902, 2006 WL 3233895, ¶ 28-29 (limiting instruction to jury creates presumption it was followed). However, as recognized in *Blanton*, the incriminating content of some out-of-court statements is so inherently prejudicial that no instruction could effectively restrict the jury's use of them to the explanatory purpose.

giving definite character to Detective Kerins actions." *Id.* As to the second requirement, there was little or no parroting of the *content* of Dyer's statements. Their substantive value was, at best, only minimally prejudicial. This led the Tenth District to conclude that "Dyer's statements neither implicated nor cleared defendant." He "made a phone call" and "[t]he statements merely described * * * how the detectives met the defendant." In other words, the second requirement for admitting Dyer's out-of-court statements—the weighing of relevancy against prejudice under Evid.R. 403(A)—was satisfied. See also *State v. Wilson*, 5th Dist. No. 09-CA-44, 2010-Ohio-1394, 2010 WL 1234447, ¶ 22 (The statement "offered to explain Mr. Moneypenny's reason for not letting appellant into the house was not unfairly prejudicial. The statement was offered merely to explain Mr. Moneypenny's behavior [in keeping him out]").

{¶ 119} In *Blanton*, 184 Ohio App.3d 611, 2009-Ohio-5334, 921 N.E.2d 1103, the defendant, a registered sex offender, was convicted of failing to provide notice to the Franklin County Sheriff's Department that he had changed his address from the motel where he previously resided. At trial, instead of calling the motel's employees to testify from personal knowledge about the time and duration of the defendant's stay at the motel and about the substance of various motel receipts, the prosecutor presented this information through the hearsay testimony of the investigating officers. *Id.* at ¶ 41-42. The *Blanton* court found reversible error in allowing the officers to repeat to the jury the substance of their conversations with motel personnel regarding the defendant's actions and whereabouts. The out-of-court statements carried substantive import that went *beyond* the asserted purpose of "explaining conduct"; instead, the contents carried proof of the elements of the crime: "[They] described the fact that [the defendant] had moved and the specific date upon which [he] moved." *Id.* at ¶ 43. In assessing

the remaining evidence, absent the hearsay, the court found it was not so overwhelming that the error in admitting the statements was harmless beyond a reasonable doubt. *Id.* at ¶ 49.

(4) Applying the *Blevins-Blanton* requirements to the facts sub judice

{¶ 120} When applied here to the police conduct "to be explained," I find that the first requirement of *Blevins* was met. Officer Steckel's initial testimony about his (and the other officers') actions in seeking to identify a second murder suspect with the street name "Peanut," was plainly relevant. *Blevins,* 36 Ohio App.3d at 149, 521 N.E.2d 1105. Without some reference to Gipson's presence to provide context and meaning, their actions in going to a particular residence in Detroit would appear "equivocal," in that it might be unclear to the jury why the officers went there in the first place. There is also no question that Gipson's statements, when made, were "contemporaneous" with the investigating conduct and vice versa.

{¶ 121} The critical question pertains instead to *Blevins*'s second admissibility proviso requiring an Evid.R. 403(A) assessment: whether repeating the statement's substantive content to the jury was substantially more prejudicial than probative, because in doing so here, that content *connected appellant to the crimes.*[2] *Blanton* at ¶ 39. While hearsay may cease to be an issue when the statement of an out-of-court declarant is not offered for its truth, the issue of

[2]If an officer's investigative steps can be summarized in a way that does not impart to the jury the prejudicial content of the out-of-court statement, then *Blevins*'s second requirement, and the third added in *Blanton*, arguably can be satisfied. It is the *officer's behavior* that is relevant, not the content of the statement. Otherwise, the statement's substance *is* being used for its truth, which renders it inadmissible hearsay. As suggested in *Blevins*, the potential prejudice that arises from repeating the content could be minimized by an officer's foundational testimony that avoids it, e.g., "[during my investigation] I came to know [Mr. Ricks] through my contact with [Mr. Gipson]." See *id.* 36 Ohio App.3d at 149, 521 N.E.2d 1105, fn. 1. In *Blanton*, the Tenth District found that the extrajudicial statements there "were offered to demonstrate appellant's guilt," because the "repetition of the detailed" contents "undeniably connected [him] with the crime charged." *Id.* at ¶ 43.

relevancy balanced against unfair prejudice remains. *State v. Maurer*, 15 Ohio St.3d at 263, 473 N.E.2d 768.

{¶ 122} Where I believe the majority errs is in its assessment of the substantive content of Gipson's statements when compared with those at issue in *Blevins*.

{¶ 123} In this case, testimony had already established that there were two suspects in the robbery and murder of Calvin Harper Jr., one of whom went by the street name "Peanut." Gipson's out-of-court statements were statements *identifying* the second suspect. Unlike the innocuous hearsay in *Blevins*, Steckel's testimony repeating Gipson's statements went substantially beyond "explaining conduct." Indeed, the statements directly connected appellant to the crimes, essentially telling the jury that he was Gipson's partner in robbery and murder.[3] But for Gipson's identification, there would have been no investigatory link to the second criminal actor. It led to the subsequent photo array from which three witnesses (Farris, Harper, and Poole) further identified appellant.

{¶ 124} In applying the *Blevins-Blanton* rules to this case, the most persuasive precedent on similar facts is *State v. Sinkfield* (Oct. 2, 1998), 2d Dist. No. 16277, 1998 WL 677413 involving a robbery and murder with multiple victims, in which the Second Appellate District reached the same conclusion I do. There, the disputed hearsay statement was also one of identification, but instead of the source being a nontestifying co-defendant, the identification came from an anonymous tip that Dayton police received from a "Crime Stoppers" program. *Id.* As here, the investigating detective used the tip to assemble a photo array from which two

[3]To some extent, the trial court's limiting instruction here sought to minimize the risk of prejudicial misuse by the jury, although I note the Tenth District in *Blanton* was plainly unconvinced by a similar cautionary instruction.

victims identified Sinkfield. At trial, as here, the prosecutor defeated a hearsay objection by asserting that the out-of-court statement comprising the tip was not offered for its truth, but "merely to explain why Detective Pearson included Sinkfield's photograph in a photo spread shown to [the victims]." *Id.* In analyzing the substantive content of the statement, the Second District held:

{¶ 125} "[T]he conduct * * * sought to be explained was [Detective Pearson's] act of placing Sinkfield's photograph in the photo spread shown to [victim] J.B. Although Detective Pearson's conduct was relevant and contemporaneous with the out-of-court statement admitted, i.e., that Sinkfield was the other suspect involved in the incident, it is doubtful that Detective Pearson's act of placing Sinkfield's photograph in the photo spread was so equivocal or ambiguous *that it needed to be explained to the jury through the use of the out-of-court statement. Furthermore, the probative value of the out-of-court statement was substantially outweighed by the danger of unfair prejudice, since the statement identified Sinkfield as the other suspect in the incident* [citing *Blevins*]. * * * Additionally, there was no reason for the prosecutor to have Detective Pearson explain why he placed Sinkfield's photograph in the photo spread shown to J.B. Both J.B. and Byrdsong already had testified that Sinkfield was one of the participants in the robbery and shootings, and J.B. related how he had identified Sinkfield from the photo spread shown to him by Detective Pearson on February 5, 1996. *Thus, it appears that the prosecutor's primary purpose in eliciting Detective Pearson's testimony regarding [the content of] the anonymous tip was for the truth of the matter being asserted therein and not to explain Detective Pearson's actions.* * * * This conclusion is further confirmed by the fact that,

during his closing argument, the prosecutor tried to use the anonymous tip as substantive proof of Sinkfield's guilt." (Emphasis added.) *Id.*

{¶ 126} I would therefore find that the trial court erred in permitting Officer Steckel, under the guise of "explaining conduct," to repeat the content of Gipson's statements identifying appellant. The content of those statements, in my view, was substantially more prejudicial than probative (*Blevins*) and despite the limiting instruction, they directly connected appellant to the crimes charged (*Blanton*). Notwithstanding that error, however, the record also reveals a second error that merely compounded the first. It stems from the same prosecutorial conduct cited by the *Sinkfield* court in the last sentence of the above-quoted passage.

(5) Misuse of extrajudicial statements admitted for a nonhearsay purpose

{¶ 127} The trial transcript indicates that in closing argument the prosecutor employed Steckel's testimony about Gipson's identification for its *substantive truth*. Permitting this was the second error. See *State v. Kirk*, 6th Dist. No. H-09-006, 2010-Ohio-2006, 2010 WL 1818894, ¶ 28; *State v. Ramos-Aquino*, 10th Dist. No. 09AP-975, 2010-Ohio-2732, 2010 WL 2395776, ¶ 13. Once an out-of-court statement has been admitted for a purpose other than the truth of its content, the content may not be used or relied upon later as *substantive proof* (i.e., for the truth of what it asserts).

{¶ 128} In *State v. Kirk*, we admonished this same switch-of-purpose tactic for otherwise inadmissible hearsay and held it to be prosecutorial misconduct. *Id.* at ¶ 29-33 ("The prosecutor essentially gave the jurors permission to use the hearsay statements as substantive evidence." *Id.* at ¶ 33). We found reversible error where the prosecutor, in closing argument, "referred to testimony which she [had] expressly claim[ed] to have offered not for its truth, but to explain

subsequent actions taken by the detectives." *Id.* at ¶ 29. In *Kirk*, an investigating detective had been permitted to testify to several out-of-court statements from a confidential informant. The prosecutor elicited these statements purportedly to explain how the detective's investigation developed. Yet, when their actual use was viewed collectively, the statements "were offered to prove the truth of the matter asserted in them [and demonstrate] appellant's guilt by connecting him to a known drug dealer." *Id.* at ¶ 19-22. Their substantive use during the prosecutor's closing argument went "far beyond" the limited explanatory purpose for which the statements were initially allowed. *Id.* This court held:

{¶ 129} "The prosecutor has now relied on extrajudicial statements for their truth - statements which she maintained during trial were not offered for their truth - as evidence that appellant brought the crack cocaine from Akron into Willard. The prosecutor's remarks were improper and argued beyond the record." *Id.* at ¶ 29.[4]

{¶ 130} In *Sinkfield*, the Second District reached essentially the same conclusion, holding:

{¶ 131} "[W]hile the trial court admitted [Detective Pearson's testimony] for a very limited purpose, the prosecutor either did not understand the limited purpose for which the anonymous tip was being admitted or simply chose to ignore it. Indeed, later on in his closing argument, *the prosecutor brazenly used the anonymous tip for its truth when he told the jury, 'You know everything J.B. told you about identification is substantiated by information received*

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[4]We also stated in *Kirk*, 2010-Ohio-2006, 2010 WL 1818894, that "[i]f a statement made by an out-of-court declarant is offered into evidence for a purpose other than asserting the truth of its content, then *the content is not substantive evidence. * * * A prosecutor must not later assert those statements for their truth during closing argument.*" (Emphasis added.) *Id.* at ¶ 28.

from Crime Stoppers when he [Pearson] got the photo spread together[.]' * * * [This is] compelling evidence that *the prosecutor's primary motivation in introducing the testimony regarding the anonymous tip was for its truth, and not to explain Detective Pearson's subsequent action.* * * * In light of the foregoing, the trial court abused its discretion by *not excluding as hearsay Detective Pearson's testimony regarding the anonymous tip received from Crime Stoppers, stating that Sinkfield was the other suspect in the incident.*" (Emphasis added.) *Id.*

{¶ 132} Here, the error in admitting Gipson's statements through Officer Steckel's testimony was exacerbated when the prosecutor later improperly referenced them for their truth. The impact of prosecutorial misconduct, however, "must be considered in the light of the whole case" and is not a basis for reversal "unless that conduct deprives the defendant of a fair trial." *Maurer,* 15 Ohio St.3d at 266, 473 N.E.2d 768. As well, the impact of the erroneously admitted hearsay is determined by the *Kidder* standard. *Kidder,* 32 Ohio St.3d at 284, 513 N.E.2d 311. Where both occur, the standards for improperly admitted hearsay and misconduct are combined to evaluate whether the errors were harmless in view of the remaining evidence. See *Kirk,* 2010-Ohio-2006, 2010 WL 1818894, at ¶ 34-35.

{¶ 133} As the majority decision details, three witnesses identified appellant from a photo array. One of them (Farris) specifically identified him as the man who mistakenly came to her door shortly before the murder. Although appellant's first and second assignments challenged as unreliable this identification evidence and the procedures employed to obtain it, I agree they are not well taken for the reasons expressed in the majority decision.

{¶ 134} However, the testimony of these witnesses established only appellant's *presence* in the neighborhood on the day of the crimes, whereas the content of Gipson's statements

involved him directly *in* the crimes. The statements were, moreover, facially incriminating, given the source. In using them in closing argument, the prosecutor was not merely summarizing what the investigating officers did, or where they went, or why. He was suggesting that the jury infer guilt from Gipson having identified appellant as "Peanut," thereby using Officer Steckel's testimony about what Gipson said for its truth value, precisely contrary to the basis on which it was admitted.

{¶ 135} In assessing the effect of this testimony, and despite the limiting instruction, I cannot say conclusively that the jury focused *only* on the other witnesses' testimony to support the conviction. Indeed, there is more than a reasonable possibility that the erroneously admitted hearsay—and its misuse—contributed to appellant's murder and robbery convictions. Therefore, I would find the third assignment of error well taken, reverse the judgment of conviction on those charges, and remand the case for a new trial consistent with this opinion on the hearsay issue.

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

State of Ohio	:	Case No. 2008-CR-282
-vs-	:	Judge Roger E. Binette
Thomas J. Ricks	:	**JUDGMENT ENTRY**
Defendant	:	
	:	
	:	
	:	

FILED
COMMON PLEAS COURT
2010 MAY -4 AM 9:55
BARBARA J. JOHNSON
CLERK OF COURTS

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On the 3rd day of May, 2010, defendant's sentencing hearing was held pursuant to Ohio Revised Code §2929.19; present were the Prosecuting Attorney on behalf of the State of Ohio, the defendant in person and represented by counsel, Robert Dixon; and defendant was afforded all his rights pursuant to Crim.R. 32.

Prior to the imposition of sentence, the Court advised defendant that as to Counts 1 and 2 that if and upon his release from prison, he would be placed on parole. The Court further advised defendant that as to Counts 3 and 5 that if and upon his release from prison, he shall be supervised after leaving prison for a mandatory period of 5 years of post release control and as to Count 4, he shall be supervised after leaving prison for a mandatory period of 3 years of post release control.

The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code §2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code §2929.12.

The Court finds that defendant is not a candidate for community sanctions. Defendant was advised at the time of this hearing of his right to appeal within thirty (30) days of the sentence.

After prison release, if post-release control is imposed, for violating post-release control conditions, the Adult Parole Authority or Parole Board may impose a more restrictive or longer control sanction, return defendant to prison for up to nine months for each violation, up to a maximum of 50% of the stated terms. If the violation is a new felony, defendant may receive a new prison term of the greater of one year or the time remaining on post-release control.

Defendant, as to Count No. 1, heretofore was found "**guilty**" by a jury of his peers of the offense of Aggravated Murder with a firearm specification [O.R.C. §2903.01(A)] subject to a LIFE sentence without eligibility for parole OR a LIFE sentence with eligibility for parole after 20 years, 25 full years or 30 full years and 3 years actual incarceration as to the firearm specification; defendant, as to Count No. 2, heretofore was

found **"guilty"** by a jury of his peers of the offense of Aggravated Murder with a firearm specification [O.R.C. §2903.01(A)] subject to a LIFE sentence without eligibility for parole - OR a LIFE sentence with eligibility for parole after 20 years, 25 full years or 30 full years and 3 years actual incarceration as to the firearm specification; defendant, as to Count No. 3, heretofore was found **"guilty"** by a jury of his peers of the offense of Aggravated Robbery with a firearm specification [F-1; O.R.C. §2911.01(A)(1)] subject to a penalty of 3, 4, 5, 6, 7, 8, 9 or 10 years and 3 years actual incarceration as to the firearm specification; defendant, as to Count No. 4, heretofore was found **"guilty"** by a jury of his peers of the offense of Complicity to Trafficking in Marijuana with an enhancement of selling within 1000 feet of the boundaries of a school premise [F-3; O.R.C. §2925.03(A)(1) and (C)(3)(c) and §2923.03(A)(2)] subject to a penalty of 1, 2, 3, 4 or 5 years; defendant, as to Count No. 5, heretofore was found **"guilty"** by a jury of his peers of the offense of Complicity to Trafficking in Cocaine with an enhancement of selling within 1000 feet of the boundaries of a school premise [F-1; O.R.C. §2925.03(A)(1) and (C)(4)(e) and §2923.03(A)(2)] subject to a penalty of 3, 4, 5, 6, 7, 8, 9 or 10 years - with mandatory prison time; the Court inquired of the defendant if he had

anything to say why judgment should not be pronounced against him and the defendant had nothing to say.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that for purposes of sentencing, *Counts 1 and 2 shall merge and the firearm specifications as to Counts 1 and 2 shall merge;* and defendant having been found guilty as to **Count No. 1**, for the offense of **AGGRAVATED MURDER with a firearm specification,** a felony in violation of §2903.01(A) of the Ohio Revised Code, shall be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for a definite sentence for the term of LIFE in prison without eligibility for parole and three (3) years actual incarceration as to the firearm specification; defendant having been found guilty as to **Count No. 3,** for the offense of **AGGRAVATED ROBBERY with a firearm specification,** a first degree felony in violation of §2911.01(A)(1) of the Ohio Revised Code, shall be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for a definite sentence for the term of ten (10) years and the offense is non-probationable and three (3) years actual incarceration as to the firearm specification; defendant having been found guilty as to **Count No. 4,** for the offense of **COMPLICITY TO TRAFFICKING IN MARIJUANA with an**

enhancement, a third degree felony in violation of §2925.03(A)(1) and (C)(3)(c) and §2923.03(A)(2) of the Ohio Revised Code, shall be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for a definite sentence for the term of five (5) years; defendant having been found guilty as to **Count No. 5,** for the offense of **COMPLICITY TO TRAFFICKING IN COCAINE with an enhancement,** a first degree felony in violation of §2925.03(A)(1) and (C)(4)(e) and §2923.03(A)(2) of the Ohio Revised Code, shall be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for a definite sentence for the term of ten (10) years - ten (10) years of which are mandatory.

The sentences imposed in Counts 4 and 5 shall run concurrent with each other and shall be served consecutively to the sentence imposed in Count 3 [twenty (20) years]; the sentences imposed as to the firearm specifications in Counts 1 and 3 shall be served consecutively [six (6) years - pursuant to R.C. §2929.14(D)(1)(g)]; further, the sentences as to the firearm specifications shall be served prior to and run consecutive to the sentences imposed in Counts 3, 4 and 5 for a

total of one LIFE sentence without eligibility for parole in addition to twenty six (26) years.

As to Count 4, defendant shall pay a mandatory fine in the amount of $5,000.00 to the Erie County Clerk of Courts [$3,500.00 to be paid to the Sandusky Police Department Law Enforcement Trust Fund Mandatory Fine Account #W060-W03 and $1,500.00 to be paid to the Erie County Prosecutor's Drug Task Force, Federal Justice Grant Account, Mandatory Fine Account #90-W04]; as to Count 5, defendant shall pay a mandatory fine in the amount of $10,000.00 to the Erie County Clerk of Courts [$7,000.00 to be paid to the Sandusky Police Department Law Enforcement Trust Fund Mandatory Fine Account #W060-W03 and $3,000.00 to be paid to the Erie County Prosecutor's Drug Task Force, Federal Justice Grant Account, Mandatory Fine Account #90-W04]; said fines shall run concurrent for a total of $10,000.00 in fines. However, said mandatory fines are hereby waived due to the defendant having filed an Affidavit of Indigency and the State not opposing the same.

Defendant shall receive 588 days credit for time served as of May 3, 2010; as to Counts 4 and 5, defendant's Ohio drivers license shall be suspended for a period of one (1) year beginning May 3, 2010; said license suspensions shall run concurrent for a total license suspension of one (1) year; and defendant shall pay the costs of this prosecution for which

execution is awarded and the recognizance heretofore given is hereby canceled and sureties thereon are discharged.

IT IS FURTHER ORDERED that as to Count 1 and pursuant to O.R.C. §2967.13(E), defendant is not eligible for parole and shall be imprisoned until death.

IT IS FURTHER ORDERED that upon serving his sentence, defendant ***shall*** be supervised after leaving prison for a mandatory period of 5 years of post release control on Counts 3 and 5 to run concurrent.

IT IS FURTHER ORDERED that upon serving his sentence as to Count 4, defendant ***shall*** be supervised after leaving prison for a mandatory period of 3 years of post release control.

IT IS FURTHER ORDERED that the transfer of defendant into Transitional Control Program(s): __X__ will be Denied by this Court/_____ will not be Denied by this Court.

IT IS FURTHER ORDERED that the defendant _____ shall be/__X____ shall not be recommended for placement into the intensive program prison [IPP].

Defendant is hereby notified that, under Federal law, persons convicted of felonies can never lawfully possess a firearm. Defendant was further notified that if he is ever found with a firearm, even one belonging to someone else, he could be subject to prosecution by federal authorities and subject to

imprisonment for several years. This restriction applies even if his Civil Rights have successfully been restored.

IT IS FURTHER ORDERED that the institution shall credit defendant for time served from the date of sentencing until reception at said facility.

IT IS FURTHER ORDERED that the Erie County Sheriff's Office shall transport defendant to the appropriate institution for service of prison sentence.

IT IS FURTHER ORDERED that the Erie County Sheriff's Office shall withdraw any warrants which may have been placed in LEADS and/or NCIC.

IT IS FURTHER ORDERED that the defendant shall submit to the collection of DNA specimen as required by law.

IT IS FURTHER ORDERED that the Erie County Clerk of Courts shall enter, without delay, this Judgment Entry on its journal pursuant to Crim.R. 32(C).

REB 5/4/10

JUDGE ROGER E. BINETTE

Approved:

Kevin J. Baxter
Prosecuting Attorney

cc: Adult Probation Department

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL FILED IN THIS OFFICE
BARBARA J JOHNSON, CLERK OF COURTS
Erie County, Ohio
By

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

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*** Annotations current through May 7, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.01 (2012)

§ 2903.01. Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in *section 2929.02 of the Revised Code.*

(G) As used in this section:

(1) "Detention" has the same meaning as in *section 2921.01 of the Revised Code.*

(2) "Law enforcement officer" has the same meaning as in *section 2911.01 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 239 (Eff 9-6-96); 147 v S 32 (Eff 8-6-97); 147 v H 5 (Eff 6-30-98); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.01 (2012)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in *section 2913.01 of the Revised Code*, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;

(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.

(2) "Law enforcement officer" has the same meaning as in *section 2901.01 of the Revised Code* and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 147 v H 151. Eff 9-16-97.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2925. DRUG OFFENSES
CORRUPTING; TRAFFICKING

Go to the Ohio Code Archive Directory

ORC Ann. 2925.03 (2012)

Legislative Alert: LEXSEE 2011 Ohio SB 337 -- See sections 1 and 2.

§ 2925.03. Trafficking in drugs

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," *52 Stat. 1040 (1938), 21 U.S.C.A. 301,* as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), (e), or (f) of this section, aggravated trafficking in drugs is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(1)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated trafficking in drugs is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If aggravated trafficking in drugs is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, the offender is a

major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(2) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), (d), or (e) of this section, trafficking in drugs is a felony of the fifth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(2)(c), (d), or (e) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, trafficking in drugs is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty times the bulk amount, trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds fifty times the bulk amount and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of trafficking in marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), (f), (g), or (h) of this section, trafficking in marihuana is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(3)(c), (d), (e), (f), (g), or (h) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, trafficking in marihuana is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, trafficking in marihuana is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, trafficking in marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds twenty thousand grams but is less than forty thousand grams, trafficking in marihuana is a felony of the second degree, and the court shall impose a mandatory prison term of five, six, seven, or eight years. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(g) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds forty thousand grams, trafficking in marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds forty thousand grams and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(h) Except as otherwise provided in this division, if the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor upon a first offense and a misdemeanor of the third degree upon a subsequent offense. If the offense involves a gift of twenty grams or less of marihuana and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a misdemeanor of the third degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), (f), or (g) of this section, trafficking in cocaine is a felony of the fifth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(4)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine, trafficking in cocaine is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than twenty grams of cocaine, trafficking in cocaine is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If trafficking in cocaine is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds twenty grams but is less than twenty-seven grams of cocaine, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds one hundred grams of cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(5) If the drug involved in the violation is L.S.D. or a compound, mixture, preparation, or substance containing L.S.D., whoever violates division (A) of this section is guilty of trafficking in L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), (f), or (g) of this section, trafficking in L.S.D. is a felony of the fifth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(5)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If trafficking in L.S.D. is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the

vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of trafficking in heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), (f), or (g) of this section, trafficking in heroin is a felony of the fifth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(6)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, trafficking in heroin is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, trafficking in heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two

hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of trafficking in hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), (f), or (g) of this section, trafficking in hashish is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(7)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in

the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams but is less than two thousand grams of hashish in a solid form or equals or exceeds two hundred grams but is less than four hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form trafficking in hashish is a felony of the second degree, and the court shall impose a mandatory prison term of five, six, seven, or eight years. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(g) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two thousand grams of hashish in a solid form or equals or exceeds four hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds two thousand grams of hashish in a solid form or equals or exceeds four hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(8) If the drug involved in the violation is 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol or a compound, mixture, preparation, or substance containing 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, whoever violates division (A) of this section is guilty of trafficking in spice. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(8)(b) of this section, trafficking in spice is a felony of the fifth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in spice is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(D) In addition to any prison term authorized or required by division (C) of this section and *sections 2929.13* and *2929.14 of the Revised Code*, and in addition to any other sanction imposed for the offense under this section or *sections 2929.11* to *2929.18 of the Revised Code*, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) If the violation of division (A) of this section is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of *section 2929.18 of the Revised Code* unless, as specified in that division, the court determines that the offender is indigent. Except as otherwise provided in division (H)(1) of this section, a mandatory fine or any other fine imposed for a violation of this section is subject to division (F) of this section. If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk of the court shall pay the forfeited bail pursuant to divisions (D)(1) and (F) of this section, as if the forfeited bail was a fine imposed for a violation of this section. If any amount of the forfeited bail remains after that payment and if a fine is imposed under division (H)(1) of this section, the clerk of the court shall pay the remaining amount of the forfeited bail pursuant to divisions (H)(2) and (3) of this section, as if that remaining amount was a fine imposed under division (H)(1) of this section.

(2) The court shall suspend the driver's or commercial driver's license or permit of the offender in accordance with division (G) of this section.

(3) If the offender is a professionally licensed person, the court immediately shall comply with *section 2925.38 of the Revised Code*.

(E) When a person is charged with the sale of or offer to sell a bulk amount or a multiple of a bulk amount of a controlled substance, the jury, or the court trying the accused, shall determine the amount of the controlled substance involved at the time of the offense and, if a guilty verdict is returned, shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance involved, and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is the requisite amount, or that the amount of the controlled substance involved is less than the requisite amount.

(F) (1) Notwithstanding any contrary provision of *section 3719.21 of the Revised Code* and except as provided in division (H) of this section, the clerk of the court shall pay any mandatory fine imposed pursuant to division (D)(1) of this section and any fine other than a mandatory fine that is imposed for a violation of this section pursuant to division (A) or (B)(5) of *section 2929.18 of the Revised Code* to the county, township, municipal corporation, park district, as created pursuant to *section 511.18* or *1545.04 of the Revised Code*, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender. However, the clerk shall not pay a mandatory fine so imposed to a law enforcement agency unless the agency has adopted a written internal control policy under division (F)(2) of this section that addresses the use of the fine moneys that it receives. Each agency shall use the mandatory fines so paid to subsidize the agency's law enforcement efforts that pertain to drug offenses, in accordance with the written internal control policy adopted by the recipient agency under division (F)(2) of this section.

(2) (a) Prior to receiving any fine moneys under division (F)(1) of this section or division (B) of *section 2925.42 of the Revised Code*, a law enforcement agency shall adopt a written internal control policy that addresses the agency's use and disposition of all fine moneys so received and that provides for the keeping of detailed financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure. The policy shall not provide for or permit the identification of any specific expenditure that is made in an ongoing investigation. All financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount

of each general type of expenditure by an agency are public records open for inspection under *section 149.43 of the Revised Code*. Additionally, a written internal control policy adopted under this division is such a public record, and the agency that adopted it shall comply with it.

(b) Each law enforcement agency that receives in any calendar year any fine moneys under division (F)(1) of this section or division (B) of *section 2925.42 of the Revised Code* shall prepare a report covering the calendar year that cumulates all of the information contained in all of the public financial records kept by the agency pursuant to division (F)(2)(a) of this section for that calendar year, and shall send a copy of the cumulative report, no later than the first day of March in the calendar year following the calendar year covered by the report, to the attorney general. Each report received by the attorney general is a public record open for inspection under *section 149.43 of the Revised Code*. Not later than the fifteenth day of April in the calendar year in which the reports are received, the attorney general shall send to the president of the senate and the speaker of the house of representatives a written notification that does all of the following:

(i) Indicates that the attorney general has received from law enforcement agencies reports of the type described in this division that cover the previous calendar year and indicates that the reports were received under this division;

(ii) Indicates that the reports are open for inspection under *section 149.43 of the Revised Code*;

(iii) Indicates that the attorney general will provide a copy of any or all of the reports to the president of the senate or the speaker of the house of representatives upon request.

(3) As used in division (F) of this section:

(a) "Law enforcement agencies" includes, but is not limited to, the state board of pharmacy and the office of a prosecutor.

(b) "Prosecutor" has the same meaning as in *section 2935.01 of the Revised Code*.

(G) When required under division (D)(2) of this section or any other provision of this chapter, the court shall suspend for not less than six months or more than five years the driver's or commercial driver's license or permit of any person who is convicted of or pleads guilty to any violation of this section or any other specified provision of this chapter. If an offender's driver's or commercial driver's license or permit is suspended pursuant to this division, the offender, at any time after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender finally was released from a prison term under the sentence, whichever is later, may file a motion with the sentencing court requesting termination of the suspension; upon the filing of such a motion and the court's finding of good cause for the termination, the court may terminate the suspension.

(H) (1) In addition to any prison term authorized or required by division (C) of this section and *sections 2929.13* and *2929.14 of the Revised Code*, in addition to any other penalty or sanction imposed for the offense under this section or *sections 2929.11* to *2929.18 of the Revised Code*, and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section may impose upon the offender an additional fine specified for the offense in division (B)(4) of *section 2929.18 of the Revised Code*. A fine imposed under division (H)(1) of this section is not subject to division (F) of this section and shall be used solely for

the support of one or more eligible alcohol and drug addiction programs in accordance with divisions (H)(2) and (3) of this section.

(2) The court that imposes a fine under division (H)(1) of this section shall specify in the judgment that imposes the fine one or more eligible alcohol and drug addiction programs for the support of which the fine money is to be used. No alcohol and drug addiction program shall receive or use money paid or collected in satisfaction of a fine imposed under division (H)(1) of this section unless the program is specified in the judgment that imposes the fine. No alcohol and drug addiction program shall be specified in the judgment unless the program is an eligible alcohol and drug addiction program and, except as otherwise provided in division (H)(2) of this section, unless the program is located in the county in which the court that imposes the fine is located or in a county that is immediately contiguous to the county in which that court is located. If no eligible alcohol and drug addiction program is located in any of those counties, the judgment may specify an eligible alcohol and drug addiction program that is located anywhere within this state.

(3) Notwithstanding any contrary provision of *section 3719.21 of the Revised Code*, the clerk of the court shall pay any fine imposed under division (H)(1) of this section to the eligible alcohol and drug addiction program specified pursuant to division (H)(2) of this section in the judgment. The eligible alcohol and drug addiction program that receives the fine moneys shall use the moneys only for the alcohol and drug addiction services identified in the application for certification under *section 3793.06 of the Revised Code* or in the application for a license under *section 3793.11 of the Revised Code* filed with the department of alcohol and drug addiction services by the alcohol and drug addiction program specified in the judgment.

(4) Each alcohol and drug addiction program that receives in a calendar year any fine moneys under division (H)(3) of this section shall file an annual report covering that calendar year with the court of common pleas and the board of county commissioners of the county in which the program is located, with the court of common pleas and the board of county commissioners of each county from which the program received the moneys if that county is different from the county in which the program is located, and with the attorney general. The alcohol and drug addiction program shall file the report no later than the first day of March in the calendar year following the calendar year in which the program received the fine moneys. The report shall include statistics on the number of persons served by the alcohol and drug addiction program, identify the types of alcohol and drug addiction services provided to those persons, and include a specific accounting of the purposes for which the fine moneys received were used. No information contained in the report shall identify, or enable a person to determine the identity of, any person served by the alcohol and drug addiction program. Each report received by a court of common pleas, a board of county commissioners, or the attorney general is a public record open for inspection under *section 149.43 of the Revised Code*.

(5) As used in divisions (H)(1) to (5) of this section:

(a) "Alcohol and drug addiction program" and "alcohol and drug addiction services" have the same meanings as in *section 3793.01 of the Revised Code*.

(b) "Eligible alcohol and drug addiction program" means an alcohol and drug addiction program that is certified under *section 3793.06 of the Revised Code* or licensed under *section 3793.11 of the Revised Code* by the department of alcohol and drug addiction services.

(I) As used in this section, "drug" includes any substance that is represented to be a drug.

HISTORY:

136 v H 300 (Eff 7-1-76); 141 v S 67 (Eff 8-29-86); 143 v H 215 (Eff 4-11-90); 143 v H 261 (Eff 7-18-90); 143 v H 266 (Eff 9-6-90); 143 v S 258 (Eff 11-20-90); 144 v H 62 (Eff 5-21-91); 144 v S 174 (Eff 7-31-92); 144 v H 591 (Eff 11-2-92); 145 v H 377 (Eff 9-30-93); 145 v H 391 (Eff 7-21-94); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 147 v S 164 (Eff 1-15-98); 147 v S 66 (Eff 7-22-98); 148 v S 107 (Eff 3-23-2000); 148 v H 241 (Eff 5-17-2000); 148 v H 528. Eff 2-13-2001; 149 v S 123, § 1, eff. 1-1-04; 151 v S 154, § 1, eff. 5-17-06; 151 v H 241, § 1, eff. 7-1-07; 152 v H 195, § 1, eff. 9-30-08; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2011 HB 64, § 1, eff. Oct. 17, 2011.

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Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 403 (2012)

Review Court Orders which may amend this Rule.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory.

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

HISTORY: Amended, eff 7-1-96.

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 801 (2012)

Review Court Orders which may amend this Rule.

Rule 801. Definitions

The following definitions apply under this article:

(A) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(B) Declarant.

A "declarant" is a person who makes a statement.

(C) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) Statements which are not hearsay.

A statement is not hearsay if:

(1) Prior statement by witness.

The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) Admission by party-opponent.

The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

HISTORY: Amended, eff 7-1-07.

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 802 (2012)

Review Court Orders which may amend this Rule.

Rule 802. Hearsay Rule

Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 803 (2012)

Review Court Orders which may amend this Rule.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.

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.

(6) Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6).

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record or entry.

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person author-

ized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records.

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.

Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.

Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history.

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character.

Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction.

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

HISTORY: Effective: July 1, 1980; amended effective July 1, 2006; July 1, 2007.

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 804 (2012)

Review Court Orders which may amend this Rule.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(A) Definition of unavailability.

"Unavailability as a witness" includes any of the following situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in

interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) Statement under belief of impending death.

In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement against interest.

A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

(4) Statement of personal or family history.

(a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Statement by a deceased or incompetent person.

The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) Forfeiture by wrongdoing.

A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

HISTORY: Amended, eff 7-1-81; 7-1-93; 7-1-01.