ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	:	S. Ct. Case No. 2011-1912
		C.A. Case No. E-10-022
Appellee	:	C.P. Case No. 2008-CR-282
v.	:	
Thomas J. Ricks	:	
Appellant	:	
	:	

--oooOooo--

APPEAL FROM THE SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO

MERIT BRIEF OF APPELLEE

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STATEMENT OF THE CASE

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

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

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

On September 30, 2011, the Sixth District Court of Appeals vacated appellant's convictions for complicity to trafficking in cocaine and complicity to trafficking in marijuana, and remanded for resentencing. The remainder of the judgment against appellant was affirmed. **State v. Ricks**, 196 Ohio App.3d 798, 2011-Ohio-5043.

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

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

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

Appellant filed his motion for reconsideration on March 2, 2012. On April 18, 2012, appellant's appeal was accepted by this Honorable Court solely on Proposition of Law No. Two.

STATEMENT OF THE FACTS

On March 10, 2008, co-defendant Aaron Gipson (hereinafter "Gipson") and appellant, were visiting with Chanel Harper (hereinafter "Chanel") at her residence, along with Crystal Pool (hereinafter "Crystal"). Neither Chanel nor Crystal had seen appellant before that night, but they all hung out for a few hours. Chanel and Gipson had dated in the past, and he helped her out occasionally. In fact, Chanel owed Gipson money for marijuana he had fronted her. Chanel was also aware that her brother, the victim, Calvin Harper (hereinafter "Mann"), was involved in drugs and that Gipson was her brother's middle man in the drug dealings. (TR. 498-507, 532-534).

On March 10th, the same day, Mann went to his mother's house, Queen Amison (hereinafter "Queen"), to pick up about $3,000.00 that she was holding for him. Mann told Queen he knew a guy who had some drugs. Queen was also aware of the relationship between Mann and Gibson. (TR. 405-406).

The next day, March 11th, Rhonda Farris (hereinafter "Rhonda") called Mann early in the morning to ask if she could borrow $20.00. Rhonda and Mann were neighbors and very close friends. In fact, Rhonda would watch Mann's back, even kept drugs at her residence for Mann, and cooked for him. When Rhonda went next door to get the money, she noticed two large stacks of money sitting on the stove, which totaled $20,000.00. After seeing the money, Rhonda

left quickly because she knew Mann was going to do a transaction that day. (TR. 560-563, 576, 582).

Around 4:00 p.m. Rhonda's daughter had just come home from track practice. Rhonda noticed a man coming up her front steps. She opened the door and inquired who he was looking for. The man was only a foot in front of Rhonda when he looked at her and said, "Oh shit, Mann." Then he turned around and started up the sidewalk to Mann's house. Rhonda called Mann to warn him of the strange man coming up to his home. Mann told Rhonda, "That's my dude, he cool he cool, good lookin' out." Mann told Rhonda he would call her back, but she never heard from him. Rhonda tried calling Mann but he did not answer. (TR. 564-565). A number of people had tried calling Mann through the evening and without any success. (TR. 386, 566).

On March 12th, Queen did not receive a phone call from her son, as she did every morning. After a few phone calls and no one being able to contact Mann, Rhonda called Queen. Queen told Rhonda to enter Mann's house and make sure everything was alright. (TR. 409). Rhonda and her son Kevin Farris (hereinafter "Kevin") went into the house through the back door, while Queen was still on the cell phone. They found Mann's cell phone on the stove. (TR. 386). When Rhonda found Mann lying on the floor, Rhonda made a noise, Queen knew something was wrong, and rushed to her son's home. (TR. 409-410). Rhonda left the house distraught and called 911. (TR. 566).

Officers arrived on scene. Sergeant Braun (hereinafter "Braun") testified that Mann had no pulse and felt stiff. Officer Alexander (hereinafter "Alexander") identified the victim as Calvin Harper. Detectives arrived on scene, and Braun, Alexander and Sergeant Snyder

(hereinafter "Snyder") all went outside to secure the area. There was a crowd quickly gathering around Mann's home with people being extremely upset and yelling. (TR. 366-371).

Detective Wichman (hereinafter "Wichman") arrived at Mann's home with Detective Orzech (hereinafter "Orzech"). From that day on, through interviews and speaking with witnesses, detectives were aware that a drug deal was to have taken place between Mann and an unknown individual or individuals. They were directed to Mann's phone to find out who he was dealing with. Detectives were led to Gipson. (TR. 850-870, 411). Through phone records, it was learned that Gipson was in Sandusky on March 10th and 11th. (TR. 854-871). Further, Chanel gave detectives a description of the man who was with Gipson at Chanel's apartment the day before the murder. (TR. 511). Rhonda had given detectives the same description of the man who was at her door the day of the murder. (TR. 569). Crystal was unable to give a verbal description; however, she advised that she would be able to point him out if she saw him again. (TR. 535-536).

Gipson was eventually found to be in Canton, Michigan, in lockup. After Canton Police spoke with Gipson, detectives became aware of appellant. (TR. 678). Orzech, Wichman, and Detective Prosowski (hereinafter "Prosowski") drove to Canton to have Gipson identify appellant and were assisted by Officer Steckel (hereinafter "Steckel") of the Canton Police Department. The officers then drove to 14263 Strathmore in order for Gipson to point out appellant's residence and observed a person standing in front of the residence. Gipson pointed to the individual stating it was appellant, who was only known at that time as "Peanut." Once back at the station, detectives were able to verify appellant's identity. Steckel then e-mailed appellant's photo to officers at Sandusky Police Department (hereinafter "SPD"). (TR. 425-443).

Detective Graybill (hereinafter "Graybill") received the forwarded e-mail of the picture of appellant from Orzach who also requested that Graybill configure a photo lineup containing appellant's photo. Graybill testified that department procedure for photo lines consist of an array of eight photographs. Graybill first entered appellant's information into the records management system, created a name file and record number, and saved appellant's photo. In creating the lineup, appellant's photo was inserted into slot number six. Graybill further testified that the system automatically populates other individuals within the system. The individuals are all of similar physical characteristics, height, weight, eye color, and hair color. Then Graybill will manually choose to insert pictures that are analogous to the background and physical features of the individual. Graybill was cautious not to insert a photo that had a completely different background, keeping the photos as close to the same as possible. (TR. 486-488).

Chanel was shown the photo array and picked number six as being the man at her house with Gipson. Chanel testified that she was "a hundred percent sure and I'm a hundred for sure now" that appellant was the man at her home with Gipson. (TR. 512-513). Crystal was also shown the photo array with appellant's photo. Crystal testified that at that time two years ago, she was 100% sure that appellant was the man at Chanel's house with Gipson. Crystal further testified that although she knew some of the other people in the photo array, it did not cause her to be any less sure of the person she picked. Detectives had also shown the photo array to Rhonda. Rhonda identified appellant as the man who came to her door the day of the murder. (TR. 570-571).

Officer Middendorf (hereinafter "Middendorf"), from Cobb County Georgia, testified that he answered a call about a robbery in Cobb County. Appellant was standing with two other individuals near where the call was received. Middendorf approached the individuals and

smelled marijuana. Appellant gave Middendorf a fake name and he was arrested for obstruction. Middendorf, upon receiving appellant's real name, checked NCIC, found the warrant from Sandusky, and took appellant to Cobb County Jail. (TR. 790-801).

ARGUMENT

PROPOSITION OF LAW NO. ONE: INCRIMINATING STATEMENTS MADE BY A CODEFENDANT MAY BE OFFERED THROUGH THE TESTIMONY OF AN INVESTIGATING OFFICER TO EXPLAIN HIS CONDUCT IN THE COURSE OF AN INVESTIGATION, SO LONG AS A LIMITING INSTRUCTION IS GIVEN TO THE JURY.

The Sixth District Appellate Court correctly found that incriminating statements made by a codefendant may be offered through the testimony of an investigating officer to explain the officer's conduct in the course of an investigation, so long as a limiting instruction is given to the jury, as was done in the case at bar. The court recognized that under **Lilly v. Virginia** (1999), 527 U.S. 116, appellant has the constitutional right to confront witnesses against him. However, relying on **State v. Blevins** (1987), 36 Ohio App.3d 147 and **State v. Williams**, 2003 Ohio App. LEXIS 4661, 2003-Ohio-5204, **appeal den.**, 101 Ohio St.3d 1468, 2004-Ohio-819, the reviewing court determined that there was no evidence that codefendant's statements were used to exonerate himself or to implicate appellant. With the curative instruction, there was no error found.

It is well recognized that the admission or exclusion of evidence rests within the sound discretion of the trial court. A reviewing court will not disturb a trial court's ruling absent an abuse of discretion. **State v. Cody**, 2007 Ohio App. LEXIS 5938, 2007-Ohio-6776, 7 (Ohio App. 10 Dist.). It is also well recognized and respected that the Sixth Amendment to the United States Constitution provides that an accused has the right to confront witnesses against him. In **Crawford v. Washington** (2004), 541 U.S. 36, the United States Supreme Court held that

"[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to *afford the States flexibility in their development of hearsay law*-as does **[Ohio v.] Roberts** [(1980), 448 U.S. 56], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (Emphasis added) **Crawford**, 541 U.S. at 68. "Thus, **Crawford** only applies to hearsay statements that are not subject to any hearsay exceptions." **State v. Goza,** 2007 Ohio App. LEXIS 5982, 2007-Ohio-6837, 14 (Ohio App. 8 Dist.) **appeal den.**, 118 Ohio St.3d 1462, 2008-Ohio-2823, citing **State v. Banks**, 2004 Ohio App. LEXIS 5957, 2004-Ohio-6522 (Ohio App. 10 Dist.), **appeal den.**, 105 Ohio St.3d 1501, 2005-Ohio-1666.

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

their criminal investigation. **Id.** **See also,** **State v. Thomas** (1980), 61 Ohio St.2d 223, 232; **State v. Willis**, Case No. 81AP-508, 1981 Ohio App. LEXIS 10333, (Ohio App. 10 Dist. Dec. 15, 1981); **State v. Robertson**, Case No. 78AP-584, 1979 Ohio App. LEXIS 10943, (Ohio App. 10 Dist. July 31, 1979). **See, also** **Houston v. Sheets**, Case No. 2:08-CV-591; 2:08-CV-595, 2010 U.S. Dist. LEXIS 8837 (S.D. Ohio, Feb. 2, 2010), **affirmed by**, 2010 U.S. Dist. LEXIS 18513 (S.D. Ohio, March 2, 2010).

In **State v. Payne**, 2003 Ohio App. LEXIS 4414, 2003-Ohio-4891 (Ohio App. 10 Dist.), **appeal den.**, 101 Ohio St.3d 1421, 2004-Ohio-123, the Tenth Appellate District explained the admissibility of a statement that led investigators to the apprehension of Payne:

> In the present case, the police had a description of a white Ford Aerostar van and a license plate number. After a check of records, the police learned that the van was registered to an address on Champion Avenue. The police then took steps to watch the address on Champion Avenue looking for the van. When the officers pulled the van over while Marilyn Williams was driving it, they ordered the occupants out of the van. It became apparent that neither defendant nor Williams were in the van. The police asked Marilyn Williams, as well as the other occupants of the van, if they had been driving the van earlier. *One of the occupants informed the police that Williams and a friend had driven the van earlier in the day and that they could be found at the address on Bedford. The testimony concerning the statement made by the person in the van regarding who was driving the van earlier was offered to explain why the police ultimately decided to proceed to the Bedford address where defendant and Williams were ultimately apprehended. The statement was admissible.* (Emphasis added)

Id. at 42-43, ¶64.

In the case of Payne's codefendant, **State v. Williams**, 2003 Ohio App. LEXIS 4661, 2003-Ohio-5204 (Ohio App. 10 Dist.), **appeal den.**, 101 Ohio St.3d 1468, 2004-Ohio-819, the appellate court also upheld the testimony of the officer as it was offered to explain the officers' conduct during the course of an investigation. **Id.**, 30-31, ¶49. The court additionally stated that:

> Further, the probative value was not outweighed by the danger of unfair prejudice. Finally, *we note that the court gave the jury a limiting instruction not to consider the statement for the truth of the matter asserted, but, rather, as an explanation for why the police officers acted in the manner they did.* Thus, any potential prejudice resulting from the testimony was "effectively cured" by the court's instructions, and it is presumed that the jury followed the instructions provided by the court. **State v. Nelson** (Feb. 25, 1999), Cuyahoga App. No. 73289, 1999 Ohio App. LEXIS 600. (Emphasis added)

Williams 2003-Ohio 5204 at 31, ¶49.

The decision in **Williams** was recognized by the United States District Court for the Southern District of Ohio, Eastern Division, in **Banks v. Wolfe**, Case No. 2:05-cv-00697, 2006 U.S. Dist. LEXIS 35333 (S.D. Ohio, May 30, 2006). In **Banks**, the District Court extensively quoted the decision of the Ohio appellate court, which relied on **Williams**, in upholding the decision of the trial court to allow statements of the investigating officers, as they explained their conduct during their investigation:

> **IV. CLAIM ONE**
>
> In claim one, petitioner asserts that he was denied his right to confront witnesses. Specifically, petitioner refers to the following testimony:
>
> 1. Michelle Stone's statement that she heard Ballow say "there he goes" while she stood outside her apartment after the police had arrived. *Transcript,* at 185-86.
>
> 2. The following testimony by police:
>
> Q. And based upon what Miss Stone told you, what did you do next?
>
> ***
>
> A. Ms. Stone indicated to me over the telephone that she had been in contact with Mr. Banks by telephone, and that he had asked her to meet him at Applebee's Restaurant on Brice Road.
>
> ***

With that in mind, I went to Miss Stone's apartment, and I had officers go to Mr. Banks' house at 7000 Candlish Avenue....

I went over and talked to Miss Stone in person. And when I arrived, she indicated that she was on the phone at that time talking to Mr. Banks again on the cell phone.

***

She hung up, and she said that he's at this house....

***

working on satellite discs. I had officers in the location of the house, and I asked them to move up closer to the house and to contain the house so if Mr. Banks was, in fact, inside, that he would not be able to get out.

I then placed the phone call to Mr. Banks from my cell phone at the number provided to me by Miss Stone, and he would not answer. Miss Stone indicated that she was not surprised that he wouldn't answer...that he had caller ID, and if he didn't recognize....

***

I placed a call to Mr. Banks, using Miss Stone's phone. He answered. I identified myself. I told him we had officers outside of his residence and asked him to come to the door, and he refused....He hung up on me.

As soon as he hung up, her cell phone rang. And, again, she stated that he was upset with her because he could tell that I had made a phone call from her phone.

***

So when she hung up from talking to Mr. Banks, she said that...he knew we were outside of his house, that he could hear us knocking on the door....

***

So based on the fact of what all had occurred....I instructed the officers to continue knocking, and if he didn't answer, we would eventually force entry, which we did.

Transcript, at 204-211.

A. During the course of my interview with her, Michelle Stone had a cellular telephone on her person and it rang several times during our interview, and she explained to me that that was the defendant calling her at those times, and I instructed her to turn the phone off so we could conduct the interview.

Id., at 280.

***

The state appellate court denied this claim as follows:

Appellant's first assignment of error argues the trial court erred in allowing the introduction of hearsay evidence to bolster Stone's version of the events leading to appellant's arrest. The admission or exclusion of evidence lies in the trial court's sound discretion. **State v. Sage** (1987), 31 Ohio St.3d 173.... To find an abuse of discretion, this court must determine the trial court's decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. **Blakemore v. Blakemore** (1983), 5 Ohio St.3d 217....

Specifically, appellant objects to:

1. Stone's testimony that she heard Ballow say "there he goes" while they stood outside the apartment building after police arrived (Tr. at 185- 187);

2. Testimony by Sergeant Jeff A. Matthias, Officer Harold Conley, and Detective John A. Weeks regarding Stone's statements to them (Tr. at 204-209, 281);

***

Appellant claims these admissions violated his Sixth Amendment right to confrontation. As supporting authority he directs us to the recent United States Supreme Court case of **Crawford v. Washington** (2004), 541 U.S. 36...in which the court rejected its previous position that an unavailable witness' out-of-court testimonial statements are admissible so long as the court finds sufficient indicia of reliability. **Crawford** now requires the exclusion of testimonial statements by unavailable witnesses unless the state establishes the witnesses are unavailable and the defense had a prior opportunity to cross-examine them.

Appellant's reliance upon **Crawford** is misplaced. The holding in **Crawford** only applies to statements that are, in fact, hearsay, and that are not subject to common-law exceptions to the hearsay rule, such as excited utterance or present sense impression. 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." Statements that are not intended to prove the truth of what was said are not hearsay. **State v. Davis** (1991), 62 Ohio St.3d 326, at 343.... *The trial court determined, and we agree, that some of the statements to which appellant objected were not hearsay because they were not being offered for the truth of the matter asserted. The court determined the remaining objectionable statements qualified as excited utterances or present sense impressions and, therefore, were exceptions to the hearsay rule.*
>
> *For example, the purpose of Sergeant Mathias' testimony was to describe, for the jury, the events leading up to appellant's arrest at the motel. A part of that testimony included statements Stone made to Sergeant Mathias about appellant. As the court explained to the jury, Sergeant Mathias' intention in repeating what Stone told him was not to bolster Stone's credibility, but to explain Sergeant Mathias' actions on the night he arrested appellant. Such statements serve to explain police conduct and are generally admissible so long as the conduct explained is relevant, equivocal, and contemporaneous with the statements.* **State v. Williams**, Franklin App. No. 02AP-730, 2003 Ohio 5204, at P48, citing **State v. Blevins** (1987), 36 Ohio App.3d 147.... Sergeant Mathias' testimony meets this test and was, therefore, admissible. Furthermore, as in **Williams**, *the court gave the jury a limiting instruction not to consider the statement for the truth of the matter asserted, but as an explanation of Sergeant Mathias' conduct. That instruction cured any potential prejudice from Sergeant Mathias' statements.*
>
> *Similarly admissible was testimony by Officer Conley and Detective Weeks regarding their investigation of the crime, their efforts to locate appellant, and their search of the apartment and the parking lot. All of the described conduct was relevant, equivocal, and contemporaneous with the statements made. In addition, the trial court continued to offer cautionary instructions to the jury that officers' reiteration of statements by Ballow and Stone were only being offered to show why officers did what they did.* Therefore, we conclude that testimony by Sergeant Mathias, Officer Conley and Detective Weeks was not, in fact, hearsay and were properly admitted by the trial court. (Emphasis added)

Banks v. Wolfe, 2006 U.S. Dist. LEXIS 35333, 72-78.

"[O]ut-of-court statements related by an officer during trial testimony can be admissible even when they identify codefendant through anonymous tips. **State v. Stadmire**, 8th Dist. No. 81188, 2003 Ohio 873, ¶ 38-42." **State v. Willis**, 2012 Ohio App. LEXIS 2309, 2012-Ohio-2623, 7, ¶13 (Ohio App. 8 Dist.). In **Stadmire**, the court found that "the anonymous tips guided

the officers in apprehending and arresting the defendant through his ties with the codefendant" and the "admission of the tips were both relevant and contemporaneous to explain the officer's pursuit of the defendant as a suspect." **Willis** at 8, ¶13.

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

Appellant argues that the statements made by Gipson were used for truth-of-the-matter and directly implicated appellant, which was substantive evidence of appellant's guilt. This argument is premised, in part, on appellee's opening statement, which is not evidence. (TR. 340-42). Appellant also premises his truth-of-the-matter argument on the testimony of Steckel. However, contrary to appellant's assertion, at no time was testimony introduced indicating that appellant was identified by codefendant Gipson as the person who committed the murder. (TR 434-437). The record demonstrates that the Sandusky Police Department was informed by witnesses that Gipson was in Sandusky and that he came with a person only known as "Peanut." The Sandusky Police Department notified Canton, Michigan, where Gipson was incarcerated. Gipson identified "Peanut" by taking Canton Police Officers to where "Peanut" lived.

Gipson's statement identifying appellant as "Peanut" is not incriminating on it's face and only became so when linked with the evidence of appellant's identification, *which identification was determined by further police investigation.* **Richardson v. Marsh** (1987), 481 U.S. 200,

203. In fact, Steckel testified that after appellant was identified as "Peanut," further efforts had to be made to identify appellant:

> Q. Okay. And when you went back to the station, was [sic] there further efforts to try to make the identification, *the name identification* of this person named Peanut?
>
> A. Yes.
>
> Q. Okay. And did you come up with a name?
>
> A. We did.
>
> Q. And what was that name?
>
> A. The name was Thomas Ricks. (Emphasis added)

(TR. 443).

Where such a link is required to incriminate defendant, a limiting instruction to the jury is sufficient to satisfy **Bruton**. **Com. v. Travers** (2001), 768 A.2d 845, 848, citing **Gray v. Maryland** (1998), 523 U.S. 185. A limiting instruction was given by the trial court in the case at bar and was duly noted and quoted by the appellate court. **Ricks,** 196 Ohio App.3d 798 at 810, ¶62-63. Specifically, the trial court stated that:

> Court: ***
>
> 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 the 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 department's investigation in conjunction with the Sandusky Police Department.* (Emphasis added)

(TR. 448-449). "[A] jury is presumed to follow the instructions of the court." **Blevins**, 36 Ohio App.3d at 150, citing **Lakeside v. Oregon** (1978), 435 U.S. 333. **See State v. Mason** (1998), 82 Ohio St.3d 144, 157, **recon. den.**, 82 Ohio St.3d 1483, **cert. den.**, 525 U.S. 1057. The limiting instruction given by the trial court and the case law relied upon, demonstrates that the trial court legitimately considered the substantive nature of Gipson's statements and appellant's right to confrontation. Therefore, there is no demonstration that the trial court abused its discretion in allowing Gipson's statements, as the statements explained the police investigation of appellant, and a limiting instruction was given to the jury.

Finally, the appellate court noted that:

> In the present case, we have a co-defendant who identified an individual he believed to be Peanut. There is no evidence that Gipson used the opportunity to exonerate himself and implicate appellant. Once Peanut was identified as appellant, the Sandusky officers were able to compile a photo array. Further, the court issued a lengthy curative instruction to ensure that the jury properly interpreted the testimony. Finally, Gipson was made available for questioning but appellant declined. Based on the foregoing, we find that the trial court did not err in allowing the testimony. Appellant's third assignment of error is not well-taken.

Ricks, 811-812, ¶69. Based on this analysis of the reviewing court, there is no demonstration that the Sixth District Court of Appeals extended this Court's holding of **Thomas**.

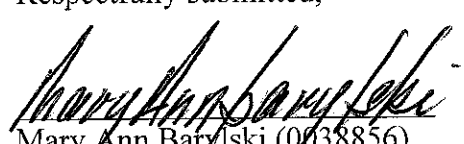
Appellant relies on the dissenting opinion of Judge Yarbrough. What Judge Yarbrough failed to take into consideration in his opinion was the totality of all the evidence presented at trial. Judge Yarbrough only centered on the identification of "Peanut" as being appellant. Other evidence demonstrates that there was overwhelming evidence of appellant's guilt. Appellant has failed to recognize the cell phone investigation demonstrating that appellant was in Sandusky with the codefendant and at Mann's residence on March 10th and March 11th. (TR. 872-877). Also, appellant's own conversations when appellant was in custody in the State of Georgia incriminated appellant. When asked why appellant did not tell his friend about what happened in

Ohio, appellant responded that "it happened, Sonja. Just know it happened." (TR. 913). Appellant knew the U.S. Marshalls were coming for him, that he needed a good lawyer, that it was over for appellant, that appellant was not getting out of jail, that they got him. etc. (TR. 908-913). Said evidence was noted by the appellate court in its recitation of the facts of the case. **Ricks** at 803, ¶11. Based on the totality of the circumstances, the trial court and the Sixth District Court of Appeals rendered the proper decisions, which decisions do not require further review as the decisions fall within the purview of **Thomas**, **supra**.

CONCLUSION

Appellee respectfully moves this Honorable Court to affirm the decision of the Sixth District Court of Appeals. If this Honorable Court would adopt appellant's arguments and analysis of this case, the decision would undermine, and potentially overrule, the decisions of **Thomas**, **supra** and **Blevins**, **supra**. The Sixth District Court of Appeals did not overextend **Thomas** and its progeny. By adopting appellant's incorrect analysis of the confrontation clause under the facts of this case, the decision would effectively undermine not only case law precedent, but the investigation of cases by law enforcement, and the effective and constitutional prosecution of criminal cases. The State also has a constitutional right to a fair trial, which fairness was upheld by the Sixth District Court of Appeals in correctly applying the case law of **Thomas**, **supra**, to the case at bar.

Respectfully submitted,



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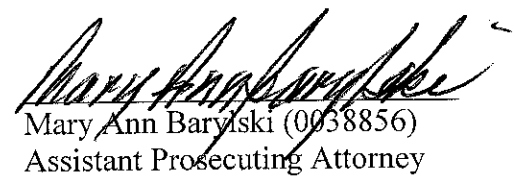
CERTIFICATION

This is to certify that a copy of the foregoing Merit Brief of Appellee was mailed to Kristopher A. Haines, Assistant State Public Defender, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215, this 27th day of August, 2012, by regular U.S. mail.



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