

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Case No. 11-0857
-vs- : Appeal taken from Cuyahoga County
DENNY OBERMILLER, : Court of Common Pleas
Appellant. : Case No. CR-10-542119-A
: **This is a death penalty case**

REPLY BRIEF OF APPELLANT DENNY OBERMILLER

William D. Mason – 0037540
Prosecuting Attorney
Cuyahoga County

Saleh Awadallah
Mary H. McGrath
Margaret A. Troia
Assistant Prosecuting Attorneys
1200 Ontario St.
Cleveland, Ohio 44113
(216) 443-7800
(330) 698-2270 – Fax

COUNSEL FOR APPELLEE

Office of the
Ohio Public Defender

Linda E. Prucha – 0040689
Supervisor, Death Penalty Division

Jennifer A. Prillo – 0073744
Supervisor, Death Penalty Division

Shawn P. Welch – 0085399
Assistant State Public Defender

Office of the Ohio Public Defender
250 E. Broad St., Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 – Fax

COUNSEL FOR APPELLANT

FILED
OCT 19 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PREFACE..... 1

PROPOSITION OF LAW NO. 1 2

 A defendant has a constitutional right to waive counsel and represent himself when the waiver is made knowingly, intelligently and voluntarily. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 10, 16. 2

PROPOSITION OF LAW NO. 2 5

 A capital defendant’s right to a reliable sentence is violated when the three judge panel fails to properly weigh aggravating circumstances and mitigating factors in imposing a sentence of death. U.S. Const. Amends. VIII, XIV; Ohio Const. Art. I §§ 9, 16. 5

PROPOSITION OF LAW NO. 3 7

 The defendant’s rights to a fair trial, due process and freedom from cruel and unusual punishment are violated when the trial court elicits and allows the pervasive introduction of evidence which is irrelevant, inadmissible and unfairly prejudicial. U.S. Const. amends. IV, V, VI, VIII and Ohio Const. art. I, §§ 2, 5, 9, 16. Ohio R. Evid. 401, 403, 404. O.R.C. §§ 2945.03, 2945.06. 7

PROPOSITION OF LAW NO. 4 13

 The right to the effective assistance of counsel is violated when counsel’s deficient performance results in prejudice to the defendant. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10..... 13

PROPOSITION OF LAW NO. 5 15

 The sentence of death imposed on Obermiller was unreliable and inappropriate. U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16 and O.R.C. § 2929.05..... 15

PROPOSITION OF LAW NO. 6 16

 The accused’s right to due process is violated when the cumulative effect of prosecutor misconduct renders the accused’s trial unfair. U.S. Const. amend. XIV; Ohio Const. art. I, § 16. 16

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

<i>Adams v. United States ex rel McCann</i> , 317 U.S. 269 (1942).....	4
<i>Faretta v. California</i> , 422 U.S. 806 (1975).....	3, 4
<i>Florida v. Nixon</i> , 543 U.S. 175 (2004).....	14
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938).....	14
<i>State v. Ashworth</i> , 85 Ohio St. 3d 56, 706 N.E.2d 1231 (1999).....	5, 15
<i>State v. Dean</i> , 127 Ohio St. 3d 140, 937 N.E.2d 97 (2010).....	3
<i>State v. Fears</i> , 86 Ohio St. 3d 329, 715 N.E.2d 136 (1999).....	16
<i>State v. Ferguson</i> , 108 Ohio St. 3d 451, 844 N.E.2d 806 (2006).....	5, 6
<i>State v. Green</i> , 81 Ohio St. 3d 100, 689 N.E.2d 556 (1998).....	9
<i>State v. Kelley</i> , No. 87324, 2006 Ohio 5432, 2006 Ohio App. LEXIS 5426 (8th Dist. Oct. 19, 2006).....	9
<i>State v. Lilly</i> , 87 Ohio St. 3d 97, 717 N.E.2d 322 (1999).....	16
<i>State v. Mink</i> , 101 Ohio St. 3d 350, 805 N.E.2d 1064 (2004).....	5, 6
<i>State v. Pasqualone</i> , 121 Ohio St. 3d 186, 903 N.E.2d 270 (2009).....	13, 14
<i>State v. Taylor</i> , 98 Ohio St. 3d 27, 781 N.E.2d 72 (2002).....	3
<i>State v. Wade</i> , 53 Ohio St. 2d 182, 373 N.E.2d 1244 (1978).....	16
<i>Taylor v. Illinois</i> , 484 U.S. 400 (1988).....	14

CONSTITUTIONAL PROVISIONS

Ohio Const. art. I, § 2	7
Ohio Const. art. I, § 5	7
Ohio Const. art. I, § 9	5, 7, 15
Ohio Const. art. I, § 10	2, 13
Ohio Const. art. I, § 16	passim
U.S. Const. amend. IV	7
U.S. Const. amend. V	7
U.S. Const. amend. VI.....	2, 7, 13
U.S. Const. amend. VIII	5, 7, 15
U.S. Const. amend. XIV	passim

STATUTES

O.R.C. § 2929.05 15
O.R.C. § 2945.03 7, 8, 9
O.R.C. § 2945.06 7, 8, 9, 10

RULES

Ohio R. Crim. P. 11 9, 10
Ohio R. Evid. 401 7
Ohio R. Evid. 403 7, 11
Ohio R. Evid. 404 7
Ohio Rule of Professional Conduct 1.2 13

PREFACE

Denny Obermiller replies to the State's arguments in Propositions of Law Nos. 1-6. The absence of a reply by Obermiller on other claims is to avoid reargument of the merit brief and is not a concession to the State's arguments. Obermiller stands on his merit brief where no reply is made.

PROPOSITION OF LAW NO. 1

A defendant has a constitutional right to waive counsel and represent himself when the waiver is made knowingly, intelligently and voluntarily. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 10, 16.

Denny Obermiller was denied his constitutional right to represent himself at his capital trial. Before the three-judge panel was convened, the trial court denied Obermiller's request to represent himself. Tr. 222-23. After the panel was convened, the court *sua sponte* revisited the issue and questioned Obermiller for over thirty pages about his ability to represent himself. Tr. 250-84. Finally, Obermiller gave up. Tr. 284.

In its brief, the State fails to address Obermiller's argument that the trial court improperly denied Obermiller's request to represent himself prior to revisiting the issue after the panel was convened. After Obermiller's initial request, the trial court conducted a colloquy with Obermiller. Tr. 219-24; 226-36. The court questioned Obermiller about his satisfaction with his attorneys, his work experience, and his prior experience with self-representation. *Id.* Obermiller indicated that he had represented himself in his juvenile case. Tr. 221. The court pointed out that that case involved a different burden of proof and again asked Obermiller if he was satisfied with his counsel. Tr. 222. Obermiller indicated that he was satisfied with the work his attorneys had done. *Id.* After that colloquy, the trial court stated:

I find that you've not had the experience necessary to adequately represent yourself at this proceeding, that this proceeding is one of the most serious proceedings we can have, and that while you can—you have assisted your lawyers, you've also indicated to this Court that you found that they were competent, that they have provided you with competent representation, and the Court sees no reason at this time to relieve them of their responsibility.

Tr. 222-23. These were improper reasons to deny Obermiller's constitutional right to represent himself. Neither Obermiller's experience nor his reasons for wishing to represent himself are relevant to a determination of whether he could represent himself. The only thing the trial court

needed to determine was whether Obermiller's decision was knowing, intelligent, and voluntary. *Faretta v. California*, 422 U.S. 806 (1975); *State v. Dean*, 127 Ohio St. 3d 140, 937 N.E.2d 97 (2010); *State v. Taylor*, 98 Ohio St. 3d 27, 781 N.E.2d 72 (2002).

The State argues that Obermiller withdrew his request to represent himself. (State's Brief p. 69.) The State further argues that even if he had not, the trial court could appropriately have denied his request as not being knowing voluntary, and intelligent based on his answers to the panel's questions. State's Brief p. 71.

First, Obermiller "withdrew" his request only after the trial court had inappropriately denied the request, *sua sponte* revisited it, and then questioned him for over thirty transcript pages about factors that were not relevant to its decision (tr. 250-84). Second, the colloquy did not provide justification for denying Obermiller's request. During its questioning, the panel asked Obermiller about whether he had ever studied the law (tr. 253, 255); whether he had read chapter 29 of the Ohio Revised Code (*id.*); whether he knew how to make an objection, give an opening statement, or form a trial strategy (tr. 258, 259); and whether he had familiarized himself with the hundreds of Ohio death penalty cases (*id.*).

The State quotes from *Faretta* in its brief, arguing that a defendant wishing to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing." State's Brief p. 71 (quoting *Faretta*, 422 U.S. at 835). However, this quote is taken out of context. What leads immediately up to that quote makes clear that the trial court's duty is only to determine that the defendant understands the perils of his decision, not that he has the abilities of an attorney: "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and

disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel McCann*, 317 U.S. 269, 279 (1942)).

Moreover, Obermiller’s “technical legal knowledge . . . was not relevant to an assessment of his knowing exercise of his right to defend himself.” *Faretta*, 422 U.S. 836. Accordingly, his responses to the trial court’s questions would not have provided justification for finding that his decision was not made knowingly, intelligently, and voluntarily.

Finally, Obermiller’s reasons for wishing to proceed *pro se* were not relevant to the decision. That representing oneself is a poor choice does not provide reason for denying this constitutional right. While the trial court does have a duty to ensure that the defendant knows that there are pitfalls to such a decision, it cannot deny the defendant’s right to make that decision because it disagrees with his reasoning or believes the perils are too great. The record indicates that Obermiller “was literate, competent, and understanding, and that he was voluntarily exercising his informed free will.” *Id.* at 835. Obermiller’s right to self-representation was denied when the trial court initially denied his request to proceed *pro se*. This violation was not cured when the trial court later revisited the issue and pushed Obermiller into giving up and telling them, “I really don’t care at this point.” Tr. 284.

Obermiller clearly expressed his desire to represent himself. The trial court violated his right to do so when it failed to grant his request.

PROPOSITION OF LAW NO. 2

A capital defendant's right to a reliable sentence is violated when the three judge panel fails to properly weigh aggravating circumstances and mitigating factors in imposing a sentence of death. U.S. Const. amends. VIII, XIV; Ohio Const. art. I §§ 9, 16.

The state misinterprets this Court's holdings in *State v. Ashworth*, 85 Ohio St. 3d 56, 706 N.E.2d 1231 (1999), *State v. Mink*, 101 Ohio St. 3d 350, 805 N.E.2d 1064 (2004), and *State v. Ferguson*, 108 Ohio St. 3d 451, 844 N.E.2d 806 (2006). Whether or not the defendant waives the presentation of mitigating evidence, the death sentence must be imposed in a fair and reliable manner. This Court acknowledged that "the Eighth Amendment does impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Ashworth*, 85 Ohio St. 3d at 64, 1238.

In *Ashworth*, this Court addressed the procedures to be followed by a trial court to ensure that a waiver of the presentation of mitigating evidence is knowing and voluntary. A court must conduct an inquiry of the defendant on the record. The court must also decide if the defendant is competent and understands his rights in both the plea process and the sentencing proceedings. "The trial court was not obligated to do any more" with regard to the *presentation* of evidence. *Id.* at 62-3, 1236-7. However, the trial court is still held to a high standard when considering available mitigating evidence and determining the appropriateness of the death sentence.

While the defendant cannot be forced to present evidence, nevertheless there are "existing safeguards to ensure the appropriateness of the death sentence." *Id.* at 64, 1238.

First, the trial court cannot impose sentence based on a guilty plea until it has made the specific findings required by R.C. 2945.06 and Crim. R. 11(C)(3) that a defendant is eligible for the death penalty. Second, the same considerations go into the sentencing decision even when a defendant does not vigorously oppose. R.C. 2929.03(F). Finally, as the state concedes, a defendant cannot waive this

court's review of his death sentence, though he can waive review of his conviction. R.C. 2929.05(A)

Id. at 64, 1238.

Before the trial court can impose the death sentence, the court must weigh the aggravating circumstances against the mitigating factors. *Id.* This Court recognized that relevant mitigating evidence should be considered when it stated that "in spite of Ashworth's efforts to preclude mitigating evidence, the record in this case is not devoid of evidence that could be considered mitigating." *Id.* at 66, 1239. In *State v. Mink*, the Court found error where the trial court failed to consider Mink's psychological problems under (B)(7). *State v. Mink*, 101 Ohio St. 3d 350, 365, 805 N.E.2d 1064, 1080 (2004) *See also, State v. Ferguson*, 108 Ohio St. 3d 451, 470, 844 N.E.2d 806, 824 (2006). The trial court in Obermiller's case failed to consider his compelling mental health evidence, as well as other relevant mitigating evidence. The court instead continuously pressed witnesses for prejudicial irrelevant statements.

In Obermiller's case the death sentence was imposed in an arbitrary and unreliable manner when the trial court failed to properly consider the available mitigating evidence, and elicited from the witnesses improper non-statutory aggravating circumstances and inflammatory, irrelevant speculation.

PROPOSITION OF LAW NO. 3

The defendant's rights to a fair trial, due process and freedom from cruel and unusual punishment are violated when the trial court elicits and allows the pervasive introduction of evidence which is irrelevant, inadmissible and unfairly prejudicial. U.S. Const. amends. IV, V, VI, VIII and Ohio Const. art. I, §§ 2, 5, 9, 16. Ohio R. Evid. 401, 403, 404. O.R.C. §§ 2945.03, 2945.06.

The State's erroneous interpretation of R.C. § 2945.06.

The State misinterprets R.C. § 2945.06. In his brief, Obermiller quoted the introductory sentence of that section, as follows:

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury.

R.C. § 2945.06 (emphasis added).

The State believes this section applying to "any case in which a defendant waives his right to trial by jury and elects to be tried by the court" is "inapplicable" to Obermiller, even though he waived his right to a jury. R.C. § 2945.06; State's Brief at 75. To say the first sentence of R.C. § 2945.06 is inapplicable when it specifically applies to "any case" involving a bench trial misinterprets the language of the statute. Instead the State contends that *only* the following sentences from the statute apply:

If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death.

R.C. § 2945.06.

The first sentence of R.C. § 2945.06 is not incompatible with the latter sentence quoted by the State, especially considering that R.C. § 2945.06 is written as one continuous paragraph without subsections. In “any case” involving a bench trial, the court would necessarily proceed “in accordance with the rules and in like manner as if the cause were being tried before a jury.” R.C. § 2945.06. This means only that the court should follow the normal rules of evidence and procedure of any criminal trial. The State’s quoted passage only provides further *clarification* of that procedure, stating that the court in an aggravated murder plea would be composed of three judges who shall examine the witnesses. The rules of evidence and procedure would not be thrown out just because a three-judge panel is convened. But that is exactly what the State believes by saying the first sentence of R.C. § 2945.06 does not apply in Obermiller’s case.

The State’s interpretation of R.C. § 2945.06 would also be inconsistent with R.C. § 2945.03 regarding the judge’s control of trial. R.C. § 2945.03 is a general rule describing the court’s function as gatekeeper of the evidence at trial. R.C. § 2945.03 states that, “The judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue.” R.C. § 2945.03.

By saying the opening sentence of R.C. § 2945.06 does not apply, the State is basically asserting that the normal rules of evidence do not apply to three-judge panel cases. This is exactly Obermiller’s concern with the procedure his trial court followed, and the State is seeking to justify the way the proceedings were handled by arguing that the rules of evidence simply did not apply. But the court should have proceeded “in accordance with the rules and in like manner as if the cause were being tried before a jury.” R.C. § 2945.06. The trial court also should have

“limit[ed] the introduction of evidence and the argument of counsel to relevant and effective material matters.” R.C. § 2945.03. R.C. § 2945.03 compels that of all criminal trials, whether they are before a jury or panel of judges.

The State’s incorrect reading of R.C. § 2945.06 is also contrary to case law. The State cites no case law for their contention that the introductory sentence does not apply to some bench trials. This Court has held that when a defendant pleads guilty to aggravated murder in a capital case, a three-judge panel is required to examine witnesses and to hear any other evidence *properly presented* by the prosecution in order to make a Crim. R. 11 determination as to the guilt of the defendant. *State v. Green*, 81 Ohio St. 3d 100, 104-05, 689 N.E.2d 556, 559 (1998) (emphasis added). In Obermiller’s case, harmful inadmissible evidence that was not properly presented was elicited by both the State and by the three-judge panel.

In *Green*, this Court reversed the trial court’s judgment because the presiding judge accepted Green’s guilty plea and proceeded to sentencing without taking any evidence, without any recorded deliberation or determination by the three-judge panel as to the appropriateness of the charge, without any finding on the record that aggravated murder had been proven beyond a reasonable doubt, and without journalizing a finding of guilt. 81 Ohio St. 3d 100 (Ohio 1998). Basically, the trial court in *Green* did not follow “the rules and...manner” of a jury trial. R.C. § 2945.06. Thus this Court concluded that there was no valid conviction and Green’s sentence was therefore void. 81 Ohio St. 3d 100 (Ohio 1998). This Court then reversed the judgment of the trial court and remanded the case for further proceedings. *Id.*

Likewise in *State v. Kelley*, No. 87324, 2006 Ohio 5432, 2006 Ohio App. LEXIS 5426 (8th Dist. Oct. 19, 2006), the Eighth District Court of Appeals held that when a three-judge panel accepted Kelley’s guilty plea to aggravated murder, it did not satisfy the requirements of Ohio R.

Crim. P. 11(C)(3) or R.C. § 2945.06 because (1) no witnesses testified about the facts of the aggravated murder, nor were any exhibits offered, except four photographs; (2) the State's recitations about the facts of the murder were not sufficient evidence; (3) guilt was imposed without deliberation among the members of the panel, raising questions about whether the finding of guilt was unanimous; and (4) a journal entry finding defendant guilty was absent. Thus, even when a capital defendant pleads guilty, the court must hear the case "in accordance with the rules and in like manner as if the cause were being tried before a jury." R.C. § 2945.06.

The State makes erroneous claims about evidence.

The core of Obermiller's claim is not only that the court should have treated the case like it was being tried before a jury in accordance with R.C. § 2945.06, but that the court failed to control the presentation of evidence and allowed irrelevant, inadmissible and unfairly prejudicial evidence to be admitted in the record. Even if a defendant, like Obermiller, waives a jury trial, they do not waive all other rights, nor should a trial court entirely disregard the rules of evidence.

In its brief, the State argues that, "Contrary to Obermiller's claim, a juvenile conviction was not introduced. Evidence as to Obermiller's incarceration while a juvenile was already introduced." State's Brief p. 78. The State seems to be conflating the domestic violence incident with Obermiller's juvenile adjudication for robbery (for which he was incarcerated). This robbery adjudication came out several times during the proceedings. This is not, however, what Obermiller complained of in his brief. Apparently there was a report of a domestic violence incident in which Stacy Lykins (Muzic) was the victim and Obermiller the perpetrator. This domestic violence offense was elicited by the State during the examination of Stacy Lykins (Muzic). The pertinent exchange is as follows:

Q. Do you recall when you were a victim of his domestic violence when you had to go to juvenile court when he was 14 and you were - - you're Stacy Muzic, correct; that's your maiden name?

A. That's my maiden name, correct.

Q. Do you remember being a victim of a domestic violence?

A. I don't remember, no. I don't. I could have been. I don't remember. No Denny has never put his hands on me. Never.

Q. Is there another Stacy Muzic that was 25 back in 1996?

A. No.

Tr. 1348.

The defense in no way opened the door to this line of questioning. This is egregious considering the evidence concerned a juvenile offense from when Obermiller was 14 years old in 1996. Tr. 1348. The offense was nearly fifteen years in the past by the time of trial and was irrelevant to the proceedings. The probative value of the testimony, if any, was far outweighed by the prejudice to Obermiller. *See* R. Evid. 403. Moreover, this did not, as the State argues, come out in response to questions about where Obermiller lived. State's Brief p. 78. The questioning was specifically about the domestic violence event and came directly after questioning Ms. Lykins about her criminal history. Tr. 1347-48.

Additionally, the State is incorrect in saying that Obermiller failed to explain how the cumulative admission of prejudicial graphic photos was plain error. Obermiller devoted his seventh proposition of law to that subject. The prejudicial photos and other irrelevant and inadmissible evidence are discussed more fully in Obermiller's merit brief.

The State tries to introduce inadmissible "evidence" into the record on appeal.

Finally, in its brief, the State claims that there was pornography on one of the computers in the crime scene house that show Obermiller's "proclivity for rape scenes." State's Brief p. 79.

The BCI computer forensic specialist called by the State to testify about the contents of the computer was withdrawn before giving any testimony about those contents. Tr. 537. While the State did tell the panel that there was pornography on the computer, nowhere in the record are “rape scenes” mentioned. This is a bald attempt by the State to get before this Court highly inflammatory “evidence” that is not part of the record in this case.

PROPOSITION OF LAW NO. 4

The right to the effective assistance of counsel is violated when counsel's deficient performance results in prejudice to the defendant. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

Denny Obermiller's Sixth Amendment right to effective counsel was violated by the cumulative effect of errors and omissions by his trial counsel. Through most of Obermiller's proceedings, counsel did nothing. Counsel told the trial court, over and over, that they were not doing anything because Obermiller had forbidden them from performing most of their duties as his counsel. Obermiller, in his brief, claimed that trial counsel were ineffective because the decisions they allowed their client to make were tactical decisions that they should have made themselves. Trial counsel were vested with the duty of making decisions about when to object, when to cross-examine, etc. Trial counsel could not cede those decisions entirely to their client.

The State argues that Ohio Rule of Professional Conduct 1.2(a) is applicable here and that it requires an attorney to abide by a client's decisions concerning the objectives of representation and to consult with the client as to the means by which the objectives are to be pursued. State's Brief p. 80. However, counsel remains the ultimate decision maker when it comes to decisions such as what arguments will be pursued, what evidentiary objections will be raised, what agreements will be entered into regarding the admission of evidence, and whether to cross-examine a witness. *State v. Pasqualone*, 121 Ohio St. 3d 186, 192, 903 N.E.2d 270, 276 (2009). The Rules of Professional Conduct recognize that there are many situations in which counsel and client may disagree, and the rules do not attempt to resolve those differences. Prof. Conduct R. 1.2, comment 2. Instead, the rules recognize that "[o]ther law . . . may be applicable and should be consulted by the lawyer." *Id.* There is applicable law from this Court as well as the United States Supreme Court that tells us that counsel in criminal cases need not have the

client's approval for every tactical decision. *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Taylor v. Illinois*, 484 U.S. 400, 418 (1988); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938); *Pasqualone*, 121 Ohio St. 3d at 192, 903 N.E.2d at 276.

The State then rests on its argument that counsel's hands were tied because Obermiller refused to allow them to do the things raised in his brief as instances of ineffective assistance of counsel. However, these instances were tactical decisions that counsel, not Obermiller, had the authority to make.

The State cites several cases for the proposition that a defendant cannot thwart his attorneys' attempts to present a defense and then claim ineffective assistance of counsel. State's Brief pp. 83-84. However, the cases cited by the State all involve mitigation presentations. This is one of the decisions that this Court has recognized as being the province of the defendant not the attorney. *Pasqualone*, 121 Ohio St. 3d at 192, 903 N.E.2d at 276. Obermiller's ineffective assistance of counsel claim is distinguishable because the decisions he raises as examples of the deficient performance involve tactical decisions that are ultimately within the attorneys' control. Counsel's ineffectiveness is not cured because they relied on their client to make the decisions.

PROPOSITION OF LAW NO. 5

The sentence of death imposed on Obermiller was unreliable and inappropriate. U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16 and O.R.C. § 2929.05.

In its response to Proposition of Law No. 5 the state merely repeats its argument made in response to Proposition of Law No. 2 that Obermiller waived the presentation of mitigating evidence, citing to *State v. Ashworth*, 85 Ohio St. 3d 56, 706 N.E.2d 1231 (1999). However, this Court noted in *Ashworth* that it is required to review the evidence in the case to determine whether the sentence was “appropriate, proportionate, and not imposed in an arbitrary or unreliable manner.” *Id.* at 64, 1238. This includes consideration of all relevant mitigating evidence. *Id.* at 66, 1239. As outlined in Obermiller’s merit brief, the evidence demonstrates that the death sentence is not appropriate in this case.

PROPOSITION OF LAW NO. 6

The accused's right to due process is violated when the cumulative effect of prosecutor misconduct renders the accused's trial unfair. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

Multiple instances of prosecutor misconduct were committed during Obermiller's capital trial. The cumulative effect of the professional misconduct violated Obermiller's due process rights. The prejudicial effect of the prosecutorial misconduct would have bled over into the sentencing phase of Obermiller's capital trial and resulted in the scales being tipped in favor of a death sentence.

First, the State contends that Obermiller has failed to establish plain error. State's Brief p. 89. To the extent that counsel failed to object to any instances of prosecutorial misconduct, the claim is subject to plain error review. An error is plain when it denies the defendant a fair trial. *See State v. Fears*, 86 Ohio St. 3d 329, 332, 715 N.E.2d 136, 143 (1999) (citing *State v. Wade*, 53 Ohio St. 2d 182, 189, 373 N.E.2d 1244 (1978)). *See also State v. Lilly*, 87 Ohio St. 3d 97, 104, 717 N.E.2d 322, 328 (1999) (Cook, J., concurring) (plain error is obvious, palpable and fundamental to the fairness of the judicial proceedings) (citations and quotation marks omitted). However, trial counsel did object to the testimony of Natasha Branam. Tr. 516-18. Thus, Obermiller's claim regarding the improper innuendo about pornographic websites and the photos on his Facebook page is not waived and is subject to an abuse of discretion standard of review.

Further, the State argues that Obermiller's claim regarding this improper innuendo has no merit because the panel's questioning about what was found on Obermiller's computer occurred prior to Natasha Branam's testimony. State's Brief pp. 89-90. This is not accurate. Branam first took the stand on January 11, 2011 when she was called by the State. Tr. 510. The State withdrew her as a witness (tr. 537), but the prosecutor had already told the trial court that she

would testify that Obermiller had accessed pornographic internet sites. Tr. 519. Moreover, during Branam's testimony, it appears that the State got before the panel a naked picture of Obermiller.¹

Thus, the improper evidence did make its way to the panel despite this witness being withdrawn. The panel was influenced by what they heard and saw when Branam initially took the stand. The subject came up later in the proceeding with one of the panel members asking about the nude picture. Tr. 1027. The problem was only made worse later in the proceedings when the court called Branam back to the stand and the prosecutor told the trial court that the evidence that was found on the computer, "may be relevant to the way that perhaps Grandma Schneider died or in terms of being tied up and all that, of a sexual nature." Tr. 1297-98.

This improper innuendo would have affected the sentencing phase of Obermiller's capital proceedings, wrongly weighing in favor of a death sentence.

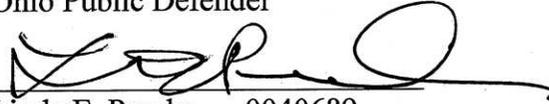
¹ The State used a screen in the courtroom to project images during Branam's testimony. Tr. 514. At one point, the prosecutor asked Ms. Branam about State's Exhibit D 190 A. Tr. 516. Branam responded that this was an image associated with Obermiller's Facebook account. *Id.* It is unclear what this image was since it was ultimately withdrawn, but defense counsel objected calling it "inflammatory." Tr. 518. And, one of the panel members later referenced a nude picture that was found on the computer. Tr. 1027.

CONCLUSION

For the foregoing reasons, Denny Obermiller's convictions and sentence must be reversed.

Respectfully submitted,

Office of the
Ohio Public Defender



Linda E. Prucha – 0040689
Supervisor, Death Penalty Division
linda.prucha@opd.ohio.gov



Jennifer A. Prillo – 0073744
Supervisor, Death Penalty Division
jennifer.prillo@opd.ohio.gov



Shawn P. Welch – 0085399
Assistant State Public Defender
shawn.welch@opd.ohio.gov

Office of the Ohio Public Defender
250 E. Broad St., Suite 1400
Columbus, Ohio 43215
(614) 466-5394 / (614) 644-0708 – FAX

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the REPLY BRIEF OF APPELLANT DENNY OBERMILLER were forwarded by regular U.S. Mail to Saleh Awadallah, Mary H. McGrath, and Margaret A. Troia, Assistant Prosecutors, Cuyahoga County, The Justice Center, 9th Floor, 1200 Ontario St., Cleveland, Ohio 44113 on this 19th day of October, 2012.



Linda E. Prucha – 0040689

COUNSEL FOR APPELLANT

379084