

IN THE SUPREME COURT OF OHIO

2015

<b>STATE OF OHIO,</b>	:	
	:	
<b>Plaintiff-Appellee,</b>	:	<b>On Appeal from the</b>
	:	<b>Lucas County Court of Appeals,</b>
	:	<b>Sixth Appellate District</b>
<b>vs.</b>	:	<b>Court of Appeals</b>
	:	<b>Case No. L-13-1225</b>
<b>HECTOR ALVARADO,</b>	:	
	:	
<b>Defendant-Appellant.</b>	:	

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**MEMORANDUM OF DEFENDANT-APPELLANT IN SUPPORT OF JURISDICTION**

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**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION..... 1

STATEMENT OF THE CASE AND FACTS..... 2

ARGUMENT..... 3

Proposition of Law No. 1.

Defective jury instructions that deprive a defendant of substantive rights constitute plain error as described in Crim.R. 52 (B) and may be considered by the reviewing court although the error was not objected to at trial..... 3

Proposition of Law No. 2.

When a prosecutor makes impermissible and prejudicial statements in reference to a defendant’s character during closing arguments, such comments are improper and prejudicially affect the defendant’s constitutional right to a fair trial. .... 6

Proposition of Law No. 3.

Defendant is effectively denied his constitutional right to assistance of counsel where counsel’s performance is deficient and there is a reasonable probability that counsel’s deficient performance prejudiced defendant, depriving him of his due process right to a fair trial.... 10

Proposition of Law No. 4.

An appellate court has a duty to reverse the conviction and order a new trial where a trial court’s verdict is against the manifest weight of the evidence..... 11

Proposition of Law No. 5.

A judgment may be reversed if the cumulative effect of multiple errors deprives a defendant of his constitutional rights even though, individually, the errors may not rise to the level of prejudicial error or cause for reversal..... 14

CONCLUSION..... 15

CERTIFICATE OF SERVICE..... 16

APPENDIX.....

Decision of the Lucas County Court of Appeals (January 9, 2015).....	17
Judgment Entry of the Lucas County Court of Appeals (January 9, 2015).....	36

## **EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION**

On January 1, 2013, Christina Henderson died as a result of a large bar fight at the South Beach Bar in Toledo, Ohio. The Lucas County grand jury indicted Defendant-Appellant Hector Alvarado on one count of murder and one of felonious assault stemming from the events of that night. A jury found Defendant guilty of the charge of murder. The court of appeals affirmed this conviction. This appeal raises five compelling issues of first impression for this Court. These issues are of public or great general interest and raise substantial constitutional questions.

The first issue is a threshold question which requires this Court to determine when a plainly erroneous instruction deprives a defendant of substantive rights. Additionally, this Court is asked to determine whether ambiguity in the instructions reduced the state's burden of persuasion to permit a conviction without requiring proof beyond a reasonable doubt.

The second issue asks this Court to uphold *Treesh*, 90 Ohio St.3d 739 N.E.2d 749, and give deference to the Rules of Evidence, to assess whether prosecutorial conduct unfairly prejudiced Defendant's trial and denied him his due process rights. This issue is of great public concern because it concerns unscrupulous practice of trying to admit otherwise inadmissible testimony and contravenes the protections afforded to defendants by the criminal justice system.

The third issue presents the question of whether a defense attorney's failure to raise objection to plain error and prejudicial misconduct, in conjunction with other error, rises to the level of error to constitute ineffective assistance of counsel. This question is of particular import because the issue has not previously been raised due to the fact that defendant was represented by the same attorney at trial and in direct appeal. *State v. Hutton*, 100 Ohio St. 3d 176.

The fourth issue requires this Court use its discretionary power to reverse the judgment and grant a new trial if it determines that the verdict is against the manifest weight of the evidence. *In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1978). It is the duty of an appellate court to review the weight of the evidence when this issue is properly raised. *Bridgeport Bank v. Shadyside Cool Co.*, 121 Ohio St. 544, 170 N.E. 358 (1930); *In re Sekulich*, 65 Ohio St.2d 13, 19 O.O.3d 192, 417 N.E.2d. 1014 (1981).

The fifth issue involves the cumulative error doctrine and asks the Court to find that the aggregate prejudice of multiple instances of error warrant a reversal even if they are independently deemed to be harmless to Defendant's case and constitutional rights.

### **STATEMENT OF THE CASE AND FACTS**

In the early morning hours of January 1, 2013, a large fight broke out at the South Beach Bar in Toledo, Ohio. Christina Henderson suffered a fatal wound to the left side of her neck and her fiancée, Stacy Bowen, suffered a non-fatal laceration to his left upper arm. Both injuries were thought to be inflicted during in the course of the bar fight. The Toledo Police interviewed witnesses at the scene but those that remained were either unwilling or unable to assist.

On February 28, 2013, Defendant-Appellant, Hector Alvarado, was approached by the police and taken in for questioning in regards to the event of January 1, 2013. After being questioned at length, Defendant was arrested on the basis of the bar's security footage which placed his in close proximity to each of the victims during the fight.

Defendant was indicted by the Lucas County Grand Jury on one count of murder in violation of O.R.C. 2903.02 (B) and O.R.C. 2929.02, and one count of felonious assault in violation of O.R.C. 2903.11(A)(2). A jury trial commenced where the State called eleven

witnesses for its case in chief. The coroner testified that the cause of death was a stab wound to the neck, severing the carotid artery. The murder weapon was never found.

Defendant's motion for acquittal pursuant to Crim. R. 29 was denied by the trial court. Following his motion, Defendant's counsel called no witnesses and offered no legal defense. At the conclusion of closing arguments, the jury instruction included the lesser included offenses of those charged.

During deliberation, the jury submitted a two-part question evincing confusion over the instructions and the charges. Their question was answered in open court. Soon after, the jury returned a verdict finding Defendant guilty of murder in violation of R.C. 2903.02(B) and 2929.02, an unspecified felony. Defendant was found not guilty of the felonious assault under O.R.C. 2903.11(A)(2). Defendant was sentenced by the trial court to a term of life imprisonment with eligibility for parole in fifteen years.

Defendant timely appealed with the Sixth Circuit Court, raising four assignments of error for consideration. The Sixth Circuit Court affirmed the lower's decision dated January 9, 2015. No application for reconsideration was filed. Defendant's timely appeal followed.

## **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

### **Proposition of Law No. 1.**

**Defective jury instructions that deprive a defendant of substantive rights constitute plain error as described in Crim.R. 52 (B) and may be considered by the reviewing court although the error was not objected to at trial.**

A trial court is obligated to provide jury instructions that correctly and completely state the law. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995 Ohio 224, 649 N.E.2d 1219 (1995). Jury instructions given must also be warranted by the evidence presented in a

case. *Estate of Hall v. Akron Gen. Med. Ctr.*, 125 Ohio St.3d 300, 2010-Ohio-1041, 927 N.E.2d 1112, ¶ 26. It is fundamental that in reviewing jury instructions they must be considered as a whole. *State v. Fears*, 86 Ohio St. 3d 329, 331 (Ohio 1999). The question of whether a jury instruction is legally correct and factually warranted is subject to de novo review. *Id.*

To prevail on a claim of plain error, a showing of error alone is insufficient to warrant reversal by the reviewing court. To prevail, a defendant must show 1.) an error occurred, 2.) the error was plain, and 3.) the error affected his substantive rights. *State v. Thompson*, 2014-Ohio-4751, P1 (Ohio Oct. 29, 2014). Thus, it is not enough to prove simply that error has occurred, but that error resulted in a “manifest miscarriage of justice.” For issues not noticed at trial, Crim.R. 52(B) provides, “errors or defects affecting substantial rights may be noticed although they were not [previously] brought to the attention of the court.” *Id.* Under the facts of this case, such gross miscarriage is readily apparent and warrants review despite not previously being noticed.

Hector Alvarado was charged with murder in violation of O.R.C. 2903.02(B), Ohio’s felony murder statute. Under the State’s theory of the case, the predicate offense and underlying felony was felonious assault, a second degree felony in violation of O.R.C. 2903.11(A)(2). In order for Mr. Alvarado to be convicted of murder as charged, the jury would have to find him guilty of “knowingly causing the death of Christina Henderson” while perpetrating a second degree felony assault. Trial Tr. vol. 3, 580.

Based on the evidence presented, Defendant was legally entitled to an instruction on the lesser included offenses under a theory of provocation. Applying this to the murder charge, the predicate felony assault offense should be reduced to the lesser offense of aggravated assault, a violation of O.R.C. 2903.12 and felony of the fourth degree; but, in the record, the judge twice

failed to appropriately classify it as such. Trial Tr. vol. 3, 584:13-585:24; Jury Instruction, 17.

Instead, the judge mistakenly substitutes the offense of felonious assault:

“Lesser offense of murder while committing felonious assault: voluntary manslaughter. Voluntary manslaughter is distinguished from murder by the failure to prove that the death was caused when committing felonious assault.”

*Id.*

While this is the appropriate lesser included offense, the resulting instruction is self-contradictory and incongruous with the previous definitions, manifesting plain error and further complicating what is already a complex area of law. Clearly confused, the jury posed the following question during deliberations:

“Can Mr. Alvarado be found guilty of murder if he is not found guilty of felonious assault? (Or is the felonious assault a “prerequisite” to finding him guilty of murder in this case?)”

Trial Tr. vol. 3, 611, 14-23.

To which the judge responded:

“...the defendant may be found guilty of the murder of Christina Henderson as alleged in the first court of the indictment if he is not guilty of the felonious assault of Stacy Bowen...[but] he may not be found guilty of the murder of Christina Henderson as alleged in the first court ...if he did not commit a felonious assault against someone.”

Trial Tr. vol. 3, 615, 3-17.

This ambiguous and misleading response is improper because it relieves the state of its burden of proving its theory of the case, depriving defendant of substantive rights. “Jury instructions that effectively relieve the state of its burden of persuasion violate a defendant's due process rights.” *State v. Gardner*, 118 Ohio St.3d 420, 2008 Ohio 2787, 889 N.E.2d 995, at P36, quoting *State v. Adams*, 103 Ohio St.3d 508, 2004 Ohio 5845, 817 N.E.2d 29, at P97. Here, the response improperly permits the jury to convict Defendant of murder even absent the state

proving the necessary predicate offense-namely, the assault of Christina Henderson. For this reason, the instructions are improper and deprive defendant of his substantive due process rights.

The opposition will attempt to argue that the instructions, as read, were proper. Ohio's felony-murder statute reads "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree." O.R.C. 2903.02 (B). While a correct articulation of the law, more specific jury instruction is warranted where it is applicable to the facts of the case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St. 3d 585, 575 N.E.2d 828. Here, it is undisputed that Christina Henderson died as a result of being assaulted with a deadly weapon. For this reason, the judge properly declined an instruction on attempt. Even though it would be appropriate under the law, it was not warranted by the facts of the case. Instructing on attempt would have been improper since "there's no evidence from which a jury can find that there was an attempt because it was completed. She was stabbed...I don't see how this jury could find anyone guilty ...without finding [them] guilty of the actual commission of the offense." Trial Tr. vol. 3, 605, 16-25. Similarly, there was no evidence to support that Ms. Henderson died as a proximate result of anyone's assault but her own. Therefore, the only appropriate answer to the jury's question would necessarily have to state that in order to convict Hector Alvarado of the murder of Ms. Henderson, he would have to have been found guilty beyond a reasonable doubt of the offense of assaulting *her*. Anything else is improperly broad and effectively relieves the state of their burden, depriving defendant his substantive rights.

**Proposition of Law No. 2.**

**When the prosecution makes impermissible and prejudicial statements referencing a defendant's character during closing arguments, such comments are improper and prejudicially affect the defendant's constitutional right to a fair trial.**

The test for prosecutorial misconduct is whether 1.) the statements made were improper and, if so, 2.) whether the remarks prejudicially affected Defendant's substantive right to a fair trial. *State v. Twyford*, 94 Ohio St.3d 340 (2002); *State v. Lott*, 51 Ohio St.3d 160 (1990); *State v. Smith*, 14 Ohio St.3d 13 (1984). While the Prosecution is entitled to a reasonable degree of latitude in opening and closing remarks, making inferences that are prejudicial and outside the scope of the record constitutes an abuse of this privilege. *Treesh*, 90 Ohio St.3d at 466, 739 N.E.2d 749. In this case, the prosecution exploited the court's latitude over closing statements and on three separate occasions made inappropriate remarks referencing Defendant's character, permeating the closing argument and effectively depriving Defendant his right to fair trial.

“He is proud of it. I'm not judging Mr. Alvarado for putting that, those tattoos. That's ...that's his own province, if you will. But he certainly doesn't look like anyone else, does he? There is a certain individuality about him. Mr. Alvarado, we talked about first impressions and we know we shouldn't, but we get them. When you saw him walk into court what did you think? Probably what everyone else thinks that sees him. Is it any wonder that people see a man like this with a – wielding a knife--”

Trial Tr. vol. 3, 566, 13-24.

An immediate objection was made by Defendant with subsequent bench conference detailing Defendant's grounds for objection. The trial court overruled Defendant's objection of improperly referencing Defendant's character. Trial Tr. vol. 3,566:25-567-16.

The second instance of prosecutorial misconduct during rebuttal closing occurred mere moments after Defendant's initial objection:

“The inference is this. If you look that way, why do you do it? Mr. Alvarado's a big guy. Some people, it's arguable, they might be afraid of him. They might not know him. But they can look at him and say he's got a tear drop under his right eye. He's got “Cholo” tattooed on his head. He's got “Mexican” tattooed on the other side of his head. And he's got significant markings all around his face. Is it possible that people might be afraid of him on looks alone?”

Trial Tr. vol. 3, 567:24-568:8.

Defendant timely objected to the comment by the Prosecutor but the trial court overruled. Trial Tr. vol. 3, 566, 11-12. The Prosecutor made a third remark that was not objected to:

“I’m not saying that he is a violent guy. He looks like he could be.”  
Trial Tr. vol. 3, 568, 17-18.

**a. The Prosecutor’s Remarks Referencing Impermissible Character Evidence and Drawing Prejudicial Inferences Beyond the Scope of the Record are Clearly Improper.**

The remarks made by the prosecutor were clearly improper for two separate and compelling reasons. First, the state is not to allude to matters outside of the admitted evidence. *State v. Smith*, 14 Ohio St.3d 13, 14. There was no evidence offered to support an inference that people in general and in particular, witnesses were afraid of Defendant due to his looks. To suggest that people are or should be afraid of him based solely on his appearance is a highly improper and prejudicial characterization. While the prosecution is afforded latitude to draw reasonable inference from the evidence presented at trial and is permitted to comment on those inferences during closing argument, these remarks must be deemed improper because nowhere on the record is there any evidence from which the prosecutor could have drawn such inferences.

In addition to being barred for being beyond the scope of the record, the reason that no evidence made it into the record is that such evidence is inherently inadmissible as a matter of law under the rules of evidence. Evid.R. 404(A), Evid.R. 403(A). The general prohibition against character testimony is based on the principle that such evidence is susceptible to being used for the purpose of suggesting a propensity to act in a way that is consistent with and in conformity to the character trait, resulting in an unfair trial for the defendant. Evid.R. 404(A). Such character evidence is pervasive and makes it hard for a jury to focus on the facts on the case, rather than the character of the defendant on trial. Improper admission of this type of evidence undermines defendant’s Fifth Amendment right not to testify and take the stand. Additionally, such evidence

would be further barred by Rule 403(A). because its probative value is not substantially outweighed by its prejudicial nature. Evid.R. 403(A). Defendant's tattoos, racial heritage, and body-type, have no bearing on his propensity to commit criminal offenses. In order for the prosecutor's statement to have probative value, he must have been alluding to the fact that defendant's tattoos were clearly prison tattoos, indicating his criminal record and implying behavior in conformity. Such inference is prohibitively barred not only under the aforementioned rules of evidence, but was also suppressed under Defendant's pre-trial motion. "The prosecution must avoid insinuations and assertions which are calculated to mislead the jury." *Berger v. United States*, 295 US 78, (1935). Here, the prosecution's insinuations are not only calculated to mislead, but also to prejudice the jury with the taint of inadmissible evidence. The court must conclude that since these statements violated multiple rules of law, they are inherently improper.

**b. The Prosecutor's Improper Statements Effectively Denied Defendant His Constitutionally Guaranteed Right to a Fair Trial.**

Since prosecutorial misconduct implicates due-process concerns, "[t]he touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 200, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). When faced with prosecutorial misconduct, the court may decline to find the trial unfair *only* where "it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty" absent misconduct. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, at ¶ 121. Where this burden of proof is not met, a trial must be deemed unfair. Presently, the closing remarks made by the prosecution permeate the closing argument and prejudice the Defendant so thoroughly that it cannot be said that the jury would have convicted him, beyond a reasonable doubt, absent the improper statements. No corrective instructions by the trial court could sufficiently overcome the defects to eradicate the

serious risk that the jury improperly considered these improper statements during their deliberation, determining their verdict. Therefore, the cumulative effect of the improper statements made in the prosecutor's rebuttal closing argument must be found to prejudice the defendant and effectively deny Defendant his Constitutional right to fair trial. U.S.C.A. VI and XIV; *State v. Libertore*, 69 Ohio St.2d 583 (1982), *State v. Smith*, 14 Ohio St. 3d (1984).

**Proposition of Law No. 3.**

**Defendant is effectively denied his constitutional right to assistance of counsel where counsel's performance is deficient and there is a reasonable probability that counsel's deficient performance prejudiced defendant, depriving him of his due process right to a fair trial.**

“(I)f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.” *McMann v. Richardson* (1970), 397 U.S. 759, 771. There is a strong presumption that a licensed attorney is competent and that the decisions made are sound trial strategy. *United States v. Cronin* (1984), 466 U.S. 648. In order to overcome this presumption and assert an ineffective assistance of counsel claim, the defendant must show that 1.) Counsel's performance was deficient, and 2.) the deficient performance prejudiced the defendant. *Id.* To prove prejudice, the defendant must show a reasonable probability that, were it not for counsel's errors, the outcome of the trial would have been different. In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Additionally, a defendant is not precluded from raising his ineffective assistance of counsel claim where the issue has not previously been raised, and the defendant was represented by the same attorney on his trial and direct appeal. *State v. Hutton*, 100 Ohio St. 3d 176.

**a. Counsel's Performance was Deficient in both Trial and Appellate Stages.**

While it is presumed that an attorney is acting in accordance to sound trial strategy, “ineffective assistance is rendered when counsel adopts a strategy so far beyond the realm or

legitimate strategy.” *State v. Burgins* (1988), 44 Ohio App. 3d 158, 160. Defendant submits that his counsel was ineffective in 1.) failing to adequately prepare for trial as demonstrated by his surprise at Charles Wells’ testimony despite the state providing it in discovery, 2.) failing to ask for an extension when realizing that he was not adequately prepared, 3.) failing to obvious instances of prosecutorial misconduct, 4.) failing to object to plainly erroneous jury instructions, 5.) failing to call any witnesses, despite availability and the insistence of Defendant, and 6.) failing to timely submit an appeal, 7.) failing to submit an affidavit of indecency despite defendant being qualified, and 8.) failing to raise all constitutional issues on appeal. Sound trial strategy cannot be inferred by the cumulative weight of all of these errors. For this reason, counsel’s performance was deficient and Defendant was deprived his constitutional right to effective assistance of counsel.

**b. There is a Reasonable Probability that Counsel’s Deficient Performance Prejudiced the Defendant and Deprived him of his Right to a Fair Trial.**

In order to succeed on a claim of ineffective assistance, it must be reasonably probably that Defendant suffered prejudice and was deprived a fair trial due to deficient counsel. Reasonable probability is “a probability sufficient to undermine the confidence in the outcome.” *State v. Carpenter*, 116 Ohio App. 3d 615, 618 (Ohio Ct. App., Montgomery County 1996). This is a reduced standard from the plain error analysis detailed in Proposition of Law No.1 above. Defendant respectfully submits that but for any one of counsel’s errors the result of the case at either stage would have been different. In light of the cumulative effect of all the purported errors, it cannot be said to be improbable that but for counsel’s deficient performance the result would not have been different. For this reason, Defendant was necessary deprived his constitutional right to effective assistance of counsel and due process right to a fair trial.

#### **Proposition of Law No. 4.**

**An appellate court has a duty to reverse the conviction and order a new trial where a trial court's verdict is against the manifest weight of the evidence.**

Due process, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, requires that a conviction not be based on some scintilla of evidence, but rather that there is sufficient evidence to justify a rational trier of fact to find the defendant's guilt to have been proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1978). It is the duty of reviewing court to weight of the evidence when this issue is properly raised. *Bridgeport Bank v. Shadyside Cool Co.*, 121 Ohio St. 544, 170 N.E. 358 (1930); *In re Sekulich*, 65 Ohio St.2d 13, 19 O.O.3d 192, 417 N.E.2d. 1014 (1981).

When reviewing questions concerning evidentiary weight, "this court sits as a 'thirteenth juror' and makes its own independent review of the evidence... and assesses and weighs the credibility of each witness's testimony". *State v. Abi-Sarkis*, 41 Ohio App.3d 333, 337-38, 535 N.E. 2d 735 (1988). This role enables the Court to weigh the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1983). "While the discretionary power to reverse a judgment as against the manifest weight of the evidence and to grant a new trial should be exercised with caution, an appellate court should reverse when the evidence weighs heavily against conviction." *Abi-Sarkis*, 41 Ohio App.3d at 337-38. See also, *Thompkins*, 78 Ohio St. 3d at 387, quoting *Martin*, 20 Ohio App. 3d at 175.

In this case, the verdict must not stand because finding Defendant guilty of murder is against the manifest weight of the evidence. The state's theory of the case is that Hector Alvarado was engaged in a fight with Stacy Bowen, and, in attempting to assault him, mistakenly

stabbed Christina Henderson in the carotid. In making their case, the state relied heavily on the testimony of Charles Wells. According to Wells, Defendant, while standing up, “swung at the victim with an unidentified object in his hand, striking the victim in the neck area.” Trial Tr. vol. 1, 111-113. Despite being previously unable to identify the object, he claims to have later seen Defendant in the parking lot with a knife. While on the stand, Mr. Well’s testimony was inconsistent, contradicting both what he said while under oath and in previous reports. Even the detectives on the case acknowledged their surprise at some of his testimony. In their close, the prosecution acknowledged that the case was a “one witness case” and that verdict “falls on Mr. Well’s testimony.” While it is the job of the jury to weigh the credibility of witnesses, when faced with the additional and reliable contradictory evidence introduced by the state, the verdict of guilty is clearly against the manifest weight of the evidence.

The state’s case also relied on the grainy security footage from the bar. Instead of corroborating Wells’ testimony, the video further undermines his credibility by showing a different sequence of events. State’s Ex., 105; Camera 12. At the time the state asserts that Ms. Henderson was stabbed, she appears on camera, bent at the waist, stooped over and repeatedly striking an unconscious female. *Id.* According to Lucas County Coroner and the state’s certified expert witness, Dr. Barnett, the victim’s fatal wound was “lateral to medial and downward.” Trial Tr. vol. 1, 174, 4-25; State’s Ex., 34. In order for Christina to have been stabbed when the state claims, the fatal blow would have to be delivered from beneath. Therefore, Defendant, who appears standing in the video at some distance from the victim, could not possibly have been the perpetrator.

Even if a jury disregarded much of the evidence and determined that defendant did deliver a fatal blow to Christina, the verdict is still against the manifest weight because

Defendant should have been convicted of a lesser offense than murder. The evidence clearly demonstrates that the bar was in complete upheaval, fights in almost every corner of the bar. State's Ex. 105; Camera 12. Instead of engaging, Defendant clearly avoids conflict and only reacts when he himself is egregiously assaulted. *Id.* The attack on Defendant and the combative atmosphere of the bar and is sufficient to provoke even the most reasonable person. In the state's own closing argument, the prosecution concedes that "I don't believe he meant to do it." Trial Tr. vol. 3, 570, 6-7. Even if a jury determined that Hector assaulted Ms. Henderson, the weight of the evidence demonstrates ample and sufficient provocation, mitigating the charge and resulting conviction from murder to voluntary manslaughter.

The jury's verdict demonstrates a complete disregard of evidentiary exhibits, expert testimony, mitigating facts, and the state's own case. Given the absence of truly compelling evidence proving Defendant's guilt beyond a reasonable doubt, the jury must have relied on the inconsistent and incredible testimony of Charles Wells. The only other plausible inference is that the jury convicted Defendant due to improper instructions or based on inappropriate, prejudicial remarks as discussed in Proposition of Law No. 1 and No. 3. Confronted with conflicting evidence, improper instruction, prejudicial statements, and ample doubt, Defendant respectfully submits that the jury necessarily lost its way in convicting him of murder. Therefore, the verdict must not stand because the manifest weight of the evidence does not support a finding of guilty.

**Proposition of Law No. 5.**

**A judgment may be reversed if the cumulative effect of multiple errors deprives a defendant of his constitutional rights even though, individually, the errors may not rise to the level of prejudicial error or cause for reversal**

Under the doctrine of cumulative error, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the

numerous instances of trial court error do not individually constitute cause for reversal. *State v. DeMarco*, 31 Ohio St.3d 191, 31 Ohio B. 390, 509 N.E.2d 1256 (1987). *See also Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 222-224; *State v. Garner*, 74 Ohio St.3d 49, 64, 1995 Ohio 168, 656 N.E.2d 623 (1995).”Generally, in order to find that substantial justice has been done ... the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, if those errors had not occurred, the jury or other trier of the facts would probably have made the same decision." *O'Brien v. Angley*, 63 Ohio St.2d 159, 164-165, 407 N.E.2d 490 (1980), quoting *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 91 N.E.2d 690 (1950), paragraph three of the syllabus.

Throughout his case, Defendant has suffered multiple injustices, including, improper jury instructions, ineffective assistance of counsel, gross prosecutorial misconduct, and a verdict against the manifest weight of the evidence. While Defendant respectfully submits that any of the previous propositions of law should independently warrant reversal of the conviction, they indisputably require reversal when considered in an aggregate.

## CONCLUSION

For all of the foregoing reasons, Hector Alvarado prays that this Court will accept jurisdiction over this appeal and allow full briefing and oral arguments on the merits.

Respectfully Submitted,

/s Erika M. LaHote  
ERIKA M. LAHOTE (0092256)  
COUNSEL FOR DEFENDANT-  
APPELLANT HECTOR ALVARADO

**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice of Appeal of Defendant-Appellant Hector Alvarado was served upon Julia R. Bates (0013426), Prosecuting Attorney, and David F. Cooper (0006176), Assistant Prosecuting Attorney, Lucas County, Ohio, Attorneys for Plaintiff-Appellee State of Ohio, 711 Adams Street, 2<sup>nd</sup> Floor, Toledo, OH 43604-5659 by Regular U.S. Mail on this 20<sup>th</sup> day of February, 2015.

/s Erika M. LaHote \_\_\_\_\_  
ERIKA M. LAHOTE (0092256)  
COUNSEL FOR DEFENDANT-  
APPELLANT HECTOR ALVARADO