

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

HECTOR ALVARADO

Defendant-Appellant.

* S.C. No. 15-0300
* On Appeal from the
* Lucas County Court
* of Appeals, Sixth
* Appellate District
* C.A. No. L-13-1225
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*

STATE OF OHIO'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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HECTOR ALVARADO

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WHY THIS IS NOT A CASE INVOLVING A SUBSTANTIAL CONSTITUTIONAL QUESTION, DOES NOT INVOLVE PUBLIC OR GREAT GENERAL INTEREST, AND WHY LEAVE TO APPEAL SHOULD BE DENIED

Of the five propositions of law asserted by defendant-appellant, Hector Alvarado ("defendant") in his memorandum in support of jurisdiction, only propositions 2 and 4, pertaining, respectively to the prosecutor's rebuttal closing and the weight of the evidence, were asserted in defendant's merit appeal. Propositions 1, 3 and 5, pertaining, respectively to jury instructions, ineffectiveness of counsel, and cumulative error were not raised in the court of appeals and are inappropriate for this court's consideration on appeal.

Defendant was represented by competent counsel both at trial and on appeal and was afforded very competent, even passionate, representation in both forums. Unfortunately, the evidence demonstrated that defendant was guilty of Murder. None of defendant's propositions of law, including issues not raised in the courts below have any merit whatsoever. Defendant received a fair trial.

Moreover, no unusual issues were presented in defendant's trial or in his appeal. There are simply no questions raised by defendant's case that need to be addressed by this court.

The court should therefore decline jurisdiction. Defendant has presented no issue raising a substantial constitutional question. Moreover, no issues of public or great general interest are involved. The issues presented are only of interest to the parties.

STATEMENT OF THE CASE

A jury found defendant guilty of the Murder of Christina Henderson in violation of R.C. 2903.02(B) and 2929.02, an unspecified felony. Defendant was found not guilty of the Felonious Assault of Stacey Bowen.

Defendant appealed in *State v. Alvarado*, 6th Dist. No. L-13-1225, 2015-Ohio-75, raising four assignments of error: alleged prosecutorial misconduct in the State's rebuttal closing, error in not sanctioning the State's alleged discovery violation, manifest weight of the evidence and sufficiency of the evidence. All of these assignments of error were rejected and the court of appeals affirmed defendant's conviction and sentence on January 9, 2015.

On February 20, 2015, defendant filed his notice of appeal in this court and his memorandum in support of jurisdiction asserting five propositions of law. Three of defendant's propositions of law assert issues that were not raised or considered by the court of appeals. Specifically propositions of law No. 1, No. 3 and No. 5 assert ineffective assistance of trial counsel and/or of appellate counsel. Defendant has not filed an application to reopen appeal pursuant to App. R. 26(B) which would give the court of appeals an opportunity to consider the issues raised in propositions of law Nos. 1, 3 and 5.

STATEMENT OF THE FACTS

A brawl broke at at the South Beach Bar just before 2:00 a.m. on January 1, 2013. The fight was violent but short-lived. Charles Wells, who observed but did not participate in the fight, decided to keep his eye on an Hispanic with tattoos on the side of his head who was the "biggest guy in the bar," and the only person there with head tattoos. (T 109, 110, 129). Wells observed that the large Hispanic was fighting some black people (T 110), which was a matter of some interest to Wells since he is African-American. Wells thought the man, whom he identified in court as defendant (T 110), was likely to do some damage. (T 113). Defendant was holding a small object in his right hand which he was swinging at the people he was fighting, causing them to fall back. (T 110, 130, 131). Defendant struck Christina Henderson in the neck with the object as though punching her. Both defendant and Henderson were standing at that time. Wells saw Henderson retreat, holding her neck. (T 112, 113, 130, 132, 139, 148). Then, defendant swung the object at Stacey Bowen. (T 113). Wells left, and shortly thereafter, saw defendant run from the bar holding a knife in his left hand and the hand of a Mexican girl in the other. (T 114, 115, 139). Concerned that defendant might also stab him, Wells kept his eyes on defendant until Wells had returned to his car, entered it and locked the door. (T 115, 116). Stacey Bowen did not see defendant stab Christina Henderson, although he recalled (and the videotapes corroborated) that the three were all in close proximity to each other at the crucial time. Bowen was also stabbed by defendant, although he initially thought he had been struck by a chair after he felt a sharp pain in his left arm. Bowen testified that he could see defendant stab him

on one of the videotapes. (T 248-252), but that a raised table blocked a clear view which would have revealed defendant stabbing Henderson. (T 239-245).

Wells helped police, who were hindered by uncooperative witnesses, break the case. Wells did not report all of what he had seen to the police initially because he did not want to be a snitch. (T 118). However, he knew that a rumor that Bowen had cut Henderson with a broken bottle was false. Therefore, when Toledo Police detective William Goodlet called Wells about a week after the murder, Wells told Goodlet that he knew who did it, although at the time Wells did not know defendant's name. (T 117, 141, 142, 308). Specifically, Wells told Goodlet that the murderer was the big Mexican guy with large head tattoos who Wells had seen fleeing the bar with a knife in one hand and a Mexican girl on the other. (T 302-307). Det. Goodlet investigated further and, after ascertaining defendant's identity and reviewing the bar's surveillance tapes with the witnesses, arrested defendant. (T 308-320.) Det. Goodlet used the bar videos showing the large Hispanic male with sizeable head tattoos in order to identify defendant from photographs the police were able to obtain. Defendant's head tattoos say "CHOLLO" on one side and "MEXICAN" on the other. (T 315). The bar videos also corroborated Wells' account that he was close enough to defendant, Henderson and Bowen to be able to see both stabbings. (T 119-120, 357, 463, 464). Later, Wells gave a taped interview to Det. Goodlet at the Safety Building. Goodlet testified that in neither the telephone conversation with Wells nor his taped interview, did Wells indicate that he saw defendant striking Henderson inside the bar with some kind of object. (T. 306, 307, 409, 416). Wells testified confidently that he did tell this to Goodlet but that he believed that Goodlet must not have recalled or properly reported it. (T. 142, 143, 146-148).

Det. Goodlet videotaped his interview of defendant at the Safety Building. (T 317-320; State's Ex. 38). Much of the account that defendant gave to Det. Goodlet was simply not true. Defendant claimed that he arrived only 15 or 20 minutes before the fight broke out, whereas the bar videos show that defendant arrived fully one hour and twelve minutes before. (T 333). Defendant also was never attacked by five to six black males or assaulted by chairs and bottles as he claimed in his statement. Defendant did not leave by the same door that he entered (T. 345-355, 362). Defendant claimed that he did not know a woman named Basila Smith, who was involved in the fighting, but the videos clearly show him arriving with her. (T 326, 333-335; State's Exs. 40 and 106). Defendant confirmed that he was right-handed. Although defendant denied that he had a knife, he also stated that he could not recall whether he had stabbed anyone. He never verbally denied stabbing Henderson. When asked this question he only shook his head. (T 416-418, 473-476).

ARGUMENT AGAINST JURISDICTION

**COUNTER-PROPOSITION OF LAW IN RESPONSE TO
DEFENDANT'S PROPOSITION OF LAW NO.1**

**THIS COURT WILL NOT CONSIDER ALLEGED ERROR THAT WAS
NOT RAISED IN THE TRIAL COURT AND IN THE COURT OF APPEALS.
State v. Wallen, 25 Ohio St.2d 45, 46, 266 N. E.2d 561 (1971) followed**

In his first proposition of law, defendant claims that the trial court improperly instructed the jury as to the lesser crime of voluntary manslaughter and that the trial court improperly responded to a jury question during deliberations, although acknowledging that the defendant did not raise an objection to these matters at trial. The Supreme Court will not consider alleged errors that were not raised in the trial court and in the court of appeals. "[T]o entertain such questions now would effectively permit appellant to bypass consideration of those questions by the trial court, or the Court of Appeals." *State v. Wallen*, 25 Ohio St.2d 45, 46, 266 N. E.2d 561 (1971). This court should therefore refuse to consider this proposition of law.

But even if defendant's contentions concerning jury instructions had been raised in the courts below, and thus could be raised here, no error occurred. The trial court determined that, in addition to the charge of Murder, the jury would be charged on the lesser offense of Voluntary Manslaughter. Defendant obviously did not object. To this end, the trial court employed the standard jury instructions from O.J.I. CR 503.02 (1)(B), (3), (5), (6), (8)(A)(2), (8)(B)(2) and (8)(C)(2), to which defendant also did not object. These instructions were standard and did not cause juror confusion. The jury did not ask any questions concerning the lesser offense of Voluntary Manslaughter. The jury did ask a question about the crime of Murder, and the court correctly answered the

question, also with the concurrence of defendant. (T 613). Defendant would be properly convicted of Murder in the event that the jury found that Henderson died as a proximate result of defendant's Felonious Assault upon Bowen, which was the view of the facts that the State advocated. Defendant would also have been properly convicted of Murder in the event that the jury found that Henderson died as a proximate result of defendant's Felonious Assault upon Henderson herself.

There was no error here.

**COUNTER-PROPOSITION OF LAW IN RESPONSE TO
DEFENDANT'S PROPOSITION OF LAW NO. 2**

A PROSECUTOR'S REBUTTAL CLOSING THAT SPECIFICALLY DOES NOT REFER TO DEFENDANT'S CHARACTER BUT REFERS TO HIS PHYSICAL CHARACTERISTICS TO EXPLAIN HOW HE WAS IDENTIFIED AND TO EXPLAIN WHY WITNESSES MIGHT NOT HAVE COME FORWARD IS NOT PREJUDICIAL

The prosecutor's rebuttal closing was in response to defendant's argument that he was misidentified as the person who stabbed Henderson and Bowen. The prosecutor's reference to defendant's distinctive facial and head tattoos properly drew the jury's attention to how defendant was identified. The prosecutor also sought to explain that defendant's bizarre appearance might have frightened witnesses from coming forward. The prosecutor did not argue that defendant acted in conformity with a bad character trait. In fact, the prosecutor explicitly advised the jury that this was not what he was arguing. Later, the trial court reminded the jury that arguments of counsel are not evidence. (T 574). The court of appeals properly found that defendant was not prejudiced.

**COUNTER-PROPOSITION OF LAW IN RESPONSE TO
DEFENDANT'S PROPOSITION OF LAW NO. 3**

THIS COURT WILL NOT CONSIDER ALLEGED ERROR THAT WAS NOT RAISED IN THE TRIAL COURT AND IN THE COURT OF APPEALS. *State v. Wallen*, 25 Ohio St.2d 45, 46, 266 N. E.2d 561 (1971) followed

In his third proposition of law, defendant asserts that his counsel was ineffective both at trial and with respect to his direct appeal. But defendant has not filed an application to reopen appeal pursuant to App. R. 26(B) which would give the court of appeals an opportunity to consider the issues of alleged ineffectiveness of counsel at trial and on appeal. This court will ignore alleged errors that were not raised in the trial court and in the court of appeals because, "[T]o entertain such questions now would effectively permit appellant to bypass consideration of those questions by the trial court, or the Court of Appeals." *State v. Wallen*, 25 Ohio St.2d 45, 46, 266 N. E.2d 561 (1971). This court should therefore refuse to consider this proposition of law.

**COUNTER-PROPOSITION OF LAW IN RESPONSE TO
DEFENDANT'S PROPOSITION OF LAW NO. 4**

AN APPELLATE COURT WILL NOT FIND THAT A JURY'S DETERMINATION IS AGAINST THE WEIGHT OF THE EVIDENCE UNLESS THE JURY 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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235 , 818 N.E.2d 229, followed

When a defendant challenges the jury's verdict on manifest-weight grounds, he must demonstrate that the State failed to meet its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 1997-Ohio-52. "Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis sic.) *Id.* at 387.

A reviewing court must "examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" (Internal citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 81, 818 N.E.2d 229.

The State presented substantial, credible evidence of defendant's guilt including the following:

(1) Testimony of Charles Wells that he saw defendant stab Henderson with a small object he held in his right hand while both were standing and then observed defendant fleeing the bar with a knife in one hand. Videotapes demonstrated that Wells was exactly where he said he was when observing these events, before Wells had an opportunity to view the videotapes. (T 307-308).

(2) Testimony of Stacey Bowen that although he did not see defendant stab Henderson, he observed defendant and Henderson in close proximity in the 3 or 4 second time period when she was stabbed. Bowen testified that shortly thereafter, defendant stabbed him in the left arm which stabbing Bowen could observe on the videotape.

(3) Defendant admitted he was fighting in the bar and that he is right handed. He lied about when he arrived at the bar, asserting that he got there much later than he did. He lied that he did not know Basila Smith. He lied about being attacked by five to six black males and about being assaulted by chairs and bottles. He lied about what door he used to exit the bar. Finally, defendant denied recalling whether he stabbed

anyone. He never verbally denied stabbing Henderson. When asked this question he only shook his head.

The weight of the evidence clearly supported defendant's murder conviction. In fact, the testimony of Charles Wells without any of the corroborating evidence and even if contradicted by another witness would suffice, provided that the jury found him more convincing. *State v. Frazier*, 5th Dist. No 04CAC10071, 2005-Ohio-3766, ¶14.

The court of appeals correctly determined that defendant's conviction was sustained by the weight of the evidence.

**COUNTER-PROPOSITION OF LAW IN RESPONSE TO
DEFENDANT'S PROPOSITION OF LAW NO. 5**

**THIS COURT WILL NOT CONSIDER ALLEGED ERROR THAT WAS
NOT RAISED IN THE TRIAL COURT AND IN THE COURT OF APPEALS.
State v. Wallen, 25 Ohio St.2d 45, 46, 266 N. E.2d 561 (1971) followed.**

In his fifth proposition of law, defendant argues that his conviction should be reversed because of alleged cumulative error. Defendant could have raised the issue of cumulative error in his merit appeal, but did not do so. Moreover, defendant has not filed an application to reopen appeal pursuant to App. R. 26(B) which would give the court of appeals an opportunity to consider the issue of whether defendant's appellate counsel was ineffective in failing to argue cumulative error in his merit briefing. This court will not consider alleged errors that were not raised in the trial court and in the court of appeals because, "[T]o entertain such questions now would effectively permit appellant to bypass consideration of those questions by the trial court, or the Court of Appeals." *State v. Wallen*, 25 Ohio St.2d 45, 46, 266 N. E.2d 561 (1971). This court should therefore refuse to consider this proposition of law.

But even if the issue of cumulative error was properly before this court, defendant's proposition of law lacks merit. Where any errors at trial were harmless or non-prejudicial, cumulatively as well as individually, the doctrine of cumulative error does not apply. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶185, 818 N. E.2d 229; *State v. Richardson*, 6th Dist. L-07-1214, 2010-Ohio-471, ¶¶117-118. Such is the case here.

CONCLUSION

Of the five propositions of law asserted by defendant in his memorandum in support of jurisdiction, only propositions 2 and 4 were asserted in defendant's merit appeal. Propositions 1, 3 and 5 were not raised in the court of appeals and are inappropriate for this court's consideration.

As argued above, none of defendant's propositions of law, including those pertaining to issues not raised in the courts below have any merit whatsoever.

Just as important, this case does not present issues of public or great general interest, nor any substantial constitutional questions. Any issues which were, or could have been considered by the courts below are well settled in this state and do not need further interpretation or elaboration by this court.

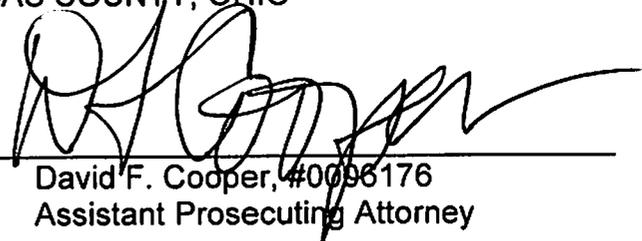
Defendant received a fair trial. Justice was done.

This case is inappropriate for this court's exercise of its discretionary jurisdiction

Respectfully submitted,

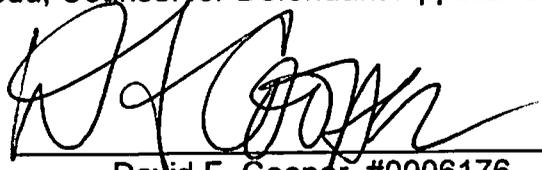
JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: _____


David F. Cooper, #0096176
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via email this 27th day of February, to Erica Lahote, lahote1@osu.edu, Counsel for Defendant-Appellant.

A handwritten signature in black ink, appearing to read 'D. F. Cooper', written over a horizontal line.

David F. Cooper, #0006176
Assistant Prosecuting Attorney