

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

BENNIE ADAMS,

Appellant.

} Case No 2011-5361

} On Appeal from the Seventh
} District Court of Appeals

} Case No 2008 MA 246

APPELLANT BENNIE ADAMS' REPLY IN OPPOSITION TO THE
STATE OF OHIO'S MOTION FOR RE-CONSIDERATION

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On October 1, 2015, this Court entered judgment in the above-captioned case, vacating Appellant's death sentence, and remanding the case for re-sentencing. The Court, finds as a matter of law there was insufficient evidence to support the capital specification. See, *State v. Adams*, Slip Opinion No 2015 Ohio 3954, syl. 4; ¶¶280-288. The State of Ohio has filed an application for re-consideration, postulating that it was "deprived the opportunity to demonstrate to this Court that [the State] did in fact produce evidence that prove each and every element of aggravated burglary." (State's Motion for Reconsideration, 2.) In addition, Appellee argued that this Court should uphold the sentence of death so long as there is sufficient evidence that at least one of the predicate offenses was committed. Appellee's arguments fail for the reasons which follow, and the Appellee's Motion for

reconsideration must be denied.

The reasons why the State's motion for reconsideration is not well-founded are found in the Court's opinion itself. As the Court noted, its obligation under R.C. 2929.05(A) to determine whether the evidence supports the jury's finding of the aggravating circumstance is separate and apart from any analysis of sufficiency on the underlying charge of aggravated burglary. R.C. 2929.05 requires this Court, when reviewing the imposition of the death penalty, to review independently the sufficiency of the evidence for that specification. The State's claim is that Appellant's failure to assert a sufficiency of the evidence claim prevented the State from presenting facts in support of the aggravated burglary specification under R.C. 2929.04(A)(7). This simply is not true. Indeed, if anything, the trial court's ruling dismissing the aggravated burglary charge but permitting aggravated burglary to be used for a death penalty specification should have heightened the State's responsibility to make its claim. In any event, whether the State *argued* there was sufficient evidence, *failed to argue* there was sufficient evidence, or was "*prevented*" from arguing that there was sufficient evidence in no way touches on the independent duty of this Court under R.C. 2929.05. R.C. 2929.05 provides in pertinent part: "[The Supreme Court] also *shall review all of the facts and other evidence* to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of

committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors.” Whether Appellant argued or failed to argue insufficiency, and whether Appellee argued sufficiency or failed to do so has nothing to do with the statutory duty of this Court to “review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury * * * found.” Because this Court is required by law to independently review the sufficiency of the evidence as to the specification, the State’s argument fails.

Curiously, the State’s motion fails to delineate in any way between evidence which supports that fact that someone was in Ms. Tenney’s apartment (perhaps even after the murder) from the State’s obligation to prove beyond all reasonable doubt that the aggravated murder was committed *while* Adams “was committing, attempting to commit, or fleeing immediately after committing or attempting to commit * * * aggravated burglary.” This Court’s opinion recognized that the State of Ohio failed to present evidence that would support that the murder occurred in the apartment. The fact that items were missing from the victim’s apartment does not support the fact that the aggravated murder occurred during the course of an aggravated burglary, as R.C. 2929.04(A)(7) requires if a death sentence is to be imposed.

The State can attempt to hide behind the grand jury and deny responsibility for the way the indictment was drafted, with more than one felony listed in the R.C. 2929.04(A)(7) specification. But it is blinking reality to believe that the grand jury and not the prosecutors drafted the indictment. Indeed, the distinction between the “kitchen sink” R.C. 2929.04(A)(7) and the separate specifications drafted by the same prosecutor’s office in *State v. Williams*, 79 Ohio St.3d 1, 1997 Ohio 407, 679 N.E.2d 646, certiorari den., *Williams v. Ohio*, 522 U.S. 1053, 118 S.Ct. 703, 139 L.Ed.2d 646 (1998), is a palpable one.¹ As the Court has observed, because each of the predicate offenses was not presented to the jury individually, there is no way to know which of the predicate offenses, or which combination of the predicate offenses the jury found, beyond a reasonable doubt, supported the specification.

The State’s assertion that the aggravated burglary is supported because items from the victim’s apartment were found in the Appellant’s apartment does precious little to prove that Ms. Tenney was killed during the course of an aggravated burglary. Moreover, when Appellant was arrested, another individual, Horace Landers, was present in Appellant’s apartment, and items belonging to Ms. Tenney were found in Landers’ coat pocket. No evidence was presented, and it was never proven as to who removed items from Ms. Tenney’s apartment, or when those items

¹ Williams was indicted for twelve counts of aggravated murder (there were four victims), four counts of kidnaping, and one count of aggravated burglary. In addition, each aggravated murder charge included two felony-murder death specifications under R.C. 2929.04(A)(7) and one death specification for multiple murder under R.C. 2929.04(A)(5).

were removed. It is possible the items were removed after Ms. Tenney was murdered.

In *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745, appeal dismissed, *Wilson v. Ohio*, 444 U.S. 804, 62 L.Ed.2d 17, 100 S.Ct. 25 (1979), this Court held that proof that a burglary occurred in an occupied structure is not sufficient to prove that someone was present or likely to be present “at the time.” *Id.*, 58 Ohio St.2d, at 58. The United States Court of Appeals for the Sixth Circuit, in reviewing the standard of proof for a burglary, recognized that under Ohio law, aggravated burglary “requires two elements of proof, permanent or temporary habitation and presence or likelihood of presence” when the burglary occurred. *See, Glenn v. Dallman*, 686 F.2d 418, 422 (6th Cir. 1982), quoting *State v. Wilson*, at 59. In *Glenn*, the Sixth Circuit vacated the aggravated burglary conviction finding proof that a burglarized structure was “regularly inhabited” and that people were “in and out during the day in question” is insufficient to create a presumption that someone was present, or likely to be present at the time of the crime which is a necessary element under Ohio burglary statute. *Dallman* recognized that a presumption that someone was present when a structure was burglarized would violate due process by unconstitutionally presuming the existence of an element of the offense. *Glenn v. Dallman*, 686 F.2d, at 422. Yet, that is exactly what the State of Ohio is asking this Court to do—to presume that Ms. Tenney was present when her apartment was

burglarized. In addition, the State of Ohio is asking this Court to *presume* that the victim's apartment was entered through force, stealth, or deception. The Court already has rightly rejected such an invitation.

Aggravated burglary requires proof that the defendant trespassed "by force, stealth, or deception." R.C. 2911.11(A). Blanchard testified that he saw no fresh signs of forcible entry into Tenney's apartment, which undercuts a theory that Adams forced his way through the door. Although it is possible that Adams entered through stealth or deception, there was no probative evidence of either. The state never directly addressed the manner by which Adams secured entry to the apartment, and absent evidence of that type, the finding of the specification pertaining to that underlying offense cannot stand. *See Howard* at ¶8-14 (reversing conviction for aggravated burglary because state presented no evidence of how defendant entered house).

State v. Adams, Slip Op. 2015 Ohio 3954, ¶282. There is no sound reason to reconsider the State's invitation, and sound reason *not* to reconsider.

The State argues that the reviewing court must view:

"inferences reasonably drawn therefrom in the light most favorable to the prosecution," (Emphasis added.) *State v. Green*, 117 Ohio App.3d 644, 650, 691 N.E.2d 316 (1st Dist. 1996), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720 (1st Dist. 1983), and "will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *Green*, 117 Ohio App.3d at 650, quoting *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132, syllabus (1978). And because the evidence is viewed in a light most favorable to the prosecution, the "reviewing court *cannot resolve evidentiary conflicts in favor of appellant* or substitute its evaluation of witness credibility for the jury's." (Emphasis added.) *Green*, 117 Ohio App.3d at 650, citing *State v. Waddy*, 63 Ohio St.3d 424, 588 N.E.2d 819 (1992).

(State's Amended Motion for Reconsideration, 4.) The State apparently would have this Court substitute "leap of faith over a wide gap in logic and proof" for "inferences

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(State's Amended Motion for Reconsideration, 4.) The State apparently would have this Court substitute "leap of faith over a wide gap in logic and proof" for "inferences

drawn therefrom in the light most favorable to the prosecution.” The Due Process Clause not only does not permit such a chilling exercise as the State proposes, the Due Process Clause prohibits it.

The standard urged by the State is a sufficiency of the evidence standard under Crim.R. 29. But former Justice Herbert R. Brown showed why the statute demands more of this Court in a case where death has been imposed.

This [statutory] mandate goes beyond a bare sufficiency of the evidence test and it is not discharged by a mere proportionality review. The legislature has made our responsibility in reviewing the sentence in a capital case different from that in any other criminal case. In essence, we are constituted as a super jury to review the record and to decide whether the death sentence is appropriate. We are not bound, as in other cases, by the findings of fact made by the trier of fact. We must be "persuaded."

Can anyone quibble with the idea that lack of certainty as to a defendant's guilt (even if the evidence is sufficient as a matter of law) should be a consideration in deciding whether the death penalty is appropriate? In this case, there is a substantial possibility that the defendant may not be guilty. I emphasize the word "may," because, as indicated, I believe the record does pass muster as to legal sufficiency.

See, State v. Apanovitch, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987) (BROWN, J., concurring in part and dissenting in part.) The Franklin County Court of Appeals, in reviewing a death sentence cited *Apanovitch*, and noted the distinction in the sufficiency of the evidence review required by R.C. 2929.05.

Initially, we note that in reviewing the sufficiency of the evidence at the guilt phase the test to be applied is whether, in construing the evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In applying the above standard, we initially find that there was sufficient evidence by which a jury could have properly found

defendant guilty of each of the aggravated murder counts and specifications. However, this Court statutorily mandated review of the death sentence differs from the above standard to the extent that R.C. 2929.05(A) requires this Court to “review and independently weigh all of the facts and other evidence disclosed in the record.” Thus, in reviewing the appropriateness of a death penalty case “we are not bound, as in other cases, by the findings of fact made by the trier of fact.” *State v. Apanovitch*, 1987, 33 Ohio St.3d 19, 29, 514 N.E.2d 394, (H.P. Brown, J. Separate Opinion).

State v. Burke, 10th Dist. No 90AP-1344, 1993 Ohio App. LEXIS, 6268, *83-*84. It is true that Appellant did not challenge the sufficiency of the evidence with regard to the dismissed predicate offenses. However, a defendant need not challenge the sufficiency of the evidence for this Court to conduct its analysis pursuant to R.C. 2929.05. The State failed to present any evidence of when and where the victim was raped and murdered. The State’s argument that locating a potholder in Appellant’s apartment was circumstantial evidence that the rape occurred in the victim’s apartment is illogical. Under the State’s theory, the inference to be drawn from finding dirt, head hair and pubic hair on the pot holder establishes that the Appellant “raped Gina Tenney inside her apartment, and afterwards used the potholder to wipe himself and the crime scene.” State’s Amended Motion for Reconsideration, 6. The fact that no bodily fluids or DNA was found on the potholder converts the State’s “reasonable inference” into a leap in logic. Likewise, the fact that there were some items that were turned over in the victim’s apartment does not indicate that there was a struggle with the victim before she was murdered

that evening. It is just as likely that the victim's apartment was entered after she was murdered, and that the items were taken after she was murdered and raped. Likewise, given Horace Landers' presence in Appellant's apartment, and his involvement, because the victim's items were found in his coat pocket, the inference that Appellant burglarized the victim's apartment and raped and murdered her there is not supported by the evidence in the record.

As the Court noted, its obligation under R.C. 2929.05(A) to determine whether the evidence supports the jury's finding of the aggravating circumstance is separate and apart from analysis of sufficiency on the underlying charge of aggravated burglary. The State, however, argues that the Court's holding is "wholly consistent" with this Court's previous conclusion "that when the jury unanimously reaches a verdict, the individual jurors need not agree on which of the alternative bases support their individual findings." *State v. Johnson*, 112 Ohio St.3d 210, 219 (2006),² citing *State v. Skatzes*, 104 Ohio St.3d 195, 2004 Ohio 6391, 819 N.E.2d 215, ¶55, following *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). (State's Motion for Reconsideration, 8.)

The Court's opinion, however, belies the State's specious claim. The Court

² As the Court noted *State v. Johnson*, 46 Ohio St.3d 96, 545 N.E.2d 636 (1989), concerned a single charge that the defendant murdered the victim while committing aggravated robbery, or while attempting to commit aggravated robbery, or while fleeing immediately after committing aggravated robbery, or while fleeing immediately after attempting aggravated robbery—a classic "multiple acts" scenario. 46 Ohio St.3d, at 105.

indicated that it had adopted the rule that each possibility in an alternative means case must be supported by sufficient evidence in *State v. Gardner*, 118 Ohio St.3d 420, 2008 Ohio 2787, 889 N.E.2d 995, at ¶49. See, *State v. Adams*, slip op. 2015 Ohio 3954, ¶290. This Court rightly rejects Justice O'Donnell's invitation to abandon the *Gardner* rule in favor of the much criticized *federal* rule announced in *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). *Griffin* held that a general verdict based on alternative means will be sustained if the evidence warrants a guilty verdict on one theory of guilt, even if there is insufficient evidence of guilt as to an alternative theory. As this Court rightly observed, *Griffin* was premised on a dubious assumption of juror infallibility: i.e., that a trial jury will *always* disregard an unproven theory and convict only on the proven theory. 502 U.S., at 59. The Court outlined the sound reasons for disregarding *Griffin* as a triumph of faith over experience:

The *Griffin* assumption defies experience and common sense. As the Supreme Judicial Court of Massachusetts explained, “[i]f the premise of the Supreme Court’s position were correct, a jury would never return a guilty verdict when the evidence was insufficient to warrant that verdict, and we know that is not so.” *Commonwealth v. Plunkett*, 422 Mass. 634, 640, 664 N.E.2d 833 (1996). When the Supreme Court of California adopted *Griffin* with modifications, one justice who did not accept the court’s reasoning thoroughly dissected *Griffin*:

First, the premise of jury “infallibility” is unsupported. Jurors may be “well equipped” to determine pure questions of fact. But their expertise does not extend to mixed questions of law and fact— which include the sufficiency of the evidence. Second, the premise of jury “infallibility” is subversive. If it obtained, we would be compelled to dismiss at the very threshold *each and every*

insufficient-evidence claim raised against *any* verdict of guilt. For we would then be required to conclude that if the evidence had indeed been lacking, the jury would *necessarily* have discerned the deficiency and could not *possibly* have rendered a guilty verdict. Thus, the bare fact of the verdict would establish the sufficiency of the evidence as a matter of law.

(Emphasis sic.) *People v. Guiton*, 4 Cal.4th 1116, 1132-1133, 17 Cal. Rptr.2d 365, 847 P.2d 45 (1993) (MOSK, J., concurring in judgment only). This illogical result is precisely what the separate opinion of Justice O'Donnell urges this court to adopt.

State v. Adams, at ¶292.

For the reasons stated, the State's Amended Motion for reconsideration is not well taken and must be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular U.S. mail on the 19th day of to: Mr. Paul J. Gains, Esq., Mr. Ralph M. Rivera, Esq., and Mr. Martin P. Desmond, Esq., all at 21 West Boardman Street, Youngstown, Ohio 44503.



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