

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 : Case No. 2010-2198
Plaintiff-Appellee, :
v. :
CALVIN McKELTON :
 :
Defendant-Appellant. : **This is a death penalty case.**

MOTION TO RECONSIDER

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MOTION TO RECONSIDER

Appellant Calvin McKelton requests that this Court reconsider its merits ruling of September 13, 2016, affirming both his convictions and death sentence. This request is made under Rule 18.02 of the Supreme Court Rules of Practice. The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

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Memorandum in Support

This Court should reconsider its findings on Proposition of Law 21, regarding the cumulative effect of the errors during Calvin McKelton's trial. Although this Court acknowledged that several errors occurred, it determined they were all harmless. It specifically found that the errors "cannot become prejudicial by sheer weight of numbers." *State v. McKelton*, 2016-Ohio-5735, ¶ 322. But the extent of the errors in this case, coupled with the lack of direct and reliable evidence against McKelton, render the outcome fundamentally flawed.

"Considered separately, it might be possible to conclude that [the defendant] was not prejudiced." *State v. Brown*, 115 Ohio St. 3d 55, 69-70 (2007). But "when considered together, these [multiple] errors call into question the fundamental fairness" of the trial.

This Court agreed with Appellant that the following testimony was improperly before the jury:

- McKelton's daughter warned Z.D., Margaret Allen's niece, that McKelton "choked her mother with a phone cord." Ex. 2. *See State v. McKelton*, 2016-Ohio-5735, ¶¶181-184.
- Incentivized informant Lemuel Johnson testified about such things as that McKelton had been selling drugs since "the late '90s" and that he spoke with McKelton for the purpose of making a deal in which McKelton could buy drugs from Johnson in exchange for McKelton not retaliating against another drug dealer who had tried to kill McKelton. Tr. 1736-37, 1746. *See McKelton*, 2016-Ohio-5735, ¶208.
- Incentivized informant Marcus Sneed testified that McKelton had committed other unrelated murders and robberies. Tr. 1600. Sneed that he knew an unrelated person who went by "Fat Boy." Tr. 1640. The State elicited that Fat Boy "[e]nded up alongside of a road." *Id.* *See McKelton*, 2016-Ohio-5735, ¶238.
- Sheridan Evans referred to McKelton as a serial killer. Tr. 1836. *See McKelton*, 2016-Ohio-5735, ¶203-204.
- The State used as substantive evidence the unsworn recorded statement of Gerald Wilson to demonstrate that McKelton killed Germaine Evans, despite Wilson's testimony that his unsworn recorded statement was a lie. Tr. 1653, 2002-03. *See McKelton*, 2016-Ohio-5735, ¶129-130.

- McKelton was previously in jail for either intimidation of a witness or contempt of court. *See McKelton*, 2016-Ohio-5735, ¶237.
- The statement of an unknown person came in through the testimony of Detective Jennifer Luke, and that improperly-admitted and uncontroverted statement supported the State's theory that McKelton killed Evans because he had witnessed Allen's murder. *See McKelton*, 2016-Ohio-5735, ¶¶188-190.

With the introduction of evidence like this, McKelton was put in the position of having to defend himself against rumors and to dispute the stories of unknown witnesses and/or witnesses who were not on the witness stand. He could not challenge the credibility of unknown sources, explore inconsistencies or inaccuracies in the statements, or prove wrong the inferences built upon inferences. *See, e.g., State v. Anderson*, 2006-Ohio-4618, ¶ 84 (8th Dist. Ct. App.) (“The record leads us to conclude that Appellant would likely have presented a different defense if he were only defending himself against the murder charge, rather than also defending against Donna Dripps’ charges and Bradley Windle's innuendo. For these reasons, there does appear to be a prejudicial effect from the cumulative errors involving the testimony of Donna Dripps and Bradley Windle.”)

The jurors heard, through hearsay, that McKelton’s daughter claimed he choked her mother. But this Court found it harmless because the trial court gave a limiting instruction and because there was “far more prejudicial evidence from other witnesses that McKelton had choked women, specifically Allen, in the past.” *McKelton*, 2016-Ohio-5735, ¶ 184. To the contrary, it is far more prejudicial for such statements to be attributed to McKelton’s own daughter than to others. More than that, however, it is the combination of such statements with the unsubstantiated and highly prejudicial accusations like McKelton is a “serial killer” and that he was responsible for the murder of someone named “Fat Boy” that deprived McKelton of a fair trial. Tr. 1600, 1640, 1836.

With regard to Detective Jenny Luke’s testimony, this Court found that it violated *State v. Ricks*, 136 Ohio St.3d 356 (2013), but found that it was harmless beyond a reasonable doubt. *McKelton*, 2016-Ohio-5735, ¶¶ 188-190. The finding that it was harmless was erroneous, as demonstrated when the appropriate test is applied. *Del. v. Van Arsdall*, 475 U.S. 673 (1986) instructs that whether a Confrontation Clause error is harmless “depends upon a host of factors, all readily accessible to reviewing courts.” *Id.* at 684. “These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” *Id.*

The State presented a moving target, at one point alleging McKelton killed Evans himself (tr. 1136) and at another alleging that he had Evans killed. Tr. 1288-89. Because Evans’ sister provided an alibi for McKelton’s whereabouts when Evans was killed, demonstrating that McKelton *had* Evans killed was crucial. Other than Detective Luke’s mystery witness, Lemuel Johnson was the only witness who provided direct evidence matching the State’s theory concerning Evans’ murder. Johnson’s testimony was not strong evidence, and due to the fact that Johnson did not report anything to the police until he was facing his own federal drug-conspiracy charges, the jury could have seen Johnson’s testimony as suspect in light of his own personal interest in gaining consideration from the prosecution. *See, e.g., United States v. Wysinger*, 683 F.3d 784, 804 (7th Cir. 2012) (“We cannot agree that the other evidence was overwhelming. The vast majority of the evidence against Wysinger came from cooperating co-conspirators who each had strong motives to lie...”)

The other witnesses who testified only provided the jury with information it could use to *infer* that McKelton killed Evans because he had witnessed Allen’s murder. *See Bulls v. Jones*, 274 F.3d 329, 336-37 (6th Cir. 2001) (“However, with the admission of Hill’s statement, the jury no longer needed to engage in any inferences at all.... We must conclude that this admission had a substantial and injurious influence in determining the jury’s verdict.”) Detective Luke was not only a detective, thus perceived as a credible witness by the jury, but she provided the evidence that Evans was a witness to Allen’s murder—something the State needed order to establish the death specification for Evans’ murder.

Nor did “the extent of cross-examination” render Detective Luke’s testimony harmless. *Van Arsdall*, 475 U.S. at 684. Defense counsel asked Detective Luke if she “interviewed numerous people in regard to this case, both Margaret Allen’s case and Germaine Evans’ case,” to which she responded in the affirmative. Tr. 1263. Although counsel asked about a few specific names of the people Detective Luke interviewed, at no point did the defense elicit details about who provided Luke with that particular information. Counsel did not explore any inaccuracies or inconsistencies in the mystery witness’ statements.

Detective Luke’s testimony was not harmless. All of the improper evidence likely affected McKelton’s sentence as well. “We would be naive not to recognize that those matters which occur in the guilt phase carry over and become part and parcel of the entire proceeding as the penalty phase is entered.” *State v. Thompson*, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 421 (1987).

The State’s reliance on Gerald Wilson’s statement—a statement that was both unsworn and admittedly a lie—was also improper and extremely damaging when combined with accusations like McKelton is a “serial killer” and that he was responsible for the murder of

someone named “Fat Boy.” Tr. 1600, 1640, 1836. It essentially was used to bolster the testimony of the State’s incentivized witnesses, and also as substantive evidence of guilt. Tr. 2003. Wilson’s unsworn and unfronted statement to investigators inculpated McKelton in both Allen’s and Evans’ deaths. Ex. 78.

This testimony that McKelton cause Evans’ death was not corroborated by any physical evidence or other testimony to support its accuracy. Adding bad evidence upon bad evidence expounded the problem. The extensive errors in McKelton’s case were numerous and prejudicial. Especially when considered in conjunction with one another, the errors prevented him from having the fair trial to which he is entitled. This Court found each error to be harmless, but “when considered together, these [multiple] errors call into question the fundamental fairness” of the trial. *Brown*, 115 Ohio St. 3d at 70.

This Court should reconsider its denial of McKelton’s direct appeal and grant him the new trial he deserves.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT CALVIN McKELTON'S MOTION TO RECONSIDER** was mailed, postage pre-paid, to Michael Gmoser, Butler County Prosecutor, and Lina N. Alkamdawi, Butler County Assistant Prosecutor, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011, on this 23rd day of September, 2016.

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