

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,**

:

Plaintiff-Appellee,

:

**CASE NO. 2010-2198**

vs.

:

**CALVIN McKELTON,**

**{Death Penalty Case}**

:

Defendant-Appellant.

:

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**MOTION IN OPPOSITION OF RECONSIDERATION**  
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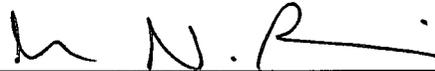
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**MOTION IN OPPOSITION OF RECONSIDERATION**  
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Now comes Appellee and moves this Court to DENY Appellant's "Motion to Reconsider."  
Appellant's motion is without merit and should be denied as more fully discussed in the  
Memorandum in Support attached hereto.

**Respectfully Submitted,**

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## MOTION IN OPPOSITION

Appellee, State of Ohio, hereby gives notice of its opposition to Appellant's "Motion to Reconsider." In Appellant's motion he argues that this Court "should reconsider its finding on Proposition of Law 21" because "the extent of the errors in this case, coupled with the lack of direct and reliable evidence against McKelton, render the outcome fundamentally flawed." Contrary to Appellant's argument, this Honorable Court's finding that multiple errors were harmless is factually sound and should be upheld in light of the direct evidence presented. Further, this Court's conclusion that the cumulative error doctrine did not warrant reversal was legally sound.

A motion for reconsideration is not to be filed simply on the basis that a party disagrees with the prior appellate court decision. It is clear, however, that in the matter at bar, Appellant has filed his motion simply because he disagrees with this Honorable Court's holdings. The State prays that this motion will be denied.

S.Ct.Prac.R. 18.02(A) provides that a motion for reconsideration "must be filed within ten days after the Supreme Court's judgment entry or order is filed with the Clerk of the Supreme Court." The Rule continues and requires that "[a] motion for reconsideration shall not constitute a reargument of the case and may be filed only with respect to the following Supreme Court decisions: (1) Refusal to accept a jurisdictional appeal; (2) The sua sponte dismissal of a case; (3) The granting of a motion to dismiss; (4) A decision on the merits of a case." S.Ct.Prac.R. 18.02(B). The standard for reviewing a motion for reconsideration is "whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (10<sup>th</sup> Dist. 1987), paragraph one of the syllabus. "An application

for reconsideration may not be filed simply on the basis that a party disagrees with the prior appellate court decision.” *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11<sup>th</sup> Dist. 1996).

Contrary to Appellant’s argument, this Honorable Court did not commit any error in concluding that Appellant was not deprived of a fair trial. This Court considered fully all issues presented in the direct appeal and simply because Appellant disagrees with this Court’s holdings does not warrant reconsideration of the decision.

**Proposition of Law 21:**

**Appellant was not deprived of a fair trial, thus, the cumulative error doctrine did not warrant reversal.**

Appellant has issue with this Court’s rejection of his proposition of law 21 and conclusion that “several errors occurred at McKelton’s trial, none of which rose to the level of reversible error[,]” and that “we are unconvinced that the cumulative effect of these error deprived McKelton of a fair trial.” *State v. McKelton*, Slip Opinion No. 2016-Ohio-5735, ¶ 322. In support of his motion for reconsideration, Appellant simply reargues his previous contentions as presented during the direct appeal and completely disregards key direct evidence presented during the trial and considered by this Court.

First, Appellant disagrees with this Court’s conclusion that the admission of the statement of Appellant’s daughter through Z.D. that Appellant had choked her mother was harmless error. This Court held that: “McKelton was not materially prejudiced by the error. *Belton*, \_\_ Ohio St.3d \_\_, 2016-Ohio-1581, \_\_ N.E.3d \_\_, at ¶ 116. The trial judge here expressly admonished the jurors not to consider *anything* in the 9-1-1 tape for its truth; they were permitted to consider the recording only as evidence of Z.D.’s “emotions and state of mind at the time” she called 9-1-1. This instruction

significantly minimized any potential harm to McKelton. In addition, the jury heard far more prejudicial evidence from other witnesses that McKelton had choked women, specifically Allen, in the past. Under these circumstances, the error in admitting the phone-cord statement was harmless beyond a reasonable doubt. *See* Crim.R. 52(A); *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 28-29.” *McKelton*, 2016-Ohio-5735, ¶ 184.

This Court’s finding is supported by the record of the case. At the conclusion of Z.D.’s testimony, the trial court instructed the jury as follows:

Ladies and gentlemen, very briefly before we start cross-examination, the Court admitted the 911 tape, and I just wanted to give you some cautionary instructions. The Court permitted it because it believed that it went to her state of mind at the time of the event. Certain things were said which were out-of-court statements which would traditionally be considered hearsay.

You should not consider the 911 tape for the truth of the matter. Anything said there only because it goes to her emotions and state of mind at the time it was said, okay.

So with that cautionary instruction, let’s proceed.

(Tr. 361-362).

Moreover, T.W., victim Margaret Allen’s niece, testified that she had previously witnessed Appellant choking Ms. Allen. (Tr. 425, 431). This direct evidence is much more prejudicial to Appellant than a statement in a 911 call which the jury was directed not to consider for the truth of the matter asserted. As such, this Court should decline to reconsider its decision.

Second, Appellant disagrees with this Court’s conclusion that the trial court’s instruction to the jury to not draw improper inferences from Lemuel Johnson’s testimony regarding Appellant’s

past drug-dealings and his offer to eliminate witnesses was sufficient to cure the admission of the testimony. *See McKelton*, 2016-Ohio-5735, ¶ 208. By simply disagreeing, however, Appellant has not met his burden to warrant reconsideration by this Honorable Court. This is especially true in light of the fact that the trial court did not solely instruct the jury once to disregard this character testimony, but rather twice. The trial court instructed the jury during Mr. Johnson's testimony and again at the conclusion of the State's direct examination:

THE COURT: Okay. Ladies and gentlemen, let me give you some instructions at this point. The Court is going to permit further evidence in of other acts and other wrongs, okay. And again, the Court is going to permit this, not because -- to show that he acted in conformity with this, but only that it shows a plan, identity, modis operandi, okay. So don't consider it for any other purpose and the limited purpose that I previously have instructed you, okay.

(Tr. 1744-1745).

THE COURT: Okay. Ladies and gentlemen, again, I want to give you some very specific instructions about how to handle some of the testimony that you received. Evidence was received about the commissions of other crimes or wrongful acts other than the offense with which the defendant is charged. The evidence was received only for a limited purpose. It was not received and you may not consider it to prove the character of the defendant in order to show that he acted in conformity or in accordance with that character.

If you find that the evidence of other crimes or wrongful acts is true and that the

defendant committed them, you may consider them only for the purpose of deciding whether it proves the absence of mistake or accident in this case, the defendant's motive, opportunity, intent or purpose, preparation or plan to commit the offenses charged, his knowledge of circumstances surrounding the offenses charged in this case, the identity of the person that committed the offense in this trial. And the evidence cannot be considered for any other purpose, okay.

(Tr. 1750-1751).

Therefore, this Court's finding that "[t]he trial court twice instructed the jury not to draw improper inferences from it. We presume that the jurors followed these instructions[]" should be upheld. *See McKelton*, 2016-Ohio-5735, ¶ 208.

Furthermore, there was direct evidence that Appellant was responsible for the death of Germaine Evans, who witnessed Appellant murder Ms. Allen. This direct evidence supports this Honorable Court's finding that the errors were harmless and also negates Appellant's other disagreements with this Court that reference of Appellant as "serial killer" was not outcome determinative, and similarly reference to the victim Mr. Evans as "fat boy". *See McKelton*, 2016-Ohio-5735, ¶¶ 204, 238. It should be noted that with reference to "fat boy" the trial court sustained Appellant's objection during trial and further instructed the jury to disregard the testimony: "I'll sustain the objection on a relevance ground. The jury will disregard it." (Tr. 1640).

With regards to the killing of Ms. Allen, Mr. Charles Bryant, who had known Appellant for seven years, testified that Appellant told him that Ms. Allen "was scandalous and running her mouth" and that he had choked her after the two had argued about her pregnancy. (Tr. 986, 989-990).

Mr. Andre Ridley, a friend of Mr. Evans, testified that Mr. Evans told him that “I was there at the house when Calvin killed that girl.” (Tr. 908). Mr. Ridley described his conversation with Mr. Evans:

And when he told me he was there, and he said Calvin, he said, I was there when Calvin killed that girl. I said, What Happened? He said, I was in another room, and he said, they was in there fighting. And then he said after a while, he came out the room. And when he came out the room, he seen Calvin choking Margaret. And I say, What you do? He said, I just stood there because I didn't know what to do.

And he said after that, when he was choking her and he said like--he didn't give me no time frame, he said Calvin just started smacking her, you know, saying wake up, Missy, wake up. Wake up. Wake up, Missy. And he said Calvin was crying like, Please, Missy, wake up. Wake up. Please wake up.

(Tr. 909).

After the discovery of Mr. Evans' body, Mr. Marcus Sneed, a witness that Appellant completely disregards in his motion to reconsider, ran into Appellant at Vito's and questioned him regarding Mr. Evans' death. (Tr. 1602). Appellant admitted that “he had to” because he was “the only guy that could link him to the murder.” (Id.)

In addition, Appellant told Mr. Lemuel Johnson that after Ms. Allen's murder, he was present when Mr. Evans' sister received a phone call from a detective attempting to locate Mr. Evans. (Tr. 1747-1748). Mr. Johnson testified about Appellant's response to the phone call he overheard:

He said basically that reaction was that he needed--he said he needed to, you know, to get--to get to Mick before the detective--before the detective did, because he knew

because he had to kill Mick before—he knew that Mick was beginning to be a weak link, and he knew he had to get to him. Mick be the only person that can connect him to Missy murder.

(Tr. 1748).

On cross-examination, Mr. Johnson recounted Appellant’s “exact words”:

Look, I did this, you know. I was over—I was over Mick’s sister house, and when the officers, the detectives called and I knew that he was a weak link. I knew he was a weak link. So when they called and talked to him, they called and said they wanted to meet with him. They wanted to meet with Mick. I knew I had to go and meet with him first, because I knew I had to kill him because he was—they was going to—he was a weak link to Missy’s murder. He was going to be able to connect me to Missy’s murder.

(Tr. 1777-1778).

As the above highlighted direct evidence demonstrates, this Court’s conclusion that the errors were harmless is factually and legally sound. As such, this Honorable Court should deny Appellant’s motion to reconsider.

Third, Appellant disagrees with this Court’s conclusion that the prosecutor’s reliance on Mr. Gerald Wilson’s prior inconsistent statement as substantive evidence of his guilt was not outcome determinative. *See McKelton*, 2016-Ohio-5735, ¶ 130. In his prior statement, Mr. Wilson stated that Appellant admitted to choking Ms. Allen and threatened to kill Mr. Wilson. *See Id.*, at ¶ 116. Appellant’s disagreement with this Honorable Court is without merit and disregards the direct evidence establishing Appellant’s criminal culpability in the killing of Ms. Allen and Mr. Evans as

outlined above. Moreover, Appellant fails to meet his burden of establishing what issues this Court did not consider or did not fully consider in its decision. *See Hodge*, 37 Ohio App.3d 68. Thus, reconsideration by this Court should be declined.

Fourth, Appellant disagrees with this Court's finding that the testimony of Mr. Charles Bryant regarding meeting Appellant in jail was not a basis to reverse for plain error. This Court held that: "Any probative value in explaining the circumstances under which Bryant met McKelton was substantially outweighed by the danger of unfair prejudice because McKelton was on trial for an unrelated charge of witness intimidation. Even so, we find no basis to reverse for plain error; notably, McKelton was acquitted on the witness intimidation charge in this case." *See McKelton*, 2016-Ohio-5735, ¶ 237. This Honorable Court's conclusion is consistent with the direct evidence establishing Appellant's guilt of murdering Ms. Allen and Mr. Evans beyond a reasonable doubt. In addition, Appellant fails to present any new arguments that he has not already presented in the direct appeal. Appellant is simply disagreeing with this Court's holdings, which is not a basis for reconsideration. *See S.Ct.Prac.R. 18.02(B)*. Wherefore, this Honorable Court should decline Appellant's motion to reconsider.

Finally, Appellant disagrees with this Court's holding finding the testimony of Detective Jennifer Luke to be harmless error in light of the cautionary jury instructions provided by the trial court and the direct evidence presented at trial. Appellant is solely disagreeing with this Court without establishing what issues this Honorable Court failed to consider, which does not warrant granting his motion to reconsider. In rejecting Appellant's argument in the direct appeal, this Court held:

Detective Luke explained why she began to look for Evans in connection with the

investigation of Allen's death. She stated that she had gotten a new lead on Evans in February 2009. Before Luke described what she heard, the trial court emphasized to the jurors that they should not take her testimony for its truth and that it was being offered only to explain her state of mind. Luke then testified that she had heard that Evans "was present during Missy's homicide, that he knew about it and that he was scared and that he may have either helped move the body or that he was present in the house when Missy was killed." This information prompted Luke to call Crystal in an effort to locate Evans.

Luke's testimony violated *Ricks* because it went beyond the nonhearsay purpose of explaining why she was trying to locate Evans; her testimony also supported the state's theory that McKelton killed Evans because he had witnessed Allen's murder.

Viewed for its truth, Luke's statement connected

the two deaths. As a result, McKelton was entitled to confront the informant who gave Luke the information.

Even so, the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also State v. Jordan*, 9th Dist. Summit No. 27005, 2014-Ohio-2857, ¶ 8-11 (evidence violated *Ricks*, but error was harmless beyond a reasonable doubt). The trial judge instructed the jurors not to consider this part of Luke's testimony for its truth, and we presume that they followed the instruction. *See State v. Loza*, 71 Ohio St.3d 61, 79, 641 N.E.2d 1082 (1994). Moreover, viewed alongside the state's other evidence against McKelton, we do not see a " 'reasonable possibility that the evidence \* \* \* might

have contributed to the conviction.’ ” *Chapman* at 24, quoting *Fahy v. Connecticut*, 375 U.S. 85, 86, 84 S.Ct.229, 11 L.Ed.2d 171.

*McKelton*, 2016-Ohio-5735, ¶¶ 188-190.

This Court should deny Appellant’s request for reconsideration since during Detective Luke’s direct examination, the trial court provided the jury with the following cautionary instructions:

Ladies and gentlemen, I’m going to permit it because it goes to this officer’s state of mind. You should not take her testimony at this point for the truth of the matter, only to show that she received this information at the meeting, and as a result of that, did something subsequent. So it’s not being offered for the truth of the matter. It is being offered for her state of mind. Okay. Let’s proceed with that admonition.

(Tr. 1249).

Moreover, there was direct evidence from the testimony of Mr. Ridley that Mr. Evans witnessed Appellant murder Ms. Allen:

And when he told me he was there, and he said Calvin, he said, I was there when Calvin killed that girl. I said, What Happened? He said, I was in another room, and he said, they was in there fighting. And then he said after a while, he came out the room. And when he came out the room, he seen Calvin choking Margaret. And I say, What you do? He said, I just stood there because I didn’t know what to do.

And he said after that, when he was choking her and he said like--he didn’t give me no time frame, he said Calvin just started smacking her, you know, saying wake up, Missy, wake up. Wake up. Wake up, Missy. And he said Calvin was crying like, Please, Missy, wake up. Wake up. Please wake up.

(Tr. 909).

Furthermore, there was direct evidence that Appellant believed Mr. Evans was his only link to the murder of Ms. Allen and he had to be eliminated, per the testimony of Mr. Sneed and also Mr. Johnson. Appellant admitted to Mr. Sneed that “he had to” kill Mr. Evans because he was “the only guy that could link him to the murder.” (Tr. 1602). Appellant also informed Mr. Johnson:

Look, I did this, you know. I was over—I was over Mick’s sister house, and when the officers, the detectives called and I knew that he was a weak link. I knew he was a weak link. So when they called and talked to him, they called and said they wanted to meet with him. They wanted to meet with Mick. I knew I had to go and meet with him first, because I knew I had to kill him because he was—they was going to—he was a weak link to Missy’s murder. He was going to be able to connect me to Missy’s murder.

(Tr. 1777-1778).

Wherefore, as the record of the case clearly demonstrates, this Honorable Court’s decision is factually and legally sound. Appellant was afforded a fair trial and his convictions and death sentence for the killings of Margaret Allen and Germaine Evans should be upheld. This Court should not reconsider its prior decision.

**CONCLUSION**

For all of the forgoing reasons, this Court should deny reconsideration of this case and not permit Appellant to simply reargue issues that he merely disagrees with their proper and just resolution.

**Respectfully Submitted,**

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**PROOF OF SERVICE**

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