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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.

STATE of Ohio, Plaintiff-Appellee,
v.
Davel V. CHINN, Defendant-Appellant.

No. 18535.
|
July 13, 2001.

Attorneys and Law Firms

Carley J. Ingram, Atty. Reg. No. 0020084, Assistant Prosecuting Attorney, Dayton, OH, for plaintiff-appellee.

Linda E. Prucha, Atty. Reg. No. 0040689, Assistant State Public Defender, Columbus, OH, for defendant-appellant.

OPINION

WOLFF.

***1** Davel V. Chinn appeals from a judgment of the Montgomery County Court of Common Pleas which denied his petition for post-conviction relief.

The record reveals as follows. On August 23, 1989, a jury convicted Chinn of the aggravated murder of Brian Jones. Upon the jury's recommendation, the trial court sentenced Chinn to death. Chinn appealed his conviction. We affirmed his convictions but reversed his death sentence and remanded the case. *State v. Chinn* (Dec. 27, 1991), Montgomery App. No. 11835, unreported. On December 6, 1994, the trial court sentenced Chinn to death again. He appealed that sentence and on June 21, 1996, we vacated his death sentence and remanded the case again for re-sentencing because Chinn had not been present when the trial court had sentenced him to death. *State v. Chinn* (June 21, 1996), Montgomery App. No. 15009, unreported. On September 25, 1996, Chinn was sentenced to death again. We affirmed that sentence in *State v. Chinn* (Aug. 15, 1997), Montgomery App. No. 16206, unreported. The Supreme Court of Ohio also affirmed Chinn's convictions and sentence of death. *State v. Chinn* (1999), 85 Ohio St.3d 548, 709 N.E.2d 1166, certiorari denied (2000), 528 U.S. 1120, 120 S.Ct. 944.

On March 14, 1997, Chinn filed a petition for post-conviction relief. The trial court denied Chinn's petition without a hearing. Chinn appealed the dismissal of his petition. We reversed the trial court's decision and remanded the case for an evidentiary hearing on the issue of whether Chinn's trial counsel had been ineffective because he had not called expert witnesses on eyewitness identification and mental retardation. *State v. Chinn* (Aug. 21, 1998), Montgomery App. No. 16764, unreported, discretionary appeal not allowed (1999), 84 Ohio St.3d 1474, 704 N.E.2d 581. An evidentiary hearing was held on February 10, 2000. On September 7, 2000, the trial court denied Chinn's petition for post-conviction relief.

Chinn now appeals the trial court's September 7, 2000 decision. He raises four assignments of error. Because his first and second assignments raise similar issues, we will address them together.

I. THE TRIAL COURT ERRED IN NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PRESENT TESTIMONY OF AN EXPERT ON EYEWITNESS IDENTIFICATION AT APPELLANT CHINN'S CAPITAL TRIAL, IN VIOLATION OF MR. CHINN'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9, 10 AND 16 OF THE OHIO CONSTITUTION.

II. THE TRIAL COURT ERRED IN NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PRESENT EXPERT TESTIMONY ON MENTAL RETARDATION AT APPELLANT CHINN'S CAPITAL TRIAL, IN VIOLATION OF MR. CHINN'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9, 10 AND 16 OF THE OHIO CONSTITUTION.

Chinn argues that his trial counsel's failure to present testimony from experts on eyewitness identification and mental retardation constituted ineffective assistance of counsel.

***2** At Chinn's trial, the state's key witness was Marvin Washington, a juvenile who testified that he had helped Chinn rob and murder Jones. Chinn denied participation in the crime and claimed that he did not know Washington. Washington is now deceased.

In his petition for post-conviction relief, Chinn alleged, *inter alia,* that his trial counsel should have presented an expert to testify about eyewitness identification and an expert to testify that Washington had suffered from mental retardation and that such retardation had affected his ability to remember and testify about the evening of the crime. With his petition, he presented affidavits from Solomon M. Fulero, Ph.D., J.D. and Caroline Everington, Ph.D. In reversing the trial court's first denial of his petition, we concluded as follows:

> Given the information contained within [the Fulero and Everington] affidavits, we find that trial counsel's failure to call any expert witnesses could rise to the level of ineffective assistance of counsel prejudicial to the rights of the defendant. Thus, we conclude that the trial court should have conducted an evidentiary hearing to determine more fully the nature of the testimony of these two witnesses, as well as the strategical reasoning of trial counsel for not presenting this expert testimony.

On remand, an evidentiary hearing was held. Fulero, Everington, and Michael Monta testified on behalf of Chinn. Barbara DeVoss, David Lantz, and Dr. Thomas O. Martin testified on behalf of the state.

Fulero testified that he held a J.D. and a Ph.D. in psychology and had published on the subject of the reliability of eyewitness identification. He said that had he testified at Chinn's trial, he would have informed the jury as follows. The accuracy of eyewitness evidence is not as "great" as lay witnesses believe it to be because a person's memory can be faulty for many different reasons. The following factors can affect a person's ability to acquire, store, and recall memories. The longer a witness is able to look at a perpetrator's face, the more accurate his later identification of the perpetrator will be, with the total length of exposure to an event not being as relevant as the length of time the witness can actually look at the perpetrator's face. The presence of a salient detail, such as a weapon, is significant because it draws a witness's attention away from the perpetrator's face. Fulero testified that people who report fear for their lives during an event are often less accurate in subsequent attempted identification procedures. Fulero stated that cross-race identifications are less accurate than same-race identifications, with the lowest accuracy resulting when a white person attempts to identify a black person. He said that mentally retarded people show a decreased accuracy rate in making later identifications and are also more suggestible and often have desires to please authority and to hide their mental retardation. He also stated that if a witness is alcohol-impaired at the time of the event, his later recall will be less accurate unless he is alcohol-impaired at the time he recalls it as well.

***3** Fulero stated that the longer the period of time between the event and the person's attempt to retrieve his memory, the less accurate that memory will be. He also said that during the period of time between the event and the witness's attempt to retrieve his memory, post-event information given to the witness can become part of his initial memory of what occurred at the event and thus his own actual memory of what happened at the event will be less accurate. Fulero also testified that there is really no relationship between a witness's confidence level in the accuracy of his memory and the actual accuracy of his memory because post-event information usually changes a witness's confidence level in the accuracy of his memory.

On cross examination, Fulero testified that it was not his role to tell the jury whether a witness's memory was correct or wrong because such judgment would be beyond the scope of his knowledge. He stated that his role in Chinn's trial would have been to give the jurors knowledge about

eyewitness identifications that would have helped them make their decision.

Everington testified that she was an associate professor in the department of educational psychology at Miami University. She testified that she had researched and published in the field of mentally retarded offenders in the criminal justice system. She indicated that the Public Defender's Office had contacted her and asked her to review the following documents pertaining to Washington: his juvenile court records, a social history report, a police interview, a transcript of his testimony against Chinn, several psychological evaluations, a neuropsychological assessment, and his school records. She testified that each of those records clearly showed the presence of moderate range mental retardation in Washington, indicating that his IQ had been below the lowest two percent of the population. She reported that Washington had had "profound academic deficits" as he had scored below a third grade level, the lowest level possible, on achievement tests when he had been thirteen years old. She stated that people who suffer moderate mental retardation need support in many areas of their lives and are less likely to live completely independently. She stated that they might not be literate and are frequently unable to do "first grade kinds of academic tasks" such as telling time.

Everington stated that the psychological reports revealed that Washington had had a limited ability to comprehend, had been easily swayed by others, had been eager to please authority figures, had been easily distracted, and had had significant weaknesses in long-term recall. She stated that the neuropsychological assessment indicated that Washington had suffered cranial abnormality that had caused a neuropsychological impairment that would have led Washington to distort and confuse new information. According to Everington's interpretation of the chemical assessment, Washington had "function[ed] well below his level," had consumed alcohol on the evening of the crime, and had reported at least three blackout episodes. She also noted that Washington's school records indicated that he had been in a developmentally handicapped class.

***4** Based upon her review of Washington's testimony at Chinn's trial, Everington stated that Washington had been unable to tell time, had been unable to recall or had given inconsistent answers to questions about temporal events, had had deficits in receptive learning in that he had not understood questions, had given inappropriate responses to questions, had asked for questions to be rephrased, and had had memory problems in that he had been unable to recall important facts from the night of the crime. On direct examination, Everington concluded that in her professional opinion, Washington had had "significant deficits in the memory" and that "his memory [had been] * * * questionable."

During cross examination, Everington admitted that she had no first-hand knowledge about Washington because she had never met him. She stated that she does not administer IQ tests because she is not a psychiatrist or psychologist. She agreed that Washington had been consistent with his story about the night of the crime. She also stated that while the police might have influenced the truthfulness of Washington's testimony, it was equally possible that Washington had not been influenced and had testified truthfully about what had happened on the night of the crime.

Michael Monta was Chinn's trial counsel. Monta had had fifteen years of experience in criminal cases and "had participated" in one other capital murder case prior to his appointment to represent Chinn. He testified that to prepare Chinn's case, he had filed a discovery motion and had received Washington's juvenile record, pre-interview forms, statements, and police reports. Monta did not receive Washington's psychological reports, social history, neuropsychological reports, or juvenile court personnel evaluation. He said that such information would have been helpful in his defense of Chinn because he could have used it during his cross examination of Washington to ask about his previous blackouts and his ability to remember things. He also stated that had he had such information, he "may very well" have had an expert examine Washington to assess his credibility and to determine whether his testimony could have been impeached.

On cross examination, Monta stated that he had met Washington prior to Chinn's trial. He stated that he had perceived Washington to be "young, uneducated, [and] not especially bright" but stated that Washington had "seemed to understand what the situation was and what he was doing there." Monta stated, "I'm not a psychologist but I'[ve] seen some psychology reports in my time; and I thought [Washington] probably would have passed that muster any way." When asked if the case against Chinn centered solely on Washington's identification of Chinn, Monta stated "probably

not completely" because there were other witnesses who had testified at trial and had implicated Chinn in the commission of the crime. Monta noted, however, that Washington had been the only witness against Chinn who had been with him on the night of the crime continually from 6:45 p.m. until shortly after midnight.

***5** Barbara DeVoss testified on behalf of the state. She stated that she was a social worker with almost thirty years of experience. She testified that she had provided counseling for boys on her "living unit" at the Training Center for Youth and had been assigned to counsel Washington in April 1989. She stated that she had interacted with Washington every day for at least some period of the day between April 1989 and August 1992. DeVoss stated that before she met Washington, she had read the reports and materials on him and had thought, "oh, my God, I have got a blooming idiot." She stated that after she had started spending time with Washington, however, she had been pleasantly surprised. She testified that although the reports had stated Washington would have problems grooming himself, he had, in fact, groomed himself very well and "was quite particular on how he looked." DeVoss said that Washington had "kept his appearance up" and had ironed his clothes because he had wanted to look nice and clean. She stated that Washington had been able to do things on his own initiative and had worked himself up to the highest level program and had been placed in an outside honor group where only ten other boys had been and he had been given a "fair amount of freedom and responsibility" in that position. DeVoss testified that after Washington had worked and saved money, she had purchased a watch for him and he had been able to read it and use it correctly to meet appointments. DeVoss also stated that she knew Washington was literate because she had heard him read aloud and she knew he had read Sports Illustrated, stories, and novels. She testified further that Washington had been able to balance a checkbook, count money, and make change with money. She testified that she did not think that Washington had had a low IQ as stated in the psychological reports.

DeVoss stated that Washington had written a letter to the juvenile court judge who had sentenced him for his participation in Jones' murder asking for early release and that the judge had written back stating that he would consider Washington for early release after he had graduated from high school. DeVoss stated that after Washington had received that information, he had been quite motivated and had eventually earned a "regular diploma[,]" had been valedictorian of his class, and had given a "talk" at the graduation. DeVoss also stated that Washington had never attempted to go "AWOL."

On cross examination, DeVoss admitted that she had not known Washington prior to April 1989. She stated that some of the staff at the training center provide a very nurturing environment for young people. She testified that Washington had been placed with learning disabled students when he had first arrived at the training center. DeVoss also agreed that there had been a marked improvement in Washington after he had been sent to the training center.

David Lantz also testified on behalf of the state. He had been the chief investigator in the murder of Jones and had interviewed Washington six days after the crime. Washington had been fifteen years old at the time of the crime. Lantz stated that during the interview, Washington had given a long narrative of the events of the crime and then had answered follow-up questions. Lantz said that Washington's story had been internally consistent and had made sense. Lantz stated that Washington had appeared to understand questions and had given appropriate answers. Lantz also said that Washington had drawn a diagram of the parking lot scene where the crime had begun and that his drawing had matched a drawing made by another victim of the crime.

***6** Lantz testified that Washington had eventually picked Chinn's photograph from a photo spread, after not making picks from earlier photo spreads that had not contained Chinn's photo. Lantz stated that during a police lineup that had included Chinn, Washington had indicated that he had not seen the suspect. After Washington was taken to an interview room, however, he indicated that he wanted to see Lantz and eventually told Lantz that the suspect had been in the lineup and was Chinn. Washington told Lantz that he had been afraid to identify him while the suspects were standing on the stage. Lantz stated that Washington's trial testimony against Chinn had been consistent with his original story. He also testified that nothing about his interactions with Washington had led him to think that Washington had been mentally retarded or had been unable to give a truthful account of the event.

Dr. Thomas O. Martin testified that he was a clinical psychologist. He stated that a number of things can affect a person taking an IQ test, such as motivation, hallucinations, brain injury, and a lack of education. He stated that little can

be known by looking solely at a person's IQ scores because IQ scores tell how a person compares to similar aged people in terms of intelligence. He said that IQ scores do not give information about a person's level of adaptive functioning. Martin stated that a person who is born moderately mentally retarded would not be expected to graduate from high school, to drive a car, to write checks, to read books, to make change with money, or to be able to hold down unsupervised jobs. On cross examination, Martin testified that he had reviewed Washington's neuropsychological report and that such report had indicated a congenital cranial abnormality that could have affected his IQ score and memory functioning.

"To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52, 64, certiorari denied (2000), ---U.S. ----, 121 S.Ct. 99, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 2064; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of syllabus, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258. A defendant's failure to satisfy one prong of this test negates a court's need to consider the other prong of the test. *Madrigal,* 87 Ohio St.3d at 389, 721 N.E.2d at 64, citing *Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069.

To meet the first prong of the *Strickland* test, the defendant must show that his counsel's conduct was objectively deficient by producing evidence that the counsel acted unreasonably. *State v. Keith* (1997), 79 Ohio St.3d 514, 534, 684 N.E.2d 47, 65, certiorari denied (1998), 523 U.S. 1063, 118 S.Ct. 1393-1394. Defense counsel's performance will be deficient if it "falls below an objective standard of conduct which is reasonable under prevailing professional norms." *State v. Peeples* (1994), 94 Ohio App.3d 34, 45, 640 N.E.2d 208, 215, affirmed (1995), 74 Ohio St .3d 153, 656 N.E.2d 1285. Counsel's performance falls below professional norms "if he fails to advocate the defendant's cause, fails to keep the defendant informed of important developments, or fails to use the requisite level of skill necessary to ensure the integrity of the adversarial proceedings." *Id.* Further, we " 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Mason* (1998), 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932, 949, certiorari denied (1998), 525 U.S. 1057, 119 S.Ct. 624, citing *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

***7** Under the second prong of the *Strickland* test, "prejudice" has been defined as "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley, supra,* at paragraph three of the syllabus. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Bays* (1999), 87 Ohio St.3d 15, 27, 716 N.E.2d 1126, 1140, certiorari denied (2000), 529 U.S. 1090, 120 S.Ct. 1727.

We also note that the supreme court has concluded that counsel's failure to call an expert and his decision to rely instead upon cross-examination does not constitute ineffective assistance of counsel. *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225, 230; see *State v. Thompson* (1987), 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407, 417. Further, one court has specifically held that counsel's failure to call an expert to testify about the variables affecting eyewitness identification was speculative in determining that defense counsel violated an essential duty owed to the defendant. *State v. Spencer* (Apr. 22, 1997), Franklin App. No. 96APA09-1226, unreported.

Chinn argues that his trial counsel was ineffective because he failed to present the testimony of experts on eyewitness identification and mental retardation. He asserts that the state presented testimony from three people who identified Chinn and that there was no other physical or circumstantial evidence linking him to the offense. Chinn argues that had an expert such as Fulero been called to testify, he could have informed the jury of the variables that affect the reliability of eyewitness identification and helped the jury understand that eyewitness identification can be unreliable in some circumstances. He asserts that had an expert such as Everington been called to testify, she could have informed the jury of Washington's mental condition and inability to store and recall memories.

The trial court concluded that Chinn's trial counsel could not be faulted for failing to call experts to testify on the reliability of eyewitness identifications and on mental retardation. The court found that Chinn's case was not a typical identification case where an identification had been made by a victim who had been involved in an incident with an unknown perpetrator

for only a brief period of time or by a victim who had been under a high amount of stress.

Fulero's testimony at the evidentiary hearing concerned the following factors that can affect the reliability of eyewitness identifications: the amount of time the eyewitness has to view the perpetrator's face, the presence of a salient detail like a weapon, the amount of fear reported by the eyewitness, cross-race identifications, the effects of mental retardation, the effects of being alcohol-impaired at the time the perpetrator is witnessed, and the acquisition of post-event information.

Three witnesses identified Chinn at his trial. Shirley Cox was not a witness to the crime but identified Chinn as a person who had introduced himself to her almost three weeks after the crime as "Tony" Chinn. She also testified that the "Tony" she had met resembled the police sketch that had been drawn from Washington's descriptions of Chinn. Christopher Ward testified that he had been introduced by his friend, Washington, to another man named "Tony" and had talked to Washington and "Tony" for thirty to forty-five minutes late on the night of the crime. Apparently, Washington and "Tony" drove Jones' car to Ward's house sometime after committing the crime. Ward stated that he had known nothing about the crime at the time he had met "Tony." He learned of the crime later that night, however, when Washington returned to his house and informed him of it. At Chinn's trial, Ward identified Chinn as the "Tony" he had met on the evening of the crime. Ward also gave a description of the vehicle that Chinn and Washington had driven and such description matched other witnesses' descriptions of Jones' vehicle.

***8** The factors about which Fulero testified were not particularly relevant to the testimonies of Cox and Ward. Cox testified that Chinn was in her presence for ten to fifteen minutes. Thus, she apparently had sufficient time to view his face. Ward testified that he had been in Chinn's presence for thirty to forty-five minutes. Thus, he had sufficient time to view his face. Neither Cox nor Ward testified about the presence of any salient detail and neither reported that they had been in fear while in Chinn's presence. Although Cox's race is unknown from the record, both Ward and Washington were black. There was no evidence that Cox or Ward were mentally retarded. There was no evidence that Cox was alcohol-impaired at the time she witnessed "Tony." Ward testified that he had not been drinking or smoking marijuana on the night he had met Chinn. Further, there was no evidence presented that would support the conclusion that either Cox or Ward had received post-event information which would have changed their identifications of Chinn. Thus, pursuant to the record, none of the factors discussed by Fulero were relevant to the testimonies of Cox or Ward.

The main witness against Chinn was Washington. On the night of the crime, Washington was with "Tony" from approximately 7:00 p.m. to midnight, a significant length of time. Further, Washington knew "Tony" before the night of the crime because he had previously met and "partied" with him. In fact, the two were together awhile before they decided to rob someone and ultimately spent the entire evening together. Washington knew that Chinn was carrying a gun before the crime was committed, but it apparently was not visible to him during most of the evening. Washington did not report being in fear at any time during the night. Although he might have experienced fear or stress during the actual crime, he was not the victim of the crime.

Both Washington and Chinn were black. Washington testified that when he had met Chinn on the evening of the crime, Chinn had been drinking alcohol. Washington, who had not had any alcohol before meeting Chinn, then began drinking with Chinn and the two eventually purchased more beer and consumed it before committing the crime. Washington testified that he had felt intoxicated by the time he had arrived at the scene where the crime had been committed. Although Washington might have been alcohol-impaired at the time of the crime, he had not had alcohol at the time he originally saw and recognized Chinn.

There is no evidence that Washington acquired post-event information about the crime that altered his memory. In fact, Detective Lantz testified that at the time Washington gave his first account of the events of that evening, Lantz had not given him any information about the crime. Lantz also said that until Washington had implicated "Tony," investigators had never suspected anyone linked to that name. Further, Lantz testified that Washington's testimony at Chinn's trial had been consistent with his original story. Thus, none of the factors discussed above would have been particularly relevant to Washington's testimony. The only factor that might have been relevant was the effect of mental retardation on Washington's ability to perceive and remember information.

***9** At the post-conviction relief hearing, Everington testified that Washington had suffered from moderate range mental retardation, had had a limited ability to comprehend, had been easily swayed by others, had been eager to please authority figures, could have been easily distracted, had had significant weakness in long-term recall, and had distorted and confused new information. Fulero testified that mentally retarded people show a decreased accuracy rate in making later identifications and are also more suggestible and often have desires to please authority and to hide their mental retardation.

On the other hand, Monta, an experienced criminal attorney, testified that, after meeting Washington, he had thought Washington probably would have passed psychological "muster." He also stated that the case was probably not centered solely on Washington's identification of Chinn because other witnesses who testified had implicated Chinn in the commission of the crime. Although DeVoss testified positively about Washington's characteristics and abilities, we note that she met Washington in April 1989 and thought he was a "blooming idiot" at that time. During her contact with him between April 1989 and 1992, she decided otherwise, but Chinn's trial was in August 1989, so DeVoss most likely would not have been available to testify positively about Washington's characteristics at the time of Chinn's trial.

Lantz testified that Washington had understood questions and had appropriately answered them. He said that in his interactions with Washington, nothing had led him to think that Washington had been mentally retarded or had been unable to give a truthful account of the events in question. Dr. Martin testified that little can be known by looking solely at a person's IQ scores and that IQ scores do not give information about a person's level of adaptive functioning.

Considering all of this evidence, we cannot conclude that there is a reasonable probability that the result of the trial would have been different had Chinn's counsel called experts to testify about eyewitness identification and Washington's mental retardation. The only eyewitness identification factor that was relevant in the case was Washington's alleged mental retardation and the effects of that retardation were disputed. Although Everington could have testified as to her beliefs about Washington, such testimony was contradicted by the testimonies of Monta, Lantz, and Martin.

Further, we have carefully reviewed Washington's testimony at Chinn's trial. His testimony is remarkably coherent and consistent. We do not agree with Everington's testimony that, during Chinn's trial, Washington had been unable to recall important facts from the night of the crime, had not understood questions, and had given inconsistent and inappropriate answers. Although Washington was unable to give times for many of the events during the evening, he testified that he had not been wearing a watch. While Washington was unable to remember some facts about the evening of the crime, such as with which hand Chinn had held the gun, Washington did remember other very specific facts, such as what he had worn on the night of the crime, the general type of clothing that Chinn had worn, that Jones' car had had a digital clock, and that Chinn had been drinking a sixteen ounce "[b]ig mouth Micky" when he had first seen him. Further, although Washington admitted during his testimony that he could not read or write in cursive, we do not believe that such abilities were required for Washington to accurately identify Chinn.

***10** Washington picked Chinn from a photo spread, after not picking suspects from earlier photo spreads that had not contained Chinn's photograph. Thus, although mentally retarded people might be eager to please authorities, assuming Washington was mentally retarded, he must not have been eager enough to please authorities to immediately pick a suspect from the first photo spread or to immediately identify Chinn during the police lineup. Finally, although mentally retarded people might generally have a decreased accuracy rate in making later identifications, such decreased accuracy rate does not mean Washington's identification of Chinn was wrong. In fact, Washington's familiarity with Chinn prior to the night of the crime likely increased his accuracy rate in identifying him. As Martin testified, a person's level of adaptive functioning is not apparent from his IQ scores. The witnesses who came in contact with Washington prior to Chinn's trial thought that, while Washington might not have been especially bright, he would have passed "muster" and that his story was consistent and plausible.

Considering all of the evidence on the record, we cannot conclude that there is a reasonable probability that had Chinn's counsel called experts on eyewitness identification and mental retardation, the result of the trial would have been different. Thus, we will not conclude that the trial court erred in concluding that Chinn's counsel was not ineffective for

failing to call experts on eyewitness identification and mental retardation.

The first and second assignments of error are overruled.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT CHINN'S MOTION TO AMEND HIS POST-CONVICTION PETITION, IN VIOLATION OF MR. CHINN'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SEC. 9, 10 AND 16 OF THE OHIO CONSTITUTION.

Chinn filed his petition for post-conviction relief on March 14, 1997. We reversed and remanded the trial court's denial of that petition on August 21, 1998. The evidentiary hearing on remand was held on February 10, 2000. On April 3, 2000, Chinn filed his post-hearing brief. The state filed its post-hearing brief on April 27, 2000. On May 12, 2000, Chinn filed his reply to the state's post-hearing brief. Also on May 12, 2000, Chinn filed a motion for leave to amend his post-conviction petition to add two grounds for relief: the state's failure to disclose Washington's juvenile records to Chinn's trial counsel was a violation of *Brady v. Maryland,* (1963), 373 U.S. 83, 83 S.Ct. 1194 and Chinn's trial lawyer's lack of knowledge of that evidence rendered him unable to provide effective representation to Chinn at trial. The state filed a motion to overrule Chinn's petition for leave to amend his petition for post-conviction relief on May 30, 2000. Chinn replied to the state's motion on June 7, 2000.

The trial court overruled Chinn's motion for leave to amend his petition for post-conviction relief on September 7, 2000, finding that the arguments in Chinn's motion were beyond the scope of the remand from our court.

***11** A trial court has discretion in granting or denying leave to amend a party's motion. *Wilmington Steel Products, Inc. v. Cleveland Elec. Illuminating Co.* (1991), 60 Ohio St.3d 120, 121-22, 573 N.E.2d 622, 624. Thus, absent an abuse of discretion, we will not disturb the trial court's denial of Chinn's motion for leave to amend his petition. See *id.* To constitute an abuse of discretion, the trial court's action must have been arbitrary, unreasonable, or unconscionable. *Id.*

Chinn argues that he should have been permitted to amend his petition pursuant to Civ.R. 15(A).

A proceeding on a petition for post-conviction relief is a civil proceeding. *State v. Scudder* (1998), 131 Ohio App.3d 470, 474, 722 N.E.2d 1054, 1057, dismissed (1999), 85 Ohio St.3d 1456, 708 N.E .2d 1010. Because the proceeding is statutory, the Rules of Civil Procedure apply unless, by their nature, they would clearly be inapplicable. Civ.R. 1(C).

Civ.R. 15(A) states, in part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires.

Only complaints, answers, and replies to counterclaims and answers are pleadings. Civ.R. 7(A); see *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 549, 605 N.E.2d 378, 382.

While Chinn's motion to amend his petition might have been filed before a responsive pleading was served, his motion was filed after the trial court had already denied his original petition and after we had reversed that ruling and remanded the case for a specific purpose. "[T]he filing of a motion to amend a petition after the court renders judgment denying that petition is without effect." *State v. Bays* (Jan. 30, 1998), Greene App. No. 96-CA-118, unreported, affirmed (1999), 87 Ohio St.3d 15, 716 N.E.2d 1126. We acknowledge that the trial court's judgment had been reversed at the time Chinn filed his motion, but the case was before the trial court for a limited purpose as prescribed by our ruling, which stated:

> Given the information contained within [the Fulero and Everington] affidavits, we find that trial counsel's failure to call any expert witnesses could rise to the level of ineffective assistance of counsel prejudicial to the rights of the defendant. Thus, we conclude that the trial court should have conducted an evidentiary hearing *to determine more fully the nature of the testimony of these two witnesses, as well as the strategical reasoning of trial counsel for not presenting this expert testimony.*

(Emphasis added.) *Chinn,* Montgomery App. No. 16764, *supra.* On remand, the trial court was to conduct a hearing for only the reasons *supra.* Such ruling was our mandate and the trial court had no authority to extend or vary that mandate. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3-5, 462 N.E.2d 410, 412-414. Thus, the trial court did not abuse its discretion when it overruled Chinn's motion for leave to amend his petition for post-conviction relief. The third assignment of error is overruled.

IV. THE FAILURE OF THE STATE TO DISCLOSE CO DEFENDANT MARVIN WASHINGTON'S JUVENILE RECORDS TO TRIAL COUNSEL WAS A VIOLATION OF *BRADY V. MARYLAND,* 373 U.S. 83 (1963), IN VIOLATION OF MR. CHINN'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 9, 10 AND 16 OF THE OHIO CONSTITUTION.

***12** Chinn argues that the prosecutor's failure to disclose psychological reports, social history reports, neuropsychological reports, and juvenile court personnel evaluations from Washington's juvenile court records constituted a *Brady* violation. Assuming *arguendo,* that Chinn did not waive his argument regarding a *Brady* violation by failing to raise it in his original petition for post-conviction relief, we will address this argument.

The Supreme Court has held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196-1197; see *State v. Treesh* (2001), 90 Ohio St.3d 460, 475, 739 N.E.2d 749, 767. "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus, following *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375.

We cannot conclude that the non-disclosed records were evidence that was material to Chinn's guilt or punishment because we do not believe that there is a reasonable probability that, had the records been disclosed to the defense, the result of the trial would have been different. Chinn's own attorney, Monta, testified at the post-conviction relief hearing that had he had Washington's juvenile records prior to the trial, he "may very well" have had an expert examine Washington to see if his testimony could be impeached. Monta did not say definitively that he would have consulted an expert had he had the records. Further, Monta stated that the case was not centered solely on Washington's identification of Chinn, as other witnesses that testified had identified Chinn as well. Further, as we indicated above, Everington's testimony was contradicted by the testimonies of Martin and Lantz. Thus, because we cannot conclude that the non-disclosed records were material to Chinn's guilt, there was no *Brady* violation.

The fourth assignment of error is overruled.

The judgment of the trial court will be affirmed.

BROGAN and YOUNG, JJ., concur.

All Citations

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State v. Chinn, 85 Ohio St.3d 548 (1999)
709 N.E.2d 1166, 1999 -Ohio- 288

85 Ohio St.3d 548
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
CHINN, Appellant.

No. 97–2020.
|
Submitted Feb. 23, 1999.
|
Decided June 2, 1999.

Synopsis

Defendant was convicted in the Court of Common Pleas, Montgomery County, of aggravated murder and, following two appeals, was sentenced to death. On appeal, the Court of Appeals affirmed. On appeal as of right, the Supreme Court, Douglas, J., held that: (1) there was no plain error in jury instructions at penalty phase; (2) failure to sua sponte instruct jury on definition of "principal offender" was not plain error; (3) erroneous admission of testimony that witness' encounter with defendant occurred during defendant's visit to law office was harmless; (4) defendant was eligible for the death penalty on remand from earlier decision of Court of Appeals; (5) there was sufficient evidence of identity to support conviction; (6) any error in trial court's denial of defendant's request for a bill of particulars did not prejudice defendant; (7) any error in the trial court's decision not to permit defense counsel to cross-examine witness on an alleged prior inconsistent statement was not prejudicial; and (8) instruction on the law of accomplice liability was not unwarranted.

Affirmed.

****1170** ***548** On the evening of January 30, 1989, Davel "Tony" Chinn, appellant, completed a midterm examination at Cambridge Technical Institute in Dayton. Later that night, fifteen-year-old Marvin Washington saw appellant near Courthouse Square in downtown Dayton. Washington, who had known appellant for approximately one year, knew him only by the name of "Tony." Washington and appellant spent part of the night drinking beer and loitering around the downtown area. At some point, appellant showed Washington a .22 caliber nickel-plated revolver and suggested that they look for someone to rob. At approximately 11:00 p.m., Washington went into an adult bookstore on South Ludlow Street and was ejected from the store because of his age. Thereafter, Washington and appellant loitered in the area of South Ludlow Street looking for someone to rob.

Meanwhile, Gary Welborn and Brian Jones had pulled their cars into a parking lot at the corner of South Ludlow Street and Court Street and had parked side-by-side in opposite directions to converse with each other through their driver's side windows. Appellant and Washington spotted the two men and decided to rob them.

***549** Washington approached Jones's vehicle from the rear, and appellant approached Welborn's car from the rear. Appellant pulled out a small silver revolver, pressed it against the side of Welborn's head, and demanded money. Welborn saw Washington's face, but he was unable to see the face of the gunman. Welborn handed his wallet to Washington, and Jones handed his wallet to the gunman. According to Welborn, "the guy with the gun said we'd better have at least a hundred dollars between us or he'd kill us both." After emptying the victims' wallets of money, the two assailants began discussing which car they wanted to steal. Following a brief discussion, they decided to steal both cars. Washington got into the driver's side of Jones's car and forced Jones into the passenger's seat. Appellant instructed Welborn to remain still. As appellant began walking toward the back of Welborn's vehicle, Welborn seized the opportunity to escape. At trial, Welborn testified, "The guy, he comes around. He starts walking around my car, telling me not to touch my keys. He still has the gun pointed at me. I watch him in my rearview mirror and sideview mirror. As soon as he gets behind my car, I ducked down. I thought he was going to kill me now or later anyway so I ducked down in my car seat, threw it in drive, and took up off [*sic*] Ludlow the wrong way, straight to the police station." Welborn arrived at the station at approximately 11:30 p.m. and reported the incident to police.

After Welborn had escaped, appellant got into the back seat of Jones's car and held the revolver to Jones's neck while Washington drove the car away from Dayton and toward an area in Jefferson Township. At some point, appellant instructed Washington to ****1171** turn the vehicle around

and to pull over to the side of the road. Washington complied with appellant's instructions. After Washington had stopped the car, he leaned forward in the driver's seat so that appellant could exit the two-door vehicle from the driver's side. According to Washington, appellant got out of the car and walked around to the passenger's side. Appellant then got Jones out of the car and shot him. Appellant and Washington drove away from the scene in Jones's automobile. While fleeing from the scene, appellant told Washington that he shot Jones because Jones could have identified them and because Jones "didn't have enough money." Appellant told Washington that he had shot Jones in the arm.

Stacy Ann Dyer lived at 5500 Germantown Pike in Jefferson Township. Dyer witnessed the shooting but did not see the gunman's face. Dyer testified that on January 30, 1989, at approximately 11:30 p.m., she had just arrived home and was parked in her driveway facing the street. At that time, Dyer saw a black two-door Chevrolet Cavalier pull off to the side of the road on Germantown Pike. Dyer observed a man get out of the driver's side of the vehicle and walk over to the passenger's side. She also saw the silhouette of a person exiting the vehicle from the passenger's side. The two people then walked to the back of the car. ***550** At that moment, Dyer heard a gunshot and a scream. The victim ran through Dyer's yard and fell to the ground in her neighbor's yard. Dyer then saw the black car speed away from the scene. Dyer ran inside her house and informed her father and her sister what had happened. Dyer's sister called police, and Dyer and her father went outside to check on the victim. They found the victim, Brian Jones, on his knees with his face to the ground. Dyer asked the victim whether he was injured, but Jones did not respond. When police and paramedics arrived at the scene, Jones was still breathing but was unconscious. He never regained consciousness and was pronounced dead on arrival at the hospital.

Dr. David M. Smith performed the autopsy. Smith found that Jones had died as a result of a massive acute hemorrhage due to a gunshot wound to his arm and chest. Smith found that the projectile had entered through Jones's left arm, had proceeded directly into Jones's chest, and had perforated the main pulmonary artery. Smith recovered the .22 caliber lead projectile from an area near the base of Jones's heart. Carl H. Haemmerle, an expert in firearms, examined the .22 caliber projectile and determined that it had been fired from a revolver. He also examined the sweatshirt that Jones had been wearing at the time of the shooting. Evidence revealed that the muzzle of the weapon had been in direct contact with the garment at the time the shot was fired.

Following the shooting, Washington and appellant drove in Jones's car to 5213 Lome Avenue in Dayton. There, Washington introduced appellant to Christopher "Bay" Ward.

Ward testified that, on January 31, 1989, at approximately 12:30 or 1:00 a.m., Washington had pulled up to 5213 Lome Avenue in the black Chevrolet Cavalier and had introduced Ward to a man named "Tony," who was seated in the front passenger's seat. Ward spoke to Washington for approximately thirty to forty-five minutes until Washington and the man he was with drove away. Later that night, Washington returned to Lome Avenue and told Ward that "Tony" had shot someone in Jefferson Township.

On February 5, 1989, police arrested Washington based on information they had received from Ward. Washington confessed to police and named Tony as the killer. However, Washington was unable to give police the suspect's last name and address. On February 7, Washington helped police prepare a composite sketch of Tony. Later, after police had nearly exhausted all leads in their search for Tony, the composite sketch was released to the news media. On Wednesday, February 22, 1989, a Dayton area newspaper printed the composite sketch along with an article indicating that the suspect's name was Tony.

Shirley Ann Cox worked as a receptionist in her husband's law office. On Thursday, February 23, two men walked into the office. One of the men identified himself as Tony Chinn and requested to see Cox's husband. Cox ***551** informed the man that her husband was not available. That night, while Cox was ****1172** reading the previous day's newspaper, she saw the composite sketch of the suspected killer. She said to her husband, "My God, I don't believe this." "This Tony Chinn that was in [the office] this morning is in the paper." On Friday, February 24, Cox called police to inform them that she had seen the suspect and that his name was Tony Chinn.

After speaking to Cox, police obtained a photograph of appellant and placed it in a photo array with the pictures of five other men. On February 24, police showed the photo array to Washington and to Ward. Washington positively identified appellant as the killer. Additionally, Ward identified

appellant as the man he had seen in the passenger's seat of the victim's car—the man Washington had referred to as "Tony." That same day, on February 24, police arrested appellant in connection with the murder.

On February 27, police conducted a lineup. Washington, Ward, Cox, Dyer, and Welborn all viewed the lineup. Dyer and Welborn could not identify appellant. Welborn attempted to make a selection based on the voices of the subjects but chose someone other than appellant. Ward and Cox were able to positively identify appellant. Washington initially indicated that the killer was not in the lineup. However, after leaving the room where the lineup was conducted, Washington summoned Detective David Lantz into an interview room and told him that number seven in the lineup (appellant) was the killer. Washington explained to the detective that he had previously indicated that appellant was not in the lineup out of fear that appellant was able to see him through the screen in the room where the lineup was conducted.

In March 1989, appellant was indicted by the Montgomery County Grand Jury for the aggravated murder of Jones. Count One of the indictment charged appellant with purposely causing the death of Jones during the commission of an aggravated robbery. Count One of the indictment also carried three death penalty specifications: one alleging that the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense (R.C. 2929.04[A][3]), a second alleging that the offense was committed during the course of aggravated robbery (R.C. 2929.04[A][7]), and a third alleging that the offense was committed during the course of kidnapping (R.C. 2929.04[A][7]). Appellant was also indicted on three counts of aggravated robbery (Counts Two, Four, and Five), one count of kidnapping (Count Three), and one count of abduction (Count Six). Each count of the indictment also carried a firearm specification. Additionally, Counts Two through Six each carried a specification alleging that appellant had previously been convicted of robbery.

***552** In August 1989, the matter proceeded to trial by jury on all counts and specifications alleged in the indictment, with the exception of the specifications premised on appellant's prior robbery conviction, which were tried to the court. The defense presented several witnesses in the guilt phase of appellant's trial. Through these witnesses the defense attempted to establish that appellant had gone directly home from school on the evening of January 30, 1989, and that he was at home, where he lived with his mother and his brother, at the time of the crimes in question. Following deliberations, the jury returned verdicts of guilt on all of the matters that were tried to the jury. Appellant presented several witnesses in mitigation and gave an unsworn statement in which he denied any involvement in the crimes. Following the mitigation hearing, the jury returned its verdict recommending that appellant be sentenced to death for the aggravated murder of Jones. The trial court accepted the jury's recommendation and imposed the sentence of death. The trial court also found appellant guilty of the prior conviction specifications that were tried to the court without a jury. For the aggravated robberies of Jones and Welborn (Counts Two, Four, and Five), for the kidnapping of Jones (Count Three), and for the abduction of Welborn (Count Six), the trial court sentenced appellant in accordance with law. The trial court also imposed one additional term of three years of actual incarceration for the firearm specifications in connection with the aggravated robbery counts. Further, the court imposed one additional term of three years of actual incarceration for the firearm specification in connection with the kidnapping count, and one for the firearm ****1173** specification in connection with the count of abduction.

On appeal, the court of appeals, in 1991, affirmed the judgment of the trial court in part, reversed it in part, and remanded the cause to the trial court for the limited purpose of resentencing appellant on the jury's recommendation of death for the aggravated murder of Jones. *State v. Chinn* (Dec. 27, 1991), Montgomery App. No. 11835, unreported, 1991 WL 289178. The court of appeals found that the trial judge had committed several errors in the performance of his functions under R.C. 2929.03(D)(3) and 2929.03(F). Specifically, the court of appeals held that "the trial judge in performing his independent review for purposes of sentencing pursuant to R.C. 2929.03(D)(3) erred (1) by failing to state his findings specifically as required by R.C. 2929.03(F), (2) by failing to consider relevant mitigating factors, (3) by failing to merge aggravating circumstances, and (4) by weighing both culpability factors of R.C. 2929.04(A)(7), 'principal offender' and 'prior calculation and design' * * *."*Id.* at 2. Therefore, the court of appeals vacated appellant's death sentence and remanded the cause to the trial court "for its reconsideration and proper imposition of sentence, which may include a sentence of death or sentences of life imprisonment with parole eligibility as provided by statute."

Id. Additionally, the court of appeals found that the trial court had erred when it "imposed more than one sentence of actual ***553** incarceration for multiple gun specifications arising from the same transaction * * *." *Id*. Therefore, the court of appeals vacated two of the three terms of actual incarceration that had been imposed by the trial court in connection with the firearm specifications. However, the court of appeals affirmed the judgment of the trial court on all other issues raised on appeal.

On remand from the court of appeals' 1991 decision, defense counsel, in January 1993, filed in the trial court a motion for imposition of a life sentence, a motion to present additional mitigation evidence, and a motion requesting that appellant be present at any resentencing hearing. In August 1994, defense counsel filed a proffer of evidence and a request to submit certain documents under seal. On December 6, 1994, the trial court denied the motions for imposition of a life sentence, for an additional mitigation hearing, and for appellant to be present at resentencing. That same day, the trial court filed an opinion and entry resentencing appellant to death.

On appeal from the trial court's resentencing decision, the court of appeals, in 1996, vacated appellant's death sentence, finding that the trial court had denied appellant the right to be present at resentencing. *State v. Chinn* (June 21, 1996), Miami App. No. 15009, unreported, 1996 WL 338678. Therefore, the court of appeals again remanded the cause to the trial court for resentencing, *i.e*., "for imposition of sentence in Chinn's presence." *Id*. at 16–17.

On remand from the court of appeals' 1996 decision, the trial court, in September 1996, once again imposed the sentence of death. On appeal, the court of appeals, in August 1997, affirmed the judgment of the trial court and upheld appellant's death sentence. *State v. Chinn* (Aug. 15, 1997), Montgomery App. No. 16206, unreported, 1997 WL 464736.

The cause is now before us upon an appeal as of right.

Attorneys and Law Firms

Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, and Carley J. Ingram, Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, Ohio Public Defender, Stephen A. Ferrell and Joseph E. Wilhelm, Assistant Public Defenders, for appellant.

Opinion

DOUGLAS, Justice.

DOUGLAS, J. Appellant presents twenty-five propositions of law for our consideration. (See Appendix, *infra*.) We have considered each of appellant's propositions of law and have reviewed the death penalty for appropriateness and proportionality. Upon review, and for the reasons that follow, we uphold appellant's convictions and sentences, including the sentence of death.

***554** I

We have held, time and again, that this court is not required to address and discuss, in opinion form, each and every proposition of law raised by the parties in a death penalty appeal. We continue to adhere ****1174** to that position today. We have carefully considered all of the propositions of law and allegations of error and have thoroughly reviewed the record in its entirety. Many of the issues raised by appellant have been addressed and rejected by this court under analogous circumstances in a number of our prior cases. Therefore, these issues require little, if any, discussion. Additionally, many of appellant's arguments have been waived. Upon a careful review of the record and the governing law, we fail to detect any errors requiring reversal of appellant's convictions and death sentence. We have found nothing in the record or in the arguments advanced by appellant that would, in any way, undermine our confidence in the outcome of appellant's trial. Accordingly, we address and discuss, in detail, only those issues that merit detailed analysis.

II

Proposition of Law No. I

Appellant contends that the trial court's instructions to the jury in the penalty phase failed to adequately define

aggravating circumstances and mitigating factors and gave the jury no guidance on what to weigh for purposes of reaching a sentencing recommendation. However, appellant failed to object at trial to the instructions he now claims were erroneous and, thus, he has waived all but plain error with respect to these matters. We find no plain error here.

Appellant was charged with and found guilty of committing one R.C. 2929.04(A)(3) and two 2929.04(A)(7) specifications of aggravating circumstances in connection with the aggravated (felony) murder of Jones. The R.C. 2929.04(A)(3) specification alleged that the aggravated murder was committed for the purpose of escaping detection, apprehension, trial, or punishment for the commission of another offense committed by the offender. One R.C. 2929.04(A)(7) specification alleged that the aggravated murder was committed during the course of an aggravated robbery and that appellant was either the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design. The other R.C. 2929.04(A)(7) specification alleged that the aggravated murder was committed during the course of a kidnapping and that appellant was either the principal offender in the murder or, if not, committed the murder with prior calculation and design.

In the penalty phase, the trial court gave the following instruction to the jury:

***555** "Members of the Jury, you've heard the evidence and the arguments of counsel, and you will now decide whether you'll recommend to the Court that the sentence of death shall be imposed upon the Defendant and, if not, whether you recommend [one of two life sentencing options]. You will consider all the evidence, the arguments, the statement of the Defendant, and all other information and reports which are relevant to the nature and circumstances of the aggravating circumstances. Among the circumstances that are listed in the statute and there are eight references have been made and you have found these aggravating circumstances. One is that if the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender. Another of those aggravating circumstances is if the offense was committed while the offender was committing, or attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping. Then they list a number of others: Kidnapping and rape; aggravated arson; aggravated robbery; or aggravated burglary; and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design. You will consider all the evidence, the arguments, the statement of the Defendant, and all of the information and reports that are relevant to the nature and circumstances of the mitigating facts, and the mitigating facts include but are not limited to the nature and circumstances of the offense, and the history, character, and background of the Defendant; and you may consider, I guess, should consider any facts that are relevant to the issue of whether the Defendant should be sentenced to death. The prosecutor has the burden to prove beyond a reasonable doubt that the aggravating circumstances of which the Defendant was found guilty outweighs [*sic*] the ****1175** facts in mitigation of imposing the death sentence. * * * You shall recommend the sentence of death if you unanimously, that's all twelve, find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating facts. If you do not so, fine, you shall unanimously, all twelve, recommend [one of two life sentencing options]."

While the trial court's instructions to the jury appear to be somewhat confusing, the instructions clearly do not rise to the level of plain error. The trial court correctly instructed the jury on the R.C. 2929.04(A)(3) aggravating circumstance the jury had previously found appellant guilty of committing. However, in referring to the R.C. 2929.04(A)(7) aggravating circumstances premised on the kidnapping and aggravated robbery, the trial court referred to a number of felonies listed in R.C. 2929.04(A)(7) for which appellant was neither charged nor convicted, *i.e.,* rape, aggravated arson, and aggravated burglary. Nevertheless, it is a stretch to argue as appellant does now that the trial court "appear[ed] to be telling the jury that there [were] *eight* aggravating circumstances" in this case. ***556** Emphasis *sic.*) A review of the record clearly reveals that the jury was made aware throughout the trial that there were *three*—not eight—specifications of aggravating circumstances at issue in this case. Moreover, there was never any evidence offered of arson, rape, or aggravated burglary that may have led the jury to believe that appellant was guilty of committing an R.C. 2929.04(A)(7) aggravating circumstance premised upon those particular felonies. The trial court's references to arson, rape, and aggravated burglary should not have been made, but the references do not amount to plain error.

Additionally, during its deliberations in the penalty phase, the jury sent a note to the trial judge requesting a clarification of the aggravating circumstances and mitigating factors. The note stated, "We would like a summary of the *elements* that make up the mitigating and aggravating circumstances/ factors. For example, character of [defendant], testimony of [defendant], etc." (Emphasis *sic.*) The trial court responded, "The aggravating circumstances are those that you have found in previous specifications and the mitigating factors are those which are relevant to the issue of whether the defendant should be sentenced to death, and they include, but are not limited to, the nature and circumstances of the offense and the history, character and background of the defendant." We find that the trial court's response to the jury's question clarified that there were only three aggravating circumstances the jury was to consider and weigh in the penalty phase, *i.e.,* the three specifications of aggravating circumstances the jury had previously found appellant guilty of committing.

Nevertheless, appellant claims that the trial court's response to the jury's question merely "added to the confusion." Specifically, appellant argues that "[b]y telling the jury that the aggravating circumstances were the same as the specifications, the court instructed the jury to weigh a nonstatutory aggravating circumstance, the firearm specification, which was attached to each substantive count in the indictment." However, the record does not support appellant's arguments in this regard. The record clearly demonstrates that the trial court's statement that "[t]he aggravating circumstances are those that you have found in previous specifications" referred only to the death penalty specifications for which the jury had previously found appellant guilty of committing. The firearm specifications were submitted to the jury only in the guilt phase and were not even identified as "specifications" on the verdict forms that were returned by the jury at the conclusion of the guilt phase. The only specifications that were identified as such on the verdict forms in the guilt phase of appellant's trial were the three death penalty specifications that had been submitted to the jury in connection with Count One of the indictment, *i.e.,* the R.C. 2929.04(A)(3) specification and the two R.C. 2929.04(A)(7) specifications. For these reasons, it is clear that the trial court's response to the jury's question in the penalty phase did not ***557** invite the jury to consider the firearm specifications as nonstatutory aggravating circumstances.

Appellant also contends that the trial court's response to the jury's question concerning aggravating circumstances and mitigating ****1176** factors led the jury to consider and to weigh the nature and circumstances of the offense as nonstatutory aggravating factors. We disagree. The trial court's response to the jury's question listed the nature and circumstances of the offense among the *mitigating* factors to be considered by the jury.

Next, appellant contends that the R.C. 2929.04(A)(3) and (A)(7) specifications of aggravating circumstances should have been merged into a single aggravating circumstance prior to the penalty phase, since, according to appellant, the specifications were duplicative. The court of appeals, in 1991, determined that the specifications should have been merged, stating, "In our view, all three specifications clearly arose from the same act or indivisible course of conduct. Jones was robbed in downtown Dayton and then driven to a remote area of Jefferson Township so that he could be killed to conceal the robbery. The kidnapping (driving Jones to a rural area) occurred only so as to effectuate the concealment of the robbery, and, as explained above, the concealment of the robbery must merge with the robbery itself as a matter of law. Furthermore, the kidnapping was merely incidental to the robbery, and thus must be merged for this reason as well." *Chinn,* Montgomery App. No. 11835, unreported, at 50–51. Therefore, the court of appeals concluded that the trial court had erred by "failing to merge the three aggravating factors into one, *viz.,* that Chinn was the principal offender in the aggravated murder committed while he was fleeing immediately after committing an aggravated robbery, per R.C. 2929.04(A)(7)." *Id.* at 53–54. However, the court of appeals also determined that the trial court's failure to merge the duplicative specifications in its instructions to the jury did not amount to plain error. *Id.* at fn. 2. We agree. On remand from the court of appeals' 1991 decision, the trial court merged the allegedly duplicative specifications into one R.C. 2929.04(A)(7) specification and imposed the death sentence upon a finding that the single aggravating circumstance outweighed the evidence in mitigation beyond a reasonable doubt. The court of appeals, in 1997, also considered a single R.C. 2929.04(A)(7) specification for purposes of its independent sentencing review and concluded that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. *Chinn,* Montgomery App. No. 16206, unreported. We believe that this conclusion was virtually inescapable. Indeed, given the dearth of mitigating

evidence in this case, it is clear to us that the outcome of appellant's trial would not have been any different had the three specifications of aggravating circumstances been merged into one prior to the penalty phase.

***558** Additionally, this court can cure any error related to duplicative aggravating circumstances by merging the three specifications of aggravating circumstances as part of our independent sentencing review. See, generally, *State v. Palmer* (1997), 80 Ohio St.3d 543, 575, 687 N.E.2d 685, 711. For purposes of our independent review, we too have considered only one aggravating circumstance, *i.e.*, the single R.C. 2929.04(A)(7) aggravating circumstance predicated on aggravated robbery. Our independent review has produced no different outcome despite the merger of the allegedly duplicative specifications. See discussion in Part XXIV, *infra*.

Appellant also claims the trial court erred by instructing the jury in the penalty phase on both the principal offender *and* the prior calculation and design aspects of R.C. 2929.04(A)(7). Appellant asserts that the jury should have been instructed that it could not consider whether appellant committed the murder with prior calculation and design if appellant was found to be the principal offender in the aggravated murder. However, we have held that "a trial court may instruct the jury on prior calculation and design and principal offender status disjunctively in the same specification." *State v. Burke* (1995), 73 Ohio St.3d 399, 405, 653 N.E.2d 242, 248. That is precisely what occurred in the case at bar.

The court of appeals vacated the appellant's death sentence in 1991 because the trial court, in its original sentencing opinion, had determined that appellant was the principal offender *and* that he had committed the offense with prior calculation and design. ****1177** *Chinn,* Montgomery App. No. 11835, unreported, at 52–57. Appellant claims that "[b]ecause the trial court committed precisely this error, it is highly likely that the jury did also." However, appellant's argument is purely speculative and is not supported by the record. Moreover, contrary to appellant's arguments, it is clear to us that the jury unanimously determined that appellant was the principal offender in the aggravated murder of Jones. At trial, the state's evidence portrayed appellant as the principal offender. Conversely, appellant offered a defense of alibi. Thus, the main issue for the jury was one of identity, *i.e.*, either appellant shot and killed the victim or appellant was somewhere else at the time of the killing. There was no evidence at trial that anyone other than appellant was the actual killer if, in fact, appellant was the man who was with Marvin Washington on the night in question. Therefore, the evidence suggested that appellant was either the principal offender in the aggravated murder or, if not the principal offender, that he committed no offense at all. The jury obviously accepted the state's theory of the case and, in so doing, found appellant to be the principal offender in the aggravated murder. Under these circumstances and because the jury was instructed on the principal offender and the prior calculation and design aspects of R.C. 2929.04(A)(7) in the disjunctive, there is no danger that the jury actually considered the prior calculation and ***559** design alternative of the R.C. 2929.04(A)(7) death penalty specifications during its sentencing deliberations.

Accordingly, for the foregoing reasons, appellant's first proposition of law is not well taken.

III

Proposition of Law No. II

The matter concerning the appropriateness of appellant's death sentence is addressed in our discussion in Part XXIV, *infra*.

IV

Proposition of Law No. III

The matter concerning the proportionality of appellant's death sentence is addressed in our discussion in Part XXIV, *infra*.

V

Proposition of Law No. IV

Appellant raises claims of prosecutorial misconduct, but many of appellant's arguments have been waived by his failure to object at trial. We have carefully reviewed the record in its entirety and have considered all of appellant's claims

of prosecutorial misconduct. We have found no instance of prosecutorial misconduct that would rise to the level of reversible error. The instances of alleged misconduct, taken singly or together, did not substantially prejudice appellant or deny him a fair trial and a fair and reliable sentencing determination.

VI

Proposition of Law No. V

Appellant contends that the trial court erred by failing to define the term "principal offender" as part of the instructions to the jury in the guilt phase. Appellant claims that the failure to define that term was tantamount to a failure to instruct on an essential element of the R.C. 2929.04(A)(7) specifications. However, appellant not only failed to object to the lack of instruction, but he also failed to raise the issue on appeal to the court of appeals. Therefore, appellant has waived all but plain error with respect to this matter.

The term "principal offender," as it is used in R.C. 2929.04(A)(7), means "the actual killer." *State v. Penix* (1987), 32 Ohio St.3d 369, 371, 513 N.E.2d 744, 746. The jury should have been so instructed. However, the absence of the instruction does not amount to plain error. Here, the state presented strong evidence ***560** identifying appellant as the killer. Conversely, the defense claimed that appellant was at home at the time of the killing. There was no evidence to suggest that appellant, if he was present at the time of the aggravated murder, was anything but the actual killer. Therefore, in order to find appellant guilty of the R.C. 2929.04(A)(7) specifications, the jury would have had to conclude that appellant was the actual killer. Under these circumstances, the trial court's failure to *sua sponte* instruct ****1178** the jury that "principal offender" means the actual killer was not outcome-determinative. See *State v. Stojetz* (1999), 84 Ohio St.3d 452, 461, 705 N.E.2d 329, 339.

VII

Proposition of Law No. VI

In his sixth proposition of law, appellant contends that the trial court erred by allowing Shirley Ann Cox to testify at trial concerning appellant's visit to her husband's law office. Appellant claims that Cox's testimony was irrelevant and was unfairly prejudicial. We agree with appellant's assertions that the trial court should not have permitted Cox to testify that her encounter with appellant occurred in a law office. However, we also agree with the court of appeals' finding in 1991 that although the evidence was "unfairly prejudicial, that unfairness does not clearly jeopardize the fundamental fairness of the proceeding or the reliability of the verdict." *Chinn,* Montgomery App. No. 11835, unreported, at 38. Appellant protests that the court of appeals' holding on this issue "fails to take into account the fundamental weakness of the State's case against Chinn." However, appellant's arguments plainly mischaracterize the strength of the evidence against him which, in our view, cannot seriously be labeled as "weak." Rather, the state's case against appellant was substantial and compelling.

Appellant also suggests that Cox's testimony concerning her identification of appellant as the person depicted in the composite drawing should have been excluded because Cox did not witness the crimes and her testimony may have misled or confused the jury. However, the jury was not misled or confused by Cox's testimony. The jury was well aware that Cox did not witness the killing. Her testimony was relevant to the fact that she had seen a man who identified himself as Tony Chinn and that she subsequently saw a composite sketch of the suspected killer and recognized the resemblance between the composite and Chinn. While this testimony was largely irrelevant to the question of appellant's guilt, the testimony was relevant to inform the jury of the events that led to appellant's apprehension and arrest. Cox's testimony also corroborated Washington's testimony that appellant (whose real name is Davel Von Tress Chinn) went by the name of Tony Chinn. The evidence was not confusing or misleading in any way.

***561** We conclude that while it might have been better for the trial court to have excluded Cox's testimony altogether, or at least any reference to the fact that she had seen appellant in a law office, the trial court's decision to allow Cox's testimony was harmless beyond a reasonable doubt. Cox's testimony was not a major factor in this case. Indeed, her testimony comprises less than eight full pages of the printed transcript. The state's case against appellant hinged

on the testimony of Marvin Washington. If the jury accepted Washington's testimony, the jury was certain to convict appellant, but if the jury did not believe Washington, it was certain to acquit appellant of all charges. Had the jury disregarded Washington's account of the crimes, Cox's testimony would have made no difference. However, the jury believed Washington and, therefore, the verdicts of guilt were inevitable. Cox's testimony had little or no impact on the outcome.

In this proposition, appellant also contends that the trial court erred by permitting Detective David Lantz to testify at trial concerning Cox's identification of appellant at the February 27, 1989 lineup. At trial, the following exchange took place during the state's direct examination of Detective Lantz:

"Q. Was Mrs. Cox able to make an –

"MR. MONTA [defense counsel]: Objection, your Honor. We need to approach on this.

"MR. MONTA: Your Honor, the prosecution had Mrs. Cox on the stand. They also had these documents which would indicate whether a person is seen in a line-up or not. They did not choose to go into that with Mrs. Cox, and as a result of no questioning on this subject with her, this * * * testimony is going to be hearsay.

"THE COURT: Well, defense has also known that she had made the identification, which she could have been asked about. The fact that she was not asked by either party does not in any way prevent this witness to testify **1179 as to what he saw. I'll overrule the objection.

"Q. Was Mrs. Cox able to [make an] identification at the line-up?

"A. Yes, she was.

"Q. Who[m] did she indicate?

"A. Again, number seven, the Defendant Davel Chinn."

Appellant contends that Lantz's testimony constituted impermissible hearsay and resulted in substantial prejudice. We disagree. Lantz's statements concerning Cox's identification of appellant were not hearsay. Evid.R. 801 provides:

"(D) A statement is not hearsay if:

**562 "(1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (c) one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification."

As the court of appeals ably recognized, "[b]ecause Cox was 'subject to cross-examination' on the lineup, regardless of whether she was actually ever *subjected* to such examination, Det. Lantz's testimony was not hearsay." (Emphasis *sic*.) *Chinn,* Montgomery App. No. 11835, unreported, at 39. We agree that Lantz's testimony did not constitute hearsay under Evid.R. 801(D)(1)(c). Moreover, and in any event, we fail to see how that testimony was prejudicial to appellant.

Appellant also argues that the trial court erred by permitting Detective Lantz to testify at trial, over defense objection, concerning Washington's explanation for not immediately identifying appellant at the lineup. Appellant contends that Lantz's testimony was hearsay. However, even if the testimony at issue was hearsay, and we do not believe that it was (see Evid.R. 801[D][1][b] and *Chinn,* Montgomery App. No. 11835, unreported, at 75–76), prejudice is lacking in that Washington had earlier testified as to the statement he made to Lantz.

Additionally, appellant challenges Christopher Ward's testimony concerning certain statements that Washington had made in the early morning hours of January 31, 1989. Specifically, appellant claims that Ward's testimony constituted inadmissible hearsay. Appellant failed to object to the testimony at trial and, thus, has waived all but plain error with respect to these matters. We agree with appellant that the testimony of Ward at issue was hearsay. However, we conclude that appellant has failed to demonstrate plain error, *i.e.*, that but for the alleged errors, the outcome of his trial clearly would have been otherwise. Therefore, we reject appellant's arguments concerning Ward's testimony.

Accordingly, for the foregoing reasons, appellant's sixth proposition of law is not persuasive.

VIII

Proposition of Law No. VII

The court of appeals, in 1991, vacated appellant's original death sentence on grounds that the trial judge, after receiving the jury's recommendation, had committed errors in his original independent evaluation under R.C. 2929.03(D)(3) and in his original sentencing opinion. However, the court of appeals also determined that the jury's recommendation had not been tainted by error. Therefore, since the errors had been committed by the trial court and not by the jury, the court of appeals determined that the rule of *Penix,* 32 Ohio St.3d 369, 513 N.E.2d 744, syllabus, did not prohibit the trial court from reimposing the ***563** death sentence on remand. *Chinn,* Montgomery App. No. 11835, unreported, at 55–57. In this regard, the court of appeals found the situation analogous to one in which a three-judge panel commits error in sentencing —a situation that would not preclude reimposition of a death sentence. *Id*., citing *State v. Davis* (1988), 38 Ohio St.3d 361, 528 N.E.2d 925, syllabus ("When a reviewing court vacates the death sentence of a defendant imposed by a three-judge panel due to error occurring at the penalty phase, not otherwise covered by [former] R.C. 2929.06, and the reviewing court does not find the evidence to be legally insufficient to justify imposition of the death sentence, such reviewing court may remand the action to that trial court for a resentencing hearing at which the state may seek whatever punishment ****1180** is lawful, including, but not limited to, the death sentence.")

On remand from the court of appeals' 1991 decision vacating appellant's original death sentence, appellant filed motions in the trial court requesting, among other things, a hearing to present additional mitigation evidence and requesting to be present at resentencing. The trial court denied these motions and, in 1994, once again imposed the death sentence. This time, the trial court complied with all statutory mandates, including those required under R.C. 2929.03(F), but did not impose the death sentence in appellant's presence.

Thereafter, on appeal from the trial court's resentencing decision, the court of appeals, in 1996, held that it was error for the trial court to have denied appellant the right to be present at resentencing. *Chinn,* Miami App. No. 15009, unreported. However, the court of appeals found that the trial court had not erred by refusing to conduct an evidentiary hearing on remand. *Id*. at 2–6. The court of appeals stated, "When we remanded Chinn's case, we did not expect the trial court to conduct a resentencing hearing, and we find no compelling reason why Chinn should have been afforded a second opportunity to present mitigating evidence prior to sentencing. Chinn was given a full opportunity to present such evidence at the initial sentencing hearing. The error for which we remanded the matter occurred after the mitigating evidence had been presented and after the jury had made its recommendation based upon that evidence. On remand, the trial court was required to proceed from the point at which the error occurred. *State ex rel. Stevenson v. Murray* (1982), 69 Ohio St.2d 112, 113 [23 O.O.3d 160, 160–161, 431 N.E.2d 324, 325]. In Chinn's case, the error occurred after the sentencing hearing." *Id*. at 5. Therefore, the court of appeals remanded the matter to the trial court "for imposition of sentence in Chinn's presence" and reiterated that the sentencing options included the possibility of a death sentence. *Id*. at 16–17.

On remand from the court of appeals' 1996 decision, the trial court, in appellant's presence, once again imposed the death sentence. In its sentencing entry, the trial court stated, "With regard to Count 1, it is the conclusion of this ***564** Court that the verdict of the jury recommending death be accepted." On appeal, the court of appeals, in 1997, affirmed. *Chinn,* Montgomery App. No. 16206, unreported.

In his seventh proposition of law, appellant contends that he was ineligible for the death penalty on remand from the court of appeals' 1991 decision vacating his original death sentence. Appellant claims that "[w]hen the court of appeals vacated Chinn's death sentence it also vacated the trial jury's sentencing recommendation." We disagree. In neither case where the court of appeals vacated appellant's death sentence did the appellate court purport to vacate the jury's verdict recommending imposition of the death penalty. Nor was the court of appeals required to vacate the jury's recommendation in this case. The appellate court specifically determined, and we agree, that the recommendation of the jury was untainted by error. Moreover, contrary to appellant's contentions, *Penix* does not preclude the trial court from imposing the death sentence on remand. The reason, of course, is that the errors identified and relied upon by the court of appeals in vacating appellant's original death sentence in 1991 related to the

trial judge's independent evaluation of sentence. These errors were committed *after* the jury had returned its verdict in the penalty phase. Under these circumstances, the court of appeals correctly determined that *Penix* does not prohibit the trial judge, on remand, from accepting the jury's 1989 sentencing recommendation. Rather, as the court of appeals recognized, the trial court was required to proceed on remand from the point at which the errors had occurred, *i.e.*, after the jury had returned its recommendation of death.

In this proposition, appellant also argues that he had "an absolute right to present any new mitigating evidence at his resentencing hearing in 1994." In support of this proposition, appellant relies on several United States Supreme Court opinions requiring that the sentencer not be precluded from considering relevant mitigating evidence in a capital case. See, *e.g.*, *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973; *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1; and ****1181** *Hitchcock v. Dugger* (1987), 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347. However, each of those cases involved a situation where the capital sentencer was prohibited, in some form or another, from considering relevant mitigating evidence at trial. In the case at bar, no relevant mitigating evidence was ever excluded from consideration during the penalty phase of appellant's 1989 trial. Therefore, the case at bar is clearly distinguishable from the United States Supreme Court's pronouncements in *Lockett, Skipper,* and *Hitchcock*. Accordingly, as was the case in *State v. Davis* (1992), 63 Ohio St.3d 44, 46, 584 N.E.2d 1192, 1194–1195, we find *Lockett, Skipper,* and *Hitchcock* to be inapplicable here. It is of no consequence that the additional mitigating evidence in *Davis* involved *post-trial* accomplishments, whereas appellant's additional mitigation evidence involves matters appellant ***565** claims he could have presented but did not present during the mitigation phase of his 1989 trial. In this case, as in *Davis,* the errors requiring resentencing occurred after the close of the mitigation phase of the trial. Under these circumstances, the trial court is to proceed on remand from the point at which the error occurred. Appellant's arguments to the contrary are not well taken. In addressing this issue, the appellate court stated, "In sum, Chinn was not entitled to an opportunity to improve or expand his evidence in mitigation simply because we [the court of appeals] required the trial court to reweigh the aggravating circumstance and mitigating factors." *Chinn,* Miami App. No. 15009, unreported, at 6. We agree with the court of appeals' assessment of this issue.

Additionally, appellant takes issue with the fact that in its 1996 sentencing entry the trial court simply stated, "it is the conclusion of this Court that the verdict of the jury recommending death be accepted." Appellant contends that the trial court failed to independently weigh the aggravating circumstance and the mitigating factors in reimposing the death sentence in 1996 and failed to comply with the requirements for the issuance of a sentencing opinion under R.C. 2929.03(F). However, the trial court's 1994 sentencing opinion fully complied with the requirements of R.C. 2929.03(F). The mere fact that the trial court did not specifically incorporate its 1994 sentencing opinion into its 1996 sentencing entry does not rise to the level of reversible error. Furthermore, appellant failed to raise this issue during his final appeal to the court of appeals and, therefore, appellant's arguments have been waived.

Accordingly, for all of the foregoing reasons, we reject appellant's seventh proposition of law.

IX

Proposition of Law No. VIII

In his eighth proposition of law, appellant contends that the evidence is insufficient to establish his identity as the perpetrator of the aggravated murder. He also claims that the evidence is insufficient to show that he specifically intended to cause the death of his victim. Appellant's contentions are not well taken.

In this proposition, appellant essentially asks us to evaluate the credibility of witnesses and to resolve all evidentiary conflicts in his favor. However, in reviewing the sufficiency of evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis *sic*.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573.

***566** Appellant argues that Marvin Washington's testimony is inherently unreliable and wholly unbelievable. We emphatically disagree. Washington's trial testimony was

cogent and intelligible, and we are completely satisfied that his testimony identifying appellant as the killer, if accepted, sufficiently and overwhelmingly establishes appellant's guilt beyond a reasonable doubt. Appellant points out that Washington was a participant in the crimes. This is undoubtedly true. Washington was an eyewitness to the killing and he participated in and witnessed all aspects of the crimes. As a participant, he was in a much better position to identify the killer than anyone else who testified at trial. Washington had nothing to gain from testifying against appellant. Prior to testifying, Washington was charged with and was sentenced ****1182** in juvenile court for his participation in these crimes. Washington's testimony at appellant's trial was not part of any plea agreement. Additionally, as a juvenile offender, Washington was not eligible for the death penalty as an accomplice to the crimes. Therefore, in addition to having been in the best position to identify the killer, Washington simply had no reason to lie.

At trial, Washington testified that he and appellant robbed two men in Dayton and that they kidnapped Jones in Jones's car. Welborn corroborated Washington's description of the robbery, the abduction, the kidnapping, and the car theft. Welborn testified that Washington was one of the perpetrators of the robbery. Welborn never saw the face of the second robber, but Washington's testimony clearly identified appellant as the other participant in the crimes. Washington testified that he and appellant drove Jones to an area of Jefferson Township. According to Washington, appellant then got out of the car and shot Jones. Stacy Dyer witnessed the shooting. Although Dyer did not get a look at the shooter and therefore could not identify him, Dyer's testimony corroborated, in large part, Washington's description of the events that occurred in Jefferson Township on the night of January 30, 1989. Washington also testified that he and appellant then drove in the victim's car to Lome Avenue in Dayton and that they spoke to Christopher Ward. Ward testified that he saw Washington and appellant in Jones's car in the early morning hours of January 31, 1989. Therefore, Ward's testimony not only corroborated Washington's testimony but also served to severely undermine appellant's alibi defense.

Appellant points out that Washington failed to immediately identify him at a lineup conducted on February 27, 1989. However, the reason that Washington had failed to do so was adequately explained at trial. Additionally, there is no dispute that immediately after the lineup Washington summoned Detective Lantz into an interview room and positively identified appellant as the perpetrator of the aggravated murder.

Appellant also points out that several witnesses at trial indicated that the man who was with Washington on the night of the murder was taller than appellant. ***567** However, this discrepancy in the evidence does not severely undermine either Washington's testimony identifying appellant as the killer or Ward's testimony that he saw appellant and Washington in the victim's car shortly after the murder.

The fact remains that Washington was the state's eyewitness to the crimes and that he positively identified appellant as the killer. The jury accepted Washington's testimony. Upon a review of the entire record, it is clear to us that Washington's testimony was neither inherently unreliable nor inherently unbelievable. Indeed, upon a careful review of the record before us, we find Washington's testimony to be entirely believable. However, we note, in passing, that our view of the credibility of witnesses is not what is important on the question of sufficiency of the evidence. What is important is our finding that the evidence in this case was sufficient to establish appellant's identity as the perpetrator of the aggravated murder.

Appellant also claims that the evidence is insufficient to show that he specifically intended to cause Jones's death, since the fatal shot had been fired into the upper portion of Jones's left arm. However, the evidence at trial established that the muzzle of the revolver was pressed against the victim's sweatshirt at the time the weapon was discharged. The projectile entered through the victim's left arm, entered his chest, perforated the main pulmonary artery, and came to rest near the base of his heart. We therefore have great difficulty accepting appellant's characterization of the evidence as indicating nothing more than that the victim was "shot in the arm." The shot was fired in a manner that was likely to and did cause the victim's death. Additionally, "[i]t is well-established that 'where an inherently dangerous instrumentality was employed, a homicide occurring during the commission of a felony is a natural and probable consequence presumed to have been intended. Such evidence is sufficient to allow a jury to find a purposeful intent to kill.' " *State v. Esparza* (1988), 39 Ohio St.3d 8, 14, 529 N.E.2d 192, 199, quoting *State v. Jester* (1987), 32 Ohio St.3d 147, 152, 512 N.E.2d

962, 968. The evidence was clearly sufficient to show that **1183 appellant specifically intended to cause the death of his victim.

Upon a careful review of the entire record, we find that the evidence was more than sufficient to establish appellant's identity as the perpetrator of the aggravated murder and to show that he specifically intended to cause the death of his victim. Accordingly, we reject appellant's eighth proposition of law.

X

Proposition of Law No. IX

The matter raised in appellant's ninth proposition of law has been waived. Moreover, we find no merit to appellant's arguments that R.C. 2929.03(D)(1) *568 somehow renders R.C. 2929.04(A) and (B) unconstitutionally vague. Accordingly, appellant's ninth proposition of law is not well taken.

XI

Proposition of Law No. X

Appellant contends that he is entitled to a new trial because there is nothing in the record to indicate that appellant and defense counsel were present on two occasions involving communications between the trial court and the jury. However, we are unwilling to presume that appellant and his attorneys were not present during the times in question. Rather, "the record must *affirmatively indicate the absence* of a defendant or his counsel during a particular stage of the trial." (Emphasis added.) *State v. Clark* (1988), 38 Ohio St.3d 252, 258, 527 N.E.2d 844, 851. The record does not affirmatively so indicate and, therefore, we reject appellant's tenth proposition of law.

XII

Proposition of Law No. XI

We find no errors in the manner in which the trial court conducted *voir dire*.

XIII

Proposition of Law No. XII

In his twelfth proposition of law, appellant argues that the trial court erred by denying his request for a bill of particulars. In this proposition, appellant also contends that the prosecution failed to comply with certain discovery rules and thereby deprived him of a fair trial. For the following reasons, we reject appellant's Proposition of Law No. XII.

During a hearing on various pretrial motions the trial court denied appellant's motion for a bill of particulars. The trial court noted that appellant's motion had been untimely filed and determined that, even if the motion was timely, a bill of particulars was not necessary to aid appellant in preparing for trial. Appellant contends that the trial court's denial of his request for a bill of particulars rendered him unable to present an adequate defense. We disagree with appellant's contentions.

Assuming, without deciding, that appellant's request was timely, it was clear error for the prosecution to fail to provide a bill of particulars and for the trial court to have denied appellant's motion. The law is clear: "In a criminal prosecution the state must, in response to a request for a bill of particulars * * *, supply specific dates and times with regard to an alleged offense where it *569 possesses such information." *State v. Sellards* (1985), 17 Ohio St.3d 169, 17 OBR 410, 478 N.E.2d 781, syllabus.

However, appellant correctly notes that the issue raised herein ultimately turns on the question whether appellant's lack of knowledge concerning the specific facts a bill of particulars would have provided him actually prejudiced him in his ability to fairly defend himself. Here, the denial of appellant's request in no way precluded or otherwise hindered him from effectively presenting his defense. A review of the indictment plainly indicates that appellant was being

charged for the aggravated (felony) murder of Brian Jones, the kidnapping of Jones, the abduction of Welborn, and three separate aggravated robbery offenses, all of which occurred January 30, 1989. Moreover, the record clearly reveals that defense counsel knew from the information they were able to obtain that the offenses had occurred between the hours of 11:00 p.m. and midnight on January 30, 1989. Therefore, the record simply does not support appellant's claims that he lacked specific information as to the offenses charged. Thus, while the denial of a ****1184** timely request for a bill of particulars should never occur, it is clear that appellant suffered no prejudice as a consequence of the denial that occurred in this case.

Appellant also asserts that the trial court erred when it failed to grant discovery in accordance with the Local Rules of the Court of Common Pleas of Montgomery County, General Division. Specifically, the trial court in this case ordered that discovery would proceed pursuant to Crim.R. 16 as opposed to Loc.R. 3.01 and 3.03. While much could be said concerning Crim.R. 16 and the theory of "open file" discovery of the type authorized by local rule (see, *e.g., State v. Lambert* [1994], 69 Ohio St.3d 356, 356–357, 632 N.E.2d 511, 511 [Pfeifer, J., concurring]; see, also, *State ex rel. Steckman v. Jackson* [1994], 70 Ohio St.3d 420, 428–429, 639 N.E.2d 83, 89–90), suffice it to say that our review of the record reveals that appellant suffered no prejudice in connection with the trial court's decision to adhere to Crim.R. 16 exclusively. The record is clear that appellant was in possession of much of the material that would have been available to him had the local rules been deemed applicable by the trial court. With respect to the materials that appellant allegedly did not have and to which he claimed entitlement under the local rules, appellant has utterly failed to demonstrate that he was prejudiced in any discernible way.

We also find no reversible error in connection with any of the other matters appellant has raised in this proposition of law. Appellant's argument concerning the alleged *Brady* violation (see *Brady v. Maryland* [1963], 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215), and his argument with respect to the denial of a motion to seal the prosecutor's file for appellate review are not well taken.

***570** XIV

Proposition of Law No. XIII

At trial, Christopher Ward testified that on January 31, 1989, at approximately 12:30 or 1:00 a.m., Washington had pulled up to 5213 Lome Avenue in the black Chevrolet Cavalier and introduced Ward to "Tony," who was seated in the front passenger's seat. Ward testified that he shook Tony's hand and then spoke to Washington for approximately thirty to forty-five minutes until Washington and Tony drove away. Ward identified appellant as the man that Washington had introduced as Tony. During cross-examination, defense counsel sought to cast doubt on Ward's identification of appellant. During questioning, the following exchange took place:

"Q. Do you remember telling McKeever—

"MR. HECK: I'm going to object now even though he didn't get to finish what he's going to quote.

"THE COURT: Let me see counsel at side Bench.

" * * *

"THE COURT: Let's make a record. First of all, let's have your complete question.

"MR. MONTA: Okay. The question which we would like to ask this witness was if he gave an oral statement to Major McKeever, Major Ronald McKeever, with the Jefferson Township Police on the 5th of February, 1989, and *did he say to Major McKeever he did not pay any attention to the other man in the car whose name was Tony*.

"MR. HECK: I object. If he wants to cross-examine him on an alleged inconsistency in the statements, written statements, that's fine. But, my reading of the written statements there is not that inconsistency. He is trying to cross-examine this witness on either a made-up statement or on something that's in the police report, which they have, and I object.

"THE COURT: First of all, under Rule 16, the police report is not available. Secondly, the copy of the statement given

to the Court made by this witness on the 5th of February, and McKeever as the officer signing it, has nothing to do with this question. It does not contain any reference to the question before the Court; therefore, the question has to be solely caused by this police report, and so the Court will sustain the objection.

"MR. MONTA: May I just add, your Honor, the question which would be asked is one in which the defense is attempting to test the credibility of what the witness has said and ****1185** answer will either be consistent with or impeach that testimony.

***571** "THE COURT: Police reports are inherently inaccurate and that is the very reason why under criminal rule 16 they are not to be made available and not to be used on cross-examination of any witnesses. On that basis, the Court sustains the objection." (Emphasis added.)

The court of appeals in its 1991 decision in this matter found that the trial court had erred by denying defense counsel the opportunity to cross-examine Ward on the alleged prior inconsistent statement, finding that "[w]hether evidence is discoverable under Crim.R. 16 has no bearing on its [admissibility]," since such evidence could be relevant, and all relevant evidence is generally admissible. *Chinn,* Montgomery App. No. 11835, unreported, at 73. The court of appeals found that the question defense counsel propounded "did not concern a police report, but a prior statement of the witness to a police officer," and that "Ward's statements to Officer McKeever concerning 'Tony' were certainly relevant to his identification of Appellant." *Id.* Therefore, the court of appeals determined, "To the extent that [Ward's statements to McKeever] might contradict Ward's trial testimony they were proper grounds for impeachment." *Id.* Additionally, the court of appeals stated, "Appellant was prohibited by Evid.R. 613(B) from introducing evidence of the inconsistent statement in extrinsic form, that is, by way of McKeever's testimony or his written report, unless Ward was first afforded an opportunity to explain and deny the same. The trial court's ruling foreclosed that opportunity. The error was prejudicial if the prior statement could reasonably cause the jury to reject Ward's testimony." *Id.* at 73–74. However, on the issue of prejudice, the court of appeals determined that "the error was not so prejudicial as to require reversal." *Id.* at 74.

Upon a review of the record, we find that the error, if any, in the trial court's decision not to permit defense counsel to cross-examine Ward on the alleged prior inconsistent statement did not unfairly prejudice appellant. After the trial court had sustained the objection to the question propounded by defense counsel, the defense questioned Ward whether he had ever "talked to McKeever about the description of the man on the passenger's side" of Jones's automobile. Ward responded, "I don't remember at all." Later, during the cross-examination of Major McKeever, defense counsel was permitted to question McKeever concerning the statements that Ward had allegedly made on February 5, 1989:

"Q. Now, you also did some investigation in this case; did you not?

"A. Yes, sir.

"Q. And before you interviewed Marvin Washington, did you not interview a person by the name of Christopher Ward?

"A. Yes, sir. I did.

"Q. In fact, you interviewed him first; is that correct?

***572** "A. That's correct.

"Q. On the same day, the 5th of February?

"A. I can't recall the day. I probably would have to see my report.

" * * *

"Q. This starts at page 12, which was provided to us. Is that your statement?

"A. Yes, that's mine.

"Q. All right.

"A. That was on the same day.

"Q. And was Mr. Ward able to give you a description of the person that he said he saw, the other person, not Marvin Washington?

"A. Very—he indicated to me that he—well, he did see the driver.

"Q. Right.

"A. And shook hands with him, but he was more interested in the car they were driving, the dashboard.

"Q. Didn't he indicate to you that he didn't pay any attention to the other person?

"A. Yes, sir, meaning that he spoke to the gentleman but he was more interested in the dashboard of that particular automobile.

"Q. More interested in the dashboard and didn't pay any attention to the other person?

"A. Correct."

****1186** During redirect examination, the prosecutor questioned McKeever concerning the police report. The prosecution asked McKeever, "I'm going to ask you, they [the defense] asked you about the statement and what Christopher Ward told you. They asked you this on cross-examination, about the second person, the passenger, this Tony in the car, and I believe Mr. Monta asked about paying attention to him. Was that your conclusion or is it his words?" McKeever responded, "That was my conclusion." The prosecution also asked, "Did Mr. Ward tell you at all times that he could identify the passenger in that car?" McKeever responded, "Several times." The prosecution then asked, "Did he also tell you that he saw the passenger and shook hands, in fact, with the passenger in the victim's car along with Marvin Washington?" McKeever replied, "That's correct."

The record is clear that defense counsel had an opportunity to impeach Ward's trial testimony during cross-examination of McKeever by questioning McKeever concerning Ward's alleged prior inconsistent statement that he "didn't pay any attention" to the man who was with Washington in the victim's car. The record ***573** is equally clear that Ward never made any such statement to McKeever. Rather, the statement at issue was McKeever's own statement and was the product of McKeever's own conclusions. In actuality, Ward specifically told McKeever that he had seen "Tony" and that he could positively identify him. Ward did positively identify appellant, and he did so on three separate occasions, *i.e.*, once from a photo array, once at the lineup, and again at trial. Therefore, the alleged inconsistent statement, even if Ward had made it, was not inconsistent with any of Ward's trial testimony. We think it obvious that the trial court's decision not to allow defense counsel to cross-examine Ward concerning the statement had no prejudicial impact whatsoever. The error, if any, was harmless beyond a reasonable doubt.

In this proposition, appellant also claims that the trial court abused its discretion when it refused to admit into evidence the composite sketch of the murder suspect during defense counsel's cross-examination of Marvin Washington and Shirley Cox. Defense counsel requested that the exhibit be admitted into evidence at that time so that the composite sketch could be shown to the jury during the cross-examination of these two witnesses. However, R.C. 2945.03 provides that "[t]he judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue." Here, the trial court admitted the composite sketch into evidence at the close of the state's case-in-chief and the jury considered it in deliberations. The trial court's decision not to admit the exhibit at an earlier time does not constitute an abuse of discretion.

Accordingly, appellant's thirteenth proposition of law is not persuasive.

XV

Proposition of Law No. XIV

In his fourteenth proposition of law, appellant contends that the trial court gave unnecessary instructions to the jury in the guilt phase on the law of aiding and abetting and on the subject of prior calculation and design. Appellant argues that the jury was instructed that "he could be found guilty as an accomplice to capital murder," and that "he could be death eligible on the two felony murder specifications as either the principal offender, or if not the principal offender, by prior calculation and design." We reject appellant's arguments for two reasons.

First, appellant's arguments have been waived. Second, on the merits, appellant has failed to demonstrate plain error.

With respect to the trial court's instruction to the jury on the law of accomplice liability, we find that the record does not support appellant's contentions. The prosecution never wavered from its theory that appellant was the principal ***574** offender in the aggravated murder of Jones and, more importantly, neither the state nor appellant proffered any evidence suggesting that someone other than appellant was the principal offender. The jury obviously did not find appellant guilty of the aggravated murder of Jones on the theory of accomplice liability, ****1187** since the evidence at trial clearly demonstrated that appellant was the principal offender in the aggravated murder. Moreover, having reviewed the trial court's instructions as a whole, we find that the trial court did not specifically instruct the jury on accomplice liability in connection with the aggravated murder charge. Furthermore, contrary to appellant's assertion, this instruction was not unwarranted, since the evidence tended to show that appellant, while the principal offender in the aggravated robbery of Welborn, was an aider and abetter in the aggravated robbery of Jones. Accordingly, we find no plain error with respect to the trial court's instruction to the jury on aiding and abetting.

As to appellant's arguments concerning the R.C. 2929.04(A)(7) specifications, we also find no error, plain or otherwise. It is not error for a trial court to "instruct the jury on prior calculation and design and principal offender status disjunctively in the same specification, as the court did here." *Burke,* 73 Ohio St.3d at 405, 653 N.E.2d at 248. Appellant does argue, however, that the trial court should have instructed the jury on the need to be unanimous concerning which of the two alternatives (principal offender or prior calculation and design) was applicable. However, appellant never specifically requested such an instruction. Additionally, given the evidence at trial, which showed either that appellant was the principal offender in the aggravated murder or that he had committed no offense at all, it is clear to us that the jury unanimously determined that appellant was the principal offender in the aggravated murder of Jones. See, also, our discussion in Part II, *supra*. Therefore, the lack of instruction on the need for unanimity does not rise to the level of plain error.

XVI

Proposition of Law No. XV

In his fifteenth proposition of law, appellant questions other aspects of the trial court's guilt phase jury instructions. However, we have reviewed the jury instructions as a whole and find appellant's objections not persuasive.

XVII

Proposition of Law No. XVI

The trial court did not abuse its discretion by failing to give the requested "*Telfaire* instruction" concerning identification testimony. See *United States v. Telfaire* (C.A.D.C.1972), 469 F.2d 552, 558–559. The use of such an instruction is ***575** a matter committed to the sound discretion of the trial court. *State v. Guster* (1981), 66 Ohio St.2d 266, 272, 20 O.O.3d 249, 252–253, 421 N.E.2d 157, 161. Here, the trial court gave a modified version of the *Telfaire* instruction that, in our judgment, was more than adequate on the facts of this case.

XVIII

Propositions of Law Nos. XVII, XIX, XX, and XXV

Appellant acknowledges that these propositions of law (Nos. XVII, XIX, XX, and XXV) raise issues that we have previously addressed and rejected in a number of our prior cases. Therefore, appellant concedes that these four propositions of law may be summarily rejected on authority of *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568, syllabus, assuming that our position on the issues has not changed. Our position on these issues has not changed. Therefore, we summarily reject these four propositions of law.

XIX

Proposition of Law No. XVIII

The arguments raised in appellant's eighteenth proposition of law are not supported by a fair and impartial review of the record. Nothing in the trial court's penalty phase instructions or in its response to the jury's questions supports appellant's assertion that "[t]hese instructions, when taken as whole, created a 'reasonable likelihood' that Davel Chinn's jury was precluded from considering all of his nonstatutory [*i.e.*, R.C. 2929.04(B)(7)] mitigation in violation of the Eighth and Fourteenth Amendments."

**1188 XX

Proposition of Law No. XXI

Appellant's twenty-first proposition of law concerns alleged victim-impact evidence that was heard by the trial judge after the jury was discharged but immediately before the trial court pronounced sentence on all of the crimes appellant was found guilty of committing. Appellant claims that the evidence included an expression of opinion by Brian Jones's mother that appellant should be sentenced to death. However, Mrs. Jones never specifically stated her opinion as to the appropriate punishment. Rather, she stated that "now we feel that the time has come for [appellant] to be punished according to the law of Ohio." Appellant also complains that Mrs. Jones stated or implied that appellant was incapable of rehabilitation. However, the record does not fully support appellant's claims in this regard. Moreover, and in any event, there is absolutely nothing in the record to suggest that the trial court was influenced by irrelevant ***576** factors in sentencing appellant for the capital crime. Therefore, we find no reversible error here.

XXI

Proposition of Law No. XXII

In his twenty-second proposition of law, appellant argues that he was deprived of the effective assistance of counsel during the trial court proceedings. Several of appellant's arguments under this proposition of law have been waived. Nevertheless, we have considered all instances of alleged ineffectiveness of trial counsel. We find that appellant has failed to satisfy his burden of establishing ineffective assistance under the standards set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

XXII

Proposition of Law No. XXIII

Appellant contends that the cumulative effect of errors at the trial court level deprived him of a fair trial and a reliable sentencing determination. We reject appellant's contention in this regard. Appellant received a fair trial and a fair and reliable sentencing determination.

XXIII

Proposition of Law No. XXIV

Appellant also argues that he was deprived of the effective assistance of counsel in the court of appeals. We find no merit to appellant's contentions. The fact that appellate counsel was able to persuade the court of appeals to reverse the death sentence on two separate occasions over the course of the years is a testament to the effectiveness of appellant's counsel. None of the instances of alleged ineffective assistance of appellate counsel compels reversal here.

XXIV

Having considered appellant's propositions of law, we must now independently review the death sentence for appropriateness (also raised in appellant's Proposition of Law No. II) and proportionality (also raised in appellant's Proposition of Law No. III). We find that all specifications of aggravating circumstances of which appellant was found guilty (two under R.C. 2929.04 [A] [7] and one under [A][3]) were proven beyond a reasonable doubt.

We specifically reject appellant's Proposition of Law No. II, wherein appellant argues that our independent assessment of the evidence should lead us to ***577** conclude that the aggravating circumstances were not proved beyond a reasonable doubt. Washington's testimony clearly chronicled the crimes and the conduct in which he and appellant engaged. His testimony was compelling proof of the existence of the R.C. 2929.04(A)(3) specification of the aggravating circumstance that appellant killed Jones to escape detection, apprehension, trial, or punishment for another offense. Appellant told Washington after the murder that he shot Jones "because he didn't have enough money and he could identify * * * us to the police." Washington's trial testimony also fully supported the two R.C. 2929.04(A)(7) specifications of aggravating circumstances. Moreover, Christopher Ward identified appellant as the person named "Tony" he had seen with Washington shortly after the murder. Gary Welborn, the surviving victim of the robbery, identified Washington as one of the ****1189** two perpetrators. Welborn testified that the armed assailant who was with Washington "said we'd better have at least a hundred dollars between us or he'd kill us both." Shirley Cox identified "Tony Chinn" as the man police were looking for after she saw the composite sketch printed in the newspaper—the composite that was created as a result of Washington's description of the gunman. Both Washington and Ward were able to positively identify appellant in a photo array, at a lineup, and at trial. Although Washington had waited until immediately after the lineup to actually inform police that appellant was in the lineup, his reasons for so doing were understandable and do not detract from his identification of appellant. With respect to appellant's defense, none of the defense witnesses directly contradicted the state's evidence, except for appellant's mother. Overall, the alibi defense was weak and unpersuasive. The evidence in this case compellingly supports a finding of guilt on each of the three specifications of aggravating circumstances. We are convinced of appellant's guilt beyond a reasonable doubt.

For purposes of our independent review, however, we will consider only the single (merged) aggravating circumstance that was considered by the trial court on remand from the court of appeals and that was considered by the court of appeals in its own independent review of appellant's death sentence. Thus, we consider the R.C. 2929.04(A)(7) specification of the aggravating circumstance premised on aggravated robbery—*i.e.,* that appellant shot and killed Brian Jones during the course of an aggravated robbery—which is clearly shown on the record before us.

The nature and circumstances of the offense reveal nothing of any mitigating value. During the penalty phase, appellant presented no evidence regarding the mitigating factors set forth in R.C. 2929.04(B)(1) through (B)(6), and our review of the record reveals that these factors are inapplicable here.

In mitigation, appellant presented evidence concerning his history, character, and family background. Appellant's father was murdered in 1972. Appellant's ***578** grandmother testified that appellant, as a child, was "[v]ery emotionally upset" over his father's death. She also testified that appellant is deeply devoted to his nieces and nephews and to his entire family. Appellant's brother and sister testified that appellant helped them spiritually and that he is close to his family and helpful to family members. Appellant's mother, Anna Lee, testified that appellant was born in 1957. Lee testified that appellant, during childhood, had no disciplinary problems and was a "[v]ery sensitive" and "active child." According to Lee, appellant became even more sensitive following his father's death. During childhood, appellant read from the Bible, believed in God, and was devoted to his family members. Lee testified that appellant had enrolled in Cambridge Technical Institute to better his life through education. Appellant gave an unsworn statement in which he proclaimed that he was innocent. Appellant stated that he had been involved in sports and certain civic organizations and activities during his childhood. He expressed his belief in God, his devotion to family, and his bitterness over his father's death. Appellant claimed to be "a compassionate and concerned human being." He also indicated that he had enrolled in Cambridge Technical Institute to better himself and that he was proud of his accomplishments in school.

Upon a review of the evidence in mitigation, we find that the evidence concerning appellant's history, character, and background is entitled to some, but very little, weight in mitigation. Specifically, we find that appellant's support and devotion for his family, his helpfulness to others, and his efforts toward education are entitled to some, but very minimal, weight in mitigation. Appellant's religious beliefs and his bitterness over his father's death are also entitled to little or no weight in mitigation. Appellant's father died more than a decade before appellant committed this senseless and tragic murder of Brian Jones, an innocent victim who offered

absolutely no resistance in the aggravated robbery. Further, appellant's belief in God obviously did not dissuade him from robbing and killing. Additionally, appellant's assertions of innocence—a matter pertaining to the issue of "residual doubt"—are entitled to no weight in mitigation. Residual doubt is irrelevant to the issue of whether appellant should be sentenced to death, *State v.* ****1190** *McGuire* (1997), 80 Ohio St.3d 390, 686 N.E.2d 1112, syllabus, and we have absolutely no doubt of appellant's guilt.

Weighing the evidence presented in mitigation against the single R.C. 2929.04(A)(7) aggravating circumstance, we find that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. Indeed, the mitigating factors in this case absolutely pale in significance to the aggravating circumstance considered here.

As our final task, we have undertaken a comparison of the sentence imposed in this case to those in which we have previously imposed the death sentence. ***579** Appellant's death sentence is neither excessive nor disproportionate in comparison to the penalty imposed in similar cases. See, *e.g., State v. Raglin* (1998), 83 Ohio St.3d 253, 699 N.E.2d 482, which involved far more mitigating evidence than was presented in the case at bar. We reject appellant's Proposition of Law No. III, wherein appellant claims that his case is far different from cases in which we have previously imposed the death penalty for aggravated (felony) murder committed during the course of an aggravated robbery. Appellant's attempts to distinguish his crime from the crimes of others on the basis that he shot his victim only once and did not shoot the victim in the head, neck, chest, or other vital part of the body are completely unavailing. Jones died as a result of the single shot appellant fired into his body during the course of an aggravated robbery. The shot was fired at point-blank range, and appellant specifically intended to cause the death of the victim. He pressed the muzzle of the revolver against the victim's clothing and pulled the trigger, causing the projectile to rip into the upper portion of Jones's arm and into his chest, where the projectile perforated the main pulmonary artery and came to rest near the base of Jones's heart. The single shot fired by appellant was just as effective in ending Jones's life as the shot or shots that have been fired by other death-row inmates whose sentences we have affirmed for having killed their victims during the course of an aggravated robbery. The fact that appellant shot Jones only once does not make appellant's death sentence either excessive or disproportionate in comparison to those cases in which we have previously affirmed the death penalty.

Accordingly, for all of the foregoing reasons, we affirm the judgment of the court of appeals and uphold the sentence of death.

Judgment affirmed.

MOYER, C.J., RESNICK, FRANCIS E. SWEENEY, SR., PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

APPENDIX

"*Proposition of Law No. I:* When a jury is allowed to consider nonstatutory aggravating circumstances because it receives inadequate guidance through a lack of instruction, or erroneous instruction during the penalty phase, and duplicative aggravating circumstances are not merged, the resulting death sentence is unreliable and cannot stand. U.S. Const. Amend. VIII and XIV.

"*Proposition of Law No. II:* Where the aggravating circumstances are not proved beyond a reasonable doubt, the death penalty in [*sic*] not appropriate.

"*Proposition of Law No. III:* The death sentence in appellant Chinn's case is excessive and disproportionate to sentences imposed in similar cases.

***580** "*Proposition of Law No. IV:* The cumulative effect of prosecutorial misconduct throughout Chinn's trial violated his rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

"*Proposition of Law No. V:* The accused's rights to a jury trial, to due process, and to a reliable capital sentencing hearing are denied when the trial court fails to define an essential element of an aggravating circumstance, that makes the accused death eligible. U.S. Const. Amend. VI, VIII, XIV.

"*Proposition of Law No. VI:* A trial court abuses its discretion when it allows the introduction of irrelevant and prejudicial evidence and further allows inadmissible hearsay

to be introduced in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

****1191** "*Proposition of Law No. VII:* A resentencing procedure in a capital case violates due process and infringes the defendant's right against cruel and unusual punishment when, the defendant is resentenced to death without a recommendation by the trial jury that convicted him, and the resentencing court excludes relevant mitigation, and the resentencing court fails either to independently weigh the mitigation and aggravation or state the reasons why the aggravation outweighs the mitigation. U.S. Const. Amend. VIII and XIV.

"*Proposition of Law No. VIII:* Insufficient evidence to sustain a conviction of aggravated murder is presented where the state relies entirely on the testimony of a co-defendant whose testimony is suspect, and reliable, independent evidence rebuts this testimony. U.S. Const. Amend. XIV.

"*Proposition of Law No. IX:* Ohio Revised Code Ann. § 2929.03(D)(1) (Anderson 1996) renders R.C. §§ 2929.04(A) and (B) unconstitutionally vague. U.S. Const. Amend. VIII, XIV.

"*Proposition of Law No. X:* Where a jury, during its deliberations, communicates with the trial court, and the court, out of the presence of the parties, provides erroneous, substantive instructions to the jury, a new trial is warranted. (*Bostic v. Connor* [1988], 37 Ohio St.3d 144 [524 N.E.2d 881], approved and followed.)

"*Proposition of Law No. XI:* A capital defendant's conviction and death sentence must be overturned where he was denied his right to a fair and impartial jury because the trial court unfairly limited his questioning, refused to conduct individual sequestered voir dire, and failed to excuse jurors who could not be fair and impartial. U.S. Const. Amends. VI, VIII, and XIV.

"*Proposition of Law No. XII:* In order for a capital defendant to be assured equal protection and due process of law, the trial court must see that the state complies with all discovery rules and turns over exculpatory material before trial. ***581** Where there are indications that the state is not complying with these rules, the prosecutor's file must be sealed for appellate review. U.S. Const. Amend. XIV.

"*Proposition of Law No. XIII:* The accused's rights to due process, to a fair trial, and to confrontation are denied when the trial court denies the accused an opportunity to challenge the identification testimony of the state's witnesses. U.S. Const. Amend. VI and XIV.

"*Proposition of Law No. XIV:* A jury should not be instructed that the defendant may be found guilty as an accomplice to aggravated murder when the evidence adduced at trial does not reasonably support that instruction. Whenever the jury is charged that a capital defendant may be found guilty as the principal offender, or as an accomplice acting with prior calculation and design, the defendant is entitled to [a] unanimous verdict on one of those alternative theories. U.S. Const. Amend. VI, VIII and XIV.

"*Proposition of Law No. XV:* A jury instruction that shifts the burden of proof on the *mens rea* element of any offense to the accused, or reduces the state's burden of proof, violates the Due Process Clause. U.S. Const. Amend. XIV.

"*Proposition of Law No. XVI:* The accused is denied due process and a fair trial when the trial court fails to give a jury instruction that informs the jury of the problems with identification testimony. U.S. Const. Amend. XIV.

"*Proposition of Law No. XVII:* The accused's right to due process under the Fourteenth Amendment to the United States Constitution is violated when the state is permitted to convict upon a standard of proof below proof beyond a reasonable doubt.

"*Proposition of Law No. XVIII:* Constitutional error results when the trial court's penalty phase instructions keep the jury from considering nonstatutory mitigating factors. U.S. Const. Amend. VIII, XIV.

"*Proposition of Law No. XIX:* A capital defendant's right to a reliable and nonarbitrary death sentence under the Eighth and Fourteenth Amendments is violated when the sentencing jury's responsibility for its verdict is attenuated by the trial court's instructions.

****1192** "*Proposition of Law [No.] XX:* A capital defendant's right to reliable sentencing under the Eighth and Fourteenth Amendments to the United States Constitution is violated

when the trial court refuses to instruct the jury that it may consider mercy in its penalty phase deliberations.

"*Proposition of Law [No.] XXI:* It is constitutional error for the trial court to consider victim impact evidence in capital sentencin[g] in the form of an opinion by a victim's family member about the defendant's inability to be rehabilitated and about the proper punishment for the defendant. U.S. Const. Amend. VIII and XIV.

***582** "*Proposition of Law [No.] XXII:* The accused's right to the effective assistance of appointed counsel is denied when counsel's errors and omissions undermine confidence in the result of the trial. U.S. Const. Amend. VI and XIV.

"*Proposition of Law No. XXIII:* The defendant is entitled to a new trial when the cumulative effect of trial error renders the conviction unreliable, and when the evidence against the defendant is not overwhelming. U.S. Const. Amend. VIII, XIV.

"*Proposition of Law [No.] XXIV:* The appellant's right to due process under the Fourteenth Amendment to the United States Constitution is violated by the ineffective assistance of counsel in the court of appeals.

"*Proposition of Law [No.] XXV:* Ohio's death penalty laws are unconstitutional. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution establish the requirements for a valid death penalty scheme. Ohio Rev.Code Ann. Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05 (Anderson 1996). Ohio's death penalty statute does not meet the prescribed constitutional requirements and is unconstitutional on its face and as applied to appellant Chinn."

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.

STATE of Ohio, Plaintiff-Appellee,
v.
Davel V. CHINN, Defendant-Appellant.

No. C.A. 16764.
|
Aug. 21, 1998.

Attorneys and Law Firms

Mathias H. Heck, Jr., Prosecuting Attorney, by Carley J. Ingram, Assistant Prosecuting Attorney, Appellate Division, Dayton, OH, Atty. Reg. # 0020084, for plaintiff-appellee.

David H. Bodiker, State Public Defender, Atty. Reg. # 0016590, Linda E. Prucha, Assistant Public Defender, Atty. Reg. # 0040689, Tanya J. Poteet, Assistant Public Defender, Atty. Reg. # 0056100, Office of the Public Defender, Columbus, OH, for defendant-appellant.

OPINION

FAIN.

***1** Defendant-appellant Davel V. Chinn appeals from a decision denying his petition for post-conviction relief. In his petition, Chinn alleges seven separate claims of error. He contends that the trial court erred by applying the doctrine of *res judicata* to, and denying, his three claims of ineffective assistance of counsel. He further contends that the trial court erred by failing to: (1) conduct an evidentiary hearing; (2) vacate his sentence; and (3) grant his motion for discovery. Chinn also claims that the State of Ohio does not provide an adequate corrective process by which criminal defendants may collaterally attack their convictions. Finally, he claims that the cumulative errors of the trial court mandate reversal.

We conclude that the trial court did err by failing to conduct an evidentiary hearing regarding two of Chinn's claims of ineffective assistance of counsel. However, we conclude that the trial court did not err by failing to conduct an evidentiary hearing or by denying the petition as to the remaining claims of error. Furthermore, we find that the trial court correctly overruled Chinn's motion for discovery. We also conclude that Chinn's claim of inadequate corrective process is not ripe for review. Finally, we do not find the doctrine of cumulative error applicable to this case.

Accordingly, the judgment of the trial court denying Chinn's petition for post-conviction relief without a hearing is *Reversed,* and this cause is *Remanded* for further proceedings in accordance with this opinion.

I

In 1989, Chinn was tried and convicted for the Aggravated Murder of Brian Jones. Upon recommendation of the jury, the Montgomery County Court of Common Pleas imposed the sentence of death. Chinn appealed his sentence and conviction. Upon review, we found that the trial court had not properly considered all mitigating factors, and that it had improperly weighed the aggravating circumstance. *State v. Chinn* (Dec. 27, 1991), Montgomery App. No. 11835, unreported. ("*Chinn I* "). We reversed, and remanded the matter for resentencing.

On December 6, 1994, the trial court again sentenced Chinn to death. Chinn was not present when the trial court resentenced him. We vacated that sentence, finding that the trial court had erred by sentencing Chinn outside of his presence. *State v. Chinn* (June 21, 1996), Montgomery App. No. 15009, unreported ("*Chinn II* "). Upon remand, the trial court resentenced Chinn to death. Thereafter, Chinn filed his third appeal with this court based upon his claim that his death sentence is inappropriate. We affirmed the sentence on August, 1997. *State v. Chinn* (Aug. 15, 1997), Montgomery App. No. 16206, unreported ("*Chinn III* "). Chinn appealed

our decision in *Chinn III* to the Ohio Supreme Court. That appeal is currently pending.

Chinn filed a petition for post-conviction relief with the trial court on March 14, 1997. In the petition, he raised seven errors that he contended rendered his sentence void or voidable. Along with his petition, Chinn filed a motion for discovery. The trial court denied the petition as well as the motion for discovery. It is from the denial of his petition for post-conviction relief that Chinn appeals.

II

***2** Chinn's First, Second, Third and Fifth Assignments of Error are as follows:

I. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE DOCTRINE OF RES JUDICATA TO SEVERAL OF APPELLANT'S CLAIMS FOR RELIEF, THUS VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 2, 5, 9, 10, 16 AND 20 OF THE OHIO CONSTITUTION.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, (PETITIONER'S FIRST, SECOND AND THIRD CLAIMS FOR RELIEF). THE FAILURE BY COUNSEL TO OBTAIN NECESSARY EXPERTS AND PRESENT AVAILABLE MITIGATING EVIDENCE VIOLATED APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 1, 2, 9, 10, 16, AND 20 OF THE OHIO CONSTITUTION.

III. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT CHINN AN EVIDENTIARY HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF, THUS VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 2, 9, 10, 16, AND 20 OF THE OHIO CONSTITUTION.

V. THE TRIAL COURT ERRED IN DENYING APPELLANT'S PETITION TO VACATE OR SET ASIDE SENTENCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

Chinn contends that the trial court erred by applying the doctrine of *res judicata* as a basis for denying four of the seven claims set forth in his petition for post-conviction relief. He also claims that the trial court erred by denying his three claims of ineffective assistance of counsel. Finally, he contends that the trial court erred by failing to conduct an evidentiary hearing on all of his claims, and by denying his petition.

The issues raised in these four assignments of error are inextricably interwoven. Therefore, our discussion will be facilitated by separately considering each claim for relief as raised in Chinn's petition for postconviction relief, and by then analyzing each of the assigned errors as they relate to the petition.

We begin with a review of the post-conviction relief statute. "R.C. 2953.21 provides that a person convicted of a crime may petition the court to set aside that conviction on grounds that the defendant's constitutional rights were violated, thereby rendering that conviction void or voidable." *State v. McDaniel* (Oct. 24, 1997), Miami App. No. 97-CA-7, unreported. Under the statute, the criminal defendant bears the initial burden to submit evidentiary documents containing sufficient, operative facts which demonstrate substantive grounds for relief. R.C. 2953.21(C); *State v. Kapper* (1983), 5 Ohio St.3d 36. A hearing is not required absent a showing that substantive grounds for relief exist. *State v. Strutton* (1988), 62 Ohio App.3d 248, 251.

***3** The first two claims raised in Chinn's petition for post-conviction relief involve the issue of ineffective assistance of counsel based upon the failure of counsel to present expert testimony at trial. Specifically, Chinn contends that trial counsel should have presented an expert on eyewitness identification and an expert to present evidence that "Marvin Washington's [a witness for the State who identified Chinn as

the perpetrator of the crime] mental retardation impacted on his ability to testify as to the facts in this case." In support of his petition, Chinn supplied the affidavits of Solomon M. Fulero, Ph.D., J.D., and Caroline Everington, Ph.D.

The trial court overruled these two claims, concluding that they were barred by the doctrine of *res judicata* on the basis that "appellate counsel could have and should have raised" these issues in his first direct appeal. Chinn argues that the trial court erred because the evidence of these claims was outside the record.

This court has stated that a claim of ineffective assistance of counsel based upon the failure to present expert testimony is a matter "which must be determined *dehors* the record." *State v. McDaniel,* supra. We thus held that such a claim is not barred by *res judicata. Id.* This holding is in accord with the decision of the Tenth District Court of Appeals in *State v. Aeh* (Dec. 11, 1997), Franklin App. No. 97APA05-601, unreported, wherein that court stated that when "a post-conviction relief petitioner alleges ineffective assistance of counsel through affidavits naming uncalled witnesses whose testimony may have demonstrated evidence significant to the defendant, an evidentiary hearing should be held."

In his affidavit, Mr. Fulero stated that he is a psychologist. The affidavit stated that in his opinion, based upon "a reasonable degree of psychological certainty," "a number of factors that have been found to impair eyewitness accuracy and to affect juror decision-making were present in this case and raise strong concerns both about verdict and sentencing." The affidavit listed numerous factors which the psychologist stated raised "significant concerns" regarding the identification of Chinn as the perpetrator of the crime. The affidavit related to the identification of Chinn by the State's three eyewitnesses; specifically, Marvin Washington, Shirley Cox and Chris Ward.

The affidavit of Ms. Everington identified her as an "Associate Professor of Special Education and Educational Psychology" who has "researched and published extensively in the field of mentally retarded offenders in the criminal justice system." Ms. Everington stated in her affidavit that she had reviewed the trial court record, as well as Marvin Washington's juvenile court file and his public school records. She stated that the juvenile court file contained a psychological report, neuropsychological assessment and chemical abuse assessment. Based upon her review, she opined that Marvin Washington's identification of Chinn as the perpetrator of the crime is of "questionable reliability" and "questionable accuracy."

***4** Given the information contained within these affidavits, we find that trial counsel's failure to call any expert witnesses could rise to the level of ineffective assistance of counsel prejudicial to the rights of the defendant. Thus, we conclude that the trial court should have conducted an evidentiary hearing to determine more fully the nature of the testimony of these two witnesses, as well as the strategical reasoning of trial counsel for not presenting this expert testimony.

The third and fourth claims raised by Chinn in his petition for post-conviction relief involve his contention that his conviction and sentence are void or voidable because: (1) his trial attorney rendered ineffective assistance of counsel by failing to investigate and present mitigating evidence; and (2) the one aggravating circumstance present in his case does not outweigh the mitigating factors. Specifically, Chinn argued that trial counsel failed to present evidence of his good conduct in prison while awaiting trial, and failed to present "additional evidence of residual doubt." He also argued that the death sentence was inappropriate because the aggravating circumstance did not outweigh all of the mitigating factors; *i.e.,* both those factors presented to the judge and jury and those not presented.

The trial court denied both of these claims under the doctrine of *res judicata.* The court stated that the claim of ineffective assistance of counsel could have been raised on direct appeal. The court further stated that the mitigating factors had been considered by this court in a prior direct appeal.

We find that although we had previously weighed the aggravating circumstance and mitigating factors in the prior direct appeals, the post-conviction petition claims involve mitigating factors that were not raised in those appeals. Furthermore, all of the mitigating evidence that Chinn referred to in support of this claim is *dehors* the record, and was therefore not capable of being presented on direct appeal. We conclude that the trial court did err by ruling that the claim of ineffective assistance of counsel was barred by the doctrine of *res judicata.* However, we must affirm the trial court's decision on other grounds.

In the prior direct appeals, we addressed, and independently weighed, the aggravating circumstance and mitigating factors present in this case. Indeed, we concluded that the aggravating circumstance outweighs the mitigating factors presented at sentencing. Therefore, we must now determine whether our assessment of the mitigating factors and aggravating circumstance would change based upon the additional evidence.

In Ohio, good behavior while in jail awaiting trial has been recognized as a mitigating factor. See e.g., *State v. Moreland* (1990), 50 Ohio St.3d 58, 70. Therefore, we will presume for the sake of argument that the failure to present this evidence did constitute ineffective assistance of counsel. In order to prevail on this issue, Chinn must show a "reasonable probability that the outcome would have been different but for the ineffective assistance of counsel." *State v. Lascola* (1988), 61 Ohio App.3d 228, 236. Evidence of good conduct in jail is entitled to very little weight in mitigation. *Moreland,* at 70. We cannot conclude that the requested evidence would have changed the outcome of the sentencing hearing. Therefore, we find that Chinn's claim of ineffective assistance prejudicial to his rights is not well-taken.

***5** Likewise, we find that Chinn's claim that trial counsel should have presented additional evidence of residual doubt is not well-taken. The Ohio Supreme Court has clearly stated that residual doubt "is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death." *State v. McGuire* (1997), 80 Ohio St.3d 390, paragraph 1 of the syllabus. Therefore, since any evidence regarding residual doubt would not be relevant to the sentence imposed, we cannot say that counsel was ineffective for failing to present such evidence.

Accordingly, we find that the trial court's denial of Chinn's claim of ineffective assistance of counsel for failure to present mitigating evidence, as well as his claim that the aggravating circumstance did not outweigh the available mitigating factors was correct, albeit for reasons differing from than those relied upon by the court. Since we conclude that Chinn's claim is not meritorious, we further find that the trial court did not err by failing to conduct an evidentiary hearing on this issue.

The fifth claim for relief raised in Chinn's petition was his contention that his sentence was void or voidable because his resentencing was conducted by a biased judge. In support of his claim, he presented the affidavit of appellate counsel. According to the affidavit, the trial judge exhibited bias toward Chinn during a pre-trial conference that was held directly in response to our decision in *Chinn I,* wherein we remanded the case for resentencing. From the affidavit, we conclude that the claim of bias is based on the judge's refusal to conduct a new hearing for resentencing and his refusal to allow the presentation of additional mitigation evidence.

The trial court, in overruling this claim, found that Chinn failed to present sufficient evidence to support a claim of bias.

We first note that there is no evidence contained in the record, or even presented *dehors* the record, to indicate that Chinn requested the trial judge to recuse or disqualify himself from presiding over the resentencing. It does not even appear that appellate counsel ever voiced any such concern with the trial court. "Absent extraordinary circumstances, an allegation of judicial bias must be raised at the earliest available opportunity." *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 188, citations omitted. Chinn could have, but did not, file an affidavit of bias and prejudice with the Ohio Supreme Court pursuant to R.C. 2701.03 to disqualify the trial judge.

In any event, we agree with the trial court that this claim must fail on its merits. From our reading of the affidavit, it merely appears that the trial judge was conducting a conversation with both appellate counsel and the prosecutor regarding the reasons for the remand of the case in *Chinn I.* It appears that, while the trial court may have disagreed with this court's reasoning in that opinion, the court was merely attempting to take steps to conform with our mandate. Thus, we cannot say that the affidavit contains any evidence that would support a finding of bias, and we conclude that the trial court did not err by failing to conduct an evidentiary hearing on this issue.

***6** In his sixth claim for relief in the petition, Chinn contends that he was "denied a meaningful proportionality review by the Ohio courts." In support of this claim, Chinn argues that the courts "typically limit comparison to cases in which the death sentence was imposed." He further argues that the courts make "no meaningful comparison of those cases."

The trial court overruled this claim as being an issue for the appellate court to decide.

We note that Chinn has previously raised the issue of the proportionality of his sentence in both *Chinn II* and *Chinn III* . In both of those opinions, we overruled his claim that his sentence was disproportionate when compared with other cases this court has decided. We also ruled that "Chinn's death sentence is appropriate, proportionate and not excessive." *Chinn III,* supra. In his third attempt to revisit this issue, Chinn expands his argument to include a claim that his sentence is disproportionate when compared with cases decided in *all* Ohio courts, rather than just this court's cases. However, we find that this issue, regardless of the expanded scope presented by Chinn, has been adequately raised and disposed of in the direct appeals. Thus the trial court did not err by overruling this claim as it is barred by *res judicata.*

Finally, in his seventh claim for relief, Chinn argued that "death by electrocution constitutes a blatant disregard for the value of human life, entails unnecessary and wanton infliction of pain and diminishes the dignity of man." His argument centers on the contention that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. In overruling this claim, the trial court stated that "[t]his argument has been presented, argued and rejected by Supreme Court of Ohio." We, likewise, conclude that this argument has no merit.

The Ohio Supreme Court has held that death by electrocution does not violate the constitutional prohibition against cruel and unusual punishment. See *State v. Coleman* (1989), 45 Ohio St.3d 298; *State v. Brooks* (1986), 25 Ohio St.3d 144. Moreover, Chinn may opt to be put to death by lethal injection, pursuant to his statutory right as set forth in R.C. 2949.22(B). Therefore, the issue of whether death by electrocution is cruel and unusual punishment is moot. Thus, we conclude that the trial court did not err by overruling this claim for relief.

We conclude that the trial court did err by failing to conduct an evidentiary hearing in regard to the first and second claims raised in Chinn's petition for postconviction relief; i.e., ineffective assistance of counsel for failure to present expert testimony. However, we conclude that the trial court correctly overruled the remaining claims without conducting an evidentiary hearing. Accordingly, Chinn's First, Second, Third and Fifth Assignments of Error are overruled in part and sustained in part.

III

***7** Chinn's Fourth Assignment of Error reads as follows:

> THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT GRANTING APPELLANT'S MOTION FOR DISCOVERY TO SUPPORT THE CLAIMS CONTAINED IN THE PETITION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 2, 9, 10, 16, AND 20 OF THE OHIO CONSTITUTION, AND OHIO R.CIV.P. 26.

Chinn contends that the trial court erred by failing to allow him to conduct discovery. He argues that discovery was necessary in order to "more completely substantiate his claims". In support, he argues that petitions for postconviction relief are civil in nature, and thus should be subject to the traditional discovery methods permitted by the Ohio Rules of Civil Procedure. He also cites this court's opinion in *State v. Otstot* (Mar. 7, 1989), Clark App. No. 2500, unreported, as support for this proposition. Finally, Chinn cites several decisions by courts in other states which he contends have "recognized a postconviction petitioner's right to conduct discovery before a decision is made on whether the claim has met the threshold burden necessary for a hearing."

Although Chinn has cited several cases that he claims support his argument, we note that we are not bound by the decisions of other states. Furthermore, in light of our holding below, we decline to follow our decision in *State v. Otstot,* supra.

According to Civ.R. 1(A), the rules of civil procedure are to be applied in all civil actions subject to the exceptions set forth in Civ.R.1(C). Civ.R. 1(C) provides, in pertinent part, as follows:

> These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

Clearly, petitions for post-conviction relief are special statutory proceedings. R.C. 2953.21(C) states that in determining whether to grant a hearing on the petition for post-conviction relief, a trial court must determine whether there are substantive grounds for relief. In making such a determination, the court must consider the " * * *petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript." R .C. 2953.21(C). The statute, which clearly sets forth the items to be considered in determining whether a hearing is mandated, makes no provision for the application of the Ohio Rules of Civil Procedure to the proceedings. Therefore, we must conclude that the Rules of Civil Procedure are not applicable to post-conviction relief proceedings, except to the extent that R.C. 2953.21 expressly provides. We note that our holding today is in accord with the decisions of several other appellate districts. See, e.g., *State v. Webb* (Oct. 20, 1997), Clermont App. No. CA 96-12-108, unreported; *State v. Hill* (June 16, 1995), Trumbull App. No. 94-T-5116, unreported; *State v. Dennis* (Nov. 11, 1997), Summit App. No. 18410, unreported; *State v. Hill* (Nov. 21, 1997), Hamilton App. No. C-961052, unreported.

***8** Accordingly, Chinn's Fourth Assignment of Error is overruled.

IV

Chinn's Sixth Assignment or Error is as follows:

> OHIO DOES NOT PROVIDE AN ADEQUATE CORRECTIVE PROCESS IN VIOLATION OF THE DUE PROCESS, THE EQUAL PROTECTION, AND THE SUPREMACY CLAUSES OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2, 10 AND 16 OF THE OHIO CONSTITUTION.

Chinn contends that Ohio's statutory scheme for postconviction relief is inadequate. In support, he argues that the Ohio Supreme Court's decision in *State v. Perry* (1967), 10 Ohio St.2d 175, applying the doctrine of *res judicata* to actions brought pursuant to R.C. 2953.21 severely limits the opportunity to raise collateral attacks on wrongful convictions. He argues that "[t]his is best illustrated by the fact that only one individual who has been sentenced to death since Ohio re-enacted its death penalty has received post-convection relief."

We must overrule this assignment of error because this case is being remanded for an evidentiary hearing. Until this hearing is held, we cannot determine whether Chinn will receive the relief requested. If he does, then his claim will be rendered moot. Therefore, we conclude that this issue is not ripe for review.

Furthermore, we note that Chinn failed to raise this issue at the trial court level. "Generally, the law in Ohio is that the failure to raise the issue of a statute's constitutionality at the trial level constitutes a waiver of such issue." *State v. Zuern* (1987), 32 Ohio St.3d 56, 63. "However, because of the * * * exacting review necessary where the death penalty is involved, [courts may] reserve the right to consider the constitutional challenges in particular cases." *Id.*

Regardless of whether Chinn agrees with its decision to apply the doctrine of *res judicata,* we must overrule this issue on its

merits. This court is bound to follow the law according to the Supreme Court. *Consolidated Rail Corp. v. Forest Cartage Co.* (1990), 68 Ohio App.3d 333, 341. The Ohio Supreme Court obviously believes, based upon its continued use of the doctrine, that the post-conviction relief statute provides adequate constitutional safeguards despite any limitations created by the use of the doctrine of *res judicata.* See e.g., *State v. Reynolds* (1997), 79 Ohio St.3d 158.

Furthermore, Chinn fails to provide more than mere conclusory allegations that the utilization of the doctrine renders the statute unconstitutional. We do not find the statute violative of Chinn's constitutional rights. Instead, we agree that "[t]he implementation of the doctrine of *res judicata* does not act to deprive litigants of constitutional rights, but rather conserves judicial resources while still permitting a defendant to have his day in court." *State v. Sklenar* (1991), 71 Ohio App.3d 444, 449.

Since Chinn has failed to present more than conclusory allegations in support of his argument, and since we find that the use of the doctrine of *res judicata* in postconviction proceedings does not render the statute unconstitutional we conclude that Chinn's argument is not well-taken.

***9** Accordingly, Chinn's Sixth Assignment of Error is overruled.

V

Chinn's Seventh Assignment of Error is as follows:

> THE CUMULATIVE ERROR OF APPELLANT'S SUBSTANTIVE CLAIMS MERITS REVERSAL OR A REMAND FOR A PROPER POST-CONVICTION PROCESS.

Chinn contends that this court must determine whether the cumulative effect of the claimed errors merit reversal of his conviction and sentence. In support, he cites *State v. Garner* (1995), 74 Ohio St.3d 49. The State contends that this assignment of error must fail because "there are no errors to accumulate."

The Ohio Supreme Court recognized the doctrine of cumulative error in *State v. DeMarco* (1987), 31 Ohio St.3d 191. "Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *Garner,* supra, at 64. The doctrine is not applicable unless there are multiple instances of harmless error. *Id.*

Chinn did not raise this issue in any of the three prior direct appeals. Therefore, we need not consider the doctrine in relation to any errors previously raised. As for the appeal presently before us, we conclude that the doctrine in not applicable. During the course of our review, we only noted two errors committed by the trial court. The first two, based upon the trial court's failure to conduct an evidentiary hearing on the issue of ineffective assistance of counsel regarding the presentation of expert testimony, are being remanded for hearing. Without benefit of a hearing, we cannot determine whether Chinn has been prejudiced. The only other error we noted, which we ruled harmless, relates to counsel's ineffectiveness for failing to present evidence of good conduct while in jail. Thus, since we found only one instance of harmless error, and we have reversed and remanded based upon the remaining errors, we cannot say that the doctrine of cumulative error is applicable. Accordingly, Chinn's Seventh Assignment of Error is overruled.

VI

Chinn's First, Second, Third and Fifth Assignments of Error having been partially sustained, the judgment of the trial court is *Reversed,* and this matter is *Remanded* for the purpose of conducting an evidentiary hearing on the issue of ineffective assistance of counsel as it relates to trial counsel's failure to present expert testimony.

BROGAN J., concurs.

GRADY, J., concurring and dissenting:

I agree that the trial court erred when it granted the State's motion for summary judgment. The operative facts in the Fulero and Everington affidavits were *dehors* the record in the prior direct appeal. Therefore, an ineffective assistance of counsel claim based on those matters is not subject to the *res judicata* bar as grounds for relief in an R.C. 2951.23 post-conviction proceeding. *State v. Cole* (1982), 2 Ohio St.3d 112. Accordingly, we are required by App.R. 12(D) to reverse and to remand for further proceedings on Chinn's petition.

***10** When a court of appeals reverses for error and remands for further proceedings, "[t]he court of appeals may or may not specify the nature of the further proceedings, and should not do so if the trial court has discretion as to the nature of the further proceedings." Whiteside, Ohio Appellate Practice (1998), Author's Note to App.R. 12(D). Our Final Entry herein merely remands "for further proceedings consistent with the opinion," as in our customary practice.

At page 8 of his opinion, Judge Fain states that "the trial court should have conducted an evidentiary hearing to determine more fully the nature of the testimony of these two witnesses (Fulero and Everington), as well as the strategical reasoning of trial counsel for not presenting this expert testimony." At page 16, Judge Fain states that "this case is being remanded for an evidentiary hearing ."

At this stage, I would not require the trial court to conduct an evidentiary hearing. The sole basis on which the trial court granted the State's motion for summary judgment was the *res judicata* bar. That decision forestalled any consideration by the court of whether the operative facts in the two affidavits demonstrate substantive grounds for relief, which is the next step required of it by R.C. 2953.21. If the trial court finds that substantive grounds for relief are not shown, which it yet has the discretion to find, the court may dismiss without a hearing per R.C. 2953.21(G). We should not mandate a hearing when the need for one has yet to be found by the trial court, which is the proper agency to find it.

More fundamentally, I am not convinced that substantive grounds for relief are demonstrated by the two affidavits. Claims of ineffective assistance of counsel which challenge a defendant's conviction must demonstrate two propositions. First, it must be shown that counsel's performance failed to satisfy prevailing professional norms in some respect. Second, it must be shown that as a result of that defect the defendant was prejudiced to such an extent that, absent the defect, the factfinder would have had a reasonable doubt respecting guilt. Further, that prejudice must be affirmatively demonstrated. *Strickland v. Washington* (1984), 466 U.S. 668.

The matters related in the Fulero and Everington affidavits are admissible pursuant to Evid.R. 702 as the testimony of an expert. The purpose for which it is thus offered is to impeach the credibility of the State's three identification witnesses by demonstrating defects in their mental capacity or perception. However, courts are generally reluctant to admit such evidence, and may exclude it per Evid.R. 403. Weissenberger's Ohio Evidence (1998) Treatise, Section 607.8.

Here, there is no showing that Chinn's trial counsel was aware of these possible avenues of impeachment. Indeed, his failure to investigate them forms the basis of Chinn's ineffective assistance of counsel claim. Nevertheless, in view of the general reluctance of the courts to admit such evidence, it is difficult to conclude that counsel's failure to investigate the possibility of developing it failed to satisfy some prevailing professional norm.

***11** With respect to the prejudice prong, the two affidavits fail to make the affirmative showing of prejudice that Strickland requires. The doubts that the expert's opinions could cast on the credibility of the State's witnesses would surely undermine the value of their testimony, but not so conclusively as to support a finding that the jury would then have had a reasonable doubt respecting Chinn's guilt. A more particular showing is required for that.

While Marvin Washington's mental defects *were* particular to him (he is now dead), the defects in perception that Chinn would hope to show with respect to the testimony of all three witnesses could probably apply to any witness who testifies about what he or she saw. We should not open the door to collateral attacks on convictions through post-conviction relief claims which assert that counsel should have investigated the possibility of offering such evidence, absent some more particularized showing that prejudice resulted.

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.

STATE of Ohio, Plaintiff-Appellee,
v.
Davel V. CHINN, Defendant-Appellant.

No. 11835.
|
Dec. 27, 1991.

Attorneys and Law Firms

Lee C. Falke, Prosecuting Attorney, Carley J. Ingram, Asst. Prosecuting Attorney, Appellate Division, Montgomery Prosecutor's Office, Dayton, for plaintiff-appellee.

Randall M. Dana, Public Defender, Kathleen A. McGarry, Linda E. Prucha, Cynthia A. Yost, Ohio Public Defender Commission, Columbus, for defendant-appellant.

Opinion

GRADY, Judge.

***1** Defendant Davel V. Chinn was convicted of Aggravated Murder, in violation of R.C. 2903.01(B), for purposely causing the death of Brian Jones in the course of a kidnapping and robbery. Chinn was sentenced to death, pursuant to R.C. 2929.02, *et seq.* He now appeals his conviction and sentence, asserting twenty-seven assignments of error. We shall overrule all but two assignments of error.

Assignment of Error IX is sustained because the trial judge in performing his independent review for purposes of sentencing pursuant to R.C. 2929.03(D)(3) erred; (1) by failing to state his findings specifically as required by R.C. 2929.03(F), (2) by failing to consider relevant mitigating factors, (3) by failing to merge aggravating circumstances, and (4) by weighing both culpability factors of R.C. 2929.04(A)(7), "principal offender" and "prior calculation and design", contrary to the rule of *State v. Penix* (1987), 32 Ohio St.3d 369. Chinn's sentence of death will be vacated and the case remanded to the trial court for its reconsideration and proper imposition of sentence, which may include a sentence of death or sentences of life imprisonment with parole eligibility as provided by statute.

Assignment of Error XVII is sustained because the trial court imposed more than one sentence of actual incarceration for multiple gun specifications arising from the same transaction, contrary to R.C. 2929.71(B). Two of the three sentences imposed will be vacated.

FACTS

The State's key witness was Marvin Washington, a juvenile who claimed to have helped Chinn rob and murder Jones. Chinn denied participating in the crime, claimed not to know Washington, and asserted an alibi defense.

Washington testified that on the evening of January 30, 1989, he rode a bus to downtown Dayton, arriving there at some time between 7:00 and 8:00 P.M. Soon after, Washington met a man whom he knew only as "Tony". Washington had first made "Tony's" acquaintance at a party one year prior, but had not seen him since.

Washington testified that he remained with "Tony" throughout the evening. The two eventually entered an adult book store on Ludlow Street between 10:00 and 11:00 P.M. Jack Couch, a clerk in the bookstore, testified that he ordered Washington from the store because he was underage. Couch was unable to identify the man who accompanied Washington.

Another witness, Gary Welborn, testified that he and the victim, Jones, each drove in their cars to the parking lot behind the same adult bookstore that night, arriving at approximately 10:00 P.M. Welborn testified that he and Jones had parked their cars and were talking when they were approached, at about 11:00 P.M., by two men, whom they did not know. At trial, Welborn identified Washington as one of these men but was unable to identify the other. Welborn testified that the two men pulled guns from their pockets and demanded that he and Jones give them their wallets. After they did so,

Washington entered Jones' car. As the other man attempted to enter Welborn's car, Welborn drove away.

***2** Washington corroborated Welborn's story, and testified that the man whom Welborn was unable to identify was "Tony". According to Washington, after Welborn escaped "Tony" entered the rear passenger area of Jones' car and held a gun to Jones' head while Washington drove the car to a secluded point in Jefferson Township, fifteen minutes from downtown.

Stacy Ann Dyer, a resident of Jefferson Township, was in her driveway at 11:30 P.M. when she saw a car pull to the side of the road. Dyer testified that she saw two men get out of the car, but was unable to identify either. Dyer then heard a gunshot followed by a scream, and saw one of the two men run a few steps before falling to the ground. The other man then got back into the car and sped away. The injured man was Jones, who died of his gunshot wound.

Washington corroborated Dyer's story, and testified that it was "Tony" who removed Jones from the car and shot him. Washington testified that "Tony" told him that he shot Jones to prevent their being identified to the police and as punishment for having too little money.

At trial, Washington identified Appellant Chinn as "Tony", the killer of Jones. Approximately one month after the killing, and after his own arrest, Washington had been shown a line-up of men, which included Chinn. Washington first stated that the killer was not in the line-up. However, once out of the room Washington identified Chinn from the line-up as the killer. He told officers that he intentionally failed to identify Chinn out of fear.

The coroner testified that Jones was killed by a single shot to the left arm. The gun had been fired at point blank range, causing the bullet to pass completely through the arm, pierce the torso, and come to rest in Jones' heart.

Washington testified that after the shooting he and Tony drove to the house of his friend, Christopher Ward.

Ward testified that Washington arrived at his house at midnight with another man whom Ward did not know. Ward originally told police that he did not get a good look at the man with Washington, but later identified him as Appellant Chinn. Washington stated according to Ward that he and "Tony" had killed someone in Jefferson Township.

While Ward was under investigation for an unrelated homicide he informed the police of Washington's role in Jones' murder. After he was arrested, Washington made a confession and helped to prepare a composite drawing of "Tony", which was disseminated in the local news media.

Although Chinn maintains that he matches neither the description nor the composite drawing of "Tony", Shirley Cox was able to identify him to the police by these means as a man who entered the law office where she worked. She testified at trial to that identification, which led to Chinn's arrest.

Chinn denied any involvement in Jones' murder. Although he did not testify in his own behalf, Chinn presented an alibi defense.

Chinn presented evidence that he was enrolled at Cambridge Technical Institute and that he took a mid-term examination that was scheduled for from 5:30 P.M. and 7:15 P.M., the night of Jones' murder. School records indicated that Chinn did take this test but did not indicate at what time Chinn completed the examination.

***3** Cassandra Taste, a classmate of Chinn, testified that she met Chinn after the examination at a bus stop in front of the Arcade Building in downtown Dayton. According to Taste, she and Chinn caught the same bus and sat together and talked on the ride home. Regional Transit Authority records indicate that a bus departed from the Arcade Building stop at 7:40 P.M. on that route.

Anna Lee, Chinn's mother, testified that Chinn arrived home at 9:30 P.M., where he remained until 11:15 P.M. when she went to bed. According to Lee, as she was going to sleep she could still hear Chinn talking to his brother, and as far as she knew he did not leave her house after that.

Chinn was tried by a jury and found guilty of aggravated murder, kidnapping, abduction, and three counts of aggravated robbery. Each count carried specifications for a prior felony conviction and use of a firearm, which the jury also found. Chinn was sentenced to terms of imprisonment of seven to ten years for abduction, consecutive to fourteen to twenty-five years for kidnapping, and fifteen to twenty-

five years for each count of aggravated robbery to be served concurrently with each other but consecutive to the other counts. Additionally, Chinn received three three-year terms of actual incarceration on the firearm specifications. As to the aggravated murder, the jury recommended the death penalty. The recommendation was followed by the trial court, which imposed the death penalty.

I

VOIR DIRE

As his first assignment of error Chinn asserts that

THE TRIAL COURT'S FAILURE TO GRANT THE DEFENSE MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE AND THE LIMITATIONS PLACED BY THE TRIAL COURT ON DEFENSE COUNSEL'S QUESTIONING OF PROSPECTIVE JURORS CONSTITUTES AN ABUSE OF DISCRETION WHICH VIOLATED APPELLANT'S RIGHTS TO AN IMPARTIAL JURY, FAIR TRIAL, AND DUE PROCESS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

On August 7, 1989, Chinn moved the trial court to allow the parties to conduct an individual sequestered voir dire of jurors. Docket 38. This motion was denied on August 15, 1989. Docket 46.

In support of his contention that this decision denied him due process, Chinn directs our attention to the Kentucky Supreme Court's holding in *Morris v. Commonwealth* (1989), 766 S.W.2d 58, 59. We note that the facts of this case are distinguished from *Morris* in that the Kentucky Supreme Court found that the unusual procedure was required solely because of the extensive pre-trial publicity in that case.

Regardless of the state of the law in Kentucky, it is well settled in Ohio that even a defendant who faces the possibility of capital punishment does not have a constitutional right to an individual sequestered voir dire. *State v. Mapes* (1985), 19 Ohio St.3d 108, Syllabus 3, certiorari denied (1986), 476 U.S. 1178.

The conduct of voir dire is left to the broad discretion of the trial court, and decisions relating to these matters cannot be reversed without the trial court's having abused its discretion. *Mapes, supra,* 114-115. A trial court commits abuse of discretion only if it acts unreasonably, arbitrarily, or unconscionably. *State v. Adams* (1980), 62 Ohio St.2d 151. Chinn argues that the trial court did so in two instances.

***4** At the beginning of the voir dire the trial court instructed the parties to examine veniremen in groups of six. Mid-way through the voir dire, in an effort to speed up the proceedings, the trial court increased the number of veniremen examined together to eight. Chinn contends that this procedure was arbitrary and unreasonable. We disagree. Given the fact that Chinn had no constitutional right to an individual sequestered voir dire, there is nothing inherently unreasonable in examining small groups of veniremen together. We also do not find the increase in the size of these groups from six to eight to have been arbitrary. A desire to conserve time and judicial resources is a reasonable basis for questioning jurors *en masse*. *State v. Brown* (1988), 38 Ohio St.3d 305, 309, certiorari denied (1989), 489 U.S. 1040, 109 S.Ct. 1177.

Chinn also argues that the trial court abused its discretion by "limiting" his counsel's, Mr. Monta's questions. Illustrative of these "limitations" is the following:

Mr. Monta: And you would have to determine whether that outweighs the aggravating first of all, could you listen openly to those mitigating facts?

Juror: I could.

The Court: In order to conserve time, the same question these people are in that same position. Why don't you go down and ask the others or we'll be going through the same litany for each of the remaining Jurors. These other three are in the same position of that phase, so you might inquire.

Mr. Monta: Okay. We'll get to the phase.

The Court: Well, inquire of each of the other three as to the same question.

The Court: Mr. Meredith, I have a question. Could you do the same? Could you vote for a life sentence?

Juror: Yes, I could.

Mr. Monta: Your Honor-

The Court: And Ms. Tangeman, could you, under those circumstances, vote for a life sentence?

Juror: I don't think so because I kind of believe in that eye for an eye, tooth for a tooth theory.

The Court: Victoria Shanks, could you, under those circumstances, vote for a life sentence?

Juror: I could but I could vote either way.

The Court: In that way we can move along without the _____

Mr. Monta: Your Honor _____

The Court: _____ extreme boredom of the complete presentation of every question to each individual. Proceed with that effort * * *. There is a more efficient way of getting answers rather than to tedium now involved.

(Voir Dire T. 157-160). The record indicates that the trial court was only "limiting" Chinn's examination in that it required certain questions to be asked of the entire venire rather than of veniremen individually. We have held that such instructions to counsel do not constitute an abuse of discretion. *State v. Hinders* (Oct. 30, 1989), Montgomery App. No. 10750, unreported.

Chinn's first assignment of error will be overruled.

II

PROSECUTORIAL MISCONDUCT

Chinn asserts, as his second assignment of error, that

THE PROSECUTOR'S MISCONDUCT THROUGHOUT APPELLANT CHINN'S CAPITAL TRIAL DENIED APPELLANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

***5** While we agree that the prosecutor did commit misconduct on three occasions, we find these errors to be harmless.

Analysis of prosecutorial misconduct claims require a two-step finding; (1) that the prosecutor's remarks were improper, and (2) that the remarks prejudiced substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. However, in making this analysis a reviewing court must look toward the "Fairness of the trial, not the culpability of the prosecutor." *State v. Landrum* (1990), 53 Ohio St.3d 107, 112, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219. Error will be harmless if it is clear beyond a reasonable doubt that even absent the offending comments the defendant would still have been found guilty. *State v. Smith, supra.*

As has Chinn, we will divide his trial into four sections and apply this analysis to the error alleged in each stage.

A.

VOIR DIRE

The prosecutor committed the following alleged misconduct during the voir dire: (1) said one aggravating circumstance was enough to recommend capital punishment and that three applied to Chinn. (T. 31, 37, 229, 377); (2) "implied" that abduction was an aggravating circumstance (T. 144); (3) asked several veniremen if they could sentence "this defendant" to death (T. 87, 88, 136, 139, 142, 143, 149, 234, 241, 259, 265, 380); and (4) used a preemptory challenge to exclude venireman Charlotte Dalton from the jury. However, except for the instance discussed below, Chinn failed to object to any of these matters. Therefore, assuming *arguendo* that any of these statements constituted misconduct, the error was waived. *State v. Broom* (1988), 40 Ohio St.3d 277; *State v. Awan* (1986), 22 Ohio St.3d 120. Nor do we find any of the above to constitute plain error, because we cannot find that "but for the error the outcome of the trial would clearly have

been otherwise." *State v. Wickline* (1990), 50 Ohio St.3d 114, 120.

Chinn did make the following objection during the voir dire examination by Prosecutor Heck:

Mr. Heck: If the Judge tells you: Look, you've got-I'm paraphrasing a lot of this and trying to see, and says: -Look, Jurors, these are the rules; this is the law; these are the things you must consider. Would you consider them, or are you going to say: I don't care what the law is; he killed somebody; we found him guilty; he could see death penalty. Or, will you consider and follow the law?

Juror: I don't know. I really don't know. I think I can do that.

Mr. Heck: Tell me your problem.

Juror: Well, because I think I would be just like you said. That, if I thought he had killed someone, I would think that he'd deserve the death penalty.

Mr. Heck: Well, we meet our burden. That's okay. My question: Do you understand the death penalty is not the sentence for everybody who commits a homicide?

Juror: Yeah.

Mr. Heck: A killing.

Mr. Monta: Your Honor, I'm going to object. We're not here to talk about other kinds. We're here to talk about this one, and this presumption or assumption is a given in this discussion with the Jurors. This particular thing, it's available in this case. Life is available in two stages, and the question ought to be contained to that and not other crimes.

***6** The Court: Overruled.

(T. 144). The remarks by the prosecutor were not improper. Clearly, the prosecutor was merely trying to discover whether this venireman would be able to follow the law as a juror.

B.

DISCOVERY

We will defer ruling on the prosecutor's alleged discovery violations until our analysis of the Eleventh and Twelfth Assignments of error, *infra.*

C.

GUILT PHASE

Chinn argues that the following acts of the prosecutor during the guilt phase of the trial constitute reversible error: (1) that he vouched for police (T. 573); (2) stated that Washington and Ward are telling the truth (T. 578); (3) attributed Washington's rationale for misidentifying Chinn at the lineup to Det. Lantz rather than Washington himself; and (4) said that "victims have rights, too" (T. 583). Chinn's failure to object to any of these statements waived objection, and we see no plain error. *Broom* and *Awan, supra.*

Chinn did object to the following statements by the prosecutor during closing argument.

Mr. Heck: "... Then you're also going to hear about involuntary manslaughter. I'm not going to get into it because in order for you to find involuntary manslaughter, you must find it was not a purposeful killing. I think that's absolutely ridiculous but that's the next thing. Well, if you find that he was there, and if you find the ID was fine, which it was, well then just say, "I didn't really mean to kill him. I really didn't mean to. I meant to hurt him a little bit."

Mr. Monta: I object, your Honor. This wasn't argued.

The Court: Overruled, because the Court is going to give that instruction.

Mr. Monta: I'm objecting to this comment, not the instructions.

Mr. Heck: Well, *they asked for it,* your Honor.

Mr. Monta: I object to that, your Honor.

The Court: Overruled.

(T. 580-581) (Emphasis added.)

Chinn's first objection was without merit. In presenting its argument the State may go beyond the scope of a defendant's closing argument. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24-25. Therefore, because the involuntary manslaughter instruction was to be given by the court the State was not required to wait until Chinn mentioned it before discussing it.

The prosecutor's comment that "they asked for it", however, is far more objectionable. No instruction should be identified with a particular party. *Columbus v. Bee* (1979), 67 Ohio App.2d 65, 80. Therefore, it was clearly improper to inform the jury that Chinn had requested the lesser included offense instruction. However, the error was harmless since we find that Chinn would yet have been found guilty absent the prosecutor's comment. *Smith, supra.*

The prosecutor also commented to the jury on the fact that Chinn's brother, who was named on a witness list, did not testify to substantiate the alibi defense offered through Chinn's mother.

Do I think she's a liar? I'm not going to say that. I think she did what any mother we would expect to do, but it's incredible. You don't sit there when your son's charged, and she knew about it. She read it in the paper. So, she told you two days later and sit there and do nothing and come into the trial and say, "he's at home with his brother all night. I heard them." You must test that. You must test if you believe that. And the other things I want you to ask. Where is Darryl, if he's at home with his brother.

***7** MR. MONTA: I object, Rule 16 before any comment on the Witness list.

THE COURT: Overruled.

MR. HECK: He was at home, they said, with his brother, but his brother didn't say that. Only mother says that. You can believe every Defendant's witness with the exception of his mother, and still find the Defendant very clearly guilty, beyond any doubt whatsoever.

(T. 576-577).

Crim.R. 16(C)(3) provides that "the fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial." The Supreme Court has interpreted this to mean that once a person's name is placed upon a witness list there is an absolute bar upon mentioning his absence at trial. *State v. Hannah* (1978), 54 Ohio St.2d 84, 90.

The State argues that this is not the law in Ohio because the rule did not appear in the syllabus of *Hannah.* However, the Supreme Court specifically found in *Hannah* that an almost identical statement by a prosecutor constituted error. Also, our sister courts have decided that the prohibition in *Hannah* is the law of this State. *State v. Ingle* (Apr. 20, 1989), Cuyahoga App. No. 54483, unreported; *State v. Smith* (May 12, 1988), Franklin App. No. 87AP300, unreported; *State v. Carter* (Dec. 27, 1985), Columbiana App. No. 84C55, unreported; *State v. Harris* (May 11, 1984), Lucas App. No. L-83-223, unreported; *State v. Yoho* (June 17, 1981), Stark App. No. 5578, unreported; *State v. Harris* (Dec. 29, 1978), Summit App. No. 8979, unreported. Several of these courts, including our own, have questioned the wisdom of this interpretation of Crim R. 16(C)(3). *See, State v. Walton* (May 11, 1987), Clark App. No. 2242, unreported; *State v. Brooks* (June 4, 1987), Montgomery App. No. 9190, unreported. See, also, the dissent per McCormac, J., in *State v. Hannah, supra,* at 91.

We continue to hold to the view that the better interpretation is that the State is prohibited from mentioning the absence of a witness *in conjunction with* the fact that he was named on a witness list. However, this element, though apparently contained in the rule itself, is not required by *Hannah.* Courts have found no *Hannah* violation in previous cases because there was no evidence that the witness in question was actually named on a witness list. *See,* e.g., *Walton, Ingle,* and case cited therewith *supra.*

In this case Chinn's brother was named on a witness list. Therefore, the court should have ordered the comment of the prosecutor stricken. It was error to fail to do so. However, because we find that Chinn would yet have been found guilty even absent this comment, the error was harmless.

D.

PENALTY PHASE

Appellant contends that the prosecutor committed the following alleged misconduct during the sentencing phase of the trial: (1) "inferred" that aggravating circumstances included abduction, gun specifications, felony murder, and a motive to punish Jones for not having enough money (T. 715); (2) said there were no mitigating factors (T. 716, 717, 724, 725); (3) said "if this is how [Chinn] celebrates a midterm, I'd hate to see him pass the class" (T. 717); (4) said "Don't reward him for not being more brutal" (T. 725); (5) said Chinn was not an underprivileged or disadvantaged youth (T. 721); (6) said one aggravating circumstance was enough to recommend capital punishment, and three applied to Chinn (T. 726); (7) told jurors that *they* would not be killing Chinn (T. 723); (8) asked for "justice for victims" (T. 718, 728)' (9) said "criminals deserve death for what they've done to us" (T. 729); (10) told jurors that Chinn would appeal if they sentenced him to death (T. 723); (11) said Chinn committed heinous act which "deserve the death penalty" (T. 729).

***8** Chinn failed to object to any of the foregoing statements. His failure waives objection any error. We may not reverse absent "plain error", i.e., error but for which the outcome of the trial *clearly* would have been otherwise. *State v. Wickline, supra.*

We have carefully reviewed the matters alleged. In some instances the prosecutor's statement does not bear the interpretation given it by Appellant. In others, the prosecutor was simply presenting a vigorous argument that the evidence mitigating against the death penalty does not convince him and should not convince the jurors. Others were harmless, albeit florid. Other than the single comment next discussed, we see no error.

The prosecutor stated (at T. 728-729):

Brian Jones had a right to live. He is not a celebrity to us; he was no one special. To his parents, to his family, he is; but, he had a right to live, to breath, to laugh, to cry. He had a right to experience life, and he was denied that without anyone coming to his defense. There was no mitigation at all about robbing and killing and kidnapping, completely compliant victims like in this case, and I wonder sometimes if we hear so much about how people commit crimes that we just sort of put ourselves away from them. I wonder if we become so morally ambivalent and so guilt ridden that we simply cannot punish anyone anymore to the extent of putting them to death. I suggest to you that justice requires that criminals get what they deserve, and that criminals deserve death on (sic) what they've done to us.

The foregoing comment was improper. The prosecutor called on the jury to recommend the death penalty, not only for the crime committed by Chinn but also to show that they were not "morally ambivalent and guilt ridden" and because "criminals deserve death on what they've done (to) us". The first comment challenges the jury to act boldly. The second invites an act of retribution against all criminals as a class, to be achieved by sentencing Chinn to death. Together, they distort the focus of the jury, which is to determine whether this defendant should be punished by death for what he did to his victim.

Chinn's counsel did not object to the argument. Therefore, to hold that the error is reversible we must conclude that but for the error the outcome of the trial *clearly* would have been otherwise. *State v. Wickline, supra.* We cannot reach that conclusion. The comments were singular and were not error which was repeated throughout the proceeding. The jury was carefully instructed and we cannot presume that the prosecutor's comments caused the jurors to disregard their charge. Egregious as they were, the comments were not so prejudicial that we can find that the outcome of the penalty phase *clearly* would have been otherwise but for those matters.

Chinn did object when the prosecutor said; "Sympathy is not a mitigating fact. One's plea or his family's plea for mercy are not mitigating facts." (T. 724-725). In our discussion of the third assignment of error, *infra,* we hold that "mercy" is not a mitigating factor. Therefore, we hold that the prosecutor's comment was not improper.

***9** Chinn also objected to the following statements made during the prosecutor's closing argument in the penalty phase:

I also want to say, and you've heard now from during the penalty phase, from this Defendant in an unsworn statement,

unlike every other single witness who testified in this trial, the Defendant has now taken the stand. We're not permitted to ask him any question or to cross-examine him.

Mr. Monta: I would object.

The Court: Overruled.

(T. 726). This was error. While the State is allowed to remind the jury that the defendant's statement was unsworn, it must stop there. *State v. DePew* (1988), 38 Ohio St.3d 275, certiorari denied (1989), 109 S.Ct. 1099. In particular, the State must *never* inform the jury that the unsworn nature of the statement prevented cross examination. *State v. Broom* (1988), 40 Ohio St.3d 277. Therefore, the statement and the court's ruling creates error.

However, statements which violate the rule of *DePew* are harmless error if, in light of the entire case, it appears that the defendant received a fair trial. *State v. Durr* (1991), 58 Ohio St.3d 86, 95. The right to a fair trial includes the right to be tried by a fair and impartial judge and jury, the right to contest the charges and evidence, and the right to not be found guilty but upon proof beyond a reasonable doubt. While the comment of the prosecutor transgressed Chinn's statutory right to speak without crossexamination, we are not able to say that it deprived Chinn of a fair trial.

Therefore, the second assignment of error will be overruled.

III

JURY INSTRUCTIONS

In his third assignment of error Chinn contends that:

THE TRIAL COURT ERRED DURING APPELLANT CHINN'S CAPITAL TRIAL BY EITHER FAILING TO INSTRUCT THE JURY ON IMPORTANT ISSUES OR BY ERRONEOUSLY INSTRUCTING THE JURY.

A.

GUILT PHASE

Chinn argues that the jury should have been instructed that it must unanimously find that Chinn was the principal offender or killed Jones with prior calculation and design, and have been given the specific intent instruction found in 4 O.J.I. 503.01(B). However, Chinn did not request that either of these instructions be given. Therefore, Chinn cannot claim that it was error not to give an instruction that he did not request. *State v. Tyler* (1990), 50 Ohio St.3d 24, 36. Crim R. 30(A).

Chinn also contends that the trial court erred in the following ways in its instructions: (1) commenting that the abduction instruction was "easiest" (T. 593); (2) giving an aider and abettor instruction; (3) telling the jury that it would not determine punishment (T. 617); (4) failing to make a distinction between the robbery counts; (5) using verdict forms that did not adequately describe aggravated murder; and, (6) telling the jury that "it may not inquire about witnesses' testimony" (T. 617-618). However, Chinn did not object to any of these alleged errors. The failure to object constitutes waiver of any claim of error, unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Underwood* (1883), 3 Ohio St.3d 12. The error, if any, is not of that quality.

***10** Chinn requested an instruction on felonious assault as a lesser included offense. However, it is well-settled that while involuntary manslaughter is a lesser included offense of aggravated murder, felonious assault is not. *State v. Scott* (1980), 61 Ohio St.2d 155. Therefore, the trial court properly refused to give the requested instruction.

The trial court also denied Chinn's request that the jury be given the eyewitness testimony instruction taken from *U.S. v. Telfaire* (C.A.D.C, 1972), 469 F.2d 552. While Ohio has adopted the *Telfaire* instruction, it is left to the sound discretion of the trial court whether to give it. *State v. Guster* (1981), 66 Ohio St.2d 266. We find no abuse of that discretion in this case. The *Telfaire* instruction warns jurors of the potential inaccuracies of eyewitness testimony when the witness only had a brief glance at the perpetrator. The State's only eyewitness in this case, Washington, allegedly knew Chinn and spent hours with him on the evening of the crime. Therefore, the *Telfaire* instruction was not warranted.

B.

PENALTY PHASE

The trial court refused to instruct the jury on residual doubt. However, it is well-settled that so long as the jury is not instructed that it *cannot consider* residual doubt, it is not error to fail to instruct the jurors that they *can* consider it. *State v. Roe* (1989), 42 Ohio St.3d 18, 20. Because the jury was not precluded from considering residual doubt, there is no error.

Chinn presents several, related arguments concerning the court's instructions on the criteria for imposing death or imprisonment, as provided in R.C. 2929.04. In that regard the court instructed the jury concerning the alternative sentences available for its recommendation, and the added:

You will consider all the evidence, the arguments, the statement of the Defendant, and all other information and reports which are relevant to the nature and circumstances of the aggravating circumstances. *Among the circumstances that are listed in the statute and there are eight references have been made and you have found these aggravating circumstances. One is that if the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender. Another of those aggravating circumstances is if the offense was committed while the offender was committing, or attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping. Then they list a number of others:* Kidnapping and rape; aggravated arson; aggravated robbery; or aggravated burglary; and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design. You will consider all the evidence, the arguments, the statement of the Defendant, and all of the information and reports that are relevant to the nature and circumstances of the mitigating facts, and *the mitigating facts include but are not limited to the nature and circumstances of the offense, and the history, character, and background of the Defendant; and you may consider, I guess, should consider any facts that are relevant to the issue of whether the Defendant should be sentenced to death.* The prosecutor has the burden to prove beyond a reasonable doubt that the aggravating circumstances of which the Defendant was found guilty outweighs the facts in mitigation of imposing the death sentence.

***11** Reasonable doubt is present when, after you have carefully considered and compared all the evidence that is involved here in the aggravating circumstances and the mitigating facts, you cannot say are firmly convinced that the aggravating circumstances outweigh the facts in mitigation of the imposition of the sentence of death. You shall recommend the sentence of death if you unanimously, that's all twelve, find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating facts. If you do not so, find, you shall unanimously, all twelve, recommend either life sentence with parole eligibility after serving 20 years in imprisonment, or life sentence with parole eligibility after serving 30 years of imprisonment.

(T. 730-732; Emphasis supplied).

During the course of its deliberations the jury sent the following request to the court by written note:

Judge: We would like a summary of the *elements* that make up the mitigating and aggravating (sic) circumstances/factors.

The court responded, in writing:

The aggravating circumstances are those that you have found in previous specifications and the mitigating factors are those which are relevant to the issue of whether the defendant should be sentenced to death, and they include, but are not limited to, the nature and circumstances of the offense and the history, character and background of the defendant.

Defense counsel made no objection to this response, but, apparently, was unaware of the jury's question or the court's response. (See Assignment Fourteen, *infra*).

Chinn requested an instruction that mercy is a mitigating "factor". The court denied the request. R.C. 2929.04(B) permits the jury to consider certain specific factors in mitigation of the aggravating circumstances proved, including "(7) any other factors that are relevant to the issue of whether the offender should be sentenced to death." Such matters are general, but as "factors" in mitigation they must have some relevance to the accused or his crime. "Mercy"

is not such a factor but, rather, an attitude of compassion or forbearance shown to an offender. The attitude may result from the weight of mitigating factors, but it is not one of them. At most, it is a frame of mind that the jury may bring to the issue and for which counsel may plead, and has a duty to plead, in his arguments to the jury. See, *Caldwell v. Mississippi* (1985), 472 U.S. 320. *State v. Rogers* (1986), 28 Ohio St.3d 427. The court did not err in refusing to give the instruction requested.

Chinn also argues that the court erred in three ways in identifying the aggravating circumstances to be considered by the jury.

First, he argues that by stating that "eight references" or circumstances are listed in the statute while the jury had found but three, the jury was misled. However, the court specifically identified two of the three found, and its comment does not suggest the jury found more.

***12** Second, he argues that by summarizing other, inapplicable, aggravating circumstances the court suggested they were found. Though this was unnecessary, we do not believe the recitation could cause the jury to believe that those "other" circumstances, such as rape or arson, which the court distinguished from those found, had any application. They were clearly surplusage.

Third, Chinn argues that when the court in its written response stated that the "aggravating circumstances are those you have found in previous specifications", it necessarily included for the jury's consideration other "specifications" found in the guilt phase, which included commission of a prior offense and use of a deadly weapon, neither of which are aggravating circumstances identified in R.C. 2929.04. However, a review of the record shows that neither the deadly weapon nor the prior offense issues had been identified to the jury as a "specification". The verdict forms concerning them simply treated them as issues of fact to be determined. Therefore, the court's comment did not direct the jury's attention to those other matters by its use of the term "specification", which had been used to identify the aggravating circumstances on the verdict forms on which the jury entered its findings. We see no error.

Appellant's third assignment of error is overruled.

IV

BILL OF PARTICULARS

Chinn asserts as his fourth assignment of error that

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT CHINN BY FAILING TO GRANT THE MOTION FOR BILL OF PARTICULARS.

On August 1, 1989, Chinn moved for a bill of particulars. This motion was denied on August 15, 1989.

The purpose of a bill of particulars is to specify what alleged conduct of the defendant is the basis of the charge, not to give the defendant evidence or to serve as a substitute for discovery. *State v. Sellards* (1985), 17 Ohio St.3d 169.

We agree with the State that the indictment makes it sufficiently clear that Chinn was being charged with the robbery and murder of Jones on January 30, 1989. We also note that the record indicates that Chinn was in possession of police reports and witness statements regarding the alleged crimes. (T. 144, 148, 174; Appellant's Merit Brief, Assignment of Error XX). Since Chinn actually had all of the particulars to the offense possessed by the State, his defense was not prejudiced by denial of his motion for a bill of particulars.

This matter is readily distinguished from *State v. Lawrinson* (1990), 49 Ohio St.3d 238, on which Appellant relies. In *Lawrinson* the indictment charged an offense that occurred at some unspecified time and date between January 1, 1985 and January 31, 1985. The state represented that it had no more specific date or dates, though in fact it did. The accused did not have access to police reports that provided the information. Here, the single date of the offense was specified in the Indictment and both parties had the same information from police reports concerning the time and circumstances of the offense. We see no violation under the rule of *Lawrinson.*

***13** The fourth assignment of error will be overruled.

V

MERGER OF AGGRAVATING CIRCUMSTANCES

For his fifth assignment of error Chinn asserts that

THE SENTENCER'S CONSIDERATION OF DUPLICATIVE AGGRAVATING CIRCUMSTANCES TIPPED THE WEIGHING PROCESS AGAINST APPELLANT CHINN, DESTROYED THE RELIABILITY OF THE SENTENCING PROCESS AND RESULTED IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH SENTENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

The jury returned verdicts in the guilt phase finding Chinn guilty beyond a reasonable doubt of three "aggravating circumstances" under R.C. 2929.04(A), which were alleged as "specifications" to the charge of Aggravated Murder in Count I. Those were; first, that the murder was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense (A)(3); second, that the murder was committed while committing an aggravated robbery (A)(7); and, third, that the murder was committed while committing a kidnapping (A)(7). Appellant argues that under the rule of *State v. Jenkins* (1984), 15 Ohio St.3d 164, these aggravating circumstances should have been merged because they arise from the same act or indivisible course of conduct and are duplicative.

State v. Logan (1979), 60 Ohio St.2d 126, holds that a defendant may not be convicted of kidnapping and another offense of the same or similar kind when the restraint or movement of the victim is merely incidental to the other crime and does not have a significance independent of it. *Jenkins,* which involved a shooting during a bank robbery, found that the movement of persons in and around the bank was only incidental to the separate crime of committing a murder in the course of a bank robbery. *Jenkins* relied on *Logan* in reaching its result.

It may be that the trial court performed an unannounced merger of two of the specifications. Its charge, quoted at pp. 23-25, *supra,* charges only the first specification, murder to escape apprehension, etc., and third specification, murder while committing kidnapping. Therefore, our analysis is limited to the need of merging only those.

The kidnapping and the movement of the victim from downtown Dayton to a location on Germantown Pike had but two possible purposes; to remove Jones from the scene of the robbery or to remove Jones to where he could be killed, or both. In either or both cases the movement in the kidnapping was only incidental to, and not separate from those *purposes,* which are charged in the first specification. Therefore, the specifications charged should have been merged under the rules of *Logan* and *Jenkins* and the court erred in failing to do so.

Our review of the record reveals that Chinn failed to object to the instruction. Therefore, he waives the error on appeal unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Underwood, supra.* We cannot find that but for the error the outcome of the trial court would clearly have been otherwise.

***14** The fifth assignment of error will be overruled.

VI

COX'S TESTIMONY

As his sixth assignment of error, Chinn asserts that

THE TRIAL COURT ERRED IN ALLOWING THE IRRELEVANT AND PREJUDICIAL TESTIMONY OF STATE'S WITNESS SHIRLEY COX.

In cross-examination of Marvin Washington, counsel for Chinn attempted to discredit Washington by showing that he had first failed to identify Chinn in a line-up, then had changed his story and identified Chinn. Counsel also presented Washington a copy of a composite drawing of a likeness of the killer (Defendants Exhibit "L"), composed from Washington's description. Washington testified that he assisted a police detective in preparing the drawing. However, it was *not* put to Washington that the composite drawing was

unreliable, and the court refused the request of counsel for Appellant to show the composite likeness to the jury.

After excusing Washington the State called Shirley Cox. The witness was permitted, over Appellant's objection, to testify that on Thursday, February 23, 1990, the day after the composite drawing of the killer was published in a local newspaper, two men appeared at her husband's law office in Dayton, where she is employed as a receptionist. She was next asked:

Q. I'm going to ask you not to relate any conversations but, if you would, during the conversations did one of the men indicate his name to you?

A. Yes. The person kept saying his name was Tony and he wanted to see my husband.

Q. Did he ever indicate his last name?

A. Yes. After I told him I would not let him see, he said his name was Chinn and he needed to see him. Tony Chinn.

(T. 377). Mrs. Cox was then asked if she saw the man in the courtroom. She identified Appellant.

Mrs. Cox next testified that on the evening of her meeting she saw the composite picture of the killer in the newspaper article concerning the crime, which stated that the man was known as "Tony". She testified that she recognized the likeness to be that of the man who had appeared at the law office, identified himself as "Tony Chinn", and asked to speak with her husband. She contacted police and gave them the information and that the man had identified himself as "Tony Chinn". This, apparently, led to Appellant's arrest.

Appellant's objections, which were made prior to the testimony of Mrs. Cox, were that her testimony impinged on the attorney-client privilege and that the probative value of her testimony was outweighed by the substantial danger of unfair prejudice it created. The State insisted that the testimony was relevant to the matter of the composite drawing, which had been raised by Appellant, and was offered to show that the identification factors presented by Washington and used to prepare the composite had been demonstrated to be reliable by Mrs. Cox's recognition of Chinn, thus rehabilitating Washington.

The court overruled the objections and permitted the testimony. However, the court excluded evidence of other statements made by Appellant to Mrs. Cox and prohibited the State from arguing that his acts indicated guilt. Appellant did not request a limiting instruction concerning the relevance of the testimony.

***15** Appellant again argues that Mrs. Cox's testimony should have been excluded under Evid.R. 403(A), which provides:

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

The prejudice contemplated by the rule is not merely the disadvantage or detriment resulting from any adverse evidence. Rather, the extent and degree of prejudice must be "unfair"; that is, it must seriously jeopardize the fundamental fairness of the proceeding and the reliability of the jury's verdict. In weighing alleged error in this regard appellate courts "should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct. *Prudential Ins. Co. of America v. Hashman* (1982), 7 Ohio App.3d 55, 58, quoting *Fairmont Glass Works v. Cub Fork Coal Co.* (1933), 287 U.S. 474, 475.

Evid.R. 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The evidence presented through the testimony of Mrs. Cox was relevant to show (1) that the composite drawing was a good likeness of Chinn and (2) that Chinn possessed a "guilty mind" concerning the crime with which the drawing was connected because he attempted to consult with an attorney after the drawing was published.

Evidence has "probative" value to the extent that it has the effect of proof. Certainly, the Cox testimony was of little, if any, probative value in proving that the composite drawing was a good likeness of Chinn. Mrs. Cox's recognition of Chinn from the photograph weighs in favor of the proposition.

However, another person might fail to see the likeness. It is subjective determination. The fact that her recognition apparently led to Chinn's arrest has little weight in the question. The accuracy of the composite drawing was not in issue, except to the extent that it gave credit to Washington's identification of Chinn. The defense had not, however, attempted to discredit the composite or the value or reliability of Washington's work in preparing it. "In applying Rule 403 the trial court should consider alternate means by which the facts sought to be proven can be established." Weissenberger, Ohio Evidence, Volume 1, Section 403.3. That could have been done simply by displaying the composite to the jury, which had before it Chinn in person and in line-up photos. The jury could then determine directly whether the composite was a good likeness. However, the trial court refused to permit the display.

Mrs. Cox's testimony was also of probative value to show that Chinn possessed a guilty mind concerning the drawing and the crime with which it was connected. This inference arises naturally and inevitably from proof that shortly after the picture appeared in the newspaper Chinn sought to consult with a lawyer. The trial court did not permit the state to argue the inference to the jury. The court also excluded testimony by Mrs. Cox that Chinn told her that he wanted to see Attorney Cox "on heavy stuff". (T. 349). The prosecutor conceded in arguments to the court that; "His comments show culpability. His comments show guilt, his comments show that." (T. 357). Exclusion of evidence of Chinn's statement ameliorated, somewhat, the prejudicial character of the evidence, but the fundamental unfairness remained.

***16** It is a necessary and cherished aspect of our adversarial system of justice that one who is or may be accused of a crime has an unrestricted right to take counsel from an attorney concerning the matter. As this right is diminished, whether through direct restriction or indirect impositions of penalty for doing so, the functioning of the adversarial system is impaired. Therefore, and as a general rule, the fact that an accused has consulted with an attorney should not be offered as proof that he is guilty of a crime with which he is accused. To do so employs a matter of no relevance to the charge to impose a penalty for the exercise of a fundamental right.

Our task is to determine whether the trial court abused its discretion in admitting evidence that Chinn attempted to consult with an attorney. An abuse of discretion connotes more than just an error of law. It exists where the court's attitude, evidenced by its decision, was unreasonable, arbitrary, or unconscionable. *Worthington v. Worthington* (1986), 21 Ohio St.3d 73.

After a careful review of the record we cannot find an abuse of discretion. The trial court gave a complete hearing, out of the jury's presence, to the various objections of Appellant. The court excluded evidence of Appellant's "heavy stuff" statement to Mrs. Cox and prohibited the state from arguing that Chinn's attempt to consult with an attorney is indicative of guilt. The court gave no limiting instruction pursuant to Evid.R. 105, but the Appellant did not request one. Though the evidence was unfairly prejudicial, that unfairness does not clearly jeopardize the fundamental fairness of the proceeding or the reliability of the verdict. While the trial court should have excluded evidence that Chinn attempted to consult a lawyer, we cannot find that its decision is unreasonable, arbitrary, or unconscionable.

The assignment of error will be overruled.

VII

COX LINEUP

For his seventh assignment of error, Chinn contends that

THE TRIAL COURT ERRED IN ALLOWING DETECTIVE LANTZ TO OFFER HEARSAY EVIDENCE OF STATE'S WITNESS SHIRLEY COX CONCERNING LINEUP IDENTIFICATION.

Det. Lantz testified over Chinn's objection that Cox picked Chinn out of lineup. (T. 397). Because Cox did not testify concerning the matter, Chinn contends that it was improper to allow Det. Lantz to so testify.

Chinn first argues that the testimony was excludable under the best evidence rule, Evid.R. 1002. However, nothing in the record indicates that Cox made her identification in writing. There being no writing to produce, the best evidence rule is inapplicable.

Chinn also contends that the statement was hearsay. We do not agree. Evid.R. 801(D)(1)(c) states, in pertinent part, "A statement is not hearsay if ... the declarant testifies and is subject to cross-examination concerning the statement, and the statement is ... one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification." Because Cox was "subject to cross-examination" on the lineup, regardless of whether she was actually ever *subjected* to such examination, Det. Lantz's testimony was not hearsay.

***17** The seventh assignment of error will be overruled.

VIII

VICTIM IMPACT STATEMENT

Chinn's eighth assignment of error reads:

THE TRIAL COURT COMMITTED ERROR WHEN IT ALLOWED THE ADMISSION OF VICTIM IMPACT STATEMENT BY WAY OF THE TESTIMONY OF THE VICTIM'S MOTHER AT THE SENTENCING HEARING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

At the court's invitation the victim's mother made the following statement to the jury in the penalty phase of the trial.

* * * First of all, we would like for you and everyone to know what a great loss that we have suffered, the pain has been and will be beyond what words could describe. Only another person that has lost a child to such a tragedy could begin to feel the empty, lonely feelings.

Needless to say, we have suffered the greatest loss of our entire life. We know that nothing or no one is going to replace that empty and void feeling and that part of our lives are gone. Now, we must begin to try to pick up the pieces and put our lives back together as good as we can. I really don't feel that this will ever be possible because, first of all, we feel very threatened by this Defendant and his family. We have not doe or said anything, your Honor, about them; but yet, we are afraid for our safety and we feel very threatened by them. I'm afraid to leave my home alone. I'm afraid for my daughter to leave her home alone. * * * I fear what could happen to her. I fear of (sic) the morning when my husband leaves for work. * * * I stand at the window and watch him until he gets in his car and pulls out of our driveway. Never in my life have I ever done this before. I have been doing this ever since our son has been killed.

Your Honor, this terrible, threatening fear that we are living with is not a good feeling. We really do feel-We really do feel very threatened by this Defendant and what he might do our family. With his previous record, if he had been put away where he should have been, my son may be living today. Your Honor, this makes me feel very ill inside to think that if this Defendant had not been out there on the streets, on January 30th, that my son would be with us. We would not be going through all of this pain that we're feeling. We would not be afraid and feel threatened as we do today. Your Honor, we feel that this Defendant has been given every opportunity that there is. He's been on shock probation, and by his own actions, has chosen not to accept any of them; and now we feel that the time has come for him to be punished according to the law of Ohio. * * *

The Eighth Amendment does not prohibit a jury from considering at the penalty phase of capital trial "victim impact" evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family. *Payne v. Tennessee* (1991), 501 U.S. 808, 115 L.Ed.2d 720, 111 S.Ct. 2597.

***18** We find the statement to which Appellant objects is admissible under the rule of *Payne.* The assignment of error will be overruled.

IX

SENTENCING CRITERIA

THE TRIAL COURT ERRED IN ITS WEIGHING OF AGGRAVATING CIRCUMSTANCES AGAINST MITIGATING FACTORS PURSUANT TO R.C. 2929.03.

A.

MITIGATING FACTORS

After a jury recommends imposition of the death penalty, the trial court must independently weigh the mitigating factors against the aggravating circumstances and determine for itself that the death penalty is warranted. R.C. 2929.03(D)(3). Pursuant to this process, the trial court is required by R.C. 2929.03(F), to:

state in a separate opinion its *specific* findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.01 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the *reasons* why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. (Emphasis added).

On September 1, 1989, the trial court filed separate findings on the jury's recommendation. The findings on mitigating factors in the instant case ran, in its entirety, as follows:

This Court, in compliance with R.C. 2929.03(F), finds that there were no mitigating factors established under R.C. 2929.04(B) subparagraphs one through six, during the penalty or mitigation phase of the trial. There was no evidence relating to any of these first six subparagraphs. Subparagraph seven allows "other factors that are relevant to the issue of whether the offender should be sentenced to death" to be considered. The testimony relating to this was limited, extremely weak and inadequate and must be characterized as Defendant's helpfulness to others, friendliness, interest in his further education and Bible study.

While a capital defendant may introduce any evidence in mitigation, the court need not accept as mitigating everything offered. "Only evidence which lessens the moral culpability of the offender or diminishes the appropriateness of the death penalty can be considered mitigating." *State v. Steffen* (1987), 31 Ohio St.3d 111, 129. Where an accused does not raise a particular mitigating factor, that factor should not be considered. *State v. DePew* (1988), 38 Ohio St.3d 275. However, a court may not refuse to consider a mitigating factor on which a capital defendant has introduced evidence. *Eddings v. Oklahoma* (1982), 455 U.S. 104.

... it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence.

Penry v. Lynaugh (1989), 492 U.S. 302, 109 S.Ct. 2934, 2947, citing *Hitchcock v. Dugger* (1987), 481 U.S. 393. Thus, while a court need not give any particular weight to evidence that a defendant has introduced in mitigation, the court must nonetheless *consider* that evidence. Ignoring mitigating evidence is tantamount to refusing to consider it. *Eddings, supra.*

***19** Considerable evidence was introduced during the sentencing phase regarding the effect upon Chinn of his father's murder and Chinn's continued protestations of innocence. However, the court did not address these factors in its independent evaluation. Because R.C. 2929.03(F) requires that the trial court *specifically* enumerate all of the mitigating factors in the case, absence in the report of factors upon which evidence was adduced cannot be treated as a mere oversight. If a court is of the opinion that certain mitigating evidence deserves little or no weight, it is statutorily required to *specifically* state this in its findings. The court cannot, as the state argues, allow this conclusion to be inferred from its silence on the matter.

Several witnesses testified that when Chinn was thirteen years old his father was murdered in California. The State argues that evidence as to the effect of this event was too vague to be considered. We disagree. Chinn claimed in an unsworn statement to the jury that his father's murder made him "bitter" and created feelings of alienation. (T. 708). Several witnesses confirmed that the event caused a personality change in Chinn. See, e.g., T. 699. Even if the State is correct in its assertion that this fact does little, if anything, to reduce Chinn's "moral culpability", it is still relevant to that issue in the context of R.C. 2929.04(B)(7), and therefore, the trial court was required to consider it in its evaluation. However, the trial court would have been within its discretion if, after having considered the factor, it determined that it should be afforded little or no weight.

Of greater significance is the mitigating factor of residual doubt. During the sentencing phase of his trial Chinn continued to vehemently proclaim his innocence. (T. 704-705). It is well-settled that this constitutes a mitigating factor under the "catch-all" provision of R.C. 2929.04(B)(7). *State v. Buell* (1986), 22 Ohio St.3d 124, 142, certiorari denied (1986), 479 U.S. 871. *State v. Watson* (1991), 61 Ohio St.3d 1. However, the defendant's protestations of innocence must be viewed in light of the fact that a jury has already found him guilty beyond a reasonable doubt. *State v. Scott* (1986), 26 Ohio St.3d 92, 105, certiorari denied (1987), 480 U.S. 923. The State argues that under *Scott,* residual doubt, by definition, can never be a significant mitigating factor after a verdict of guilty. We disagree.

A capital defendant's right to mitigate his sentence is not merely statutory, but a constitutional guarantee. *Lockett v. Ohio* (1978), 438 U.S. 586, 608; *Furman v. Georgia* (1972), 408 U.S. 238, rehearing denied (1972), 409 U.S. 902. A factor that could never possibly tip the scales in favor of life imprisonment would be "mitigating" in name only. The Eighth Amendment requires that any mitigating evidence, given the right factual circumstances, have the potential of precluding the death penalty. *Id.* The precise weight to assign to a factor lies, in the first instance, in the sound discretion of the sentencing court. However, in this case the trial court abused its discretion by completely ignoring the factor of residual doubt.

***20** *Scott* cannot be read as eviscerating the mitigation value of residual doubt. Rather, *Scott* serves as a reminder to the court that the defendant's continued protestations of innocence must be viewed in light of fact that the issue of guilt has already been resolved. Residual doubt is, as the name implies, the gap between "beyond a reasonable doubt" and absolute certainty. The size of this gap is, necessarily, dependent upon the facts in the case. In *Scott, supra,* the Supreme Court found that the only fact which contributed to residual doubt was the defendant's continued protestations of innocence, and therefore the factor had little mitigating effect. [1] However, in the case at bar there are a number of facts in addition to Chinn's claims of innocence which cause the gap between reasonable doubt and absolute certainty to be far broader than in *Scott.*

It is uncontroverted that Chinn is five feet five inches tall. (T. 702). However, everyone who saw "Tony" claimed that he was much taller. Couch, the bookstore employee, testified that "Tony" was "certainly taller" than Washington, who also stands five feet five inches, and estimated "Tony's" height at five feet seven to nine inches. (T. 74-75). Dyer, who witnessed the murder of Jones, testified that the victim and the murderer were the same height. (T. 90). Jones was five feet ten inches tall. (T. 23). Welborn, the man whom "Tony" robbed, told police that "Tony" was five feet nine inches tall. (T. 126). Finally when Washington originally described "Tony" to the police, he too said that he was taller than himself, standing at least five feet seven inches. (T. 265).

Further residual doubt may have been created by the fact that witnesses were unable to pick Chinn out of a lineup. Welborn was able to positively identify Washington, but identified someone other than Chinn as being "Tony". (T. 132). Dyer and Couch were also unable to identify Chinn. Washington did not identify Chinn in a line-up, but then changed his story. He testified that he had deliberately misidentified Chinn from fear of being seen through the one way mirror.

Washington's testimony was crucial to Chinn's conviction, but given Washington's admitted culpability in the murder of Jones his testimony is inherently suspect. This suspicion is intensified by the fact that Washington testified that he had been introduced to "Tony" and his girlfriend Stephanie Woods by Henry Walker one year before the night of the murder. (T. 257). Detective Lantz testified that he had spoken to both Walker and Woods, and both claimed not to know anyone named "Tony", and neither could identify Chinn by his picture. (T. 412-413). Washington's friend, Ward, was also able to identify Chinn. However, Ward initially told police that did not get a clear look at "Tony", (T. 158), and before making the identification inquired into the availability of a reward. (T. 181).

It must also be remembered that Chinn produced evidence from several sources that he was elsewhere taking an examination for school at the time when Washington said he met "Tony" and was at home with his mother and brother thereafter. Furthermore, neither the murder weapon nor any other incriminating evidence was discovered which would implicate Chinn. The totality of these circumstances may create a substantial amount of residual doubt as to whether Chinn actually was "Tony".

***21** Since Jones was shot once in the arm, there may also be residual doubt as to whether "Tony" intended to kill Jones.

The trial court erred in not considering these mitigating factors.

B.

AGGRAVATING CIRCUMSTANCES

In addition to its findings concerning mitigating factors shown by the evidence, the trial court noted that three aggravating circumstances were found by the jury, two of which were R.C. 2929.04(A)(7) matters. One pertained to a crime of kidnapping and the other to a crime of aggravated robbery. As to each, the jury found that in addition "he was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." The court found beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, and concluded:

The Court finds the evidence is sufficient to find the Defendant the principal offender and also that he committed the crime with prior calculation and design.

The above findings constitute the reason why this Court finds the aggravating circumstances are sufficient to outweigh the mitigating factors.

The Supreme Court has had occasion to discuss in detail the aggravating circumstance of committing murder "for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender." R.C. 2929.04(A)(3). This aggravating circumstance will almost always be duplicative of R.C. 2929.04(A)(7), murder in the course of the underlying felony (in this case aggravated robbery).

The overlap or duplication occurs in view of the likelihood that in most felony murders, death occurs while the offense is being committed or while fleeing from the scene in order to facilitate escape or to prevent apprehension. In fact, this precise situation occurred in the present case. Thus, under these circumstances, a defendant would likely be charged and convicted of a specification under R.C. 2929.04(A)(7). However, since the specification contained within R.C. 2929.04(A)(3) applies to many factual situations likely to arise in connection with a felony murder, unnecessary duplication occurs.

State v. Jenkins (1984), 15 Ohio St.3d 164, 197, certiorari denied (1985), 472 U.S. 1032. It is clear from subsequent cases that these factors will merge unless the crime being hidden is separate and unrelated to the crime which is the basis of the felony murder specification. See, e.g., *State v. Cooey* (1989), 46 Ohio St.3d 20. For example, if a defendant were to rob a victim on Monday, return on Tuesday to kill her to prevent her from reporting the Monday robbery, and in the course of murdering her also commit a second robbery, then both specifications could be considered against him. Such is not the case here, however. The robbery that was being hidden was the same robbery during the course of which Jones was murdered. Therefore, the specifications for committing murder during the course of an aggravated robbery and to escape apprehension for aggravated robbery should have been merged.

***22** A broader application is given to the doctrine of merger as applied to death specifications than in other instances.

In the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing.

Jenkins, supra, at paragraph five of syllabus.

In our view, all three specifications clearly arose from the same act or indivisible course of conduct. Jones was robbed in downtown Dayton and then driven to a remote area of Jefferson Township so that he could be killed to conceal the robbery. The kidnapping (driving Jones to a rural area) only occurred so as to effectuate the concealment of the robbery, and, as explained above, the concealment of the robbery must merge with the robbery itself as a matter of law. Furthermore, the kidnapping was merely incidental to the robbery, and thus must be merged for this reason as well. *State v. Broom* (1988), 40 Ohio St.3d 277.

We find nothing in the record to substantiate the State's claim that the kidnapping was a separate event due to either prolonged restraint or motivation to "terrorize" Jones. According to Washington's testimony Jones was driven, albeit at gunpoint, from downtown Dayton to Jefferson Township, which lies only six miles due west. Thus, the kidnapping was not only motivationally, but temporally and spatially tied to robbery. Nor can any significance be given to the fact that Chinn allegedly told Washington that he had killed Jones both to cover up the robbery and to punish him for having had too little money. Murder committed as "punishment" is not an aggravating circumstance under R.C. 2929.04(A). Furthermore, either motivation was inexorably bound up with the robbery itself. This alleged statement further supports the holding that the robbery, kidnapping, and murder were one indivisible occurrence.

The trial court committed further error in duplicating aggravating circumstances when it found at page three of its evaluation that Chinn was "the principal offender *and also* that he committed the crime with prior calculation and design." (Emphasis added). This language comes from one of the statutorily enumerated aggravating circumstances.

The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, *and either* the offender was the principal offender in the commission of the aggravated murder *or, if not the principal offender,* committed the aggravated murder with prior calculation and design.

R.C. 2929.04(A)(7) (Emphasis added.)

The Supreme Court has discussed the meaning of this section at length.

Since the jury found that appellee was the principal offender, the second aggravating circumstance referred to in the instructions was present. The first, however, was a incomplete statement of a portion of R.C. 2929.04(A)(7) not applicable to appellee. Prior calculation and design is an aggravating circumstance *only* in the case of an offender who did not personally kill the victim. Thus, the criteria set forth in R.C. 2929.04(A)(7) are constructed *in the alternative.* If the aggravated murder was committed during the course of one of the enumerated felonies, then the death penalty may be imposed only where the defendant was the principal offender (i.e., the actual killer), *or* where the defendant was not the principal offender, if he committed the murder with prior calculation and design. The language of the statute provides that *these are alternatives which are not to be charged and proven in the same cause.* Thus, if the defendant is found to be the principal offender, then the aggravating circumstance is established, and the question of whether the offense was committed with prior calculation and design is irrelevant with respect to the death sentence.

***23** *State v. Penix* (1987), 32 Ohio St.3d 369, 371. (Emphasis added). The aggravating circumstances that may be considered in imposing the death penalty are those specifically enumerated in R.C. 2929.04(A). *State v. Johnson* (1986), 24 Ohio ST.3d 87. Use of both the "principal offender" and "prior calculation and design" culpability factors in an (A)(7) aggravating circumstance is contrary to the mandate of the statute that they apply only in the alternative, and taints the weighing process against mitigating factors that may apply. Thus, it impermissibly tips the scales in favor of death. *State v. Penix, supra.* This conclusion applies to an independent review by the trial court as well as to a jury deliberation, the case in *Penix,* because the trial court must also find that the aggravating circumstances were sufficient to outweigh the mitigating factors. R.C. 2929.03(D)(3).

We conclude that the trial court erred by (1) failing to merge the three aggravating factors into one, viz., that Chinn was the principal offender in the aggravated murder committed while he was fleeing immediately after committing an aggravated robbery, per R.C. 2929.04(A)(7), and by (2) considering the additional, alternative culpability element of the aggravating circumstance that Chinn, clearly the principal offender, committed the murder with prior calculation and design, which it was not permitted to do. Each, and both together, tainted the weighing process required by R.C. 2929.03(D)(3) and impermissibly tipped the scales in favor of death.

C.

DISPOSITION

We now turn to the question of how to dispose of this matter, given that several errors occurred in the trial court's independent evaluation. The State argues that these errors may be cured by our independent reweighing of the aggravating circumstance and mitigating factors pursuant to R.C. 2929.05(A). Chinn argues that we are required to remand the case for resentencing, but that the trial court would be constrained from reimposing the death penalty. We do not agree with either party.

The State is correct in its assertion that, normally, the failure to consider certain mitigating factors or to merge multiple aggravating circumstances into one can be cured by our independent review. *State v. Jenkins,* (1984), 15 Ohio St.3d 164, 199-200, certiorari denied (1985), 472 U.S. 1032. Our independent review may also cure the failure of the trial court to specify the reasons why the aggravating circumstances outweigh the mitigating factors. *State v. Maurer* (1984), 15 Ohio St.3d 239. However, the Supreme Court has specifically stated that if the sentencer considered the defendant to be both the principal offender *and* to have committed the murder with prior calculation and design, then the error was prejudicial and "could not simply be corrected in the appellate review process pursuant to R.C. 2929.05" *State v. Penix* (1987), 32 Ohio St.3d 369, 372 (Emphasis added). That is the exact error here. Thus, Chinn's death sentence must be vacated and the issue of sentencing be remanded due to this error alone.

***24** Because the trial court must reweigh the mitigating factors and aggravating circumstances during the resentencing process, and as the procedural posture of this case has already allowed us to review these issues, justice requires the trial court be instructed as to the proper factors. Therefore, we have addressed the issues of merger and residual doubt so that Chinn's resentencing might be free of the errors that occurred in its predecessor.

In general, when a jury trial has culminated in a sentence of death a reviewing court that finds prejudicial error must remand the issue of sentencing but prohibit the trial court from reimposing capital punishment. *Penix, supra,* at syllabus. However, this general rule is not applicable to the instant case. The rationale for prohibiting a reimposition of the death penalty on remand is that R.C. 2929.03(D)(2) requires that "the decisions leading to a death sentence must be made by the same jury that convicted the offender in the guilt phase." *Id.* at 373. However, the errors in the instant case were committed by the trial court in its independent evaluation, not by the jury. [2] As opposed to the insurmountable problems associated with reassembling the exact same jury, there is no difficulty in the instant case in remanding this issue to the same judge who presided over Chinn's conviction.

Although it does present a rather novel question, we find that when a sentencing error was committed solely by the trial judge in his review of the jury's recommendation, it is analogous to a situation in which the defendant's case was heard by a three-judge panel which committed a sentencing error. The Supreme Court has held that

When a reviewing court vacates the death sentence of a defendant imposed by a three-judge panel due to error occurring at the penalty phase ... such reviewing court may remand the action to that trial court for a resentencing hearing at which the state may seek whatever punishment is lawful, including, but not limited to, the death sentence.

State v. Davis (1988), 38 Ohio St.3d 362, syllabus. Accordingly, we will vacate Chinn's death sentence and remand the issue of sentencing to the trial court so that it may weigh the proper mitigating factors against the single aggravating circumstance. Pursuant to this reevaluation, the trial court may impose whatever lawful punishment it deems appropriate, including but not limited to a sentence of death.

X

JURORS

For his tenth assignment of error Chinn asserts that

THE TRIAL COURT ERRED IN FAILING TO EXCUSE FOR CAUSE PROSPECTIVE JURORS THAT WERE BIASED AGAINST THE APPELLANT, WHICH VIOLATED APPELLANT'S RIGHTS TO A IMPARTIAL JURY, FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED

STATES CONSTITUTION AND SECTIONS 5, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION

Chinn argues that nine of the people who sat on his jury should have been excluded. Some were excused by peremptory challenges. However, because Chinn did not exhaust all of his peremptory challenger he cannot show prejudice. *State v. Scott* (1986), 26 Ohio St.3d 92; *State v. Poindexter* (1988), 36 Ohio St.3d 1; *State v. Roe* (1989), 41 Ohio St.3d 18. Moreover, eight of these jurors Chinn also did not challenge for cause. Therefore, any potential error was also waived.

***25** The final juror in question, Barbara Lincoln, was challenged for cause, but on the basis of her view of alibi witnesses, not her "predisposition" to impose the death penalty that Chinn now alleges. Thus, waiver is applicable here as well.

The tenth assignment of error is found to be not well taken.

XI

LOCAL DISCOVERY RULE 3.03(D)

In his eleventh assignment of error Chinn asserts that

THE TRIAL COURT ERRED IN FAILING TO GRANT DISCOVERY AS AUTHORIZED BY THE LOCAL RULES IN VIOLATION OF APPELLANT'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS.

On March 15, 1989, Chinn requested discovery under Crim.R. 16 and Montgomery County Common Pleas Court Local Rule 3.03(d), which provides:

(d) If at arraignment a not guilty plea is entered by the defendant:

(1) The Arraignment Judge will set a date and time for a prosecutor's pretrial, and for a scheduling conference before the Judge assigned via Local Rule 1.19.

(2) An information packet shall be delivered to defendant's counsel upon execution of a Demand and Receipt for same.

(3) The INFORMATION PACKET shall contain:

(a) All police reports

(b) All witness statements

(c) Any statements of defendant

(d) All available laboratory reports

(e) Names and addresses of all witnesses

(4) The police reports supplied in the information packet shall *not* be used for cross-examination of any witness unless same is properly qualified under Rule 16(b)(1)(g) Ohio Rules of Civil Procedure and Rule 613 Ohio Rules of Evidence.

(5) Execution of a demand and receipt, and acceptance of the information packet by counsel for defendant automatically obligates defendant to supply reciprocal discovery as provided in Rule 16 Ohio Rules of Criminal Procedure.

The trial court granted discovery under Crim.R. 16, but denied it under Loc.R. 3.03(d). The trial judge opined that he was "tired of abuse of the local rule" by defendants and that it was not applicable to Chinn because the local rules are intended to avoid trials and there would certainly be a trial in this case. (Motion T. 18). However, "avoidance of trials" is not the only purpose of the local rules.

The purpose of these rules of criminal practice is to provide the fairest and most expeditious administration of criminal justice possible within the requirements of the Ohio Rules of Criminal Procedure; and the provisions of the Ohio Revised Code, the Ohio Constitution and the U.S. Constitution. These rules shall be construed and applied to eliminate delay, unnecessary expense, and all other impediments to a just determination of criminal cases. Further, the disclosure and discovery requirements placed upon both the prosecution and the defense are to fully implement Rule 16 of the Ohio Rules of Criminal Procedure and the requirements of *Brady v. Maryland* 373 J.S. 83 (1963). The rules of practice of this Court for civil cases apply to all criminal proceedings, except where clearly inapplicable.

***26** Loc.R. 3.01. Moreover, the local rules are intended to "supplement and compliment" the criminal rules. Loc.R.

1.01(b). Local rules cannot detract from the Rules of Criminal Procedure.

The trial court also relied on dicta found in our holding in *State v. Davis* (Aug. 25, 1986), Montgomery App. No. 9472, unreported. However, *Davis* is not controlling. In *Davis* we held that Loc.R. 3.03 could not be read to allow the State, in direct contravention of Crim.R. 16, to request discovery without the defendant having first requested it. We did not, however, hold that the local rules had no force and effect.

It is well settled that local rules may expand upon statutes or rules by creating additional requirements, so long as they are not contradictory to those statutes or rules. *Vorisek v. North Randall* (1980), 64 Ohio St.2d 62, 64. The "packet" required by Loc.R. 3.03(d) is not in contradiction of Crim.R. 16.

Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), *this rule* does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case or of statements made by witnesses or prospective witnesses to state agents.

Crim.R. 16(B)(2) (Emphasis added). Simply because such discovery is not provided for by "this rule" does not prohibit its discovery by other rules, namely Loc.R. 3.03(d). Therefore, Loc.R. 3.03(d) is an expansion of Crim.R. 16, not a contradiction of it, and is thus fully enforceable. *Vorisek, supra.*

While the trial court did err in refusing to grant Chinn discovery under Loc.R. 3.03(d), we find that this error was harmless. The record indicates that Chinn eventually did receive the materials required in the "discovery packet" from Washington's attorney. (T. 142-148, 174). Furthermore, Chinn has failed to demonstrate how this error prejudiced him because, as explained in our discussion of the twenty-fifth assignment of error, *infra,* his attempt to "proffer" the prosecutor's entire file was properly denied.

The eleventh assignment of error will be overruled as we find that the error was harmless.

XII

OTHER DISCOVERY VIOLATIONS

As his twelfth assignment of error Chinn asserts that

THE WITHHOLDING OF EVIDENCE FAVORABLE TO THE APPELLANT, BY A PROSECUTOR AND THOSE PERSONS ACTING UNDER HIS DIRECTION AND CONTROL, VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DENIED THE APPELLANT A FAIR TRIAL.

It is well settled that the State cannot withhold evidence favorable to the defendant if the evidence is material to either guilt or punishment. *Brady v. Maryland* (1963), 373 U.S. 83. Furthermore, the State has a duty to volunteer exculpatory information to the defendant if it could create a reasonable doubt. *U.S. v. Agurs* (1976), 427 U.S. 97. Chinn argues that the State violated these duties in four instances.

***27** Welborn testified that prior to the robbery he saw a third man with "Tony" and Washington, but that the man drove away prior to the robbery. The man was not identified. (T. 124). Welborn testified that he gave this information to the prosecutor (T. 125), but the State did not share this information with Chinn. We are dismayed that the evidence was not produced. However, we see no reasonable possibility that Chinn would have been acquitted if he had known this information. Therefore, there was no *Brady* violation. *U.S. v. Bagley* (1985), 473 U.S. 667.

Chinn also complains of error in that his attorney did not receive photographs of the lineup in which Washington saw Chinn until the morning of the trial. Chinn contends that this was too late to be effective, and thus violated *U.S. v. Johnston* (1986), 784 F.2d 416, 425. We do not agree. Chinn's attorney was present during the Washington lineup (T. 393), and any "concealment" was rendered harmless. The same is true of Chinn's claim that he did not know that Welborn had picked someone other than Chinn out of a lineup, as Chinn's attorney was present at this lineup as well. (T. 393).

Finally, Chinn claims that he should have been given a copy of the photo array that Washington viewed. However, Washington picked Chinn's picture out of the array. Thus, the "withheld evidence" was inculpatory, not exculpatory, and failure to produce it was not error. *Agurs, supra.*

The twelfth assignment of error will be overruled.

XIII

PROPORTIONALITY OF SENTENCE

Chinn's thirteenth assignment of error contends that

THE TRIAL COURT ERRED IN DETERMINING THAT DEATH WAS THE ONLY APPROPRIATE PUNISHMENT IN THIS CASE. THE DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE TO SENTENCES IMPOSED IN SIMILAR CASES THEREBY RESULTING IN CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

This assignment of error addresses directly the factors involved in our "independent review" of the death sentence imposed by the trial court, which we are required to perform pursuant to R.C. 2929.05(A). However, having vacated the death sentence imposed by the trial court we are no longer required to perform that review. Furthermore, having remanded the matter to the trial court for resentencing it would be improper, as well as prejudicial to the Appellant and the State, for us to determine the same matters in advance. Therefore, the issues raised in the assignment cannot be addressed.

The assignment of error is overruled.

XIV

COMMUNICATONS WITH JURY

As his fourteenth assignment of error Chinn contends that

THE TRIAL COURT ERRED IN COMMUNICATING WITH THE JURY DURING ITS DELIBERATIONS OUTSIDE THE PRESENCE OF THE DEFENDANT OR HIS COUNSEL.

The court may not communicate with the jury concerning the charge of the court after the jury has retired, except publicly and in the presence of the accused. To do so is a cause for a new trial. *Kirk v. State* (1846), 14 Ohio 511. *State v. Abrams* (1974), 39 Ohio St.2d 53.

***28** Appellant complains that the trial court engaged in seven separate correspondences with the jury, only five of which are of record. We are unable to determine the error, if any, in respect to matters outside the record.

The remaining "correspondences" concern matters such as meals, breaks in deliberations, and the order of juror signatures on verdict forms, or minor typographical errors in the forms. Those matters do not involve the court's charges. The jury also questioned whether all the elements of the offenses were stated in the court's instruction. Apparently, that question was not answered.

Appellant also complains that the court gave a written response to the jury's inquiry concerning aggravating circumstances and mitigating factors, discussed in assignment of error three, *supra,* out of the presence of Chinn or his counsel. However, we are unable to determine that from the record, and any error must be affirmatively shown in the record. *State v. Clark* (1988), 38 Ohio St.3d 352. If the court's response was given without the knowledge of Chinn or his attorney, error occurred. However, that fact and any resulting prejudice may only be determined through a petition for post-conviction relief filed pursuant to R.C. 2953.21.

The fourteenth assignment of error is overruled.

XV

SUFFICIENCY OF THE EVIDENCE

Chinn's fifteenth assignment of error states:

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR ACQUITTAL WHEN INSUFFICIENT EVIDENCE WAS PRESENTED TO SUSTAIN A CONVICTION.

A trial court may not properly grant a motion for acquittal under Crim.R. 29 if reasonable minds can reach different conclusions as to whether each element of an offense has been proven beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The standard of review is, viewing the evidence in the light most favorable the State, could any rational trier of fact find that each element was proven beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

A conviction is not against the manifest weight of the evidence if there is substantial evidence upon which a jury could reasonably conclude that all elements of the crimes charged were proven beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169. The relevant inquiry on appeal is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier or fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259.

Chinn argues that the State failed to prove that he was the man who killed Jones. We disagree. Washington positively identified Chinn as the man who shot and killed Jones. While there are a number of factors that gnaw at the credibility of Washington's identification (see our discussion of residual doubt, *supra*), a reasonable juror could believe Washington and disbelieve Chinn's alibi evidence. Viewing the evidence in the light most favorable to the State, a reasonable juror certainly could have believed the identification testimony of an accomplice to the killing. Therefore, the conviction was not against the manifest weight of the evidence and the trial court properly denied the motion to acquit.

***29** Chinn also argues that as Jones was shot in the arm the State failed to prove an intent to kill. We do not agree. Use of a dangerous instrumentality, like a gun, in a robbery is evidence of intent to kill because homicide is the natural and probable consequence of the act. *State v. Clark* (1988), 38 Ohio St.3d 252, 256.

Therefore, Chinn's fifteenth assignment of error will be overruled.

XVI

WEIGHT OF THE EVIDENCE

Chinn's sixteenth assignment of error states:

A CONVICTION CANNOT STAND WHEN IT IS AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL.

The test to be applied in reviewing the weight of the evidence is the same for reviewing the sufficiency of the evidence. *State v. Jenks, supra.* Therefore, the standard for appellate review of error is also the same.

We cannot find that the conviction is against the manifest weight of the evidence, for the reasons stated in our discussion of the fifteenth assignment of error, which concerned sufficiency of the evidence.

The sixteenth assignment of error will be overruled.

XVII

GUN SPECIFICATIONS

In his seventeenth assignment of error Chinn asserts that

THE TRIAL COURT ERRED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 9, 10, AND 16, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT OVERSENTENCED APPELLANT TO NINE YEARS OF ACTUAL INCARCERATION FOR OFFENSES INVOLVING A SINGLE FIREARM.

The trial court sentenced Chinn to three consecutive three-year terms of actual incarceration for gun specifications on aggravated robbery, the kidnapping of Jones, and the

abduction of Welborn. However, if felonies were committed as part of the same act or transaction, only one three-year term of actual incarceration can be imposed. R.C. 2929.71(B).

A "transaction" is a series of continuous acts bound together by time, space, and purpose directed toward a single goal. *State v. Thomason* (Mar. 29, 1990), Montgomery App. No. 11202, unreported; *State v. Mosley* (Aug. 15, 1990), Montgomery App. No. 11824, unreported. We have held that all of the crimes for which Chinn was convicted were part of a single transaction. Therefore, the trial court could sentence Chinn to only one three-year term of actual incarceration.

Chinn's seventeenth assignment of error will be sustained, and two of Chinn's three-year terms of actual incarceration will be vacated.

XVIII

JURY NOTES

As his eighteenth assignment of error Chinn asserts that

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT CHINN BY ALLOWING JURORS TO TAKE NOTES DURING APPELLANT'S TRIAL.

Chinn did not object to the note taking by jurors. Therefore, he waived any potential error. However, we find that even had he preserved the issue for review, there was no error. The mere fact of note-taking by jurors is not necessarily prejudicial; it lies within the sound discretion of the trial court. *State v. Kehn* (1977), 50 Ohio St.2d 11; *State v. Jones* (1988), 50 Ohio App.3d 40. The court closely regulated note taking at trial. Notes could not be brought into the jury room, they could not be taken during testimony, and could not be shown to other jurors. (T. 5354). Under these circumstances we find no abuse of discretion.

***30** The eighteenth assignment of error will be overruled.

XIX

WELBORN'S PRIOR STATEMENT

Chinn contends in his nineteenth assignment of error that

THE TRIAL COURT ERRED IN FAILING TO SUPPLY DEFENSE COUNSEL WITH THE STATEMENT OF WITNESS, GARY WELBORN, PURSUANT TO AN *IN CAMERA* INSPECTION UNDER CRIM.R. 16(B)(1)(G) IN VIOLATION OF APPELLANT CHINN'S RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

The trial court held that because witness statements and police reports were not given to Chinn it would review each witness' testimony for inconsistent statements in an *in camera* inspection pursuant to Crim.R. 16(B)(1)(g). (T. 140-141, 145). The trial court was obligated to reveal any inconsistency, regardless of how slight, to defense counsel. *State v. Daniels* (1982), 1 Ohio St.3d 69.

Chinn argues that the trial court erred by failing to reveal an inconsistency between Welborn's testimony and his police report. Welborn told the police that "Tony" struck him in the face and with his keys, but testified that the keys were dropped in his lap. (T. 118). The State concedes error under *Daniels, supra.* However, the State argues that the error was cured when the police report was marked as an exhibit and admitted into evidence. We agree. Contrary to Chinn's assertions, the exhibit was marked prior to the defendant's re-cross examination of Welborn, and was thus available for impeachment. (T. 184-187). Furthermore, because the statement was admitted into evidence the jury had it during deliberations to examine for inconsistencies.

The nineteenth assignment of error is overruled.

XX

WARD'S PRIOR INCONSISTENT STATEMENT

In his twentieth assignment of error Chinn contends that

THE TRIAL COURT ERRED BY PROHIBITING DEFENSE COUNSEL FROM USING A PUBLIC RECORD, IN DEFENSE COUNSEL'S POSSESSION, TO IMPEACH STATE'S WITNESS CHRISTOPHER WARD. THIS ERROR DENIED APPELLANT CHINN HIS RIGHTS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

Christopher Ward testified that on the date of the crime Marvin Washington, whom he knew, arrived at his home with another man, whom he did not know. Washington introduced the other man as "Tony", and Ward and Tony shook hands. Washington and Tony were in a car, which Washington said was Tony's. They stayed for about thirty to forty-five minutes and then drove away. Ward also testified that Washington returned later and told him that "Tony shot somebody in Jefferson Township." At trial, Ward was asked: "Did you look at Tony?" He responded: "Yeah". Ward then identified Appellant Chinn as "Tony". He also identified photographs of Appellant's automobile as the car that Marvin Washington and Tony drove that night.

Ward testified on direct examination that about five days later he was interviewed concerning the meeting by Det. McKeever of the Jefferson Township Police Department. On cross-examination counsel for Appellant began the following exchange (at T. 174-175).

***31** *BY MR. ARNTZ:*

Q. Do you remember telling McKeever-

MR. HECK: I'm going to object now even though he didn't get to finish what he's going to quote.

THE COURT: Let me see counsel at side bench.

(Side bar conference is held off the record.)

MR. MONTA: Okay. The question which we would like to ask this witness was if he gave an oral statement to Major McKeever, Major Ronald McKeever, with the Jefferson Township Police on the 5th of February, 1989, and did he say to Major McKeever he did not pay any attention to the other man in the car whose name was Tony.

MR. HECK: * * * He is trying to cross-examine this witness on either a made-up statement or on something that's in the police report, which they have, and I object.

THE COURT: First of all, under Rule 16, the police report is not discoverable. * * * The question has to be solely caused by this police report, and so the court will sustain the objection.

MR. MONTA: May I just add, your Honor, the question which would be asked is one in which the defense is attempting to test the credibility of what the witness has said and answer will either be consistent with or impeach that testimony.

THE COURT: Police reports are inherently inaccurate and that is the very reason why under Criminal Rule 16 they are not to be made available and not to be used on cross-examination of any witnesses. On that basis, the Court sustains the objection.

The trial court erred when it denied Appellant's counsel the opportunity to ask the question. Whether evidence is discoverable under Crim.R. 16 has no bearing on its admissability. Any evidence tending to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence is relevant. Evid.R. 401. All relevant evidence is generally admissable. Evid.R. 402.

The question propounded by Appellant did not concern a police report, but a prior statement of the witness to a police officer. Any constraints on the use or introduction of a police report in which the same matter might appear were not in issue. See. Mont.Loc.R. 3.03(d)(4).

Ward's statements to Officer McKeever concerning "Tony" were certainly relevant to his identification of Appellant. To the extent that they might contradict Ward's trial testimony they were proper grounds for impeachment.

Appellant was prohibited by Evid.R. 613(B) from introducing evidence of the inconsistent statement in extrinsic form, that is, by way of McKeever's testimony or his written report, unless Ward was first afforded an opportunity to explain and deny the same. The trial court's ruling foreclosed that opportunity. The error was prejudicial if the prior statement could reasonably cause the jury to reject Ward's testimony.

After a careful review of the record we conclude that the error was not so prejudicial as to require reversal. The jury might reject Ward's identification of Appellant Chinn as the man whom he saw that night upon hearing that only five days later Ward told Det. McKeever that "he did not pay any attention" to the man introduced as "Tony". However, Ward also testified that photographs of Appellant's car depicted the car in which he saw Washington and "Tony" that night. That evidence, albeit circumstantial, is independent of Ward's identification of Appellant personally or any benefit of impeachment reasonably derived from the excluded evidence.

***32** The twentieth assignment of error is overruled.

XXI

COMPOSITE DRAWING

As his twenty-first assignment of error Chinn asserts that

THE TRIAL COURT ERRED WHEN IT DID NOT ALLOW THE COMPOSITE PREPARED BY MARVIN WASHINGTON TO BE VIEWED BY THE JURY DURING THE TESTIMONY OF MARVIN WASHINGTON AND SHIRLEY COX. THIS ERROR DENIED APPELLANT CHINN HIS RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

R.C. 2945.03 gives the trial court authority to control trial proceedings, including the time and manner of the introduction of evidence, and such decisions will not be reversed absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173; *State v. Davis* (1988), 49 Ohio App.3d 109. While the trial court did not permit the picture to be shown to the jury during Cox's testimony, it was admitted into evidence at the end of the trial and available for the jury's scrutiny. We see no abuse of discretion.

Accordingly, the twenty-first assignment of error is overruled.

XXII

HEARSAY

Chinn's twenty-second assignment of error contends that

THE TRIAL COURT IMPROPERLY ADMITTED HEARSAY EVIDENCE DURING THE GUILT PHASE OF APPELLANT CHINN'S TRIAL, IN VIOLATION OF OHIO RULE OF EVIDENCE 802, THEREBY DEPRIVING APPELLANT CHINN OF THE RELIABILITY AND FAIRNESS REQUIRED IN A CAPITAL TRIAL BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 5, 9, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

Det. Lantz testified that Washington told him that he had deliberately misidentified Chinn at a lineup for fear that he could be seen by Chinn through the one-way glass. (T. 398-399). Chinn contends that this was hearsay and should have been excluded.

A statement is not hearsay if it is "consistent with [the declarant's] testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." Evid.R. 801(D)(1)(b). Appellant elicited from Washington on cross-examination that he had identified another person in the lineup. (T. 302307). Thus, Chinn was implicitly, and later during closing argument explicitly, asserting that Washington fabricated the identification out due to police coercion. Therefore, Det. Lantz's testimony was admissable under Evid.R. 801(D)(1)(b). Furthermore, due to the fact that Washington had previously testified to the same thing (T. 249), we see no unfair prejudice.

Chinn also claims it was hearsay for Ward to testify that Washington told him that he and "Tony" had shot someone (T. 157) and for Welborn to testify that Jones asked Washington to leave him alone and cried out for help. (T. 118). However, Chinn did not object to this testimony. Therefore, any error has been waived. *State v. Hutton* (1990), 53 Ohio St.3d 36, 43-44.

The twenty-second assignment of error is overruled.

XXIII

PHOTOGRAPHS OF VICTIM

***33** As his twenty-third assignment of error Chinn asserts that

THE TRIAL COURT VIOLATED APPELLANT CHINN'S FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION WHEN INFLAMMATORY AND GRUESOME PHOTO-SLIDES OF THE VICTIM WERE ADMITTED DURING THE GUILT PHASE OF THE TRIAL.

As an initial matter, we note that Chinn not only did not object, but actually assisted the prosecutor in selecting five slides of the victim's corpse to be shown to the jury. (T. 424-425). Therefore, any error was certainly waived.

However, assuming *arguendo* that there had been no waiver, we find no error. In capital cases if the prejudicial effect of photographs outweigh their probative value in a simple balancing test, or if they are repetitive or cumulative, they should be excluded. *State v. Morales* (1987), 32 Ohio St.3d 252, 257, certiorari denied (1988), 484 U.S. 1047. This standard of review is less stringent than in non-capital cases, where the prejudicial effect must substantially outweigh the probative value. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, certiorari denied (1985, 472 U.S. 1012.

We do not find the five photographs in question to be gruesome, nor are they repetitive or cumulative. Therefore, this assignment of error is found to be not well taken.

XXIV

INEFFECTIVE ASSISTANCE

As his twenty-fourth assignment of error, Chinn asserts that

APPELLANT CHINN WAS DENIED A FAIR TRIAL AND HIS RIGHTS AS GUARANTEED BY THE SIXTH AMENDMENT THROUGH THE FAILURE OF HIS DEFENSE COUNSEL TO MAKE APPROPRIATE AND TIMELY OBJECTIONS.

In order to prove a claim for ineffective assistance of counsel a defendant must meet a two-pronged test: (1) that his attorney's performance must have been so deficient that it fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that but for the deficiencies the outcome of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668.

Chinn claims that his counsel was ineffective in failing to object on the numerous instances cited throughout this opinion. We have examined each of Chinn's claims carefully and find none to have merit. As discussed *supra,* on many of the occasions when there was no objection we have overruled the assignment of error not only on the basis of waiver but also because we find no error. If there was no error, then counsel was acting reasonably in not objecting, and therefore was not ineffective under the first prong of the *Strickland* test. Assuming *arguendo* that counsel was acting unreasonably in failing to object at any other point, we see no reasonable possibility that Chinn would either have been acquitted or sentenced to life in prison had timely objections been made. Therefore, the second prong of the *Strickland* test has not been met.

Chinn's twenty-fourth assignment of error will be overruled.

XXV

PROSECUTOR'S FILE

***34** Chinn asserts in his twenty-fifth assignment of error that

THE TRIAL COURT ERRONEOUSLY DENIED DEFENSE COUNSEL'S MOTION THAT A COMPLETE COPY OF THE PROSECUTOR'S FILE BE MADE AND SEALED FOR APPELLATE REVIEW.

On August 2, 1989, Chinn moved for the trial court to seal the prosecutor's entire file and inspect it *in camera* for alleged

discovery violations. The trial court overruled this motion. (T. 668).

A court is not obligated to conduct a general "*Brady* Search" of the prosecutor's file *in camera. U.S. v. Holmes* (1983), 722 F.2d 37; *In Re Application of Storer Communications, Inc.* (1987), 828 F 2d 330. We find no abuse of discretion in failing to grant Chinn's overly broad request that the prosecutor's entire file be inspected.

The twenty-fifth assignment of error is overruled.

XXVI

"DEATH QUALIFYING" JURY

As his twenty-sixth assignment of error Chinn asserts that

THE STATE AND THE TRIAL COURT APPLIED AN INCORRECT STANDARD IN "DEATH QUALIFYING" APPELLANT CHINN'S JURY.

Appellant argues that the trial court erred in permitting the State on voir dire to ask jurors if their attitudes concerning the death penalty would "prevent or substantially impair" their ability to make a sentencing decision in the case, the standard of *Wainwright v. Witt* (1985), 469 U.S. 412, rather than the more stringent standard of R.C. 2945.25(C) and *Witherspoon v. Illinois* (1968), 391 U.S. 510, which permits challenges for cause if the prospective juror states unequivocally that he will not follow the law.

The exact argument was recently rejected by the Supreme Court. *State v. Durr* (1991), 58 Ohio St.3d 86, 90. It is clearly established that the proper standard for excluding jurors due to their views on capital punishment is that contained in *Wainwright v. Witt* (1985), 469 U.S. 412, not *Witherspoon v. Illinois* (1968), 391 U.S. 510. as Chinn argues. *Durr, supra.*

The twenty-sixth assignment of error is overruled.

XVII

CONSTITUTIONAL QUESTIONS

As his twenty-seventh assignment of error, Chinn contends that

THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 2, 9, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION ESTABLISH THE REQUIREMENTS FOR A VALID DEATH PENALTY SCHEME. OHIO REVISED CODE SECTIONS 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 AND 2929.05, OHIO'S STATUTORY PROVISIONS GOVERNING THE IMPOSITION OF THE DEATH PENALTY, DO NOT MEET THE PRESCRIBED REQUIREMENTS, AND, THUS, ARE UNCONSTITUTIONAL BOTH ON THEIR FACE AND AS APPLIED TO APPELLANT CHINN.

Chinn advances nineteen arguments why Ohio's death penalty statute is unconstitutional. We do not agree with any of these contentions.

Several of Chinn's arguments were rejected by the Supreme Court in the first capital case under the current statute, *State v. Jenkins* (1984), 15 Ohio St.3d 164, certiorari denied (1985), 472 U.S. 1032. Chinn argues that because the prosecutor has "virtually uncontrolled discretion" in deciding whether or not to seek the death penalty, its application is necessarily arbitrary and capricious. This reasoning was rejected in *Jenkins,* at 169170.

***35** Chinn asserts that because he has a fundamental liberty interest in his own life the State may only take his life if execution is the least restrictive means of achieving a compelling State interest. The *Jenkins* court rejected this argument at 168, citing *Gregg v. Georgia* (1976), 428 U.S. 153, 184.

It is also well settled that, "contrary to [Chinn's] contention, the Eighth Amendment does not require that in order to be subject to a death sentence, the defendant must have committed the murder with prior calculation and design." *Id.* at 170-171, citing *Edmund v. Florida* (1982), 458 U.S. 782. Nor is Ohio's death penalty constitutionally infirm for failing

to require the State to prove the absence of mitigating factors. *Id.* at 171, citing *Proffitt v. Florida* (1976), 428 U.S. 242, and *Barclay v. Florida* (1983), 463 U.S. 939, rehearing denied (1983), 464 U.S. 874.

The *Jenkins* court also rejected the contention that the Sixth and Fourteenth Amendments are violated by allowing the jury to consider aggravating circumstances in the culpability phase of the trial. *Id.* at 174. It is also incontrovertibly established that, contrary to Chinn's contentions, at the present time the death penalty is not considered to be cruel and unusual punishment *per se. Id.* at 168, citing *Gregg, supra* at 187.

Many of Chinn's other arguments have been specifically addressed by the Supreme Court subsequent to *Jenkins*. Chinn argues that capital punishment is racially discriminatory because the death penalty is more likely to be imposed in cases where the defendant is black (like Chinn) or the victim is white (like Jones). Both of these contentions have been rejected. *State v. Sowell* (1988), 39 Ohio St.3d 322, 336, certiorari denied (1988), 109 S.Ct. 1766, rehearing denied (1988), 109 S.Ct. 2444 (black defendant); *State v. Steffen* (1987), 31 Ohio St.3d 111, 124, certiorari denied (1988), 485 U.S. 916 (white victim).

Contrary to Chinn's assertions there is no constitutional right which guarantees that the prosecutor must prove guilt beyond *all* doubt. *State v. Maurer* (1984), 15 Ohio St.3d 239, 248, certiorari denied (1985), 472 U.S. 1012.

Chinn also argues that the constitution prohibits the jury from being told that it is only making a "recommendation" as to whether the defendant will receive the death penalty. While this practice is discouraged, there are no constitutional infringements in so informing the jury. *State v. Rogers* (1986), 28 Ohio St.3d 427, 429431; *contra State v. Durr* 91991), 58 Ohio St.3d 86, 98-99 (Wright J. dissenting).

It is also of no constitutional significance that certain "death specifications" may, and in the instant case *did,* duplicate certain elements of aggravated murder. *State v. Henderson* (1989), 39 Ohio St.3d 24, 29, certiorari denied (1989), 109 S.Ct. 1357, rehearing denied (1989), 109 S.Ct. 1947.

The Supreme Court has also rejected the notion that Crim.R. 11(C)(3) has the effect of putting those who exercise their right to go to trial at a greater risk of death than those who plead guilty. *State v. Nabozny* (1978), 54 Ohio St.2d 195, syllabus 1; *State v. VanHook* (1988), 39 Ohio St.3d 256, 264, certiorari denied (1988), 109 S.Ct. 1578, rehearing denied, (1989), 109 S.Ct. 2094.

***36** The Supreme Court found no constitutional significance in the fact that juries are not required to report what factors they considered so that appellate courts might better judge the proportionality of the sentence. *State v. Buell* (1986), 22 Ohio St.3d 124, 137, certiorari denied (1986), 479 U.S. 871. Nor is the death penalty unconstitutional because juries may not impose life imprisonment unless the defendant presents *some* mitigating factors. *Id.* at 141.

Chinn asserts that Ohio's capital punishment scheme is void for vagueness, but does not direct our attention to what he specifically finds to be vague. We find that a person of "common intelligence" who read R.C. 2929.02-04 would know what acts put him at risk of receiving the death penalty. Therefore, the statute is not vague.

Chinn also complains that capital punishment is unconstitutional because juries are "often" instructed not to allow mercy to enter into their decision. However, no such instruction was given to the instant case. It is wellsettled that it is not sufficient for a defendant to claim that constitutional errors occur in other capital cases; he must show that this error also existed in his case. See, *State v. Zuerne* (1987), 32 Ohio St.3d 56, 64-65.

Chinn also sees constitutional infirmity in the fact that the jury is not told that one aggravating circumstance might "weigh less" than another. However, the jury is charged with weighing all of the factors both in favor of and against imposition of the death penalty. Inherent in the concept of "weighing" is that some factors have more weight than others.

Chinn argues that the pool of cases examined in the proportionality review is unconstitutionally small. However, proportionality reviews are statutorily required, not constitutionally mandated. *Jenkins, supra,* 175, citing *Pulley v. Harris* (1984), 465 U.S. 37, 47. Therefore, the size of the array has no constitutional implications.

Chinn contends that R.C. 2929.03 does not provide juries with enough guidance as to how they should "weigh" aggravating and mitigating factors. This argument was rejected in *Jenkins,*

supra, 172-173. However, Chinn argues that this aspect of *Jenkins* was overruled by the U.S. Supreme Court in *McKoy v. North Carolina* (1990), ---, U.S. ----, 110 S.Ct. 1227, which invalidated a capital punishment scheme on the basis that it "devalued the importance of mitigation." *McKoy* is inapposite. The problem with the North Carolina statute was that juries were *only* allowed to consider mitigating factors *unanimously* found to exist. *Id.* Ohio's statute has no requirement of unanimity, and thus does not suffer from the same constitutional infirmity. Therefore, *Jenkins* is still controlling, and Chinn's argument must be found to be not well taken.

Finally, Chinn argues that the death penalty is unconstitutional because the defendant must prove the existence of mitigating factors by a preponderance of the evidence. *Jenkins, supra,* 171-172. In support of this contention Chinn directs our attention to *Adamson v. Ricketts* (1988), 865 R.2d 1011, certiorari denied (1990), --- U.S. ----, 110 S.Ct. 3287, wherein the Ninth Circuit Court of Appeals invalidated Arizona's death penalty on the grounds that the preponderance of the evidence standard prohibits the jury from considering relevant mitigating evidence. However, the day before denying certiorari in *Adamson,* a plurality of the Justices of the U.S. Supreme Court found Arizona's preponderance standard to be constitutional. *Walton v. Arizona* (1990), 497 U.S. 639, 110 S.Ct. 3047. As Chinn correctly points out, the plurality opinion leaves the question open on the federal level. However, Ohio courts continue to uphold the validity of the preponderance standard. *State v. Durr* (1991), 58 Ohio St.3d 86, 97.

***37** For the foregoing reasons, we hold that Ohio's capital punishment scheme is constitutionally valid. Chinn's twenty-seventh assignment of error will therefore be overruled.

XVIII

CONCLUSION

For the foregoing reasons each of Appellant Chinn's assignments of error is overruled, except Assignment of Error IX concerning the error of the trial court in making the findings required by R.C. 2929.03(D)(3) and (F) prior to imposing a sentence of death and Assignment of Error XVI concerning convictions for multiple gun specifications. Those Assignments of Error are found well-taken and are sustained.

Two of Appellant Chinn's three terms of actual incarceration for a period of three years each are ordered vacated. A single term of three years on one gun specification is affirmed.

The sentence of death imposed on Appellant Chinn is ordered vacated. The matter is remanded to the trial court for further and proper proceedings required by R.C. 2929.03(D)(3), which may culminate in a sentence of death or the optional sentences of life imprisonment with parole eligibility as provided by that statute.

BROGAN and WOLFF, JJ., concur.

All Citations

Not Reported in N.E.2d, 1991 WL 289178

Footnotes

1 At first blush one might suspect that anyone who is facing the possibility of execution would naturally claim to be innocent. Experience has proven, however, that this is actually the exception rather than the rule. See, e.g., *State v. Zuerne* (1987), 32 Ohio St.3d 56.

2 We are aware that Chinn also claims, in his fifth assignment of error, that it was error not to instruct the jury that the three death specifications merged for sentencing purposes. However, Chinn did not request a merger instruction from the trial court. Therefore, any error by the jury on this point was waived. *State v. Tyler* (1990),

50 Ohio St.3d 24, 36; Crim.R. 30(A). Neither did he object to use of both culpability factors in the court's instruction on Aggravating Circumstances, and he does not argue that error here. We see no plain error.

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