[Cite as *State v. Branch*, 2009-Ohio-3946.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 22030
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-CR-1258/1
v.	:	
	:	(Criminal Appeal from
SHEA D. BRANCH	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 7th day of August, 2009.

. . . . . .

MATHIAS H. HECK, JR., by CARLEY J. INGRAM, Atty. Reg. #0020084, Montgomery County Prosecutor's Office, P.O. Box 972, 301 West Third Street, 5th Floor, Dayton, Ohio 45422
Attorneys for Plaintiff-Appellee

MARC N. GREENBERG, Atty. Reg. #0077480, Sherrets Law Offices, LLC, 580 Lincoln Park Blvd., Suite 399, Dayton, Ohio 45429
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant Shea D. Branch appeals from his conviction and ten-month sentence for Insurance Fraud, in violation of R.C. 2913.47(B)(1). Branch was found guilty by a jury. His assigned appellate counsel filed a brief in accordance with *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18

L.Ed.2d 493, indicating that he could find no potential assignments of error having arguable merit.

{¶ 2} By entry filed September 19, 2008, we rejected counsel's initial *Anders* brief as deficient. New appellate counsel was assigned. New counsel filed another *Anders* brief, on March 26, 2009, this one containing a commendable analysis of potential issues.

{¶ 3} By entry filed herein on April 3, 2009, we accorded Branch sixty days within which to file his own, pro se brief. He has not done so.

{¶ 4} We have conducted the independent review of the entire record, including the transcript of Branch's jury trial, required by *Anders v. California*, supra, and we have found no potential assignments of error having arguable merit. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} On December 29, 2005, a truck in which Branch was a passenger was involved in a collision with a car being driven by Timothy Diekman. Both Diekman and the occupants of the truck were leaving a bowling alley near the Dayton Mall. The truck, being driven by Samantha Wilson, was directly ahead of Diekman's car. Both had been waiting on a red light. According to Diekman, the truck waited for several seconds after it was free to proceed, and then began moving backwards, toward Diekman. Diekman sought to put his car into reverse and back up to avoid being struck by the truck. Unfortunately, Diekman inadvertently put his car into third gear, with the result that his car moved forward, hitting the truck that was moving

backward.

{¶ 6} According to Diekman, it was a low-impact collision: "Very, very minor. Just similar to somebody bumped your car in the lot or something. Nothing substantial at all."

{¶ 7} Occupying the truck were Branch, Wilson, and James Stepp. Stepp was also charged, in the same indictment, with Insurance Fraud, but was tried separately, and is not a party to this appeal. Diekman and the truck occupants got out of their vehicles after they had moved to a parking lot, and discussed the matter. Branch was of the view that there were significant damages to the truck, which was owned by Branch's brother, Zachary, who testified that he, Zachary, was in the process of selling the truck to Branch. Diekman, who believed there had been no fresh damage to the rear of the truck, remained largely silent, but complied with Branch's request to provide insurance information. Diekman did not seek insurance information from Wilson, because he did not intend to seek compensation for minor damage to his front license-plate holder, which was the only damage he could see on his car.

{¶ 8} Wilson testified for the State. Branch did not testify in his own defense. According to Wilson, Branch was intoxicated. She didn't see any fresh damage to the back of the truck, a 1999 model that already had a lot of dents and scrapes. She testified that:

{¶ 9} "And, so, Mr. Diekman gave me that stuff and I wrote it all down. And then, when we got back in the truck, Shea took that paper from me. And Shea was just saying that he was going to get some red paint and put it on the back of his truck

[Diekman's car was red], get his truck fixed because of what he was going to say Mr. Diekman done to his truck.

{¶ 10}"He was saying that we was going to go to the hospital because his back and his neck was hurt. And he kept saying he was going to tell, Jimmy [Stepp] was going to the hospital and tell them that's what happened to him. And he was going to – and I was going to go to the hospital and say the same thing."

{¶ 11}The trip to the hospital did not take place until the following morning. Branch, Wilson and Stepp went from the accident scene to a bar. When that bar closed, Branch and Stepp got into a fight with some other men. Branch injured his wrist.

{¶ 12}According to Wilson, Branch told the doctor at the emergency room the next morning that his back and neck were hurting him, and that his right wrist was broken, as a result of the car accident. He did not mention the fight at the bar. A brown splint was prescribed for Shea's wrist, and he wore it out of the emergency room. As soon as they got back into the truck, after leaving the emergency room, Shea removed the splint and threw it on the floor of the truck.

{¶ 13}Doctor Charles McIntosh, who treated Branch at the emergency room, confirmed that Branch complained of injuries resulting from a car accident, without mentioning a bar fight. Doctor McIntosh found no objective evidence of injuries, and an x-ray of Branch's wrist was negative, meaning that it was not broken. Doctor McIntosh prescribed a velcro wrist strap for Branch's comfort, but denied telling McIntosh that his wrist was broken, or suggesting in any way that Branch's wrist was broken.

{¶ 14}Diekman was insured by Nationwide Insurance. Branch's claim was assigned to Michael Austria, a casualty claim representative. Austria testified that a claim would not be assigned to him unless it included a claim for bodily injury. Austria testified that he telephoned Branch on January 3, 2006. During that phone call, Branch told Austria that he was hit from behind by a Nationwide policy holder while stopped at a red light, sustaining a neck injury, that he was missing a week of work, and that there had been damage to the truck. Branch told Austria that he had been to the hospital, but did not mention a wrist injury, or a bar fight. Austria testified that Branch's oral statements to him over the telephone were sufficient to begin a claim for bodily injury.

{¶ 15}As a result of this telephone conversation, arrangements were made for Zachary, the owner of the truck, to bring the truck to Wayside Collision for inspection of the damage. This took place on January 5, 2006. Branch was present, along with his brother, Zachary. At this meeting, Zachary pointed out the places on the back of the truck that had been damaged, allegedly, as a result of the collision. Branch was wearing a wrist splint, and claimed that his right wrist was fractured in the accident.

{¶ 16}Because the alleged damage to the truck did not appear to Austria to match up with the damage to Diekman's license-plate holder, and because the wrist injury did not appear to Austria to have been a plausible result of a low-impact collision, Austria alerted Nationwide's fraud department. James Kelleher, a special investigator for Nationwide, became involved.

{¶ 17}Kelleher talked to Branch on the telephone on January 9, 2006, and

met with him on January 10, 2006. Branch was not wearing a brace or splint on his wrist. Kelleher gave Branch a medical release form, which Branch signed. Branch told Kelleher that he had injured his wrist in the collision, but admitted that it was just sprained, not broken or fractured.

{¶ 18}After Kelleher showed Branch the photographs of the vehicles and asked Branch how such a low-velocity impact could cause a wrist injury, Branch told Kelleher, "really all I really want is just my truck fixed."

{¶ 19}Kelleher gave Branch an opportunity to sign a form withdrawing his claim, but it is not clear from the record whether the intent of the form was to effectuate the withdrawal of the entire claim, or just the bodily injury claim. At this point, the tenor of the meeting became acrimonious.

{¶ 20}Kelleher asked Branch for contact information for Samantha Wilson, the driver of the truck at the time of the accident. Branch said he had no contact information for her – that she had just been a "one-night stand."

{¶ 21}Samantha Wilson called Austria on January 12, 2006, and told Austria her version of events, meaning that Branch's claim was fraudulent. Kelleher and Austria met with Wilson at her place of employment. Austria denied the claim on January 13, 2006, and sent a letter to Branch to that effect. Kelleher reported evidence of insurance fraud to police.

{¶ 22}The relationship between Branch and Wilson, who gave evidence for the State very damaging to Branch, was a matter of importance in the trial. They had known each other since elementary school. On the subject of their relationship, Wilson testified as follows:

{¶ 23}"Q. Let's talk about since high school. Isn't it a true statement that since high school there have been periods of time that you and Shea had a relationship?

{¶ 24}"A. Mm-hmm.

{¶ 25}"Q. And then you would break up. There would be a period of off. And then you would get back together?

{¶ 26}"A. Yes.

{¶ 27}"Q. And that occurred from high school through the present; isn't that true?

{¶ 28}"A. Yes.

{¶ 29}"Q. When did you get out of high school?

{¶ 30}"A. In '96.

{¶ 31}"Q. Now, isn't it true that in the few days before this accident –

{¶ 32}"A. Seems longer than that, but, yes.

{¶ 33}"Q. In, in the days since the accident, you described your relationship with Shea as being on?

{¶ 34}"A. No.

{¶ 35}"Q. Were you seeing him?

{¶ 36}"A. No.

{¶ 37}" * * * *

{¶ 38}"Q. You told the insurance company that you had been driving his truck four or five times prior to the accident. Were you driving, were you having a relationship with Shea during that time?

{¶ 39}"A. No, I was not.

{¶ 40}"Q. So, so, at the, right before the night of the accident that you – right before the night of the accident, did you guys sleep together?

{¶ 41}"A. Yes.

{¶ 42}"Q. So, you were in a relationship right about the time of the accident. Is that a fair statement?

{¶ 43}"A. No. (Laugh, laugh.)[1]

{¶ 44}"Q. How would you describe it?

{¶ 45}"A. Um, well, I'm married. I don't know how to describe it. An affair, I guess.

{¶ 46}"Q. At the time of the accident, you were in the middle of an affair with Shea?

{¶ 47}"A. Yes."

{¶ 48}One tangible evidence of Wilson's relationship with Branch is that she had Branch's name tattooed on the back of her neck, which was displayed to the jury at trial.

{¶ 49}After this, defense counsel attempted to elicit from Wilson that she became aware, shortly after the accident, that Branch had begun living with another woman. She acknowledged having learned of this fact, but only "way after all this stuff."

---

[1]The parenthesized "Laugh, laugh" is in the original transcript. It is unclear whether the laughter referred to was that of the witness, of others in the courtroom, or both.

{¶ 50}The other woman referred to, Debra Brush, testified for the defense. She testified that she was just outside the door when Branch met with Kelleher, and that around this date, she received a telephone call from Wilson, who told her: "Debbie, you're a scandalous bitch. And if I can't have Shea, no one can have Shea. And I'm bringing him down on insurance fraud."

{¶ 51}Branch was indicted on one count of Insurance Fraud, in violation of R.C. 2913.47(B)(1), which provides as follows:

{¶ 52}"No person, with purpose to defraud or knowing that the person is facilitating a fraud, shall do either of the following:

{¶ 53}"(1) Present to, or cause to be presented to, an insurer any written or oral statement that is part of, or in support of, an application for insurance, a claim for payment pursuant to a policy, or a claim for any other benefit pursuant to a policy, knowing that the statement, or any part of the statement, is false or deceptive;

{¶ 54}"(2) * * * ."

{¶ 55}Following a jury trial, Branch was convicted as charged. He was sentenced to imprisonment for ten months, to be served consecutively with a sentence imposed in an unrelated case. From his conviction and sentence, Branch appeals.

{¶ 56}Because appellate counsel has filed a brief under the authority of *Anders v. California*, supra, there are no assignments of error to consider, but counsel has identified five potential assignments of error that he considered, before concluding that they have no arguable merit, and we have, in the course of our independent review, identified two additional potential assignments of error that we

have considered, before concluding that they have no arguable merit. These are addressed, seriatim, hereinbelow.

II

{¶ 57}"THE GUILTY VERDICT RENDERED BY THE JURY IN THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 58}We agree with appellate counsel that this potential assignment of error has no arguable merit. Certainly there is evidence in the record, that, if believed, would establish Branch's guilt beyond reasonable doubt – the test for sufficiency of the evidence. As appellate counsel notes, to reverse a conviction as being against the manifest weight of the evidence requires the reviewing court to determine that the fact finder clearly lost its way. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. We agree that it is not even reasonably arguable that this is the exceptional case where the jury lost its way.

III

{¶ 59}"THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE INDICTMENT OR CONVICTION OF THE APPELLANT."

{¶ 60}In connection with this potential assignment of error, appellate counsel discusses an argument made by defense counsel at trial that Branch could not be guilty of the charged offense because he neither owned the damaged truck nor was a named insured under Diekman's Nationwide Insurance policy. We agree with appellate counsel that this contention has no arguable merit. The statute, R.C.

2913.47(B)(2), is broad enough to include any statements that Branch may have made, either orally or in writing, in support of a claim for benefits under an insurance policy, knowing that it would facilitate a fraud.

{¶ 61}As far as the truck is concerned, there is nothing in the statute to require that the person receiving the benefits be the person making the statements. As far as the bodily injury claim is concerned, there is nothing in the statute to require that the person making a claim for benefits be an insured.

IV

{¶ 62}"THE DEFENDANT WAS DENIED HIS DUE PROCESS RIGHTS WHEN THE TRIAL COURT PERMITTED POTENTIALLY PREJUDICED JURORS TO REMAIN ON THE JURY."

{¶ 63}This potential assignment of error refers to a report that the regular bailiff, Julene Powers, made that one juror might have overheard a comment that she had made to a sheriff's deputy in the courthouse lobby, before she noticed the presence of the juror apparently waiting near an ATM (automatic teller machine) in the lobby, that "Mr. Branch got a little agitated at the end of the day."

{¶ 64}The trial court had the juror brought into chambers, and asked her if she had overheard any of the conversation between the bailiff and the sheriff's deputies in the courthouse lobby while she had been waiting there. The juror's response was:

{¶ 65}"No, because there was so much noise going on at this time and her back was turned to me. And at first, I didn't even realize who she was until she had

turned around."

{¶ 66}Without objection, the juror was sent back to the jury room with an admonition not to let the jury know the reason why she was brought into chambers.

{¶ 67}In view of the juror's statement that she did not overhear the conversation, we see no arguable merit to any potential assignment of error involving this incident.

V

{¶ 68}"THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN RULING ON THE ADMISSION OF HEARSAY AND IRRELEVANT EVIDENCE."

{¶ 69}Appellate counsel first refers to the trial court's admission of certain medical bills from the hospital where Branch was treated at the emergency room, over Branch's objection. Counsel concludes that the trial court properly admitted these documents under the business-record and statements-for-purposes-of-medical-treatment exceptions to the hearsay rule.

{¶ 70}Appellate counsel next refers to a State's objection that was sustained, to a question addressed to a Nationwide claims representative eliciting an out-of-court statement made by Samantha Wilson. Appellate counsel concludes that trial counsel was, in fact, attempting to use this out-of-court statement to prove the truth of the matter asserted therein, so that the State's hearsay objection was properly sustained.

{¶ 71}Appellate counsel next refers to the trial court's having sustained the

State's hearsay objection to a log kept by Michael Austria, the Nationwide claims representative. Trial counsel was unable to point to anything in the log that was inconsistent with Austria's trial testimony, so that the trial court properly found that it could not be admitted for impeachment purposes. Furthermore, as appellate counsel notes, and as trial counsel conceded at the time, Austria had testified concerning the things contained in his log, so that even if the trial court erred by ruling that the log was inadmissible, that error was harmless.

{¶ 72}Finally, appellate counsel refers to the ruling that the trial court made sustaining the State's objection to Branch's line of inquiry, directed to Debra Brush, intended to elicit that Samantha Wilson routinely engaged in conduct designed to get Branch in trouble. Appellate counsel concludes that the trial court properly excluded this evidence as evidence not qualifying as evidence of habit, routine or practice, and therefore not relevant.

{¶ 73}We agree with appellate counsel's conclusion that: "In none of these cases, could a valid argument be made that the rulings were unreasonable, arbitrary or unconscionable."

{¶ 74}Indeed, we have reviewed the entire trial transcript, and we have found no potential assignment of error having arguable merit that any of the trial court's evidentiary rulings, either separately, or in combination, constitutes prejudicial error.

VI

{¶ 75}"THE PRETRIAL MOTION TO QUASH WAS IMPROPERLY OVERRULED."

{¶ 76}Appellate counsel refers to a ruling by the trial court overruling Branch's

motion to quash a subpoena for his medical records from his visit to Southview Hospital, where he was treated at the emergency room the day after the accident, upon the ground that production of these documents would violate his physician-patient privilege.

{¶ 77}The trial court predicated its ruling upon two independent grounds. The first of these was based upon our holding in *Menda v. Springfield Radiologists* (2000), 136 Ohio App.3d 656, that by filing a civil suit putting a plaintiff's medical condition or treatment at issue, the plaintiff waives the physician-patient privilege in subsequent cases. As appellate counsel notes, our holding in *Menda* has most probably been overruled by the decision of the Supreme Court of Ohio in *Hageman v. Southwest Gen. Health Ctr.* (2008), 119 Ohio St.3d 185.

{¶ 78}But the second, independent ground for the trial court's ruling was that the physician-patient privilege will not protect disclosure of a fraudulent communication by the patient to the physician, since its purpose is not to facilitate obtaining medical treatment, but to facilitate, or to commit, fraud. *State v. Spencer* (1998), 126 Ohio App.3d 335, 340; *State v. Buchman* (1987), 36 Ohio App.3d 109; *State v. Desper* (2002), 151 Ohio App.3d 208; *State v. Jackson*, Cuyahoga App. No. 80051, 2002-Ohio-2746; *State v. Mouser*, Clinton App. No. CA2003-05-013, 2004-Ohio-2295. This second, independent ground for the trial court's ruling is unaffected by the holding in *Hageman v. Southwest Gen. Health Ctr.*, supra. Therefore, we agree with appellate counsel that there is no arguable merit to this potential assignment of error.

VII

{¶ 79}The first potential assignment of error we have independently considered is:

{¶ 80}"TRIAL COUNSEL WAS INEFFECTIVE FOR HAVING FAILED TO MOVE FOR A MISTRIAL AFTER THE WITNESS SAMANTHA WILSON REFERRED TO BRANCH'S HAVING BEEN IN PRISON AND ALSO HAVING REFERRED TO HIM AS A 'CAREER CRIMINAL.' "

{¶ 81}Samantha Wilson was an important witness for the State. She testified that Branch articulated, in her presence shortly after the accident, a scheme to defraud Diekman's insurance carrier by falsely claiming bodily injury and damage to the truck. This testimony, if believed, would not only establish that Branch's statements to the insurance company's representatives were false, but also that they were knowingly false – that they were not inadvertent misstatements.

{¶ 82}Wilson's original cross-examination concluded with her displaying to the jury, on request, Branch's first name, Shea, tattooed on her neck. The State's re-direct examination, immediately following this, began with an evident attempt to show that Wilson still loved Branch, despite her damaging testimony. The following testimony and colloquy ensued:

{¶ 83}"Q. Tell the jury why you got a tattoo with the defendant's name?

{¶ 84}"A. *Because he went to prison* and –

{¶ 85}"MS. TANGEMAN [representing the State]: Objection. Move to strike.

{¶ 86}"THE COURT: Sustained.

{¶ 87}"MS. TANGEMAN: Ask that the jury disregard.

{¶ 88}"THE COURT: The jury will disregard that last statement.

{¶ 89}"Q. I guess what I'm saying is, how significant was the defendant? What feelings did you have for him at the time that you got that?

{¶ 90}"A. I have a lot of feelings for Shea. Still do. But that didn't change the things he does to people or what he, he continues to do. *He's a career criminal*.

{¶ 91}"Q. Let me ask you, Samantha. Do you love the defendant even today as we sit in this courtroom?

{¶ 92}"A. Yes, I do. I always will."

{¶ 93}(Emphasis added.)

{¶ 94}The italicized statements are, of course, extremely prejudicial to Branch. Significantly, Branch, who in fact has a long criminal record, did not testify in his own defense, so that his criminal record would not otherwise have been made known to the jury.

{¶ 95}We have considered whether defense counsel's failure to have requested a mistrial following this interchange could be an assignment of error having arguable merit.

{¶ 96}One thing that should be noted is that the trial court, on its own initiative, fashioned a jury instruction on this subject, which it gave as part of its general jury instructions, as follows:

{¶ 97}"There was testimony that the defendant was previously in prison. This testimony was stricken by the court from the record. You are to completely disregard this testimony and you may not consider it for any purpose."

{¶ 98}When the trial court, on its own initiative, proposed this jury instruction to counsel, there was no objection, and, in fact, defense counsel remarked: "Sounds

great. Whatever you think is appropriate."

{¶ 99}There is no video record of this trial. Therefore, we cannot review the tone of Samantha Wilson's trial testimony beyond the words appearing on the printed page. We do have defense counsel's characterization of her testimony in closing argument, as follows:

{¶ 100} "Samantha Wilson's account. Now, God bless Samantha Wilson. Her last words she said to you were true. I've always loved Shea and I always will. But that woman is pathetic. Is that a sad situation. Why? She's torn between love and hate. And there was a pattern of it. I didn't go into it. I didn't beat her up like my witness who just mentioned the pattern gets beat up.

{¶ 101} " * * * *

{¶ 102} "The hate. Where's the hate come in? Every chance she had, she slammed Shea in that interview.

{¶ 103} "How the accident happened, what Shea's intentions were, what his background is, what he did. Everything she could.

{¶ 104} "The first chance she had, she did talk to these folks, she just leveled him. And when did that happen? Or, what other occasions do you have?

{¶ 105} "I'll tell you. Right there (indicating). She said everything she could, even stuff that was stricken, to hurt Shea. There's the love-hate.

{¶ 106} "I'm not making that up. You saw it. That is there. It's your province, you can decide."

{¶ 107} It was crucial for the defense to discredit Wilson's testimony. From the above-quoted passage from defense counsel's closing argument, we infer

that the tone of her testimony clearly evinced an animosity to Branch to which counsel was referring in an attempt to persuade the jury that her damaging testimony could be explained by her status as the woman scorned.

{¶ 108} This was clearly a defense strategy during the trial. After Wilson's testimony, during the State's case-in-chief (there was no rebuttal), concerning Branch's having been in prison and his being a career criminal, when defense counsel did not ask for a mistrial (in fact, it was the State, not the defense, that objected to the prison remark and obtained an instruction to disregard it), defense counsel attempted, unsuccessfully, to elicit testimony from Debra Brush that Branch had gone to prison before as a result of Wilson's actions. In explaining to the court the relevance of the inquiry he was seeking to be allowed to pursue with Brush, defense counsel expounded:

{¶ 109} "MR. MCGINNIS: It's true. According to all the – all these folks. I was getting to a pattern. I was not going to get into the details.

{¶ 110} "THE COURT: I'm not sure. I hear you saying she's [Wilson] made false statements against your client in the past that's brought him down.

{¶ 111} "MR. MCGINNIS: Yes.

{¶ 112} "THE COURT: Involving insurance fraud or?

{¶ 113} "MR. MCGINNIS: Not insurance fraud but he has gone to prison before because of events relating to her.

{¶ 114} "THE COURT: So he's been falsely imprisoned because she's falsely testified against him?

{¶ 115} "MR. MCGINNIS: I don't know the particulars but she was the

catalyst of that.

{¶ 116} "THE COURT: I'm not persuaded of the relevance of that line of inquiry. So I sustain the objection."

{¶ 117} Although the attempt to elicit this testimony was unsuccessful, it illustrates the defense strategy of attempting to discredit Wilson's testimony by showing that her vengeful resentment against Branch extended as far as having caused him in the past to go to prison. Thus, she would have no qualms about falsely testifying in this trial to send Branch to prison.

{¶ 118} Because it was obviously so crucial to the defense to discredit Wilson's testimony, we are persuaded that it is not even reasonably arguable that the above-described strategy of welcoming, and using, Wilson's objectionable testimony was not within the limits of reasonable trial strategy, where appellate courts routinely give great deference to the judgments of experienced trial counsel. Branch's trial counsel was experienced. Consequently, we conclude that this potential assignment of error has no arguable merit.

VIII

{¶ 119} The second potential assignment of error we have independently considered is:

{¶ 120} "TRIAL COUNSEL WAS INEFFECTIVE FOR HAVING FAILED TO REQUEST A MISTRIAL, OR OTHER RELIEF, AS A RESULT OF A COMMENT BY A DEFENSE WITNESS THAT WAS OVERHEARD BY, AND WAS THE SUBJECT OF THE CONCERN OF, ONE JUROR."

{¶ 121} Debra Brush, with whom Branch was living, testified for Branch. At the conclusion of cross-examination, the State elicited from her that she had been convicted of Falsification, which, of course, was a proper subject of cross-examination, since Falsification, although a misdemeanor, is a crime involving dishonesty. Evid. R. 609(A)(3). This was the last question and answer during Brush's testimony, and she was excused. According to the transcript, she said, after the trial court thanked her and told her that she could step down: "I'm about to go off."

{¶ 122} When we first read this in the transcript, we presumed that Brush's comment merely alluded to her physically stepping down from the witness stand, possibly referring to almost falling off the edge. This presumption, however, was overcome by a later episode in the transcript, in which the trial court's staff attorney, Tyler Starline, who had been pressed into service as the acting bailiff when the regular bailiff had a death in the family, made the following report:

{¶ 123} "MR. STARLINE: Judge, as the jurors, and I don't know which one was stepping down from the jury box, she said something to the line of I've got a question. And when I was leading them in the hallway to the jury room, she turned around and stopped.

{¶ 124} "Asked: What do we do about a witness saying something when he's coming off the stand, something to that effect.

{¶ 125} "And I overheard this last witness say something like, I'm about to go off. And she said I'm concerned for the prosecutor's safety.

{¶ 126} "And, I told her, you do what the judge instructed you to do.

Don't worry about the prosecutor or anything else. We have security in the courthouse for everything like that.

{¶ 127} "And then, let her go back into the room and that was it.

{¶ 128} "THE COURT: All right. Any questions?

{¶ 129} "MS. TANGEMAN: No. I mean, she didn't inquire about her safety, did she?

{¶ 130} "MR. STARLINE: No.

{¶ 131} "THE COURT: Mr. McGinnis?

{¶ 132} "MR. MCGINNIS: Did the other jurors hear?

{¶ 133} "MR. STARLINE: I don't know. Most of them had gone to the door, the jury room door.

{¶ 134} "THE COURT: It was just that I wanted this to be reflected on the record.

{¶ 135} "MS. TANGEMAN: The defendant has repeatedly made comments throughout this trial, I know I've heard them at counsel table, under his breath.

{¶ 136} "Actually, at one point I even was interrupted because I thought it was like an objection under Carlo's [McGinnis] breath. So, I would note that pattern of comments being made has not been foreign to the jurors. I don't know if they hear what the defendant is saying. But, but there have been comments.

{¶ 137} "THE COURT: Yes. I had asked counsel before we went on the record whether the comment about I'm about to go off was overheard by counsel.

{¶ 138} "MR. MICHENER [representing the State]: I have heard that

comment, your Honor, when she was getting down from the stand. I think she said it loud enough that it was audible in the courtroom.

{¶ 139} "THE COURT: Did you hear that, Mr. McGinnis?

{¶ 140} "MR. MCGINNIS: Yes, Judge.

{¶ 141} "THE COURT: All right. Well, I don't think there's anything – the court's reaction is it was said. It was overheard. But it was said by Debra Brush. And we can't undo it. She said it. It was the defense witness, not a prosecutor's witness. So, my reaction is that's what happened. There's not much the court can do now that it's happened. But have you got any input?

{¶ 142} "MS. TANGEMAN: No, your Honor.

{¶ 143} "THE COURT: I don't think there's any evidence that there's any problem with the jury. I mean, again, she didn't express concern for her safety.

{¶ 144} "MS. TANGEMAN: I'll be honest with you, I didn't hear it. But my head was obviously in my notes and so forth.

{¶ 145} "THE COURT: But again, I would just reiterate that comments have not been unusual in trial. And certainly the defense couldn't, any witnesses for the defendant can't invite error and then take advantage of that error even if it was not by the defense attorney, but it is a defense witness; it's not a state's witness.

{¶ 146} "MR. MCGINNIS: Judge, I'll defer to what you do in this situation. And if you think it's all right to leave it the way it is, I'm fine.

{¶ 147} "THE COURT: I don't know what the court can do. Again, this is not a situation of, of anything done by the state or by the prosecutor. It was not something that was elicited by the prosecutor. It was volunteered by a witness for

defense as the witness was getting off the chair and blurted out by the witness. There was no question. The statement was made. Both Mr. McGinnis and Mr. Michener overheard it. So, I guess that's the way we leave it. Okay."

{¶ 148} We see no arguable merit to this potential assignment of error. Nothing said by the juror indicated that it would affect her verdict. Inquiry concerning whether other jurors heard the remark, and what they might have made of it, would serve only to either: (1) bring the remark to the attention of jurors who had not heard it; or (2) give the remark significance in the minds of the juror who had heard it, that it would not otherwise have had. We see no potential claim of ineffective assistance of trial counsel having arguable merit.

IX

{¶ 149} We have found no potential assignments of error having arguable merit. We conclude that this appeal is wholly frivolous. Accordingly, the judgment of the trial court is Affirmed.

. . . . . .

GRADY and FROELICH, JJ., concur.

Copies mailed to:

Mathias H. Heck, Jr.
Carley J. Ingram
Marc N. Greenberg
Shea D. Branch
Hon. Dennis J. Langer