

[Cite as *State v. Saxton*, 2002-Ohio-1024.]

**IN THE COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
MARION COUNTY**

**STATE OF OHIO**

**CASE NO. 9-2000-88**

**PLAINTIFF-APPELLEE**

**v.**

**ANTHONY LAQUAN SAXTON**

**OPINION**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas  
Court**

**JUDGMENT: Judgment Affirmed**

**DATE OF JUDGMENT ENTRY: March 7, 2002**

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**ATTORNEYS:**

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**Walters, J.**

{¶1} Defendant-Appellant, Anthony Saxton, appeals a judgment of conviction by the Marion County Common Pleas Court finding him guilty of aggravated murder, in violation of R.C. 2903.01(B), aggravated arson, in violation of R.C. 2909.02(A)(2), and aggravated burglary, in violation of R.C. 2911.11(A)(1).

{¶2} Appellant claims that there was insufficient evidence to support his conviction, which, in turn, should have supported his motion for acquittal, and that the convictions were against the manifest weight of the evidence. However, based upon an abundance of circumstantial evidence coupled with Appellant's numerous contradictory statements to the police during their investigation, we find that the evidence was sufficient to warrant conviction, and as such, the convictions were not against the manifest weight of the evidence.

{¶3} Appellant also asserts that the State's expert witness's testimony concerning an out-of-court experiment and his wife's testimony regarding threats he allegedly made just days before the crime should have been excluded. The expert's testimony was probative, however, to determine the solubility of magazine ink that had left a clear impression on Appellant's shoe, and any dissimilarities between the experiment and the actual events went to the weight of the evidence, not its admissibility. Furthermore, Appellant's wife's testimony was

probative of Appellant's motive behind the crimes, and any potential prejudice was cured by cross examination of the witness about her prior inconsistent statements.

{¶4} The record further does not support Appellant's contentions that the State engaged in prosecutorial misconduct, that his attorneys provided ineffective assistance of counsel, or that his motion for a new trial should have been granted. The State did not inaccurately state the evidence in closing arguments, and the State is free to comment on Appellant's failure to call witnesses to support his case; thus precluding Appellant's claim of prosecutorial misconduct. Appellant's attorneys' failure to seek a continuance in order to locate an alibi witness did not rise to the level of ineffective assistance of counsel because the record does not indicate what the testimony would have been had the witness testified at trial, and there is not a reasonable probability that the outcome would have changed had the witness testified. However, the failure to request a continuance did preclude the granting of a new trial based upon newly discovered evidence because Appellant did not use due diligence prior to trial in attempting to procure the testimony.

{¶5} The facts leading to Appellant's appeal are as follows. On Saturday, July 3, 1999, Appellant and his wife, Pamela Saxton, argued about her refusal to leave Appellant the keys to her car while she went out of town to visit family. She

left the car at her mother and daughter's house and locked the keys to the car in her mother's bedroom without telling anyone. Thereafter, she and her mother left, leaving her daughter, Taranda Braddy, at home alone.

{¶6} On Wednesday, July 7, 1999, the Marion, Ohio Fire Department was dispatched to Taranda Braddy's house in response to a fire. Once a majority of the fire was extinguished, Taranda's body was found lying on the bed in her upstairs bedroom. The coroner determined that she had died of strangulation before the fire was set. Investigators determined that the fire was intentionally set using gasoline as an accelerant.

{¶7} Appellant arrived at the scene later that morning and was approached by investigating officers. Thereafter, he consented to a search of his home located approximately one mile from the scene of the crime. During the search, officers found potential evidence linking Appellant to the crimes. Appellant was later arrested for an unrelated parole violation, and the investigation surrounding Taranda Braddy's death continued.

{¶8} During the investigation, Appellant never accounted for his whereabouts between the times the crimes were committed and continually gave conflicting statements to the police. Furthermore, an abundance of circumstantial evidence was recovered linking Appellant to the crime. Consequently, on July 29,

1999, Appellant was indicted on one count of aggravated murder, one count of aggravated burglary, and one count of aggravated arson.

{¶9} On March 8, 2000, after a two-week jury trial, Appellant was convicted on all counts. Subsequently, Appellant filed a motion for acquittal and a motion for a new trial, which were both denied after a hearing on the motions. On September 22, 2000, Appellant was sentenced to life imprisonment for aggravated murder, ten years imprisonment for aggravated burglary, and eight years imprisonment for aggravated arson; all terms to be served consecutively.

{¶10} From this conviction and sentence, Appellant brings his appeal and raises nine assignments of error for our review. For purposes of brevity and clarity, we will not be addressing them in the order in which they were assigned.

**Assignment of Error II**

**{¶11} The record contains insufficient evidence to support Defendant-appellant's conviction.**

**Assignment of Error VIII**

**{¶12} The trial court erred to the prejudice of Defendant-appellant by denying Defendant-appellant's post trial motion for acquittal.**

**Assignment of Error I**

**{¶13} Defendant-appellant's conviction is contrary to the manifest weight of the evidence.**

{¶14} Appellant challenges the sufficiency of the evidence in his second assignment of error and the weight of the evidence in his first assignment of error.

In his eighth assignment, he avers that the trial court erred by denying his Crim.R. 29 motion for acquittal. Because these assignments are sufficiently related, we will address them together.

{¶15} The relevant inquiry for reviewing a denial of a Crim.R. 29 motion is the same as the inquiry for sufficiency of the evidence.<sup>1</sup> To reverse a conviction for insufficient evidence, we must be persuaded, after viewing all of the evidence in a light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.<sup>2</sup> The elements necessary for a conviction of aggravated murder in this case include that Appellant purposefully caused another's death while committing or attempting to commit kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, or escape.<sup>3</sup> Likewise, for a conviction of aggravated arson, the State must prove that Appellant knowingly caused physical harm to an occupied structure by means of fire.<sup>4</sup> And, aggravated burglary requires proof that Appellant trespassed in an occupied structure by force, stealth, or deception when another person was present with the purpose to commit any criminal offense and

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<sup>1</sup> *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus.

<sup>2</sup> *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, superseded by state constitutional amendment on other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89.

<sup>3</sup> R.C. 2903.01(B).

<sup>4</sup> R.C. 2909.02(A)(2).

that physical harm was inflicted upon another.<sup>5</sup> Appellant contends that the evidence adduced at trial was insufficient to maintain his convictions. Based upon the following, we disagree.

{¶16} The State's case herein was based solely upon circumstantial evidence. No direct evidence was presented that placed Appellant at the scene of the crime; however, the Ohio Supreme Court has held that “[c]ircumstantial evidence and direct evidence inherently possess the same probative value.”<sup>6</sup> Therefore, regardless of whether the evidence is comprised of direct or circumstantial evidence, the standard of review for sufficiency of the evidence is the same.<sup>7</sup>

{¶17} Testimony at trial revealed that the victim died as a result of strangulation before the fire was set. The coroner testified that while the precise time of the victim's death could not be accurately pinpointed due to the burn damage to the body, evidence revealed that the victim was killed between 2:00 a.m. and 6:00 a.m. Arson investigators testified that the fire was intentionally set with a gasoline accelerant based upon the burn patterns found in the upstairs of the house, a gas can found at the top of the stairs, and samples of the upstairs carpet

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<sup>5</sup> R.C. 2911.11(A)(1).

<sup>6</sup> *Jenks*, 61 Ohio St.3d at 272.

<sup>7</sup> *Id.* at 273.

that tested positive for gasoline. Testimony also indicated that there was no forced entry into the house and nothing was taken from the premises.

{¶18} Less than seven hours after the fire was reported, Appellant gave investigators consent to search his home. In his upstairs bathroom, officers found several articles of clothing soaking in the bathtub. Testimony revealed that the clothes included two pairs of men's underwear, a pair of shoes, a t-shirt, a jacket, a pair of denim shorts, and a yellow mesh outfit consisting of a pair of shorts and a shirt. Officers testified that they smelled gasoline emanating from the tub and the smell of a strong detergent. Next to the tub, officers found an almost completely empty bottle of Purex. Testimony indicated that Appellant told them the clothes had been in the tub since he worked at the county fair dismantling rides in the late hours of July 4th to the early morning hours of July 5th.

{¶19} Results of scientific testing revealed that traces of gasoline were present on either the denim shorts or the shoes. Which specific item contained the gasoline could not be determined because those articles were packaged together and were possibly cross contaminated. On July 13th, Appellant told the police that the denim shorts were soaking in the bathtub because he accidentally had diarrhea while wearing them, although the State's scientific testing revealed no traces of feces, and Appellant also stated that he may have washed his hands with

some gasoline from his neighbor after working at the fair. Neither of these statements were given to police in any of the prior interviews with Appellant, and in prior statements Appellant specifically stated that no gasoline would be found on his clothes.

{¶20} Investigators also discovered that one of the shoes found in the bathtub had a perfectly transferred impression of a magazine advertisement on its sole. The magazine was later confiscated from Appellant's home. The advertisement that transferred to the shoe was located in an issue that did not arrive in Marion until Tuesday, July 6th, which contradicted Appellant's statement that the clothes and shoes had been in the bathtub since the early morning of July 5th. Witnesses also indicated that Appellant had worn the yellow outfit and the shoes found in the tub the day before the murder.

{¶21} The first fire and police personnel who arrived at the scene of the crime in the morning hours of July 7th noticed a single track in the dew of the grass, apparently left by a bicycle, that lead from the front of the house to the dirt alley behind the house. The only break in the track was over a portion of the driveway located on the side of the residence. Later that day, a stolen bicycle was recovered four houses away from Appellant's house, and plaster casts of tire tracks made in the alley running behind the victim's house closely resembled one

of the tires on the stolen bike and did not match any of the approximately 125 bicycles that were in the custody of the Marion Police Department at the time of the murder. Further testimony indicated that the bicycle was stolen approximately half-way between Appellant's house and the scene of the crime and was stolen sometime after 11:00 p.m. on July 6th and deposited near Appellant's house before 6:30 a.m. on July 7th. Moreover, a blue cotton fiber consistent with denim material was found on the seat of the bicycle, and an eyewitness saw a black male riding a bicycle at 5:50 a.m. in the direction of Appellant's home; however, the witness could not identify Appellant and stated that the man on the bike had on long pants.

{¶22} Appellant's wife, Pamela Saxton, testified that she and Appellant had engaged in a heated argument over her prohibiting Appellant's use of her car while she was out of town. Appellant's statements to the police corroborated this testimony. She indicated that when Appellant realized that the car would be left at the victim's house, he threatened to blow up the car and burn down the house. Her testimony also revealed that Appellant was more angry than she had ever seen him. Pamela further stated that Appellant had previously never washed his clothes in the bathtub aside from occasionally using the bathtub to wash underwear.

{¶23} During the course of the investigation, Appellant never accounted for his whereabouts during the hours of 3:00 a.m. to 6:00 a.m. on July 7th, the times between which the crimes were committed. Appellant initially told police that he was in bed by 2:30 a.m. and was then awakened by his mother's arrival around 3:00 a.m., after which they sat up talking. Thereafter, Appellant told police that he had left the house to make a phone call to his girlfriend around 3:00 a.m. and missed the arrival of his mother who was waiting in her rented U-Haul truck. These statements were not given until after the police told him that his prior statement indicating that he called his girlfriend from his house on the night of the murder did not correlate with the fact that he had a long distance block on his home phone. The telephone records from the pay phone he used indicated that the call was placed at 2:51 a.m. on July 7th. Appellant also initially told another witness that on the night of the crime he had gone to Cleveland to pick up his mother and drive her back to Marion. This was refuted by the testimony of a police officer who gave Appellant's mother directions to Appellant's house at around 3:00 a.m. on the morning the crimes were committed. Pamela Saxton testified that Appellant originally stated that his mother was outside waiting in the U-Haul truck until 6:00 a.m. but later claimed that he let her in by 4:00 a.m. Pamela also indicated that several months after the crime Appellant asserted for

the first time that another woman was with him at his house on the night of the crime, and she left out the back door while Appellant was letting his mother in the front door; however, no testimony at trial corroborated this account of events.

{¶24} Another State witness testified to a statement made by Appellant, which inferred that Appellant knew facts about the case that only the perpetrator could have known. Following the murder, Appellant stated to a friend over the phone that the victim was strangled before the fire was set; however, this statement was made before the police had publicly announced the cause of death. The investigating officer monitoring this phone conversation did not know the cause of death at that time. Appellant claims that he heard the information from a cellmate who was told the cause of death from one of the investigating officers.

{¶25} Based upon the foregoing evidence presented by the State, we find that a rational trier of fact could have concluded that Appellant committed the crimes for which he was convicted beyond a reasonable doubt. Therefore, we overrule Appellant's second and eighth assignments of error.

{¶26} We now turn to discuss Appellant's contention that the jury verdict was against the manifest weight of the evidence. The standard to apply when reviewing such a claim has been set forth as follows:

**{¶27} The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of**

**witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.<sup>8</sup>**

{¶28} Furthermore, an appellate court should grant a new trial only in an exceptional case “where the evidence weighs heavily against the conviction.”<sup>9</sup>

This is not such a case. A complete review of the record herein does not lead this court to conclude that the jury clearly lost its way in rendering a guilty verdict.

{¶29} Consequently, Appellant’s first assignment of error is not well taken and is overruled.

### **Assignment of Error III**

**{¶30} The trial court erred to the prejudice of Defendant-appellant by allowing the testimony of Michelle Yezzo regarding the paper to paper transfer experiment.**

{¶31} At trial, the State’s expert witness, Michelle Yezzo, testified to the results of an experiment she conducted in order to determine the solubility of the ink used in the magazine that had left a clear impression on one of Appellant’s shoes found during the day of the murder. The experiment revealed that gasoline clearly transferred the ink from the magazine to a piece of white bond paper, whereas the dry magazine or the use of water did not transfer the ink onto the paper. Appellant contends in his third assignment of error that the experiment was not representative of how the ink transferred to the shoe because it was conducted

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<sup>8</sup> *State v. Martin* (1983), 20 Ohio App.3d 172, 175; *Thompkins*, 78 Ohio St.3d at 387.

using bond paper instead of a shoe, and therefore, the testimony should have been excluded because the experiment lacked probative value and was unduly prejudicial. Appellant does not contend, however, that Michelle Yezzo lacked the qualifications to testify as an expert or that the methods utilized to conduct the experiment were unreliable.

{¶32} As an initial matter, we note that the admission of expert testimony is a matter generally within the discretion of the trial court and will not be disturbed absent an abuse of discretion.<sup>10</sup> An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary.<sup>11</sup> For the reasons that follow, we find that the trial court did not abuse its discretion in allowing Michelle Yezzo's testimony concerning the experiment.

{¶33} The Ohio Supreme Court has held that when an out-of-court experiment is not represented to be a reenactment of a given situation and instead relates to one aspect or principle directly associated to the cause or result of the occurrence, the exact conditions of the situation need not be duplicated.<sup>12</sup> Herein, the experiment was utilized to test the solubility of the magazine ink and whether

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<sup>9</sup> *Id.*

<sup>10</sup> *State v. Awkal* (1996), 76 Ohio St.3d 324, 331.

<sup>11</sup> *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 498, 506.

gasoline would clearly transfer the ink on to another surface, not to recreate the actions taken to transfer the impression on to Appellant's shoe. As such, the solubility of the magazine ink is directly associated to how a clear impression of the magazine is able to transfer to other surfaces. For these reasons, the testimony was probative.

{¶34} Additionally, we find that the testimony was not unduly prejudicial. Evid.R. 403(A) states that, “although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice[.]” The rule favors admission unless the risk of prejudice is so substantial that a jury cannot properly evaluate it.<sup>13</sup> The testimony elicited upon the State's direct examination and Appellant's cross examination of Michelle Yezzo informed the jury of the dissimilarities between the experiment and the actual events. Furthermore, Appellant rebutted the testimony with his own expert who used a shoe to conduct his experiment. Though he found that the ink transferred dry or with water, he was unable to testify to whether any words or letters clearly transferred. The dissimilarity of the State's experiment to the actual events,

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<sup>12</sup> *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 615, citing *Galindo v. Riddell, Inc.* (1982), 107 Ill. App.3d 139. See, also, *Leichtamer v. Am. Motors Corp.* (1981), 67 Ohio St.2d 456, 473.

<sup>13</sup> *Miller*, 80 Ohio St.3d at 615; *Leichtamer*, 67 Ohio St.2d at 473; *State v. Aliff* (Apr. 12, 2000), Lawrence App. No. 99CA8, unreported.

therefore, goes to the weight, not the admissibility of the evidence.<sup>14</sup>

Consequently, Appellant was not unduly prejudiced by the expert testimony.

{¶35} In light of the foregoing, we overrule Appellant's third assignment of error.

#### **Assignment of Error IV**

**{¶36} The trial court erred to the prejudice of Defendant-appellant by allowing the testimony of Pamela Saxton about an alleged threat to set the house on fire.**

{¶37} In his fourth assignment of error, Appellant maintains that the trial court erred by allowing testimony of Pamela Saxton concerning threats made by Appellant a few days before the crime that he would burn down the victim's house. Appellant claims that because Pamela never mentioned the specific threat she stated during the trial in any prior statements to the police, it should have been excluded as it lacked credibility and was unduly prejudicial.

{¶38} The testimony concerning the threats were directly related to the State's theory of the motive behind the crimes; namely, that Appellant wanted use of Pamela's car, which she had left at the victim's house while she went out of town. Though the testimony was admissible as proof of motive under Evid.R. 404(B), Appellant contends that the trial court should have excluded the evidence

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<sup>14</sup> *Miller*, 80 Ohio St.3d at 615; *Leichtamer*, 67 Ohio St.2d at 473.

because its probative value was substantially outweighed by the danger of unfair prejudice.<sup>15</sup> Because Appellant's alleged threats occurred just days before the crimes were committed, were specifically directed toward the victim's home, and bear a direct correlation to Appellant's motive, we do not find that their probative value was substantially outweighed by the risk of unfair prejudice.

{¶39} Moreover, though Pamela had never mentioned the specific threat that was elicited upon direct examination before trial, the recentness of the statement and potential inconsistencies in Pamela's prior statements to the police and her trial testimony were effectively inquired into on cross-examination. The weight of the evidence and the credibility of witnesses are primarily left for the trier of fact;<sup>16</sup> thus, as the trier of fact, the jury was free to determine the veracity of the testimony, and there was no prejudicial error in its admission. Accordingly, Appellant's fourth assignment of error is hereby overruled.

#### **Assignment of Error V**

**{¶40} Prosecutorial misconduct rendered Defendant-appellant's trial fundamentally unfair in violation of the Constitutions of Ohio and the United States.**

{¶41} Appellant claims in his fifth assignment of error that the State engaged in prosecutorial misconduct at several points during the trial. He first

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<sup>15</sup> Evid.R. 403; *State v. Allard* (1996), 75 Ohio St.3d 482, 500; *Jacobs v. Gupta* (May 11, 2000), Allen App. No. 1-99-85, unreported; *State v. Sargent* (Mar. 9, 1998), Butler App. No. CA97-05-097, unreported.

<sup>16</sup> See, e.g., *State v. Wilson* (1996), 74 Ohio St.3d 381, 390.

asserts that the State's failure to disclose to Appellant that Pamela Saxton was going to state for the first time at trial that Appellant had threatened to burn down the victim's house constitutes prosecutorial misconduct. However, Crim.R. 16, which controls discovery for criminal cases, specifically states that "statements made by witnesses or prospective witnesses to state agents" is not discoverable.<sup>17</sup> Moreover, there is nothing in the record that indicates the State was aware that she would be testifying differently than her pre-trial statements. Therefore, the fact that Pamela gave inconsistent statements before and during trial as to the exact wording of Appellant's threats does not constitute prosecutorial misconduct.

{¶42} Appellant also maintains that the State inaccurately recited the trial testimony during closing arguments. Specifically, Appellant asserts that the State commented during summation that nothing had been taken from the victim's house on the night of the murder, which he claims is inaccurate because testimony did indicate that the victim's pager was never recovered. As a threshold matter we note that Appellant did not object to these statements; accordingly, the issue of whether the comments constituted prosecutorial misconduct were not properly preserved for our review upon appeal.<sup>18</sup>

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<sup>17</sup> Crim.R. 16(B)(2).

<sup>18</sup> *State v. Lott* (1990), 51 Ohio St.3d 160, 167.

{¶43} Notwithstanding Appellant's failure to preserve the issue for appeal, we find that the State's comments did not constitute prosecutorial misconduct. In order to find prosecutorial misconduct, we must first determine whether the prosecutor's remarks were improper; if so, we then consider whether the remarks prejudicially affected substantial rights of the accused.<sup>19</sup> Additionally, we note that the State is entitled to a certain degree of latitude during closing arguments<sup>20</sup> and is free to draw reasonable inferences from the evidence presented at trial, which may be commented on during closing argument.<sup>21</sup>

{¶44} At trial, the victim's grandmother, Tiny Braddy, who owns and also resides in the house where the crimes were committed, testified that nothing had been removed from the house on the night of the murder. Further testimony from one of the investigating officers indicated that the victim's pager was never recovered. Because there was evidence that nothing was taken from the residence and because the officer's testimony did not conclude that the pager was taken, we do not find that the prosecution's statements were improper.

{¶45} Finally, Appellant argues that the State also made improper statements during its rebuttal closing argument. Appellant objected to the following statement:

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<sup>19</sup>*State v. Treesh* (2001), 90 Ohio St.3d 460, 464, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

<sup>20</sup>*Treesh*, 90 Ohio St.3d at 466, citing *State v. Grant* (1993), 67 Ohio St.3d 465, 482.

**{¶46} You see both sides have an opportunity to subpoena witnesses in this case and both sides exercised that option to do that. If there's anyone to help account for this Defendant's presence, you can bet the Defendant would subpoena them in here.**

{¶47} The Ohio Supreme Court has held that the State is not prevented from commenting upon the failure of the defense to offer evidence in support of its case.<sup>22</sup> Consequently, comments that a witness other than the accused did not testify are not improper.<sup>23</sup> As such, the State's comments did not constitute prosecutorial misconduct.

{¶48} For these reasons, we overrule Appellant's fifth assignment of error.

#### **Assignment of Error VI**

**{¶49} Defendant-appellant received prejudicially ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights, as well as his rights under Section 10, Article I, Ohio Constitution [sic].**

{¶50} Appellant avers that his counsel was ineffective because they failed to procure a potential alibi witness to testify at trial. A claim for ineffective assistance of counsel requires proof that trial counsel's performance fell below objective standards of reasonable representation and that the defendant was prejudiced as a result.<sup>24</sup> To show that a defendant has been prejudiced by

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<sup>21</sup> *Smith*, 80 Ohio St.3d at 111.

<sup>22</sup> *State v. Williams* (1986), 23 Ohio St.3d 16, 20, citing *Lockett v. Ohio* (1978), 438 U.S. 586, 595; *State v. Lane* (1976), 49 Ohio St.2d 77, 86, vacated on other grounds (1978), 438 U.S. 911; *State v. Clemons* (1998), 82 Ohio St.3d 438, 452.

<sup>23</sup> *Clemons*, 82 Ohio St.3d at 452, citing *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 193.

<sup>24</sup> *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, but for counsel's errors, the outcome at trial would have been different.<sup>25</sup> "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial.<sup>26</sup> Based upon the following rationale, we find that Appellant was afforded effective assistance of counsel.

{¶51} Shortly before trial Appellant informed his counsel of a potential alibi witness. Because Appellant could only provide a nickname for this witness, his counsel hired a private investigator to identify the witness's true name and her whereabouts. Five days before trial a subpoena was issued in hopes to procure this witness's testimony at trial; however, because Appellant's counsel did not have the correct name or address of the potential witness, the subpoena was issued under the name Denise Bonds instead of Donna Bonds and was not issued to her address. As such, the witness did not appear at trial.

{¶52} Thereafter, Appellant's counsel located the witness, and in support of Appellant's motion for a new trial, Appellant's counsel produced two affidavits from Donna Bonds. The first affidavit stated that Donna was with Appellant at his house on the night of the murder and left out the back door while Appellant was letting his mother in the front door. The second affidavit was drafted to affirm the

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<sup>25</sup> *Id.* at paragraph three of the syllabus.

first because during the interim between the two affidavits, investigating officers from the Marion Police Department took a certified statement from Donna, indicating that the sworn affidavit she initially gave was false and that she had signed the affidavit without reading it. At Appellant's hearing for a new trial, Donna was called to testify; however, because there was a risk that she may testify contrary to her sworn affidavits, in light of her prior statements to the police, the trial judge afforded her an opportunity to consult with an attorney. After consultation, she asserted her Fifth Amendment privilege against self incrimination and did not testify. Furthermore, she stated at the hearing that she would likely assert her Fifth Amendment right in any future proceeding on Appellant's behalf.

{¶53} While we find that the better practice would have been for defense counsel to seek a continuance in order to procure Donna's appearance at trial, based upon her contradictory statements and her refusal to testify at the new trial hearing, we have no indication from the record as to what her testimony would have been had she appeared and testified, or even if she would have testified. Without knowing the content of Donna's testimony, or even whether she would have testified, there is no basis for this court to find prejudice and that there is a

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<sup>26</sup> *State v. Waddy* (1992), 63 Ohio St.3d 424, 433, superseded by state constitutional amendment on other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89.

reasonable probability that the result of the trial would have been different if her testimony had been presented.<sup>27</sup>

{¶54} Consequently, we find that Appellant's sixth assignment of error is without merit and is hereby overruled.

#### Assignment of Error VII

**{¶55} The combination of the aforementioned errors are sufficient to call into question the validity of the verdict, preventing the appellant from obtaining the fair trial guaranteed by the Fifth and Sixth Amendments to the U.S. Constitution as made applicable to the states by the Fourteenth Amendment, and Article One, Sections Ten and Sixteen of the Ohio Constitution, requiring reversal of the appellant's conviction and a new trial.**

{¶56} In his seventh assignment of error, Appellant asserts that, singularly, the aforementioned assigned errors may not rise to the level of prejudicial error; however, his conviction should be reversed because the cumulative effect of the errors deprived him of a fair trial. The Ohio Supreme Court has recognized the doctrine of cumulative error by holding that

**{¶57} 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.<sup>28</sup>**

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<sup>27</sup> Cf. *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228. See, also, *State v. Evans* (Mar. 21, 1988), Preble App. No. 87-08-023, unreported; *State v. Ray* (Dec. 22, 1993), Summit App. No. 16050, unreported; *State v. Rhoden* (May 20, 1997), Pike App. No. 96CA589, unreported; *City of Lakewood v. Glaser* (Jan. 15, 1998), Cuyahoga App. No. 71668, unreported; *State v. Williams* (Sept. 17, 2001), Cuyahoga App. No. 76816, unreported.

<sup>28</sup> *State v. Garner* (1995), 74 Ohio St.3d 49, 64. See, also, *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus.

{¶58} Because we have found no error in the trial as claimed, harmless or otherwise, the doctrine is not applicable;<sup>29</sup> consequently, Appellant's seventh assignment of error is overruled.

#### **Assignment of Error IX**

**{¶59} The trial court erred to the prejudice of Defendant-appellant by denying Defendant-appellant's motion for new trial [sic].**

{¶60} Appellant contends in his final assignment of error that the trial court erred by denying his motion for a new trial, pursuant to Crim.R. 33. Specifically, Appellant claims that he should have been granted a new trial based upon prosecutorial misconduct<sup>30</sup> during his trial and newly discovered post-trial evidence.<sup>31</sup> Because we have already discussed Appellant's allegations of prosecutorial misconduct in his fifth assignment of error, we decline to grant a new trial on the basis of our previous rationale.

{¶61} To warrant granting a motion for a new trial, based on the ground of newly discovered evidence, it must be shown that the new evidence 1) discloses a strong probability that it will change the result if a new trial is granted, 2) has been discovered since the trial, 3) is such as could not in the exercise of due diligence have been discovered before trial, 4) is material to the issues, 5) is not merely cumulative to former evidence, and 6) does not merely impeach or contradict the

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<sup>29</sup> *Garner*, 74 Ohio St.3d at 64.

<sup>30</sup> Crim.R. 33(A)(2).

former evidence.<sup>32</sup> Furthermore, the allowance of a new trial on this basis is within the competence and discretion of the trial court, and in the absence of a clear showing of an abuse of discretion, we will not reverse the judgment.<sup>33</sup>

{¶62} Appellant claims that the affidavits of Donna Bonds, which were acquired after trial, should constitute newly discovered evidence and justify an allowance of a new trial. We disagree and find that the trial court did not abuse its discretion in denying Appellant's request.

{¶63} The trial court held, in part, that a new trial was not proper because Appellant did not exercise due diligence in attempting to secure Donna Bonds as a witness before trial, which was evident by Appellant's failure to request a continuance in order to locate her. We agree. Where a party is given reasonable cause to believe that favorable and available evidence exists, it is his duty, in the exercise of due diligence, to seek a continuance, if necessary, to investigate and to produce such evidence; a failure to do so will preclude the granting of a new trial on the basis of newly discovered evidence when it is recovered after the close of trial.<sup>34</sup> Herein, Appellant was aware of a potential alibi witness prior to trial;

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<sup>31</sup> Crim.R. 33(A)(6).

<sup>32</sup> *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

<sup>33</sup> *State v. Tijerina* (1994), 99 Ohio App.3d 7, 11, citing *State v. Hill* (1992), 64 Ohio St.3d 313, 333.

<sup>34</sup> *Domanski v. Woda* (1937), 132 Ohio St. 208, paragraph four of the syllabus; *State v. Sheppard* (1955), 100 Ohio App. 399, 405; *Rothstein v. Rothstein* (1958), 109 Ohio App. 234, 240-41; *State v. Gregory* (Dec. 16, 1981), Hamilton App. Nos. C-800915, C-810223, unreported; *State v. Davis* (Apr. 21, 1983), Cuyahoga

however, while a subpoena was issued, albeit under the wrong name and address, Appellant did not seek a continuance in order to secure Donna Bond's testimony at trial. While Appellant claims that he could not have discovered through due diligence what Donna would testify to based upon alleged intimidation of Donna by the police, there is no requirement that the testimony be elicited prior to trial but that due diligence was exercised in an attempt to secure the evidence. In the absence of a request for a continuance, we find that Appellant did not exercise due diligence in attempting to find the evidence prior to trial.

{¶64} We further find, in light of Donna Bond's conflicting statements in her affidavits and her statements to the police, and her assertion at the new trial hearing that she would likely assert her Fifth Amendment right against self incrimination in any future proceeding with regards to this case, that there is not a strong probability that her testimony would change the result if a new trial is granted. For these reasons, we find that the trial court did not abuse its discretion in denying Appellant's motion for a new trial.

{¶65} As a final matter, Appellant argues in his reply brief that the trial court improperly allowed Donna Bonds to assert her privilege against self-incrimination without first determining whether she was mistaken about the

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App. No. 45309, unreported; *State v. Hall* (Aug. 18, 2000), Hamilton App. No. C-990639, unreported, appeal not allowed by (2000), 90 Ohio St.3d 1481.

potential for actual incrimination. Because Appellant did not object to this alleged error in the trial court and, in fact, contested the State's request for that very procedure, he has waived the issue upon appeal.

{¶66} Accordingly, Appellant's ninth assignment of error is hereby overruled.

{¶67} Having found no error prejudicial to the Appellant herein, in the particulars assigned and argued, the judgment of the trial court is affirmed.

*Judgment affirmed.*

**HADLEY, J., concurs.**

**BRYANT, J., Dissenting**

**Bryant, J., Dissents.**

{¶68} For the following reasons, I respectfully concur in part in the opinion, dissent in part, and dissent from the judgment of the majority as outlined below.

{¶69} The facts of this case are as follows. On Saturday, July 3, 1999, Saxton and Pamela Saxton ("Pam"), his wife argued over whether Pam would leave her car for Saxton to use while she went with her mother to a family reunion in Georgia. Pam decided not to leave the car with Saxton because he lacked a

valid driver's license. So, she took it to her mother's home when she was ready to leave and left her car keys and her purse locked in her mother's bedroom. She told neither Saxton, nor Taranda Braddy, Pam's daughter who lived with her grandmother, that the purse and keys were at the house. Pam then left with her mother for the family reunion.

{¶70} On Wednesday, July 7, 1999, the fire department was dispatched to a house fire. Taranda's body was found lying across the mattress in her bedroom. The forensic examination determined that she had died of asphyxia caused by strangulation before gasoline was poured across her body and around the room and a fire set.

{¶71} On July 29, 1999, Saxton was indicted on one count of aggravated murder, one count of aggravated burglary, and one count of aggravated arson. The case was heard by a jury from February 22, 2000 to March 8, 2000. At the trial, the State posited its theory of the events on July 7, 1999. The State argued that Saxton wanted to use his wife's car, which was parked at Taranda's home. The State then claimed that Saxton stole a bicycle and rode it to Taranda's home where he confronted her about the location of the car keys. According to Pam's testimony, no one knew that the keys were locked in the grandmother's bedroom. The State argued that Saxton confronted Taranda, strangled her in his rage, and set

fire to the house to cover up the murder. The State argued that Saxton then rode the stolen bicycle home and left it leaning against the bushes four doors from his home.

{¶72} To prove this theory, the State presented the testimony of 57 witnesses. These witnesses tested as follows:

{¶73} Kenny Rudolph, Joe Mawer, and Dodi Mawer testified that they saw smoke coming from the house at approximately 6:00 a.m. on July 7, 1999. None of them saw anyone in the vicinity of the house.

{¶74} Officer Anthony Pahl was the first officer on the scene. He testified that he saw the smoke and saw Kenny Rudolph and Dodi Mawer attempting to wake anyone in the home. He also testified that he saw the bike track in the dew coming from the road and going through the back yard to the alley behind the home.

{¶75} Firefighter Rex Coldwell testified that he went in the back door and had to unlock the front door to admit the fire hose. He also testified that he found a gas can at the top of the stairs and Taranda's body in the bedroom.

{¶76} Lieutenant Terry Bowdre testified that he performed the fire investigation and determined that the fire was arson. He collected evidence to test for accelerants. He stated that the fire had more than one origin since the burn patterns did not meet, but were separated by unburned sections. He also testified that he observed the collecting of Saxton's clothes from the bathtub in Saxton's home.

{¶77} Firefighter Kevin Smith testified that he saw the gas can at the scene, so started taking photographs for an arson investigation. He also testified that he saw the bicycle track in the dew and notified Officer Pahl.

{¶78} Firefighter Wade Ralph was a fire investigator at the scene. He testified that he secured the scene to protect the evidence. He also

testified that he observed Saxton in the crowd at the scene and that Saxton stated that the victim must be Taranda.

{¶79} Deputy State Fire Marshal Lee Bethune testified that he examined the scene of the fire, but did not collect any of the evidence. He testified that he saw no sign of forced entry. He stated that there was more than one origin of the fire. According to his testimony, the suspect had to pour the gasoline on the body, at the top of the stairs and in the bathroom before lighting any of the fires or the suspect would have been trapped. Bethune was also partially responsible for collecting the clothes from the bathtub at Saxton's home. He testified that he found the clothes in the tub and noticed the strong smell of detergent. He removed the clothes from the water, placed them in bags, and gave them to the police officers at the scene. He also collected water from the tub.<sup>35</sup> Bethune then took hand swabs from Saxton to see if any gasoline could be found.<sup>36</sup> He testified that only a minute amount of gasoline need be present in order to get a positive result.

{¶80} Officer Electa Foster testified that she searched Saxton's home and found the clothes in the tub. She stated that she smelled the detergent in the water and smelled gasoline when she lifted the denim shorts from the water. She then removed the clothes from the tub and hung them over the side of the tub to dry. She testified that Saxton told her the clothes had been in the water since early Monday morning.

{¶81} Robert Smiffen, Mark Springer, and Jerry Ryan all testified that a magazine ad, found imprinted on the bottom of Saxton's shoe was not available in the Marion area before July 6, 1999.

{¶82} Tiny Braddy, Taranda's grandmother, testified that Taranda always locked the doors and that nothing was missing from the house. She also testified that Pamela had locked the purse and car keys in her bedroom and that Taranda did not know this. She also testified that the gas can found at the top of the stairs was one she kept on the front porch to fill the

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<sup>35</sup> The lab results from these items all came up negative for gasoline, except for the shoes and or shorts. The water sample collected also tested negative for gasoline.

<sup>36</sup> The hand swabs tested negative for the presence of gasoline, however this may be explained by the passage of time between the fire and the test.

lawnmower. Finally, she testified that Taranda did not like Saxton and probably would not have let him in the house.

{¶83} K-9 officer Matt Bayles testified that he brought his dog to the house to attempt to track the bike. However, the dog never picked up a scent, so was unable to proceed.

{¶84} James Hardway, Bobby Crum and Christopher Crum all testified that they worked with Saxton at the Marion county fair on the night of July 4, 1999, tearing down rides. They testified that Saxton was wearing a yellow mesh outfit at the time. None of them got grease on them, though they did get dirty. Hardway testified that he next saw Saxton on the afternoon of July 5, 1999.

{¶85} Sharon Crum testified that she does the laundry for Bobby and Christopher Crum and that their clothes were not greasy from tearing down rides at the fair.

{¶86} Dr. Patrick Fardal, the medical examiner, testified that Taranda was strangled to death and the fire was then set to cover up the murder. Taranda was not alive at the time of the fire. He also testified that Taranda's body bore no signs of a struggle nor was there any evidence of sexual assault.

{¶87} Jeff Carlyle testified that he saw Saxton on July 6, 1999, and he was wearing Adidas tennis shoes.

{¶88} Lieutenant Wayne Creasap testified that he located a stolen bike leaning against the bushes in the alley that runs behind Saxton's home. There were no tracks in the area to indicate where the bike had come from or where its rider had gone. He also testified that he smelled gasoline in Saxton's bathroom.

{¶89} Betty Macneil, Robert Blevins, and Charles Baker all testified that they saw the bike leaning against the bushes on July 7, 1999, and that it had not been there the previous evening. No one saw anyone around the bike and did not know how it had gotten there.

{¶90} Danielle Jeffrey testified that she had placed the bike in her back yard on July 6, 1999, at approximately 11:00 p.m. She did not see anyone around. The next morning, she realized the bike was missing. She also testified that she had not ridden the bike much before it was stolen because the chain fell off every time it was ridden a few feet. This problem was not fixed before it was stolen.

{¶91} Tracey Foos identified the bike as belonging to her daughter. She testified that the front tire was newer than the back tire and that they did not match.

{¶92} Officer Howard Jones testified that he ordered the far end of the alley cordoned off because he saw bike tracks in the mud there. He requested that plaster casts be made of all tracks found in the alley, which he had isolated. Two tracks were evident in the casts. He also testified that the distance between Saxton's home and Taranda's home was 9/10 of a mile.

{¶93} Detective Jim Oaklief testified that he collected evidence at the scene. He also photographed the tire tracks and made the plaster casts of the tracks. He testified that he used an ultraviolet light to locate accelerant at the scene and located it in the upstairs. However, no trace of accelerant was located on the steps or near either of the doors of the house. He then took fingerprints at the scene, but testified that none matched those of Saxton. Saxton then testified that he examined 125 bikes at the police station to see if any of them matched the tire tracks found in the alley behind the house. Although some were similar, none matched as well as the front tire of the bike found in the alley behind Saxton's home. He testified that the front tire of the bike was very similar to one of the tracks seen in the cast.<sup>37</sup> However, no track was found matching the rear tire of the bike. He further testified that the print on the bottom of Saxton's shoe matched an ad in the July 5, 1999, edition of Ohio Auto and RV magazine.<sup>38</sup> He also testified that entry to the Braddy house may have been forced because the back door was loose in the jam and Mrs. Braddy stated that it was tight before she left. He also found a butcher knife in Taranda's room. He found two condom wrappers at the scene and one used condom

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<sup>37</sup> The other track was not matched to any bike.

<sup>38</sup> A copy of this magazine was found at Saxton's home.

wrapped in toilet paper with blood on it. The DNA on the outside of the condom did not match that of Saxton and was believed to belong to Jeremiah Trumble from a sexual encounter that occurred on July 4, 1999. Oaklief testified that Trumble refused to give a DNA sample. He also testified that no attempt was made to obtain the local phone records for Taranda's phone until February 2000 (the month of trial). At that time, the attempt was unsuccessful because more than 90 days had elapsed since the day of the murder. The phone company does not maintain records of local calls after 90 days.

{¶94} Shirley Harrison, a Sprint employee, and Todd Haywood, an AT & T employee, both testified that calls were made to 419-522-3979 from a pay phone in Marion. The phone number belonged to Tanya Stone, a former girlfriend of Saxton's, and the pay phone is near Saxton's home. The calls were made at 9:28 p.m. on July 6, 1999, and at 2:51 a.m. on July 7, 1999.

{¶95} Stephanie Pittman testified that she saw Saxton wearing the yellow mesh top on July 6, 1999. On July 7, 1999, she was at Saxton's home and found the clothes in the tub. Later that day, she received a phone call from Saxton asking her to go look for a bike in the alley.<sup>39</sup> She also testified that Saxton told her he was outside at approximately 3:45 a.m. on July 7, 1999. She further testified that police and the district attorney had pressured her to testify and had told her that they had Saxton's fingerprints and semen at the scene of the crime.

{¶96} Officer Steve Ross testified that he overheard Ms. Pittman on the phone asking about the bike. Testified that there were two bikes in Saxton's back yard, but they did not look as if they had been used in a while. He was present when the shorts were found and smelled gasoline on them. He saw the auto magazine in the living room of Saxton's home. He also testified that he saw no marks on Saxton's body on July 7, 1999.

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<sup>39</sup> The State argues that the only way that Saxton could have known where to look for the bike is if he put it there. However, the call was made at around 4:00 p.m. on July 7, 1999. At approximately 2:30 p.m. the transcript from the police interview with Saxton indicates that Detective Shenefield told Saxton that they had found a stolen bike in the alley four doors down from his home. Since Saxton lives on the corner, there was only one direction to look.

{¶97} Hershhal Slone testified that he saw a bike in the alley at approximately 6:30 a.m. on July 7, 1999. However, he testified that the bike he saw was not the same one identified as an exhibit because the bike he saw was newer and had gears. The bike identified as the stolen bicycle had no gears. He never saw Saxton anywhere in the alley.

{¶98} G. Michele Yezzo, a forensic scientist, testified that she examined a blue fiber found on the seat of the bike and determined that it was probably from denim material. However, she could not limit the source anymore than that. She also testified that she tested the soil samples removed from the bike with the various samples from the crime scene and the alley behind the house. The samples did not match. She then examined the tracks shown in the tire casts and determined that the various tracks were made by different bikes. Finally she testified that ink from the magazine in question transferred to another surface most readily when it came into contact with gasoline.<sup>40</sup>

{¶99} Christa Rajendram, a forensic scientist, testified that gasoline was found on either the shorts or the shoes. She was not able to be more specific because the items had been placed in the same bag, thus causing cross contamination. All the other items found in the tub tested negative for gasoline. She testified that the test is capable of picking up an amount as miniscule as 1/10 of a drop of gasoline. She also testified that gasoline was the accelerant used at the scene. However she was not able to determine the specific brands of gasoline. She finally testified that the magazine tested negative for gasoline.<sup>41</sup>

{¶100} Margaret Saupe testified that she tested the shorts in which Saxton claims to have defecated. The shorts tested negative for fecal matter, though she did find stains of some sort. She also testified that the swabs of Taranda tested negative for semen.

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<sup>40</sup> This opinion was based upon her tests transferring ink to paper. She first applied pressure to dry paper, then to paper moistened with water and finally to paper moistened with gasoline. The gasoline treated paper was the only one that accepted the transfer.

<sup>41</sup> She testified that she did not test the specific page because that might have prevented the performance of other tests.

{¶101} Pam, Saxton's wife and Taranda's mother, testified that Saxton was angry about not having the car to use and that on July 3, 1999, he threatened to blow up the car and burn down the house.<sup>42</sup> She also testified that she found the auto magazine in the house she shares with Saxton later that week. She had never known Saxton to wash anything but underwear in the bathtub. However, there is no washing machine in the house, only a dryer. She further testified that Saxton originally told her he let his mother in the house around 4:00 a.m. and later said that he let her in the house at 6:00 a.m. She testified that Taranda always kept the doors locked and would not have admitted Saxton at that time of the night.

{¶102} Kimberly Keith testified that she spoke with Saxton two days after the murder. Saxton told her that he had been in Cleveland with his mother. He later changed his story and said his mother slept in the U-Haul that night, but did not say why. She stated that Saxton seemed upset that Pamela did not leave him the car, but he was not angry.

{¶103} Detective Scott Sterling overheard Ms. Keith's conversation with Saxton. He testified that Saxton told Ms. Keith that another inmate, in jail for violating a civil protection order, had heard that Taranda was strangled and then burned. He testified that at that time, he did not know the cause of death, so he was surprised that Saxton did. He also testified that he called those numbers that were listed on the caller ID unit at Taranda's home, but did not attempt to locate those listed as "private" or "unavailable." He did not check Taranda's answering machine. He testified that Taranda's pager was never found.

{¶104} Detective Jeff Shenefield testified that he interviewed Saxton. At Saxton's home, he found the clothes in the bathroom and smelled detergent and gasoline on the shorts. He also found two bikes in Saxton's back yard, but they both had flat tires. During the July 7, 1999, interview, Saxton told him that he went to bed between 2:00 a.m. and 2:30 a.m. and woke up when his mother arrived around 3:00 a.m.<sup>43</sup> Later, he informed Saxton that a stolen bike was found in the alley behind his house

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<sup>42</sup> The first time that the threat to burn down the house was mentioned was during the trial testimony. This threat was never mentioned in any of the previous statements. Only the threat to blow up the car was previously disclosed.

<sup>43</sup> The phone calls show that Saxton was on the phone with Ms. Stone at 2:51 a.m.

approximately four doors down. During the July 12, 1999, interview, Saxton told him that the shorts were soaking because he had accidentally defecated in the shorts. On July 13, 1999, Saxton told him that he had used some gasoline from his neighbor to clean off his hands and may have splashed some on himself.<sup>44</sup> He also testified that he did not check the DNA on the condoms because Trumble admitted to putting one in the trash can on Sunday. He testified that Saxton was very cooperative and did not have any marks on his body on July 7, 1999, that would indicate any type of struggle. Finally, he testified that no investigation was done to determine who, if anyone, had phoned Taranda's pager that evening.

{¶105} Anthony Tambasco, a forensic scientist, testified that he attempted to analyze a potential blood sample found on a shirt found near Taranda's body<sup>45</sup>, but was unable to do so. He explained that the blood probably came from the body during the fire, not prior to death. He also stated that they did not perform DNA tests on the condom or the blood on tissue it was wrapped in because it was too expensive.

{¶106} Joseph Johnston testified that at approximately 6:00 a.m. he saw an adult black male riding down Silver Street on a 20" bike. However, he did not identify either Saxton or the bike as the one he saw. He described the rider as wearing long pants, a dark shirt, and a stocking cap.<sup>46</sup>

{¶107} Robert Starcher testified that he lives in a house on the alley behind Taranda's home. At 4:15 a.m. on July 7, 1999, he was awakened by his dog barking. He looked out the window, but did not see anyone. He also testified that he left the house for work at 5:45 and did not see anyone in the vicinity.

{¶108} Thurnetta Hood testified that she spoke with Taranda the night of the murder and that she had no intention of going out. She also testified that she went to Lucius Jones' apartment on July 7, 1999, to tell him about the fire, but no one answered the door. When she was at

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<sup>44</sup> Further investigation revealed that the neighbor did have several cans of gasoline at his home.

<sup>45</sup> The shirt was presumed to have belonged to the victim as it was found lying on the bed.

<sup>46</sup> Saxton was believed to have been wearing denim shorts and a light colored shirt. This assumption was based upon the fact that these clothes, along with others, were found soaking in the tub and the shorts were said to smell of gasoline.

Saxton's home, she noticed that the house was a mess and that there were clothes soaking in the tub. She did not smell gasoline in the bathroom.

{¶109} Jeremiah Trumble testified that he spoke with Taranda on July 7, 1999, at approximately 1:15 a.m. and she wanted him to come over. He declined. He also testified that he had sexual relations with Taranda on July 4, 1999, and had placed the used condom in the garbage. He did not wrap it in a tissue.

{¶110} Sheryl Mahan, the fingerprint expert, testified that Saxton's prints were not found at either the scene or on the bike. The only identifiable prints found were on the back door and belonged to Kenny Russell and Dodi Mawer.

{¶111} Officer Mark Young testified that he collected the clothes from the bathtub in Saxton's home. He did smell gasoline in the bathroom. He also stated that he attempted to follow the bike tracks, but could not do so because they would go over stones that did not permit a track to be made.

{¶112} Benjamin Fallor, a meteorologist, testified that between 7:00 a.m. on July 6, 1999, and 7:00 a.m. on July 7, 1999, the high temperature was 91 degrees and the low temperature was 58 degrees. The area received .2 inches of rain during that time period.

{¶113} Gary Squires and Kathy Caudill testified that the chain of custody the various exhibits had not been broken.

{¶114} Lucius Jones II testified that Taranda had come to his apartment on July 7, 1999 at approximately 12:30 a.m. They engaged in sexual relations and she left sometime between 1:30 and 2:30 a.m. He testified that he refused to give a DNA sample on the advice of his attorney and that he felt the police were harassing him. His phone records show that he called Taranda's pager at 1:03 a.m.

{¶115} Plez Booker testified that he saw Jones standing in the parking lot of Jones' apartment complex the morning of July 7, 1999, but he did not see Taranda.

{¶116} Officer Rob Reed testified that he gave Saxton's mother directions to Saxton's house at around 3:00 a.m. on July 7, 1999.

{¶117} Officer Jerry Zacharias testified that the number of the pay phone used by Saxton matches the number of the phone from which calls were made to Tanya Stone on July 7, 1999.

{¶118} Officer John Gruber testified that he took Dodi Mawer's fingerprints as a control for the prints found on the back door.

{¶119} Officer Randall Caryer testified that Saxton asked him about the extent of the fire damage at the house. He also testified that it is not unusual for the fingerprints of the suspect to be lacking from a crime scene.

{¶120} For its case, Saxton presented three witnesses who testified as follows.

{¶121} Lonnie Yates testified that he saw Saxton the evening of July 3, 1999, and Saxton did not seem upset about not having the car.

{¶122} Walter Eugene Thieshen testified that he met Saxton in jail on July 7, 1999. He testified that he was in jail for violation of a civil protection order and that he had told Saxton that he heard Taranda had been strangled and that the fire had been set. He also testified that he was told the police were looking for a small built Mexican on a bike. He testified that he overheard this information while in the police car. He also testified that Detective Shenefield picked him up and asked him "what the word on the street" about the murder was.<sup>47</sup>

{¶123} Larry Dehus, a forensic scientist testified that the evidence was gathered inappropriately as it should all have been bagged separately, not placed in one bag. He agreed with the State's witness that the fiber

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<sup>47</sup> Detective Shenefield admits picking up Thieshen and asking him about the word on the street. However, he denies that Thieshen heard about the cause of death from him or any other officer. Claims that Thieshen told them that Saxton had known the cause of death. Thieshen denies that Saxton ever told him the cause of death, but states that he gave the information to Saxton.

most likely came from denim and that no further identification was possible. He stated that if Saxton had stepped on the magazine with gasoline on his shoes, the magazine should have had traces of gasoline on it. He then testified that the items with gasoline on them would have had to have had minute amounts of it on them for gasoline not to be found floating on top of the water in the bathtub. He tested the shorts and found the presence of fecal material. He also tested bicycle tracking and testified that the rear tire should have at least partially eradicated the impression left by the front tire unless the rider was constantly turning. He then testified that in his experiments, the ink from the magazine transferred to the bottom of a tennis shoe when the bottom of the shoe was dry, was moistened with water, and was moistened with gasoline.

{¶124} On March 8, 2000, the jury returned with a verdict of guilty on all counts. On March 21, 2000, Saxton filed a motion for acquittal and a motion for a new trial. A hearing was held on these motions on May 15, 2000, and May 19, 2000. On July 6, 2000, the trial court denied both motions. On September 22, 2000, Saxton was sentenced to life imprisonment with parole eligibility after 20 years for the aggravated murder, to ten years imprisonment for the aggravated burglary, and to eight years of imprisonment for the aggravated arson. The trial court ordered that the sentences be served consecutively.

{¶125} The third and fourth assignments of error raised by Saxton deal with the admissibility of evidence. The admission of evidence is left to the discretion of the trial court and will be reviewed on an abuse of discretion basis. *State v. Awkal* (1996), 76 Ohio St.3d 324, 667 N.E.2d 960. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the

court that is unreasonable, unconscionable, or arbitrary. *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 498, 589 N.E.2d 24.

{¶126} In the third assignment of error, Saxton argues that the trial court should not have permitted Michelle Yezzo (“Yezzo”) to testify concerning her paper-to-paper transfer experiments.

**{¶127} A witness may testify as an expert if all of the following apply:**

**{¶128} The witness’ testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons:**

**{¶129} The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;**

**{¶130} The witness’ testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:**

**{¶131} The theory upon which the procedure, test, or experiment is based objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles:**

**{¶132} The design of the procedure, test, or experiment reliably implements the theory;**

**{¶133} The particular procedure, test, or experiment was conducted in a way that will yield an accurate result. Evid.R. 702.**

**{¶134} The expert may testify in terms of opinion or inference and give his reasons therefore after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise. Evid.R. 705.**

{¶135} In this case, the only part of Yezzo's testimony subject to objection was that paper to paper transfer experiment. Saxton claims that since the original transfer was newsprint to the sole of a tennis shoe, the experiment is too different to be reliable. However, Yezzo testified that what she was testing was the solubility of the ink, not the ability of the surface to pick up the transfer. She testified that she used the paper dry, moistened with water, and moistened with gasoline in order to determine which caused the ink to transfer best. Her tests revealed that gasoline was the best solvent of the ink.<sup>48</sup> Based upon this, the State argued that Saxton had gasoline on the bottom of his shoes that permitted the newsprint to transfer to the sole of the shoe. The trial court determined that the differences in the circumstances went to the weight of her testimony, not the admissibility. Although the test was not identical to the original transfer, it was conducted in a way, which would yield accurate results on the solubility of the ink. The differences between the experiments and the original circumstances were explained to the jury, thus giving the jurors enough information to decide the amount of weight to give the results. Since the testimony of Yezzo complied with

the requirements of the rules of evidence, the trial court did not err by permitting the testimony and I concur with the majority's decision to overrule this assignment of error.

{¶136} The fourth assignment of error raises the question of whether the trial court should have permitted Pam Saxton to testify concerning Saxton's threat to burn down the house. The basis of this argument is that Pam Saxton had never mentioned this threat until trial. Saxton claims that this failure is a prejudicial surprise and has no credibility. However, the question of the credibility of a witness is one for the jury to decide. On cross-examination Saxton's attorney questioned Pam Saxton about her failure to mention this threat previously. Thus, the jury knew that her testimony was inconsistent with her prior statements. The jury was free to believe or disbelieve that the threat was made. The trial court, however, did not err by permitting her inconsistent testimony to be admitted. Thus, I concur with the majority that the fourth assignment of error should be overruled.

{¶137} Saxton argues in the second assignment of error that the evidence is not sufficient to support the conviction. When reviewing a criminal conviction, the court's examination of the record is limited to determining if evidence was

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<sup>48</sup> According to Yezzo, the surface upon which the ink is to be transferred is inconsequential to the solubility of the ink. So she did not run a test attempting to transfer the ink to rubber.

presented, which, if believed, could satisfy the average person of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. "In conducting this evaluation, we must view the evidence in the light most favorable to the prosecution, and ask whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* at 274, 574 N.E.2d at 504.

{¶138} At the trial, as discussed above, the State presented its theory of the crime. This theory is supported by the fact that gasoline was the accelerant used at the crime scene to set the fire. There is testimony that gasoline was found on either Saxton's shoes or his shorts.<sup>49</sup> The State argued that Saxton got the gasoline on the bottom of his shoes by walking through the gasoline at the scene as he was lighting the various puddles of gasoline. The State also argued that having gasoline on the bottom of the shoes is what made the magazine ink transfer to the sole of Saxton's tennis shoe. At Saxton's home, the police found several items of clothing and the tennis shoes soaking in a tub with Purex and Tide. Saxton claimed that the items had been there for three days, but a print from a magazine on the bottom of one of the tennis shoes indicated that the shoes had only been there for less than 24 hours. Additionally, Saxton could not account for his

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<sup>49</sup> The laboratory could not determine whether the gasoline was on a shoe or on the shorts because they were placed into the same plastic bag, thus contaminating the items.

whereabouts on the night of the murder and gave conflicting statements throughout the investigation.

{¶139} Bicycle tracks were found in the dew of the yard leading from the road through the yard to the alley behind Taranda's home. In the alley, the police found tracks in the dirt that were very similar to those on the front tire of the stolen bicycle found four doors away from Saxton's home. The bicycle seat contained a cotton fiber from denim. There is also the threat that Saxton allegedly made to Pam about burning down the house. The police also questioned other friends of Taranda, but were unable to determine a more likely suspect. Giving every benefit of every doubt to the State, a reasonable person might conclude that Saxton committed the offense and the second assignment of error should be overruled.

{¶140} In the first assignment of error, Saxton claims that the conviction is against the manifest weight of the evidence.

**{¶141} Weight of the evidence concerns “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.”**

{¶142} *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 546. To establish a charge of aggravated murder, the State must prove beyond a

reasonable doubt each of the following elements of the offense. The 1) suspect 2) purposely 3) caused another's death 4) while committing or attempting to commit 5) kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, or escape. R.C. 2903.01. To establish a case of aggravated arson, the State must prove that 1) the suspect 2) knowingly 3) caused physical harm to an occupied structure 4) by means of fire. R.C. 2909.02. The elements of aggravated burglary are that 1) the suspect 2) trespassed in an occupied structure 3) by force, stealth, or deception 4) when another person was present 5) with the purpose to commit any criminal offense and 6) the offender inflicts physical harm on another. R.C. 2929.11.

{¶143} In this case, the State presented evidence through the testimony of 57 witnesses.<sup>50</sup> Through that testimony, the State established that Taranda was killed and the fire was set at sometime after 2:30 a.m. and before 6:00 a.m. when the fire department was called. The State also proved that Taranda had been strangled and that gasoline had been poured over the body and throughout the upper level of the house and a fire was set. At some point after the dew settled on the ground, a bicycle was ridden through the yard of Taranda and back into the alley. A bicycle with a similar tire tread to one of the marks found in an alley

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<sup>50</sup> Although numerous witnesses were presented, most of the testimony presented was cumulative in effect. None of it supplied direct evidence that Saxton was present at the scene of the crime.

behind Taranda's home was found in an alley four doors away from Saxton's home.

{¶144} At Saxton's home, the police located several items of clothing soaking in the bathtub. Saxton claimed that they had been there since Monday, however, the testimony of other witnesses indicates that the shoes and some of the items of clothing were worn on Tuesday. The State then produced evidence that Saxton had gasoline on the bottom of his shoes and/or on his shorts. At the time of the initial questioning, Saxton did not account for how the gasoline came to be there. The State also showed that Saxton had left his home to make phone calls to a girlfriend until approximately 3:00 a.m. Saxton did not meet his mother until later. At no time has Saxton provided a credible explanation for his whereabouts.

{¶145} The State's theory of the crime is that Saxton was angry because his wife did not leave him the car. Acting on this, Saxton allegedly went to Taranda's house to get the keys and the car. The State claims that Saxton stole the bike and rode it to the house. When Taranda let him in the house, there was a confrontation about the keys and Saxton allegedly strangled Taranda in anger. To cover up his crime, the State claims that Saxton took the gasoline can off of the front porch and set fire to the house. In the process, Saxton allegedly got gasoline on his shoes as he walked through the puddles of gasoline to set fire to a previously poured puddle

of gasoline.<sup>51</sup> The State claims that Saxton then rode the bike through the yard to the alley, down the alley to Silver Street and home, abandoning the bike four houses away from his own. Then, to get rid of any evidence, Saxton placed the clothes in the tub with a whole bottle of detergent.

{¶146} From the testimony presented, it is clear that there are many inconsistencies in the presentation and there are several questions raised by the testimony. One question that is raised is what connection there is between the stolen bike and Saxton. The only witness to seeing a black man on a bike at about 6:00 a.m. on July 7, 1999, did not identify either the defendant or the bike and described a different outfit than that believed to be worn by Saxton. The State presumes that Saxton stole the bike based upon the fact that it was found in the alley behind his house. Another question is why the bike track starts at the road in front of Taranda's home and goes through the back yard. Since Saxton lives to the east of Taranda's house, why did he come to the house from the street to the west of the house, but leave through the alley? Also, why would Saxton steal the bicycle in the first place since he lived less than one mile from Taranda and was allegedly going to the house to get a car? Why would he go out of his way to steal a bike so that he could go get a car? Another question that is raised is if there was

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<sup>51</sup> This conclusion can be drawn from Yezzo's testimony that the ink from the magazine transferred most easily when it came in contact with gasoline.

enough gasoline on his shoes to allow an ink transfer when Saxton got to his home, why was there no trace of accelerant on the stairs in Taranda's home or inside the doorway of Taranda's home where the arsonist would have had to walk to leave the house? Why did the police not test the pedals of the bike for accelerant? Why did the police not test the carpet in Saxton's house for the presence of gasoline? If there was sufficient gasoline to cause the transfer of the ink when Saxton allegedly stepped on the magazine, why wouldn't the surfaces with which Saxton had prior contact also have traces of gasoline? How did the bike manage to go through the mud in the alley and leave a track without picking up any of that mud? Finally, all the testimony on the subject shows that Saxton was not told the keys were at the house. There was no testimony that Pamela told anyone she had left the keys in Ohio rather than taking them and her purse with her.<sup>52</sup> Given all of the inconsistencies and the failure to connect Saxton to the scene with anything more than speculation, I do not believe a reasonable person could conclude beyond a reasonable doubt that Saxton committed these offenses. Thus, I would affirm the first assignment of error.

{¶147} Saxton claims in the fifth assignment of error that prosecutorial misconduct prevented him from having a fair trial. In support of this argument, he

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<sup>52</sup> In its closing argument, the State stated that Pam had told Saxton the keys were at the house, however a review of the record indicates that no such testimony was given at trial.

claims that the prosecutor misstated the evidence in his closing argument and commented on the Saxton's failure to produce any witnesses contradicting the State's theory of the crime. No objections were made to either of these instances of alleged misconduct. Prosecutorial misconduct is not grounds for reversal unless it so taints the proceedings that it deprives the defendant of a fair trial. *State v. Phillips* (1995), 74 Ohio St.3d 72, 656 N.E.2d 643. The statements alleged as misconduct, as well as some other statements may have been interpreted as misstating the evidence, however, they alone did not deny Saxton a fair trial. The jury was informed by defense counsel that the beeper had never been found. The jury was also informed that the first time Pam mentioned the threat to burn down the house was at trial and that none of her prior statements mentioned the threat.

{¶148} Saxton also argues that it was misconduct for the prosecutor to comment on Saxton's failure to produce any evidence to contradict the State's theory. However, it is not error for the State to comment on the fact that the defendant has neither presented witnesses in his/her defense or that he or she did not rebut the State's case. *State v. Clemons* (1998), 82 Ohio St.3d 438, 696 N.E.2d 1009. Here, the State pointed out that Saxton did not present any witnesses that provided him with an alibi. This is not impermissible. Thus, I concur in the decision to overrule the fifth assignment of error.

{¶149} In the sixth assignment of error, Saxton alleges that his counsel was ineffective.<sup>53</sup>

**{¶150} When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.**

**{¶151} On the issue of counsel's ineffectiveness, the appellant has the burden of proof, since in Ohio a properly licensed attorney is presumably competent. \* \* \* [T]he initial burden [is placed] upon the appellant since, \* \* \* [t]o impose automatically the initial burden of proof on the state \* \* \* would penalize the prosecution for acts over which it can have no control.**

{¶152} *State v. Jackson* (1980), 64 Ohio St.2d 107, 110-11, 413 N.E.2d 819, 822.

{¶153} Here, Saxton claims that his counsel were ineffective because they did not procure the witness upon which his motion for a new trial was premised. Allegedly, this witness would have provided an alibi for Saxton. However, the first time trial counsel heard of this witness was less than a month before trial. A subpoena was issued, but service was not completed prior to trial and the witness did not appear.<sup>54</sup> Since this is the only allegation of incompetence, and trial

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<sup>53</sup> Saxton had two attorneys representing him during this trial.

<sup>54</sup> An allegation was later made that the witness had been told by the police that it would be in her best interest not to appear.

counsel did attempt to compel the witness to appear, one cannot conclude that trial counsel did not act competently. I concur in the decision to overrule the sixth assignment of error is overruled.

{¶154} The eighth assignment of error challenges the trial court's judgment denying Saxton's motion for a new trial. I note with considerable interest that the trial court in that judgment observed as follows:

**{¶155} There was no direct evidence in this case which could place the defendant at the scene of the crime. There was no direct evidence that the defendant personally committed any act necessary to the offenses of burglary, murder or arson. Only circumstantial evidence was offered by the state as to any issue. While there were 57 witnesses presented by the state, much of the testimony was mere foundation, with no direct materiality to the issue of guilt. Examples are the three witnesses who first observed the fire and called 911, and numerous fire personnel and police who described the scene of the crimes.**

**{¶156} This case was tried on the quantity of the evidence, not the quality. Much of the physical evidence was mishandled, and the testimony of several witnesses who handled that evidence was contradictory as to who did what and how.**

{¶157} Judgment on Motion for Acquittal, 1-2. The trial court however, not wishing to overturn the jury's verdict, denied the motion for acquittal.

{¶158} Upon review of the record, I concur with the trial court's evaluation of the evidence. There was no direct evidence of Saxton's involvement in the crimes. The whole case was based upon a theory developed by the State about

how the crimes might have occurred, supported by slim evidence, such as gasoline on the bottom of Saxton's shoes and a stolen bike found in an alley near Saxton's home. Additionally, it is clear from the record that several tests that could have either strengthened the State's case or weakened it were not performed.<sup>55</sup> Thus, I would affirm the eighth assignment of error.

{¶159} The final assignment of error argues that the trial court should have granted the motion for a new trial. A new trial may be granted on the basis that there was misconduct by the prosecuting attorney or on the grounds that new evidence material to the defense is discovered, which the defendant could not reasonably have discovered and produced at trial. Crim.R. 33(A). A motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. Here, Saxton claims that his alibi witness had been located only after trial and supplied an affidavit that attested that she was with him at the time the crimes were committed. However, at the hearing on the motion for a new trial, the witness refused to testify and asserted her fifth amendment right to remain silent.

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<sup>55</sup> Among specifics, the record shows that the bike pedals were never tested for signs of accelerant and no ultraviolet illumination was done at Saxton's home to check for signs of accelerant. It is incredible that Saxton could leave Taranda's home with accelerant on his shoes, which is what was implied by the print on

{¶160} To warrant the granting of a motion for new trial in a criminal case based upon the ground of newly discovered evidence, the movant must show that the evidence 1) has a strong probability that it will change the result if a new trial is granted, 2) has been discovered since the trial, 3) is such as could not in the exercise of due diligence have been discovered before the trial, 4) is material to the issues, 5) is not merely cumulative to former evidence, and 6) does not merely impeach or contradict the former evidence. *State v. King* (1989), 63 Ohio App.3d 183, 578 N.E.2d 501. The trial court, in evaluating the motion held the following:

**{¶161} The motion was supported by the affidavit of a Donna Bonds, dated March 29, 2000. Ms. Bonds' affidavit unequivocally stated that she had been with the defendant on the date of the subject murder, and spent the night with him. She further stated that prior to the trial date she had been confronted by "two police officers" in Mansfield, Ohio, where she lives, and was told the date on which the defendant's trial was to begin and that if she "testified for Anthony they would make sure that [Donna Bonds] would go to prison." Further, she stated that as a result, she "was scared and [she] avoided any contact with Anthony's attorney and [she] did not want to receive the subpoena that they were trying to serve \* \* \*."**

**{¶162} This "supplemental" motion and attached affidavits were filed on March 31, 2000. On April 10, the court received the state's response, accompanied by the affidavit of Lt. Shenefield of the Marion Police Department, who stated that he had talked to Donna Bonds on April 4, 2000, and that she told him she had lied in the affidavit that she signed March 29.**

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the bottom of the tennis shoe and the State's expert witness, yet none of this accelerant would rub off on the pedals of a bike allegedly ridden by Saxton for approximately one mile.

**{¶163} On April 18, 2000, the defense replied with another affidavit from Ms. Bonds, dated April 5, 2000, stating that the information in her first affidavit was true. She further stated that on April 4, 2000, she was confronted by two Marion police officers (identifying one as Lt. Shenefield), accompanied by Mansfield police. She stated she was questioned and threatened for having given her first affidavit, and that as a result she signed a statement prepared by the officers, but reconfirmed that her first affidavit was true.**

**{¶164} The court then scheduled a hearing on the motions for acquittal and for a new trial and Ms. Bonds appeared at the hearing. During discussion with counsel, the prosecutor indicated that he had talked with Ms. Bonds that morning, alone, in the law library. The court expressed concern that, after two affidavits alleging intimidation by law enforcement, Mr. Slagle would further complicate the issue by such a confrontation. The court's concern was heightened by the fact that the Marion County Law Library consists of two small and dreary rooms, more likely to engender fear than confidence.**

**{¶165} The hearing was commenced, and defense chose to proceed on their motion without calling Ms. Bonds, relying on her affidavits. However, the state chose to call Ms. Bonds. The witness proved to be an eighteen-year-old black girl, small in stature, and obviously quite nervous. Ms. Bonds was advised that she might be entitled to a privilege against testifying, due to apparently contradictory statements in an official proceeding, and that the court would appoint an attorney to counsel her if she so desired. She did request an attorney and one was immediately contacted to talk with her. Those discussions became extended and the hearing was continued to another date.**

**{¶166} Ms. Bonds was called to the stand by the state at the second hearing, with appointed counsel present near her. Her testimony was extremely limited, because she claimed a Fifth Amendment privilege.**

**{¶167} Ms. Bonds' mother also testified at the request of the state. She stated that she was present during some of the discussions**

**with Lt. Shenefield and other officers on April 4, but was asked to leave the room during some portions of the interview. It was apparent that prior to April 4, the mother had no idea that her daughter might be an alibi witness in a murder case.**

**{¶168} Mother also testified that her daughter was nervous by nature and easily excited, that Donna would be intimidated by police officers, as was she (the mother), and that when Mr. Slagle took Donna into the law library, he had asked to talk to her alone. It must be noted that of the three police officers that testified about the April 4 meeting with Donna Bonds, all were white**

**{¶169} Mr. Slagle also testified for the state, stating that he had not heard of the name of Donna Bonds prior to March 31, 2000 filing of the defense. When reminded by defense counsel that Ms. Bonds was named in a praecipe for subpoena filed on February 17, 2000, Mr. Slagle responded with the speculation that his secretary had regularly checked the Clerk's file, and while she had found every other praecipe, she had apparently missed that one. He also stated that upon receipt of the defense motion containing Donna bonds' affidavit, he had called Lt. Shenefield, and instructed him to go to Mansfield and interview Ms. Bonds. He stated that he saw nothing improper or intimidating in that conduct. He further saw nothing intimidating in his action of taking Donna away from her mother and into the law library on the morning of the first hearing on these motions.**

**{¶170} The court finds that the information provided in Donna Bonds affidavit "discloses a strong probability that it will change the result if a new trial is granted," thereby meeting the first requirement under *Petro*, if the witness would testify.**

**{¶171} Judgment on Motion for New Trial, 2-5. The trial court went on to find that the evidence met all of the prongs of the test except that it was not discovered since trial and that defense counsel did not exercise due diligence by**

requesting a continuance of the trial. Based on these failures, the trial court denied the motion for a new trial based upon the discovery of new evidence.

{¶172} Another basis for the motion for a new trial was that the prosecutor engaged in misconduct. Saxton claims that the witness was not listed on earlier requests for subpoenas because of the pattern of intimidation and/or harassment by the State and its agents. The trial court denied this basis because no evidence of harassment against any other witness was submitted at the hearing on the motion to show a pattern.

{¶173} When reviewing the ruling on the motion for a new trial, I am once again struck by the trial court's findings that support the motion and then the subsequent denial of the motion. I am also concerned about the allegations of misconduct by the State's agents, which have not been addressed by the State. The State's argument against the motion is that there is no new evidence because the "new witness" is asserting her fifth amendment right due to inconsistent statements.<sup>56</sup> However, the State does not address the allegations that Ms. Bonds was threatened with prison if she testified on behalf of Saxton and that she was told to avoid Saxton's attorneys and the subpoena. The State also does not address

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<sup>56</sup> The easy remedy to the potential problem of conflicting statements would be for the State to grant her immunity for her testimony. The witness was called by the State as the defense chose to rely on the affidavits. However, the State did not make any offers of immunity on the record. This raises the question

the second affidavit which states that Ms. Bonds was intimidated into signing the statement she gave to the police and that her original affidavit was true. These allegations, along with various other allegations of intimidation and harassment by the police department made by various witnesses during the trial are disturbing.<sup>57</sup>

{¶174} Also disturbing is the statements made by the prosecutor during closing arguments. The trial court stated as follows:

**{¶175} While Ohio courts have allowed prosecutor's [sic] to comment on the defendant's failure to call witnesses, there is the ever-present danger that such comments might prejudice the defendant by causing the jury to believe that the defendant had an obligation to present some evidence of his innocence. Such arguments should be avoided. Furthermore, this court should have given a limiting instruction when the defense objected during argument.**

{¶176} Judgment on Motion for New Trial, 7. Closing arguments also contained instances of misstated evidence by the State as noted earlier.

{¶177} The test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394. In this case, some of the alleged misconduct

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if the State is concerned that Ms. Bonds will testify consistent with her affidavits rather than with the statement made to the police, allegedly under duress.

<sup>57</sup> Both Lucius Jones and Stephanie Pittman both testified that they felt intimidated and/or harassed by officers to testify against Saxton. This may indicate a pattern of conduct that may have caused the witnesses to testify differently than otherwise they would have.

was allegedly perpetrated by the investigative officers.<sup>58</sup> However, this alleged misconduct may have interfered with Saxton's ability to present a defense at his trial. All reasonable doubts must be given to the defendant and any misconduct on behalf of the prosecution should be imputed to the State. See *State v. Defronzo* (1978), 59 Ohio Misc. 113, 394 N.E.2d 1027 (holding that the police represent the state no less than the prosecutor's office and the taint on a trial is not less if the police, rather than the state's attorney is guilty of misconduct) and *State v. White-Barnes* (July 22, 1999), App. No. 98CA2459, WL 566856, unreported. The trial court determined that the testimony of Ms. Bonds, if she testified consistent with her affidavits, probably would have affected the outcome of the trial.

Additionally, the trial court has repeatedly expressed concerns about how the trial was conducted and the relevancy of the evidence, implying doubt about the fairness of the trial. A review of the totality of the circumstances likewise engenders doubt that Saxton received a fair trial, thus tainting any confidence in the correctness of the jury's verdict. The trial court's denial of the motion for a new trial therefore is unreasonable and the ninth assignment of error should be sustained.

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<sup>58</sup> No final determination of any misconduct has occurred. There is not enough information to determine exactly what occurred between the various witnesses and the police. However, none of the allegations of harassment have been rebutted by the State.

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{¶178} As a result of the above analysis, I would reverse the trial court and remand for a new trial. Thus, I respectfully dissent from the judgment of the majority.