[Cite as *State v. Miniard*, 2004-Ohio-5352.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 04CA1
vs.	:	
	:	DECISION AND JUDGMENT
	:	ENTRY
Michelle Miniard,	:	
	:	FILE STAMPED DATE: 9-29-04
Defendant-Appellant.	:	

APPEARANCES

Richard Roderick, Gallipolis, Ohio, for appellant.

Brent A. Saunders, Gallia County Prosecuting Attorney, Gallipolis, Ohio, for appellee.

Kline, P.J.:

{¶1} Michelle Miniard appeals the Gallia County Court of Common Pleas' decision finding her guilty of voluntary manslaughter and sentencing her to nine years imprisonment. Miniard contends that the trial court committed prejudicial error when it allowed the state to amend the bill of particulars immediately prior to trial. Because the trial court has discretion to allow amendment of a bill of particulars, and because the amendment here did not change the nature of the

offense charged, we disagree. Miniard next asserts that the trial court erred when it refused to allow evidence on the aggravated menacing charge brought against the victim's brother. We disagree because the charge only related to the brother's conduct after the killing, and therefore it was not relevant to Miniard's claim of self-defense. Miniard also contends that the trial court erred in refusing to instruct the jury regarding her right to protect her children. Because Miniard did not present any evidence that she reasonably believed the victim might harm her children, we disagree. Miniard next contends that the trial court erred in denying her motion for a new trial. Because Miniard did not attach supporting affidavits to her motion or demonstrate that a different result would occur if the court granted a new trial, we find that the trial court did not abuse its discretion in denying her motion for a new trial. Finally, Miniard contends that her sentence is disproportionate to what other offenders in Gallia County have received for similar offenses. Because we find that the trial court made the necessary findings to support the sentence imposed, we disagree. Accordingly, we overrule Miniard's assignments of error and affirm the judgment of the trial court.

I.

{¶2} On March 27, 2003, police responded to a 911 call from Miniard's apartment in Gallipolis. When police arrived, they found William "Big John"

Armstrong lying with his feet on Miniard's front stoop and the rest of his body on the grass in front of Miniard's apartment. The storm door had been kicked in. The main door was closed and undamaged except for a smear of blood. Police discovered large drops of blood just outside the front door and a large amount of blood on Armstrong's torso. Inside, they found a few small blood droplets. An autopsy revealed that Armstrong died from a stab wound that punctured his lung. Armstrong also had a blood alcohol level of 0.32 and a small amount of cocaine in his system. The state charged Miniard with voluntary manslaughter. Miniard pled not guilty, and the case proceeded to a jury trial.

{¶3} The parties dispute most of the remaining facts. The trial testimony indicated that Miniard and her two children, Tavius Miniard and Destiny Miniard, were asleep on the second floor of her apartment when Armstrong began knocking on the front door at approximately 2:00 a.m. Miniard's guests, Barry Cox, Howard Johnson, and a woman named Heather, were watching television in Miniard's living room on the first floor of her apartment. Miniard's landlord had recently warned her that he would evict her if she permitted any loud parties or disturbances.

{¶4} Armstrong's brother, Tony Armstrong ("Tony"), testified that he and Armstrong were together for several hours prior to the stabbing. Tony

acknowledged that they both had been drinking, but claimed that he was not drunk and that he only saw Armstrong drink one or two beers. When they were heading home at around 2:00 a.m., Armstrong told Tony he wanted to go visit a girl he knew. Tony did not accompany Armstrong to Miniard's apartment initially, but shortly after he got to their mother's home, he decided to go back and find his brother.

{¶5} Tony testified that he saw Armstrong arguing with two men when he arrived at Miniard's apartment. The four got into a physical fight. Tony saw Miniard come out of the apartment. After the fight, Miniard and her two male guests went back into her apartment. Armstrong went back to the front door. Tony saw someone open the door, and then he saw Armstrong fall. Tony told Armstrong they should leave. Then he noticed how badly Armstrong was bleeding. The police arrived shortly thereafter.

{¶6} Tony testified that he could not recall what happened next because he was so angry and upset. He believes he broke the window next to the front door and kicked in the screen door after Miniard stabbed his brother. While he was at the police station after the stabbing, he made threats against Miniard and her children. The police captured Tony's threats on videotape. As a result of the threats Tony

made at the police station, Detective Chad Wallace charged him with aggravated menacing. He pled guilty, and the court entered a conviction against him.

{¶7} Miniard's guest, Barry Cox, testified to a very different version of events. Cox testified that both Armstrongs were on Miniard's front porch when he first answered the door, and that they were visibly drunk. Cox told the Armstrongs to go home, and he shut the door. The Armstrongs came back about five times, kicking and pushing the door each time. At some point, Miniard woke up and came downstairs. Miniard called the police.

{¶8} The Armstrongs started to swing at Cox and Miniard's other male guest, Howard Johnson. Cox did not want to hurt the Armstrongs because he could see that they were drunk and he knew them. In fact, Cox had seen Armstrong at Miniard's house just a few days prior. However, Cox did hit one or both of the Armstrongs to keep them from hitting him.

{¶9} Cox, Miniard, and Johnson went back inside the apartment, and the Armstrongs came knocking again. Cox heard the Armstrongs threaten to "do this and * * * that." Cox began packing his bags to leave because he does not like to associate with the police and he knew they were coming. He saw Miniard with a knife and heard her tell the Armstrongs that she would stab them if they came into her house. Cox saw Armstrong push in the door, with Tony behind him, and then

he saw Miniard stab Armstrong. Cox, Johnson, and Heather then left the apartment through the back door.

{¶10} The state played the 911 tape for the jury. On the tape, Miniard tells the dispatcher someone is beating on her door and trying to force his way into her apartment. She requests that the dispatcher send the police to remove the man from her front porch. Seconds later, she repeatedly threatens to stab the man if he is not removed. She tells the dispatcher she does not know the man. When the dispatcher asks whether there is a safe room in her house she can go to, she informs him that she will be evicted if the police do not remove the men from her porch.

{¶11} When the dispatcher asks Miniard if she can get the door shut, she replies that she does not want to shut the door; she wants the people off her porch. She repeats her threat to stab someone several times. When the dispatcher asks if they are threatening her, she says that they are trying to get into her house. The call is disconnected, but the 911 operator quickly reestablishes contact with Miniard. Miniard informs the dispatcher that "they" are fighting outside. The dispatcher asks Miniard if she can lock her door since they are outside. Miniard replies that she does not want to lock her door, because she is afraid the Armstrongs will hurt

the other people who came outside when they heard her screaming. A few minutes later, Miniard calls 911 again to inform the dispatcher that she stabbed someone.

{¶12} When the police arrived, they found Armstrong dead. Scott Fitch of the Ohio Bureau of Criminal Investigation took photographs of the scene and gathered evidence. With regard to the photographs of the spattered blood and Armstrong's body, Mr. Fitch testified that the nature and direction of the spatter indicated that the stabbing occurred outside of the apartment on the front stoop. In contrast, the photographs show that the blood droplets inside the apartment were very small, and likely came from the knife as Miniard carried it upstairs. Mr. Fitch also testified about his photographs of the doors. While the aluminum storm door was damaged, the primary wooden door, door jam, and doorframe were undamaged, in working order, and revealed no signs of forced entry.

{¶13} In her videotaped statement to police, Miniard said that she was alone in her apartment with her two children before the Armstrongs began knocking on her door. She claimed that she did not know the two men who fought the Armstrongs in front of her apartment, and that she could not recall what they looked like, where they came from, or where they went. She stated that the Armstrongs told her that if she did not let them in, they would come in anyway. She did not allege that they otherwise threatened her in any way. However, she stated that she felt threatened

by their behavior. Miniard described the knife she used to stab Armstrong as a butter knife. Police found a bloodied, serrated knife with a pointed tip hidden under Miniard's bed when they searched her apartment.

{¶14} The state charged Miniard with voluntary manslaughter. Miniard pled not guilty and requested a bill of particulars. The state complied with Miniard's request. In the original bill of particulars, the state alleged that Miniard, "while under the influence of sudden passion or in a sudden fit of rage, either of which [was] brought on by serious provocation occasioned by William E. Armstrong, Jr. that [was] reasonably sufficient to incite [Miniard] into using deadly force, knowingly cause[d] the death of William E. Armstrong, Jr. * * *." In addition, the state indicated that it would introduce evidence that Armstrong and his brother attempted to force access into Miniard's apartment, and that Armstrong knocked in the front door of the apartment before Miniard stabbed him.

{¶15} A few days prior to trial, the state served Miniard with an amended bill of particulars. Miniard's counsel did not see the amended bill until the morning of the trial. The amended bill of particulars contained identical language describing Miniard's offense. However, the state indicated that its evidence would show that Armstrong knocked on Miniard's front door several times; that Miniard called 911 and stated that she was going to stab someone; and that, when Armstrong

continued at the front door, Miniard opened it, stepped outside in the doorway, and stabbed Armstrong. Miniard objected to the amendment of the bill of particulars, but did not request a continuance of the trial.

{¶16} At the trial, during her cross-examination of Detective Wallace, Miniard elicited testimony that Detective Wallace charged Tony with menacing on the night of the stabbing. She attempted to introduce the complaint and conviction entry on the charge, but the trial court sustained the state's objection to the evidence. The court ruled that the complaint and conviction entry proved only that Tony made threats after the stabbing, and were not relevant to the issue of whether Tony made threats against Miniard and her children before the stabbing.

{¶17} Miniard requested that the trial court include a jury instruction regarding her right to defend her children. The trial court instructed the jury on self-defense, but did not give an instruction on defense of another. The court determined that the record did not contain evidence to support a finding that Miniard reasonably feared for her children's safety prior to the stabbing.

{¶18} The jury found Miniard guilty of voluntary manslaughter, and the trial court entered a judgment of conviction. Miniard filed a motion for a new trial, which the trial court denied. The trial court sentenced Miniard to nine years imprisonment.

{¶19} Miniard appeals, asserting the following assignments of error: "1. The trial court committed error prejudicial to the defendant when it allowed the State of Ohio to amend its bill of particulars immediately prior to the jury trial of this case. 2. The trial court committed error prejudicial to the defendant/appellant when it refused to allow defense counsel to enter into evidence or permit cross examination on the charge of aggravated menacing * * * filed against the decedent's brother, Tony Armstrong. 3. The trial court committed error prejudicial to the defendant/appellant in its charge to the jury on the duty of retreat and for not using or incorporating into the instructions the defendant/appellant's proposed jury instruction with respect to protecting defendant/appellant's two minor children, Tavius and Destiny Miniard. 4. The trial court committed error prejudicial to the defendant/appellant when it failed to grant defendant/appellant's motion for a new trial. 5. The trial court committed reversible error when it sentenced defendant/appellant to a term of incarceration of nine years for her conviction of voluntary manslaughter * * *."

II.

{¶20} In her first assignment of error, Miniard contends that the trial court erred in permitting the state to amend the bill of particulars immediately prior to trial. Miniard did not receive the amended bill of particulars until the morning of trial.

She claims that the amendment totally changed the proof she needed to set forth and that she therefore was prejudiced by the amendment.

{¶21} Pursuant to Crim.R. 7(E), a bill of particulars shall set forth the "nature of the offense charged and the conduct of the defendant alleged to constitute the offense." In an offense involving the death of a victim, the bill should specify "the manner in which or the means by which death was caused." *State v. Petro* (1947), 148 Ohio St. 473, paragraph four of the syllabus. The purpose of a bill of particulars "is to inform a defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, to prevent surprise, or to plead his acquittal or conviction in bar of another prosecution for the same offense." *State v. Clay* (1972), 29 Ohio App.2d 206, 215. However, "[a] bill of particulars may be amended at any time as justice requires." Id.

{¶22} The decision of whether to allow an amendment to a bill of particulars is left to the discretion of the trial court. *State v. Davis*, Clark App. No. 2002-CA-43, 2003-Ohio-4839, at ¶83; *State v. Lewis* (1993), 85 Ohio App.3d 29, 32-33. A finding that a trial court abused its discretion implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing

court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶23} While the bill of particulars must enable the defendant to prepare for trial, it is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery. *State v. Chaffin* (1972), 30 Ohio St.2d 13, paragraph one of the syllabus; *Clay* at 215. The state will not be limited to the evidence set forth in the bill of particulars in presenting its case. *Chaffin* at paragraph two of the syllabus; *State v. DeRighter* (1945), 145 Ohio St. 552. A bill of particulars need not include information that is within the knowledge of the defendant or information that the defendant could discover herself with due diligence. *Clay* at 215; *State v. Halleck* (1970), 24 Ohio App.2d 74, 77. Additionally, a bill of particulars need not be precise, but rather "need only be directed toward the conduct of the accused as it is understood by the state to have occurred." *State v. Gingell* (1982), 7 Ohio App.3d 364, 367.

{¶24} Here, both the indictment and the original bill of particulars informed Miniard of the nature of the offense charged. By specifying the voluntary manslaughter charge, the state informed Miniard the state of mind it believed she possessed when she caused the victim's death. In addition, the original bill informed Miniard that she allegedly caused the victim's death by stabbing him

with a kitchen knife. The changes from the original bill of particulars to the amended bill did not change the state's allegation of the conduct that it believed constituted the offense; namely, the stabbing with a kitchen knife. Thus, the amendment did not change the nature of the alleged offense, but only the circumstances surrounding the alleged offense.

{¶25} The amended bill of particulars clearly impacted the viability of Miniard's affirmative defense that she stabbed Armstrong in self-defense, and thus likely impacted her trial preparation. However, as we noted above, a bill of particulars need only describe the events as the state understood them to have occurred. *Gingell.* Moreover, Miniard had access through discovery to the photographs that depict her front door and its locking mechanism, both of which appear undamaged. She had access to the list of witnesses who testified that the door was not damaged and that the lock was in working order. And she had access to the audio tape of the 911 calls, during which she expressed more concern about being evicted than about her personal safety. Thus, Miniard had knowledge of, or an equal opportunity to discover, evidence supporting the circumstances alleged in the state's amended bill. Knowledge of this evidence afforded Miniard sufficient opportunity to prepare for trial.

{¶26} Because the amended bill of particulars did not change the nature of the offense charged, and further because Miniard had access to evidence supporting the amended bill through discovery, we decline to find that the trial court abused its discretion by permitting the state to file the amended bill of particulars. Accordingly, we overrule Miniard's first assignment of error.

III.

{¶27} In her second assignment of error, Miniard contends that the trial court erred when it refused to allow her to introduce evidence of the charges that the state filed against Armstrong's brother, Tony, on the night of the stabbing. Specifically, Miniard sought to introduce evidence that the state charged Tony with aggravated menacing for threatening to kill Miniard and both of her children, and that Tony pled guilty to the charge.

{¶28} A trial court has broad discretion in the admission or exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to defendant. *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271; *State v. Hymore* (1967), 9 Ohio St.2d 122, certiorari denied (1968), 390 U.S. 1024. As we noted above, a finding that a trial

court abused its discretion implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore* at 219.

{¶29} Generally, all relevant evidence is admissible. Evid.R. 402. "Relevant evidence" is any evidence that tends to make a fact of consequence seem more or less probable than without the evidence. Evid.R. 401. While evidence of a witness' crimes, wrongs or acts is not admissible to illustrate the witness' character, such evidence may be admissible for other purposes. Evid.R. 404(B).

{¶30} Miniard contends that the trial court abused its discretion when it refused to permit her to introduce evidence of Tony's aggravated menacing conviction because it constitutes evidence that has a tendency to make a fact of consequence more likely.[1] Specifically, Miniard contends that the fact that the state charged Tony with aggravated menacing on the night of the stabbing tends to prove that she feared for the safety of her and her children when she stabbed Armstrong. The trial court found, however, that the aggravated menacing charge and conviction were not relevant because they related to Tony's conduct after the stabbing.

{¶31} The aggravated menacing charge and conviction prove that Tony threatened Miniard and her children *after* he witnessed her stab and kill his brother. We

[1] As the state notes, Miniard did not attempt to introduce this evidence during her cross-examination of Tony to attack his credibility. Rather, Miniard only sought to introduce the charge and conviction during her cross-examination of the police officers who investigated the stabbing. Thus, we confine our analysis to the question of relevancy.

cannot find that the trial court abused its discretion in ruling that such threats, made following the extreme provocation of watching Miniard stab and kill Armstrong, did not tend to make Miniard's allegation of similar threats prior to the stabbing more or less likely. It is not reasonable to infer from the fact that Tony made threats after he witnessed Miniard stab his brother that he also made threats prior to witnessing Miniard stab his brother. The trial court did not prevent Miniard from questioning the investigating officers or Tony about whether he made threats to Miniard and her children prior to the stabbing. Thus, we find that the trial court did not abuse its discretion. Accordingly, we overrule Miniard's second assignment of error.

IV.

{¶32} In her third assignment of error, Miniard contends that the trial court committed prejudicial error when it declined to give Miniard's proposed jury instructions regarding the lack of a duty to retreat and Miniard's right to protect her children.

{¶33} A trial court has broad discretion in instructing the jury. *Jenkins v. Clark* (1982), 7 Ohio App.3d 93, 100. The court ordinarily should give a requested jury instruction if it is a correct statement of law, which is applicable to the facts in the case, and reasonable minds might reach the conclusion sought by the specific

instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591. The court need not give a proposed instruction in the precise language requested by its proponent; rather, the court retains discretion to use its own language to communicate the same legal principles. *State v. Nelson* (1973), 36 Ohio St.2d 79, paragraph one of the syllabus; *State v. Scott* (1987), 41 Ohio App.3d 313, 317. The proper standard of review for jury instructions is whether the trial court abused its discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

{¶34} Miniard requested that the trial court instruct the jury that, if she "was preventing any forcible entry to her apartment, [Miniard] had no duty to retreat or escape, and could use such means as are necessary to repel William Armstrong from her apartment, even to the use of deadly force, provided that she had reasonable grounds to believe, and an honest belief that the use of deadly force was necessary to repel William Armstrong or prevent the forcible entry." Additionally, she requested the trial court to instruct that she "has no greater rights than Tavius and Destiny Miniard, and was justified in using deadly force only if her two children were not at fault in creating the situation of the Armstrong's (sic) trying to break into the apartment, and Michelle Miniard had reasonable grounds to believe that in addition to herself, Tavius and Destiny Miniard were in danger of death or

great bodily harm and the only means of protecting them was by the use of deadly force."

{¶35} The trial court did not give either of these requested jury instructions verbatim. The trial court instructed the jury that "if the defendant was assaulted in her home or if the home was attacked, the defendant had no duty to retreat, escape or withdraw and could use such means as are necessary to repel the assailant from the home to prevent any forcible entry to the home, even to the use of deadly force, provided that she had reasonable ground to believe and an honest belief that the use of deadly force was necessary to repel the assailant or to prevent the forcible entry." We find that this instruction communicates the same legal principles as the first of Miniard's requested jury instructions listed above, and that the trial court acted within the bounds of its discretion in using its own language to convey this instruction.

{¶36} With respect to the second of the proposed instructions quoted above, the trial court found that the evidence did not support the instruction. Therefore, the court refused to give an instruction on defense of another. Miniard contends that the record contains evidence that she acted to defend her children when she stabbed Armstrong. However, our review of the testimony Miniard cites in support of this assertion reveals only testimony that Miniard's children were home

on the night of the stabbing. The record does not contain any evidence that Armstrong threatened the children or that Miniard feared for the children's safety. Therefore, the trial court did not abuse its discretion in determining that the evidence did not support Miniard's requested instruction on defense of her children.

{¶37} Accordingly, we overrule Miniard's third assignment of error.

V.

{¶38} In her fourth assignment of error, Miniard asserts that the trial court erred when it failed to grant her motion for a new trial. Miniard did not cite to Crim.R. 33 in her motion to the trial court. However, she used language in her motion corresponding to Crim.R. 33(A)(1), (2), and (3), alleging that she is entitled to a new trial due to irregularity of the proceedings, the prosecuting attorney's misconduct, or a surprise which ordinary prudence could not have guarded against. On appeal, Miniard discusses the same events and evidence described in her motion to the trial court, but instead characterizes the cause as "newly discovered evidence," which would fall under Crim.R. 33(A)(6).

{¶39} Pursuant to Crim.R. 33(A), the trial court may grant a defendant's motion for a new trial for various causes affecting her substantial rights, including: "(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of

discretion by the court, because of which the defendant was prevented from having a fair trial; (2) Misconduct of the jury, prosecuting attorney, or witnesses for the state; (3) Accident or surprise which ordinary prudence could not have guarded against; * * * (6) When new evidence favorable to the defense is discovered * * *."

{¶40} Generally, the decision on whether to grant or deny a motion for new trial is committed to the sound discretion of the trial court. *State v. Matthews* (1998), 81 Ohio St.3d 375, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus. We will not reverse a trial court's denial of a motion for new trial absent an abuse of that discretion. *Shark v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307. However, when a defendant alleges that the state denied his due process rights by failing to disclose exculpatory evidence, the usual standard for a new trial does not apply. *State v. Johnston* (1988), 39 Ohio App.3d 48, 60. Instead, when a defendant asserts that the state withheld exculpatory evidence, we undertake a due process analysis to determine whether the misconduct of the prosecutor deprived the defendant of her right to a fair trial. Id.; *State v. Reedy* (Sept. 27, 1999), Jackson App. No. 98CA835.

{¶41} Crim.R. 33(C) provides that "[t]he causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth * * *." When a defendant fails to attach such supporting affidavits, the court, in its discretion, may

summarily deny the motion. *State v. Rogers* (1990), 68 Ohio App.3d 4, 7; *Toledo v. Stuart* (1983), 11 Ohio App.3d 292, 293. This holds true even when the defendant alleges that the prosecutor improperly withheld exculpatory evidence. See, e.g., *State v. Smith* (Mar. 27, 1998), Montgomery App. No. 97CA46; *State v. Morgan* (Dec. 31, 1992), Cuyahoga App. No. 63666.

{¶42} In her brief to the trial court, Miniard first alleged that the prosecutor committed misconduct by failing to disclose favorable evidence. Specifically, Miniard alleged that the prosecutor failed to disclose that the videotape containing Miniard's statement also contained video footage of Tony Armstrong threatening Miniard and her two children. Additionally, Miniard alleged that the prosecutor committed misconduct by telling a law enforcement officer, whom both the prosecution and the defense had subpoenaed, that he need not appear.

{¶43} Allegations of misconduct fall under Crim.R. 33(A)(2), but Miniard did not attach any affidavits to her motion. Thus, we find that the trial court could properly summarily deny her motion based upon her failure to support it with affidavits as required by Crim.R. 33(C).

{¶44} Even if we view the videotape and the law enforcement officer's potential testimony as newly discovered evidence, Miniard's motion fails because she did not meet her burden. In order to prevail on a motion for a new trial based on newly

discovered evidence, the offender bears the burden of demonstrating to the trial court 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 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. Petro* (1947), 148 Ohio St. 505, syllabus; *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350.

{¶45} As we determined in ruling on Miniard's second assignment of error, threats made by Tony Armstrong after the stabbing are not material to any issue before the court. As to the law enforcement officer's potential testimony, Miniard alleges it is "very valuable" to the defense, but does not provide further detail. Thus, we find that Miniard did not meet her burden of demonstrating that the new evidence discloses a strong probability that it will change the result if a new trial is granted or that it is material to the issues.

{¶46} Miniard also states that the "primary thrust" of her motion for a new trial was to show the court that the state's last minute amendment to the bill of particulars prejudiced her. For the reasons we found no abuse of discretion in the trial court's decision to permit the state to amend the bill of particulars, we

likewise find no abuse of discretion in the trial court's decision to overrule Miniard's motion for a new trial due to the amended bill of particulars. Specifically, the amended bill of particulars did not change the nature of the offense charged, and Miniard had access to evidence supporting the amended bill through discovery. Therefore, the amendment to the bill of particulars did not materially affect Miniard's substantial rights, and the trial court did not abuse its discretion in declining to grant her motion for a new trial due to the amendment.

{¶47} Accordingly, we overrule Miniard's fourth assignment of error.

VI.

{¶48} In her fifth assignment of error, Miniard contends that the trial court committed reversible error when it sentenced her to a term of incarceration of nine years. Miniard contends that her sentence is "disproportionate" to what other offenders in Gallia County have received for like or similar offenses, and requests that we remand for resentencing. Miniard does not cite any authority in her argument.

{¶49} R.C. 2953.08(A)(4) provides that a defendant who is convicted of a felony may pursue an appeal on the ground that the sentence is contrary to law. The appellate court may modify the sentence upon clearly and convincingly finding that the record does not support the sentence, the sentence erroneously includes a

prison term, or the sentence is contrary to law. R.C. 2953.08(G)(1)(a)-(d). In applying this standard of review, we do not substitute our judgment for that of the trial court. Rather, we look to the record to determine whether the sentencing court: (1) considered the statutory factors, (2) made the required findings, (3) relied on substantial evidence in the record supporting those findings, and (4) properly applied the statutory guidelines. *State v. Persons* (Apr. 26, 1999), Washington App. No. 98CA17, citing Griffin & Katz, Ohio Felony Sentencing Law (1999) 542-547, Section 9.16-9.20.

{¶50} The word "disproportionate" appears in the sentencing guidelines in R.C. 2929.14(E)(4), relating to the imposition of consecutive sentences. It provides that consecutive sentences can only be imposed if the court makes a finding "that consecutive sentences are not disproportionate to the seriousness of the offender's conduct." Id. Because this provision relates to consecutive sentences and the court convicted Miniard of only one crime, the provision is not applicable to Miniard's sentence.

{¶51} Miniard notes that she has no prior felony convictions, yet she received a sentence greater than the minimum sentence. "Minimum sentences are favored for first-time imprisonment." *State v. Edmonson* (1999), 86 Ohio St.3d 324, 325. R.C. 2929.14(B) requires a trial court to impose a minimum sentence for first-time

imprisonment, unless it "finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others." R.C. 2929.14(B)(2); see, also, *State v. Jones* (2001), 91 Ohio St.3d 391, 398. The trial court is not required to "give its *reasons* for its finding that the seriousness of the offender's conduct will be demeaned or that the public will not be adequately protected from future crimes before it can lawfully impose more than the minimum authorized sentence." *Edmonson* at syllabus (Emphasis sic). Nor is the court required to use the "talismatic" words contained in the statute. See *State v. Mirmohamed* (1998), 131 Ohio App.3d 579, 584. However, the court must indicate on the record that it first considered imposing the minimum sentence and then decided to depart from the minimum based on one or both of the permitted reasons. *Edmonson* at 328; *Mirmohamed* at 584.

{¶52} Here, the trial court specifically stated in its judgment entry that "the shortest prison term will demean the seriousness of the defendant's conduct and the shortest prison term will not adequately protect the public from future crime by the defendant or others." Thus, the court indicated on the record that it considered the minimum sentence before deciding to depart from it, and we find no error in the court's decision to impose a sentence greater than the minimum.

{¶53} R.C. 2929.11(B) directs trial courts to impose felony sentences which are "consistent with sentences imposed for similar crimes by similar offenders." However, the General Assembly has not identified the means by which the courts should attain this goal. *State v. McSwain*, Cuyahoga App. No. 83394, 2004-Ohio-3292, at ¶47. Courts do not have the resources to assemble reliable information about sentencing practices throughout the state. *State v. Haamid*, Cuyahoga App. Nos. 80161 and 80248, 2002-Ohio-3243 (Karpinski, J., concurring). "Identification of the data and factors which should be compared in deciding whether a crime or an offender is 'similar' in itself would be a massive task, yet the identification of such data would be essential even to begin to build a database. Unless and until someone undertakes this daunting task, 'appellate courts will be able to address the principle of consistency only to a very limited degree.'" *McSwain* at ¶47, quoting *Haamid*, supra. In particular, courts are best able to address consistency issues when sentencing co-defendants. See, e.g., *State v. Stern* (2000), 137 Ohio App.3d 110, 115.

{¶54} Miniard did not supply the trial court or this court with data on sentences imposed in 'similar' cases for purposes of comparison. Instead, she argues that certain mitigating factors, such as the victim's intoxication, the fact that she called 911, and the fact that she has no prior felony convictions, should have caused the

court to impose a lesser sentence than it did. By requesting a remand on the basis of factors that she believes should lessen her sentence, Miniard "effectively demands reconsideration, not an assessment of the proportionality of the sentence." *McSwain* at ¶48. Thus, Miniard's assignment of error does not set forth reasons that her sentence is contrary to law. Accordingly, we overrule Miniard's fifth assignment of error.

{¶55} Having overruled each of Miniard's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Court of Common Pleas to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. The stay as herein continued will terminate in any event at the expiration of the sixty day period.

The stay shall terminate earlier if the appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec.2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.