[Cite as *State v. Barfield*, 2015-Ohio-891.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 13CA3387
v.	:	
	:	DECISION AND
ZACHARY W. BARFIELD,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	Released: 03/12/2015

APPEARANCES:

Mary Elaine Hall, Cleveland, Ohio for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney and Jeffrey C. Marks Assistant Prosecuting Attorney, Chillicothe, Ohio for appellee.

Hoover, P.J.

{¶ 1} Appellant-defendant Zachary Barfield appeals his conviction and sentence from the Ross County Court of Common Pleas. A jury found Barfield guilty of one count of Burglary, a third degree felony, in violation of R.C. 2911.12. The trial court sentenced him to 36 months to be served consecutively to a current prison sentence and to pay restitution to the victim in the amount of $1,200. Here on appeal, Barfield sets forth four assignments of error, all arguing that his trial counsel provided ineffective assistance of counsel. For the following reasons, we overrule appellant's assignments of error and affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

{¶ 2} In February 2004, Tiffany Robinson ("Robinson") reported that her computer had been stolen from her apartment. Earlier that evening, appellant-defendant Zachary Barfield

("Barfield") and David Hufford ("Hufford") showed up at Robinson's apartment for an unexpected visit. The three were casual acquaintances. Robinson told Barfield and Hufford to leave because she had to run some errands. When Robinson returned, she noticed her computer was missing and reported the robbery.

{¶ 3} Later that night, the investigating officer, Detective Twila Goble, learned that a fellow officer had stopped Barfield and Hufford's vehicle. The officer placed Barfield and Hufford in custody. Detective Goble asked the officer to inquire if the two had any knowledge of the stolen computer. Barfield and Hufford denied any knowledge of the incident. From that point, law enforcement did not investigate any further.

{¶ 4} Then, in October 2012, Barfield sent a letter wherein he confessed to multiple crimes to the Ross County Prosecutor's office. The crimes included breaking into an apartment and stealing a computer. At the time Barfield sent the letter, he was serving a prison sentence on an unrelated conviction. In response to the letter, Detective Shawn Rourke ("Rourke") traveled to the Southern Ohio Correction Facility and interviewed Barfield. Detective Rourke recorded the interview with a digital recorder. During the initial remarks, Detective Rourke informed Barfield of his Miranda rights. Barfield acknowledged his rights and proceeded with the interview.

{¶ 5} In December 2012, Barfield was indicted on one count of Burglary, a third degree felony, in violation of R.C. 2911.12. The case proceeded to trial in May 2013. A jury found Barfield guilty on the offense of Burglary. The trial court sentenced Barfield to 36 months in prison to be served consecutively to the term he was already serving. Barfield then timely filed this appeal.

Appellant's First Assignment of Error:

THE DEFENDANT-APPELLANT WAS DENIED ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE HIS LAWYER FAILED TO REPRESENT HIM DURING THE CRITICAL STAGE OF PRE-TRIAL INVESTIGATION AND DISCOVERY BY OMITTING TO FILE MOTIONS TO SUPPRESS THE LETTER AND AUDIO CD CONFESSION AND BY OMITTING TO FILE A MOTION FOR PSYCHIATRIC EXAMINATION PURSUANT TO R.C. 2945.371, *ET SEQ*. BEFORE TRIAL.

{¶ 6} In his first assignment of error, Barfield argues that his trial counsel provided ineffective assistance of counsel by failing to file a motion to suppress his confession letter and the compact disc containing the audio of his interview with Rourke and failing to file a motion for a psychiatric examination.

{¶ 7} All of Barfield's assignments of error are based upon the allegation that he received ineffective assistance of counsel. The following standard of review associated with claims of ineffective assistance of counsel will therefore apply to each assignment of error.

{¶ 8} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), fn. 14; *State v. Stout,* 4th Dist. Gallia No. 07CA5, 2008–Ohio–1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a criminal defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient

performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Conway,* 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. "Failure to establish either element is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14.

{¶ 9} "When considering whether trial counsel's representation amounts to deficient performance, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Walters,* 4th Dist. Nos. 13CA33 & 13CA36, 2014-Ohio-4966, ¶ 23 quoting *Strickland* at 689. "Thus, 'the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.' " *Id.* "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor,* 4th Dist. Washington No. 07CA1, 2008–Ohio–482, ¶ 10, citing *State v. Smith,* 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). "Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment." *Walters* at ¶ 23 citing *State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62 and *State v. Hamblin,* 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶ 10} "To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different." *Walters* at ¶ 24 citing *State v. White,* 82 Ohio St.3d 15, 23, 693 N.E.2d 772 (1998) & *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph three of the syllabus. "Furthermore, courts may not simply assume the existence of prejudice, but must require that

prejudice be affirmatively demonstrated." *Walters* at ¶ 24. "There are countless ways to provide effective assistance in any given case; therefore, judicial scrutiny of counsel's performance must be highly deferential." *Id.* (Citations omitted).

{¶ 11} In his first assignment of error, Barfield argues that his trial counsel provided ineffective assistance of counsel by failing to file a motion to suppress his confession letter and the compact disc containing the audio of his interview with Rourke and failing to file a motion for a psychiatric examination. Further, Barfield contends that he was presumptively prejudiced by his attorney's complete denial of representation during the critical stage of pre-investigation and discovery. According to Barfield, if the letter and audio confession had been suppressed, the case against him would not prevail.

{¶ 12} Barfield cites the United States Supreme Court cases of *Cronic v. United States*, 466 U.S. 648, 104 S.Ct. 2574, 80 L.Ed.2d 657 (1984) and *Missouri v. Frye*, 566 U.S. ——, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) and argues that pursuant to these cases, his trial counsel substantially prejudiced him by failing to subject the state's evidence to "adversarial testing during the pre-trial stage of this case. Barfield contends that the *Cronic-Frye* test and not the *Strickland* test is the new standard for ineffective assistance of counsel.

{¶ 13} Barfield specifically cites *Cronic* where the Court stated: "If no actual "Assistance" "for" the accused's "defence" [sic] is provided, then the constitutional guarantee has been violated. *Id.* at 654 citing *United States v. Decoster*, 199 U.S.App.D.C. 359, 382, 624 F.2d 196, 219 (MacKinnon, J., concurring), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979). "In *Cronic*, the United States Supreme Court created a narrow exception to the *Strickland* requirements, when it determined that prejudice should be presumed in 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in

a particular case is unjustified.' " *State v. Drake,* 8th Dist. Cuyahoga No. 93761, 2010–Ohio–1065, ¶ 8, quoting *Cronic,* 466 U.S. 648, 658 (1984). "Specifically, the Supreme Court found that if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Drake,* at ¶ 8.

{¶ 14} In *Frye,* the United States Supreme Court "set forth a new standard to determine prejudice in context of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) as it applies to plea offers and plea negotiations." *State v. Elmore,* 5th Dist. Licking No. 13CA84, 2014-Ohio-3674, ¶ 79. In *Frye,* defense counsel allowed a plea offer to expire without communicating the offer to the defendant resulting in the defendant accepting a later offer that was less favorable. *Id.* at ¶ 80 citing *Frye,* at 1404. "The Court held that 'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea....' " *Elmore* at ¶ 80 quoting *Frye* at 1408. Effectively, the Court affirmed the right to effective assistance of counsel to the plea negotiation process. *Frye* at 1407-08.

{¶ 15} The *Strickland* standard is still the proper standard of review for ineffective assistance of counsel claims. *State v. Lawson,* 4th Dist. Highland No. 14CA5, 2015-Ohio-189, ¶ 26; *State v. Pickens,* 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 199; *State v. Thompson,* 141 Ohio St.3d 254, 2014-Ohio-475, 23 N.E.3d 1096, ¶ 223. Neither *Cronic* nor *Frye* attempt to overturn the *Strickland* standard. In *Cronic,* the Supreme Court noted that the *Strickland* standard applies when appellant asserts specific errors made by counsel. *See Cronic* at fn. 41 ("Since counsel's overall performance was the only question on which the Court of Appeals passed, and is the primary focus of respondent's arguments in this court, we have confined our analysis to a claim challenging counsel's overall performance, and not one based on particular errors or omissions.

Should respondent pursue claims based on specified errors made by counsel on remand, they should be evaluated under the standards enunciated in *Strickland v. Washington*, 466 U.S., at 693–696, 104 S.Ct., at 2067–2069.") The Supreme Court, in *Frye*, evaluated Frye's complaint under the *Strickland* analysis. *See generally Frye.* Therefore, since appellant here claims that his trial counsel was deficient by failing to file a motion to suppress the confession letter and the compact disc and by failing to file a motion for a psychiatric exam, we will apply the *Strickland* standard.

{¶ 16} First, we will address appellant's claim that trial counsel was deficient by failing to file a motion to suppress the confession letter and the compact disc of his interview with Rourke. The failure to file a motion to suppress does not constitute per se ineffective assistance of counsel. *Walters,* 2013–Ohio–772 at ¶ 20. Instead, the failure to file a motion to suppress amounts to ineffective assistance of counsel only when the record demonstrates that the motion would have been successful if made. *Id., See State v. Resendiz,* 12th Dist. Preble No. CA2009–04–012, 2009–Ohio–6177, ¶ 29. This court acknowledged, "***it may be difficult for a defendant to establish in hindsight that a suppression motion would have been granted on the basis of evidence contained in a trial transcript." *Taylor,* 2008–Ohio–482 at 14. "Where the record is not clear or lacks sufficient evidence to determine whether a suppression motion would have been successful, a claim for ineffective assistance of counsel cannot be established" *State v. Parkinson,* 5th Dist. Stark No.1995CA00208, 1996 WL 363435, *3 (May 20, 1996).

{¶ 17} Here, appellant focuses his argument on the failure to file the motion to suppress as an error in providing "adversarial testing" of the state's evidence. Barfield argues that the motion to suppress would not be futile, as the state suggests, because the letter and the compact disc provided the only evidence against him. The futility of a potential motion to suppress is not

our focus however. Appellants must demonstrate that a potential motion to suppress would have been successful. *Resendiz,* supra, at ¶ 29. Only in his third assignment of error, which this court will fully discuss below, does Barfield argue that because he did not sign a waiver form, a basis exists for the filing of a motion to suppress. Barfield cites *State v. Siders*, 4th Dist. Gallia No. 07CA10, 2008-Ohio-2712, as the standard for this argument regarding a signed Miranda waiver form.

{¶ 18} However, *Siders* does not stand for the proposition that "obtaining a signed Miranda Waiver is mandatory***" Appellant's Brief at 6. The *Sider*s decision stated:

> Based upon the evidence contained in the trial transcript, any claim that Siders did not knowingly, intelligently, and voluntarily provide his statement is meritless. The transcript shows that Siders signed a waiver of rights form, and the law enforcement officer testified that he reviewed the form with Siders and that Siders indicated his understanding of his rights and consented to give a statement.

Id. at ¶ 12.

This Court was just explaining that "[n]othing in the record indicates that Siders was under any undue police coercion or duress" when the defendant in *Siders* gave a statement to a law enforcement officer. Similarly, in this case, Barfield acknowledges waiver of his Miranda rights at the beginning of his interview with Rourke. Therefore, an argument that the interview should have been suppressed because Barfield did not waive his Miranda rights is unsubstantiated. Additionally, in the recorded interview between Barfield and Rourke, Barfield admits to writing and sending the letter.

{¶ 19} Because appellant has not provided any reason why the trial court would have granted a motion to suppress the confession letter or compact disc, we cannot find that trial

counsel was deficient for not filing the motion. Accordingly, we do not find that trial counsel provided ineffective assistance of counsel in failing to file a motion to suppress the confession letter or the compact disc.

{¶ 20} Now, we will address Barfield's argument that his trial counsel was ineffective for failing to file a motion for a psychiatric examination. Much like his argument regarding the motion to suppress, Barfield contends only that his counsel had an objective and reasonable duty to request a psychiatric evaluation in order to subject the state's evidence to adversarial testing.

{¶ 21} The competency of a defendant is presumed. The presumption is rebutted only when a preponderance of the evidence shows that due to his present mental condition, the defendant was unable to understand the nature of the proceedings against him and could not assist in his defense. *State v. Nethers*, 5th Dist. Licking No. 07CA78, 2008-Ohio-2679, ¶ 43 citing R.C. 2945.37(G); *State v. Swift*, 86 Ohio App.3d 407, 411, 621 N.E.2d 513 (1993).

{¶ 22} "On the issue of appellant's competency, the Supreme Court of Ohio has held that '[t]he term 'mental illness' does not necessarily equate with the definition of legal incompetency.' " *State v. Smith*, 6th Dist. Lucas No. L-05-1350, 2007-Ohio-5592, ¶ 82 quoting *State v. Berry*, 72 Ohio St.3d 354, 650 N.E.2d 433 (1995) at syllabus. The court in *Smith* continued:

> The court in *Berry* further stated at 359: 'In *Dusky v. United States* (1960), 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825, the United States Supreme Court set forth the test to determine whether a defendant is competent to stand trial, stating that ' * * * the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings

> against him.' " * * * The right to a hearing on the issue of competency rises to the level of a constitutional guarantee where the record contains 'sufficient indicia of incompetence,' such that an inquiry into the defendant's competency is necessary to ensure the defendant's right to a fair trial." (Citations omitted.)

Smith at ¶ 82.

{¶ 23} While Barfield's trial counsel attempted to show that Barfield had made a false confession to the theft of Robinson's computer, the issue of competency never played a role at any stage of the proceedings below. No expert witnesses testified regarding the mental health of Barfield. Here on appeal, Barfield does not give any reasons why his mental capacity or competency to stand trial would be questionable. Therefore, no reason exists for this Court to find that trial counsel's failure to file a motion for a psychiatric evaluation was deficient or would have caused the outcome of the trial to be any different. Accordingly, we do not find that Barfield's trial counsel was ineffective in not filing a motion for a psychiatric evaluation. Barfield's first assignment of error is overruled.

Appellant's Second Assignment of Error:

> THE DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT BECAUSE HIS "COUNSEL'S PERFORMANCE WAS DEFICIENT [DURING TRIAL] AND THAT HER DEFICIENT PERFORMANCE SO PREJUDICED MR. BARFIELD THAT HE WAS DENIED A FAIR TRIAL.

{¶ 24} Under his second assignment of error, Barfield argues that his trial counsel failed to provide effective assistance of counsel when she did not object to the admission of his prior criminal history. Barfield contends that pursuant to Evid.R. 404(B), his criminal history is barred

from admission; and his counsel had a duty to object and force the state to produce an exception for the admission of the criminal history.

{¶ 25} During the state's case in chief, a discussion outside the presence of the jury occurred where the parties discussed the contents of the interview between Barfield and Rourke. The trial transcript reads as follows:

> THE COURT: THE NEXT ONE, ALSO MS. DAVIS I'M GOING TO ASK JUST YOU TO ADDRESS, IT'S MY UNDERSTANDING THAT THE STATE IS GETTING READY TO PRESENT EVIDENCE WHICH IS GOING TO INCLUDE EVIDENCE THAT INDICATES YOUR CLIENT IS AN INMATE AT LUCASVILLE-
>
> [Defense counsel]: THAT IS CORRECT, SIR.
>
> THE COURT: YOU ARE NOT OBJECTING TO THAT COMING IN OR THE FACT THAT HE HAS PRIOR CONVICTIONS, OBVIOUSLY THAT ARE GOING TO COME FROM THAT AND YOU ARE DOING THAT AS A BASIS FOR WHAT REASON?
>
> [Defense counsel]: YOU HONOR, IT IS PART OF OUR TRIAL STRATEGY REGARDING THE MULTIPLE, WHAT WE CONSIDER TO BE FALSE CONFESSIONS.
>
> THE COURT: ALRIGHT, AND YOU UNDERSTAND THAT THE RULE OF EVIDENCE WILL PROBABLY PRECLUDE THOSE GOING IN ABSENT YOUR OBJECTION, CORRECT?
>
> [Defense counsel]: YES, SIR. AND SO WE'RE CLEAR, I DID NOT REVIEW THE RECORDING FOR THE SPECIFIC PURPOSE. I KNOW THAT THE

INTERVIEW WAS CONDUCTED WITHIN LUCASVILLE. I DON'T KNOW, MAY I ASK- IS THERE REFERENCE TO THE PRIOR (INAUDIBLE) THAT HE'S BEEN CONVICTED OF AND THOSE RECORDINGS ARE ONLY THAT HE HAS BEEN WITHIN THE PRISON SYSTEM?

[Prosecutor]: HE DOES TALK THAT HE SERVED A STINT FROM TWO THOUSAND FOUR TO TWO THOUSAND EIGHT AND THAT HE WAS RELEASED, I WANT TO SAY, IN NOVEMBER OF TWO THOUSAND EIGHT AND THAT HE THEN PICKED UP CHARGES WHICH LANDED HIM BACK THERE.

[Defense counsel]: OKAY, YEAH, SO THEN WE HAVE NO OBJECTIONS.

[Prosecutor]: SO, THERE'S TALK ABOUT THE BURGLARIES THAT GOT HIM IN THERE FROM '04 TO '08 AND THEN THE ONES THAT HE'S CURRENTLY SERVING.

[Defense counsel]: RIGHT, RIGHT, WE HAVE NOT OBJECTIONS [SIC] TO THAT - ARE WE ON BOARD WITH THAT?

[BARFIELD]: YES, MA'AM.

[Defense counsel]: OKAY.

THE COURT: OKAY.

{¶ 26} Evid.R. 404(B) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

From the above exchange and defense counsel's closing arguments to the jury, it is clear that counsel's trial strategy was to convince the jury that Barfield's confessions were falsely made.

{¶ 27} In evaluating Barfield's ineffective assistance arguments we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *State v. Tyson*, 4th Dist. Ross No. 12CA3343, 2013-Ohio-3540, ¶ 25 quoting *Strickland*, 466 U.S. 668, at 689. In addition to arguing that Barfield made false confessions, his trial counsel also cross examined Rourke about the inconsistencies of the timeline of events Barfield described in the interview. The cross examination testimony was as follows:

> [Defense counsel]: NOW, MR. BARFIELD, ON THE RECORDING IF I COULD HEAR IT CORRECTLY, TOLD YOU THAT HE STOLE THE DESKTOP COMPUTER, TOOK IT TO PORTSMOUTH, AND SOLD IT TO SOMEBODY DOWN THERE AND THEN RETURNED TO CHILLICOTHE AND THAT'S WHEN HE GOT ARRESTED ON THE OUTSTANDING WARRANT, CORRECT?
>
> [DETECTIVE ROURKE]: YES.
>
> [Defense counsel]: BUT YOU YOURSELF SAID THAT THAT TIME FRAME DOESN'T WORK?
>
> [DETECTIVE ROURKE]: THAT'S CORRECT. I BELIEVE YOUR CLIENT IS MISTAKEN ABOUT THAT.
>
> [Defense counsel]: OR ELSE HE GOT THE DETAILS WRONG FROM SOMEBODY ELSE, CORRECT?

[DETECTIVE ROURKE]: I OBVIOUSLY DON'T BELIEVE THAT TO BE THE CASE.

***

[Defense counsel]: THE TIME FRAME THAT MR. BARFIELD CONFESSED TO YOU DOES NOT FIT IN THE TIME FRAME THAT WAS A PART OF THE OFFICIAL REPORT, DOES IT? YES OR NO?

[DETECTIVE ROURKE]: WHAT DOES NOT FIT IS THAT HE MADE A TRIP TO PORTSMOUTH AND CAME BACK TO CHILLICOTHE.

{¶ 28} Here on appeal, Barfield argues that his prior bad acts were not part of an immediate plan or scheme in the crime charged in this case, and were therefore inadmissible under Evid.R. 404(B). "An appellate court reviewing an ineffective assistance of counsel claim 'must refrain from second-guessing the strategic decisions of trial counsel.' " *State v. Black*, 4th Dist. Ross No. 12CA3327, 2013-Ohio-2105, ¶ 40 quoting *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶ 29} The first inquiry we must make then is whether trial counsel's performance was deficient when she failed to object to admission of the Evid.R. 404(B) evidence. We must refrain from second guessing trial strategy. It is clear that defense counsel's main strategy was to present an argument to the jury that Barfield had made multiple false confessions including one regarding the robbery at issue in this case. Barfield's trial counsel stated this was her strategy; she cross examined Rourke about Barfield's inconsistent remarks; and she explained her position in her closing remarks to the jury. Therefore, we do not find Barfield's trial counsel was deficient in her performance in executing a trial strategy. Accordingly, we overrule Barfield's second assignment of error.

Appellant's Third Assignment of Error:

> THE DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE OHIO CONSTITUTION, ARTICLE 1, SECTION 10 BECAUSE HIS ATTORNEY'S PERFORMANCE WAS DEFICIENT DURING THE CRITICAL STAGE OF PRE-TRIAL INVESTIGATION AND DISCOVERY BECAUSE SHE OMITTED TO FILE MOTIONS TO SUPPRESS THE LETTER AND AUDIO CD CONFESSION, WHEN SHE KNEW OR SHOULD HAVE KNOWN THAT MR. BARFIELD DID NOT SIGN A MIRANDA WAIVER AND OMITTED TO FILE A MOTION FOR A PSYCHIATRIC EXAMINATION PURSUANT TO R.C. 2945.371, ET SEG. THE DEFENDANT-APPELLANT WAS ALSO DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE TRIAL STATE WHEN SHE FAILED TO OBJECT TO THE ADMISSION OF PRIOR BAD ACTS EVIDENCE UNDER 404(B) AND FAILED TO PROPERLY CROSS-EXAMINE THE STATE'S WITNESSES: DET. GOBLE AND DET. ROURKE.

{¶ 30} In his third assignment of error, Barfield repeats a majority of the arguments he made in his first and second assignments of error. First, Barfield argues that the record, specifically the pre-trial orders of the court requesting any additional pre trial briefs, and the fact that Barfield did not sign a waiver form before being interviewed by Rourke provides a basis for filing motions to suppress the confession letter and the compact disc containing the audio recording of the interview. Here, appellant also repeats the argument that his counsel should have filed a motion of psychiatric evaluation. Barfield also repeats the arguments made in his second assignment of error concerning his counsel's alleged failure of objecting to the admission of the

404(B) evidence. Barfield adds that his trial counsel was ineffective in her cross examination of the state of Ohio's witnesses.

{¶ 31} The only new argument Barfield presents in his third assignment of error is that his trial counsel was ineffective in her cross-examination of the state's witnesses. Specifically, Barfield argues that his trial counsel failed to cross examine Rourke about why he did not obtain a signed waiver before, during, or after his interview with Barfield.

{¶ 32} "The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Leonard,* 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, at ¶ 146, citing *State v. Campbell,* 90 Ohio St.3d 320, 339, 2000-Ohio-183, 738 N.E.2d 1178; *State v. Otte,* 74 Ohio St.3d 555, 565, 1996-Ohio-108, 660 N.E.2d 711.

{¶ 33} Barfield's argument is based on his mistaken statement of law from *Siders*, 2008-Ohio-2712, ¶ 12 that obtaining a signed Miranda waiver is mandatory. As we have already determined, *Siders* does not stand for that proposition of law. Furthermore, we do not find that failure to cross-examine Rourke about a waiver constitutes ineffective assistance of counsel. Accordingly, Barfield's third assignment of error is overruled.

Appellant's Fourth Assignment of Error:

> THE DEFENDANT-APPELLANT'S COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL LAUGHLIN FROM THE JURY [VOIR DIRE TRANSCRIPT OF THE TRIAL/ PAGE 4, 42, 48-51/APPENDIX 9/ & VERDICT FORM/ APPENDIX 10] FOR FAVORITISM TOWARD THE STATE'S WITNESS, DET. SHAWN ROURKE.

{¶ 34} In his final assignment of error, Barfield argues that his trial counsel was ineffective because she failed to use a peremptory challenge to remove a juror who showed favoritism toward Rourke. Barfield contends that his counsel should have known she was required to exhaust her peremptory challenges to remove the juror and not just rely upon a challenge for cause.

{¶ 35} During the state's voir dire of the jury, the following questions and answers took place:

> [Prosecutor]: SEATED AT THE STATE'S TABLE WITH ME IS DETECTIVE SHAWN ROURKE. IS ANYBODY FAMILIAR WITH MR. ROURKE AT ALL? MS. LAUGHLIN, I THINK DETECTIVE ROURKE POINTED OUT THAT YOU ATTEND CHURCH TOGETHER, CORRECT?
>
> [Laughlin]: YES.
>
> [Prosecutor]: AND YOU HUSBAND IS FRIENDS WITH HIM?
>
> [Laughlin]: YES- THOUGH SCHOOL.
>
> [Prosecutor]: DO YOU THINK THAT RELATIONSHIP MIGHT HAVE ANY ON [SIC] YOUR FAIRNESS OR PARTIALITY ON THIS PARTICULAR CASE?
>
> [Laughlin]: NO.
>
> [Prosecutor]: DO YOU THINK YOU'LL BE MORE INCLINED TO BELIEVE THE TESTIMONY OF DETECTIVE ROURKE THAN YOU WOULD ANY OTHER PARTY?
>
> [Laughlin]: (INAUDIBLE)

[Prosecutor]: IS THAT BECAUSE HE'S LAW ENFORCEMENT OR BECAUSE YOU KNOW HIM?

[Laughlin]: (INAUDIBLE)

[Prosecutor]: WHAT DO YOU HAVE CHILDREN?

[Laughlin]: YES. OUR KIDS GO TO SCHOOL TOGETHER.

***

***MS. LAUGHLIN, IN THIS PARTICULAR CASE, DO YOU THINK YOU WOULD BE ABLE TO PUT ASIDE OR AT LEAST ATTEMPT TO DISTANCE YOURSELF WITH THAT RELATIONSHIP WITH DETECTIVE ROURKE AND BASE HIS CREDIBILITY, HIS TESTIMONY, HOW MUCH WEIGHT YOU GIVE IT, ON THE SAME FACTORS THAT YOU WOULD YOUR OWN FAMILY MEMBERS?

[Laughlin]: YES.

{¶ 36} Barfield's defense counsel also questions Laughlin:

[Defense counsel] OKAY. MS LAUGHLIN THE FACT THAT YOUR HUSBAND IS GOOD FRIENDS WITH DETECTIVE ROURKE, ARE YOU FRIENDS AS A FAMILY UNIT?

[Laughlin]: No. MY HUSBAND WORKS BINGO WITH HIM, OUR KIDS GO TO SCHOOL TOGETHER, WE SEE THEM AT CHURCH AND I'M FRIENDS WITH DETECTIVE ROURKE'S (INAUDIBLE)

[Defense counsel] OKAY DO YOU ALL SOCIALIZE TOGETHER?

[Laughlin]: NO. IT'S JUST THROUGH SCHOOL.

[Defense counsel] NOW THE FACT THAT DETECTIVE ROURKE IS GOING TO BE TESTIFYING TODAY, UM, WILL THAT HAVE ANY IMPACT ON THE WAY YOU WOULD LISTEN TO WHAT HE HAS TO SAY?

[Laughlin]: I WOULD HOPE OBJECTIVE ABOUT THE FACTS [SIC] (INAUDIBLE)

[Defense counsel] CAN YOU EXPLAIN A LITTLE BIT MORE ABOUT WHAT YOU MEAN BY OBJECTIVE?

[Laughlin]: NOT USE MY PERSONAL FEELINGS AND MAKE A DECISION BASED ON WHAT I KNOW ABOUT DETECTIVE ROURKE.

DO YOU THINK YOU CAN SEPARATE YOURSELF FROM THAT?

[Laughlin]: I BELIEVE I CAN [SIC]

{¶ 37} "The use of peremptory challenges is 'inherently subjective and intuitive' and rarely does the record reveal 'reversible incompetence in this process.' " *Monford,* 190 Ohio App.3d 35, 2010-Ohio-4732, 940 N.E.2d 634, at ¶ 94, quoting *Mundt,* 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, at ¶ 83. "[T]o establish the prejudice element when a defendant alleges ineffective assistance of counsel due to trial counsel failing to excuse a biased juror, 'the defendant must show that the juror was actually biased against him.' " *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 23 quoting *Mundt* at ¶ 67 "Moreover, '[s]o long as a juror indicates that he can be fair and impartial, counsel is not ineffective in declining to exercise a peremptory challenge.' " *State v. Hess*, 4th Dist. Washington No. 13CA15, 2014-Ohio-3193, ¶ 39 quoting *Monford* at ¶ 94.

{¶ 38} Barfield argues that pursuant to *State v. Eaton*, 19 Ohio St.2d 145, 249 N.E.2d 897 (1969) his attorney should have known that she was required to exhaust her peremptory

challenges to remove Juror Laughlin from the jury and not just rely upon a challenge for cause. According to *Eaton*, "A party cannot complain of prejudicial error in the overruling of a challenge for cause if it does not force him to exhaust his peremptory challenges." *Id.* at 149. Here however, there is no claim against the trial court's decision on a challenge for cause. Barfield's trial counsel did not attempt to remove Juror Laughlin for cause or by using a peremptory challenge. Therefore, the *Eaton* decision has no effect on the case *sub judice*.

{¶ 39} Juror Laughlin indicated that she believed she could be fair and impartial. Besides what is contained in the voir dire transcript, nothing in the record persuades us to conclude that the outcome would have been different if trial counsel would have exercised a peremptory challenge on Juror Laughlin. Therefore, we cannot conclude that Barfield's trial counsel provided ineffective assistance of counsel in the failure to remove Juror Laughlin. Accordingly, we overrule Barfield's fourth assignment of error.

{¶ 40} Having overruled Barfield's four assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the 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 Ross County Common Pleas Court 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 temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of 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.

Abele, J. and McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, 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.