[Cite as *State v. Richardson*, 2010-Ohio-471.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-07-1214

Appellee — Trial Court No. CR-2006-2896

v.

Darryl Richardson — **DECISION AND JUDGMENT**

Appellant — Decided: February 12, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, following a jury trial, in which appellant, Darryl Richardson, was found guilty of one count of aggravated murder, in violation of R.C. 2903.01(A) and (F). The undisputed facts that are relevant to the issues raised on appeal follow.

{¶ 2} On August 18, 2006, Toledo police were summoned to Toledo Spain Park at approximately 1:00 a.m., to investigate a report that a woman had been badly beaten and was lying on the ground in the park. By the time police arrived the victim, Lori Rivera, was being taken to St. Vincent's Hospital. While looking for evidence in the neighborhood, Toledo Police Officer Theresa Sanders noticed a man sitting on the front steps of a nearby apartment complex known as Executive Towers. The man, who identified himself as appellant, Darryl Richardson, told Officer Sanders that he was looking for his girlfriend. Appellant's description of his girlfriend matched that of Rivera.

{¶ 3} Appellant let Sanders and Toledo Police Detective Scott Smith into Rivera's apartment to look for Rivera's cell phone. Upon entering the apartment, officers noticed a telephone that was broken in half, lying on the floor. Detective Smith also noticed blood on appellant's cheek, and what appeared to be blood on the bathtub.

{¶ 4} Seven hours after she was taken to the hospital, Lori Rivera died. On August 28, 2006, the Lucas County Grand Jury indicted appellant on one count of aggravated murder, in violation of R.C. 2903.01(A). On October 16, 2006, the state filed a "Notice of Intent to Use Evidence," pursuant to Evid.R. 12(D). The evidence in question related to a reported incident in May 2006, during which police intervened in an altercation between appellant and Rivera at Rivera's apartment. Appellant filed a motion to suppress evidence of the altercation on October 31, 2006. On November 2, 2006,

appellant filed a motion to exclude any evidence related to other crimes, wrongs, or acts not directly related to the incident that led to Rivera's death.

{¶ 5} The state filed a response to appellant's motion to suppress on December 12, 2006. A motion to supplement the state's response was filed on January 16, 2007. On January 23, 2007, appellant filed a supplement to his motion to suppress. On March 6, 2007, appellant filed a second motion to exclude evidence of other crimes, wrongs, or acts. On March 22, 2007, the state filed a second notice of its intent to use evidence of an incident that occurred on April 27, 2006, involving appellant and Rivera.

{¶ 6} A jury trial was held from April 30 to May 3, 2007, at which testimony was presented by 21 witnesses on behalf of the prosecution. Executive Towers resident Kenneth Harris testified that he saw a person in the park, wearing a white T-shirt and dark pants and with what looked like a short ponytail, hitting the ground with a blunt object at approximately 12:30 a.m. on August 18, 2006. Harris said he saw that same person leave the park and walk toward Executive Towers, after which Harris went to the park and saw a person lying on the ground, bleeding.

{¶ 7} Another Executive Towers resident, Joe Jaris, testified that he saw a woman lying on the ground in Toledo Spain Park, with a man standing over her, at about 12:30 a.m. Jaris stated that the man, who was wearing light-colored khaki pants and had dark skin, had his arms raised as if he was "tending to someone who was harmed." Jaris' girlfriend, Amanda Whittington, testified that she arrived home at approximately 12:50

a.m., and saw a person lying on the sidewalk in the park. The person lifted his or her head and put it back down.

{¶ 8} Executive Towers resident Jignesh Patel stated that was talking on his cell phone around 12:45 a.m. as he returned home from seeing a movie. Patel did not testify that he saw anything in the park. Resident Keisha Serrant testified that she came home to her apartment at approximately 12:30 a.m.

{¶ 9} Officer Sanders testified at trial that she arrived at the park after 1:00 a.m. on August 18, 2006, and observed bloody clumps of hair and "all kinds of blood around the [victim's] body." In addition, some of Rivera's clothing was missing and she appeared to have been "very badly beaten." Sanders stated that when she saw appellant sitting on the front steps of Executive Towers, he was wearing jeans, a T-shirt, and dark sweatshirt, even though the weather was very warm. Appellant told Sanders he had an argument with his girlfriend, whose description closely matched that of Rivera. Sanders knew appellant was describing Rivera when he accurately described the tattoos on his girlfriend's body. Sanders also testified that, when appellant let the officers into his apartment, they observed a broken telephone on the floor; otherwise, the one bedroom apartment was orderly.

{¶ 10} Toledo Police Officer Michelle Roush testified that she went to Executive Towers at the request of her partner, Officer Sanders. Roush stated that appellant let the officers into the building by using a key fob.

{¶ 11} Toledo Police Detective Steve Applin testified that he went into the apartment, where he observed red spots on the bathtub. Applin also noted that appellant had blood on his face, and he told appellant not to clean the blood off. On cross-examination, Applin stated that appellant was not wearing a white shirt or light pants at the time, and there was no blood on appellant's clothes. On redirect, Appling testified that he did not test the shower drain for blood.

{¶ 12} Toledo Police Detective Scott Smith testified at trial that Rivera had already been taken to the hospital when he arrived at the scene, where he observed clumps of hair within a 20-foot radius. Smith stated that he was still processing the crime scene several hours later when he was asked to come up to Rivera's apartment, where he observed blood on appellant's face. Over the objection of the defense, Smith testified that he has processed hundreds of crime scenes involving blood evidence, after which he proceeded to explain the concept of "blood spatter" for the jury. Smith stated that appellant had a substance on his cheek, under his eye, on his chin, and behind his right ear, which later was found to be blood. Smith further testified that, in his opinion, the blood on appellant's face was the result of the medium-to-high velocity impact of blood "spattering."

{¶ 13} On cross-examination, Smith testified that he did not collect evidence from the tub drain, and no blood was found on appellant's clothes. Smith stated that he did not do field tests on the swabs from appellant's face, because the test would have used up the relatively small samples.

{¶ 14} Toledo Police Officer Duane Poole testified that he was called to the intersection of Front and Main streets in East Toledo on April 27, 2006, where he observed a female "stumbling" in the street. Poole stated that the woman, Lori Rivera, was bleeding from her nose, mouth and head, and appeared confused and upset. Over objection, Poole testified that Rivera told him that her boyfriend, named "Dee" or "Dean" had "beat her up;" however, Rivera was uncooperative in the investigation and refused medical treatment for her injuries. Poole also stated that Rivera's mother told him Rivera's boyfriend was "Dean Thomas."

{¶ 15} Toledo Police Sergeant Norman Giesige testified that, on May 23, 2006, he responded to a call involving a domestic disturbance at 718 Chestnut Street. Upon arrival, Giesige heard a woman crying inside the residence, and a male voice saying: "I own you, bitch. I'll kill you. I'll bash your f----g skull in." Giesige stated that police broke the door down, and found Rivera, covered in blood and holding appellant at bay with a knife. Upon seeing the police, Rivera said: "Man, I'm glad you guys came because he would have killed me." Appellant responded: "You [police] ain't got nothin on me. I ain't got no blood on me." Giesige testified that, ultimately, charges against appellant were dropped because Rivera did not come to court.

{¶ 16} Rivera's mother, Barb Najmi, testified that her daughter was living with appellant, who was also known as "Dee Thompson," at the time of her death. Najmi also testified that, on April 27, 2006, Rivera was beaten, after which she had "stomp marks" on her head and face. Najmi also testified that she helped her daughter move into

Executive Towers, which has around-the-clock security, to get away from appellant after the incident on May 23, 2006. On cross-examination, Najmi testified that she never saw appellant hit her daughter. Najmi also testified that Rivera had a fight with another female on a prior occasion, during which the woman "jumped" Rivera and hit her.

{¶ 17} Rivera's friend, Mary Clark, testified that on August 17, 2006, she was talking to Rivera on the telephone about Rivera coming to her house for a visit. Clark stated that, during the conversation, she heard appellant say: "Bitch, you ain't going nowhere. You go anywhere, I'll kill you." On cross-examination, Clark stated that she never met appellant in person; however, she recognized his voice from talking to him on the phone. Clark also stated that she knew Rivera had a fight with another woman, and that Rivera previously had a "rocky" relationship with a man named Jose.

{¶ 18} Jennifer Losey, a friend of both Rivera and Clark, testified that she had a telephone conversation with Rivera on August 17, 2009, at about 10:30 p.m., about an upcoming trip with Rivera to Cedar Point amusement park. Losey said that, during that conversation, she heard appellant in the background saying in an angry tone: "I'm going to f-----g kill you tonight, bitch, if I have to throw you off the balcony." On cross-examination, Losey testified that she gave the police her cell phone number so they could check the time of her call to Rivera.

{¶ 19} Ann Broderick, another friend of Rivera, testified that she last saw Rivera on Tuesday of the week that Rivera died. However, she was unable to speak to Rivera on August 17 because her phone was out of order.

{¶ 20} Toledo Police Officer Mark Johnson testified that he reviewed surveillance tapes from three cameras that recorded events at the lobby area, front entrance and workout room of Executive Towers on August 17 and 18, 2006. Johnson stated that he interviewed Patel and Serrant, and used Patel's cell phone records and a stopwatch to isolate events around the time of the attack on Rivera. Johnson testified that the tape shows someone sitting on the front steps of the building when police arrived at 1:08 a.m. He further testified that the tapes show appellant entering the building with Rivera at 10:52 p.m., leaving one hour later, and walking with Rivera across the parking lot. Later, at 12:15 a.m., they show appellant coming back, going into the building for three minutes, then leaving again. This time, appellant returned after 27 minutes, shortly before police arrived on the scene. Both times, appellant entered the building wearing a white FUBU brand T-Shirt with a distinctive logo on the front. However, at 12:52 a.m., after the attack on Rivera, someone in a dark hooded sweatshirt left the building carrying a plastic bag. Shortly thereafter, a person wearing dark colored clothes sat down on the front steps. That person later proved to be appellant.

{¶ 21} On cross-examination, Johnson stated that his timeline depends on Patel's testimony. Johnson further stated that he could not tell from the tapes if there was blood on appellant's face or on his white FUBU shirt.

{¶ 22} Janelle Barker, the property manager of Executive Towers, testified that the front doors of the building are always locked, and residents can only access the building by using a key or a key fob. Barker further testified that appellant did not have his own

key fob, because he was not on the lease to Rivera's apartment. Barker stated that Rivera had a swollen, bruised face, that looked like she had been in a "severe car accident," the day she came with her mother to rent an apartment. Barker further stated that appellant, who lived in the apartment with Rivera, always wore a white FUBU jersey and a hat on backwards. She said four complaints for domestic disturbances, including yelling and screaming, had been lodged regarding apartment 511, Rivera's apartment, since Rivera moved in. When she spoke to Rivera about the noise, Rivera stated that she and appellant had a rocky relationship and they were working it out.

{¶ 23} Toledo Police Detective Denise Muszynski testified that she was called to Toledo Spain Park at 2:30 a.m. on August 18, 2006, after Rivera had been taken to the hospital. After staying at the scene for 45 minutes, Muszynski went to the police station to interview appellant. She stated that appellant was wearing dark pants, a dark sweatshirt and boots, even though it was hot outside. Muszynski further stated that she read appellant his Miranda rights at around 5:20 a.m., after which he agreed to talk. During a one-hour interview, appellant stated that his relationship with Rivera was "rocky." He also told Muszynski that Rivera was abusive and always "picking at him to argue." Muszynski said that appellant told her he and Rivera fought on the night of August 17, after which they made up and went outside for a walk. Five to ten minutes later, they returned home, and Rivera went back out to get a beer. When she did not return, appellant went looking for her for about 35 minutes. Appellant told Muszynski

that it was after he came back from looking for Rivera that he first saw police in the park. Muszynski testified that appellant said he wore the same dark clothes all day.

{¶ 24} Muszynski stated that police did not find a baseball hat or a FUBU jersey in Rivera's apartment. She also stated that appellant had blood on his face when she first saw him in the apartment, which he explained by saying that Rivera slapped him and caused his nose to bleed.

{¶ 25} On cross-examination, Muszynski testified that appellant was cooperative with police, and that he signed a waiver for the original search of the apartment. Muszynski also testified that there was no sign of a struggle in the apartment, and the only substances that looked like blood were on appellant and the bathtub. She stated that appellant explained that there were scratches on his hands "because he is a working man." Muszynski further stated that appellant did not have a ponytail at the time of the interview. She said no attempt was made to locate Jose, Rivera's former boyfriend.

{¶ 26} On re-cross, Muszynski recapped Harris' and Jaris' testimony that the man in the park was wearing a light shirt, as well as Harris' statement that the man was wearing dark pants and had a ponytail, and Jaris' conflicting statement that the man was wearing dark pants. Muszynski testified that video from the surveillance tapes indicated appellant changed his clothes from light to dark after Rivera left the apartment for the last time.

{¶ 27} Lucia Hinojosa, Ph.D., a clinical psychologist specializing in forensics, testified at trial as to the nature of Battered Women's Syndrome ("BWS"). Specifically,

Hinojosa testified that BWS is an anxiety disorder, similar to Post-Traumatic Stress Disorder, which involves a cycle of violence in which there is a phase where tension builds up, followed by physical and/or verbal and mental abuse, and ending in excuses, apologies, and attempts to make amends by the abuser. She further testified that, in order to be classified as a battered woman, there has to be at least two cycles of such battering. Hinojosa explained to the jury that, in cases of BWS, the victim gives up control to the abuser in an attempt to stem the abuse. The result is a state of "learned helplessness," in which the victim refuses to walk away from the abusive relationship, even if they are outwardly able to do so, and in spite of the consequences of staying. Hinojosa stated that it is common for victims of BWS to refuse to cooperate with police.

{¶ 28} On cross-examination, Hinojosa testified that she never interviewed Rivera, and her testimony was not specific to this case. At that point, an off-the-record discussion was held, at which the defense objected to Hinojosa's testimony, on grounds that, pursuant to R.C. 2901.06, BWS testimony may only be used by the defendant, and only in cases involving claims of self-defense or insanity. The prosecution responded that BWS testimony was being offered to explain that "[BWS] does in fact exist for whatever purpose the jury wants to put forth for the facts of this case." Thereafter, the trial court overruled the objection and the trial resumed.

{¶ 29} Lindsey Hail, forensic scientist at the Ohio Bureau of Criminal Investigation, testified that she analyzed the samples collected at the crime scene and from Rivera's body, which included two rape kits, DNA and fingernail clippings from

Rivera and appellant, swabs from appellant's face and the bathtub, and a dollar bill found in appellant's shoe. Hail stated that the swab of appellant's cheek and chin contained both his and Rivera's DNA; however, appellant was the major contributor, while swabs of the bathtub contained a mix of both Rivera's and appellant's DNA. She also stated that Rivera was the major contributor of DNA on the swab from behind appellant's ear; while the major contributor of DNA on the dollar bill was an unknown male. Hail further stated that it was reasonable to find appellant's DNA on his own face, and she could not say whether Rivera's DNA came from body fluids or skin cells that sloughed off during intimate contact.

{¶ 30} Deputy Lucas County Coroner Diane Scala-Barnett, MD, testified there were more than 40 injuries to Rivera's body; however, the likely cause of death was a massive blow to the head by a square instrument. Scala-Barnett also testified that Rivera was hit so hard the orbital bone around one of her eyes was shattered, and her eyeball was ruptured. In addition, Rivera's jaw and teeth were fractured, her neck was bruised, and she had bruises on the back of her head and on her shoulders, as well as defensive wounds on her arms and hands. There were also bruises on her legs and thighs and genital area. Scala-Barnett stated that Rivera's death was a homicide caused by "craniocerebral injuries * * * due to beating."

{¶ 31} On cross-examination, Scala-Barnett testified that some of Rivera's bruises were older, and not all of the injuries appeared to be caused by a squared-off, blunt instrument. She also testified that Rivera lost a lot of blood in the attack, and it would be

reasonable to expect to find blood spatter on her attacker. Finally, Scala-Barnett stated that Rivera had the name "Jose" tattooed on her neck.

{¶ 32} At the conclusion of Scala-Barnett's testimony, the state rested. Defense counsel made a motion for acquittal pursuant to Crim.R. 29, which was denied. No testimony was presented by the defense. Closing arguments were then presented by both parties, after which the case was given to the jury. Three hours later, the jury unanimously found appellant guilty of aggravated murder, as charged in the indictment.

{¶ 33} A sentencing hearing was held on May 24, 2007, at which defense counsel told the trial court that appellant was a 44-year-old man with no previous felonies as an adult, and no convictions for violent crimes. Defense counsel also stated that appellant was remorseful; however, he maintained that someone else killed Rivera. Appellant did not speak on his own behalf. The prosecutor reminded the trial court of the viciousness of the attack on Rivera, and stated that appellant showed no true remorse for his actions.

{¶ 34} Najmi told the trial court that Rivera's four children were all affected by the loss of their mother. Najmi also stated that she has nightmares about her daughter, and she could not understand how one human being could do such things to another.

{¶ 35} After Najmi's statements, the trial court remarked that it could not ignore the fact that the attack on Rivera was vicious and involved extreme emotion. The trial court stated that the jury had convicted appellant of aggravated murder, in violation of R.C. 2903.01(A) and (F), an unclassified felony. The trial court also stated that it had reviewed the entire record, and considered oral statements, the victim impact statement

and presentence report, as well as the principles and purposes of sentencing pursuant to R.C. 2929.11, and balanced the seriousness and recidivism factors set forth in R.C. 2929.12. Thereafter, the trial court ordered appellant to serve a mandatory term of life in prison, with parole eligibility after 30 years.

{¶ 36} In addition to the above, the trial court advised appellant as to the consequences of a felony conviction and the nature and obligations of postrelease control, and his right to appeal both his conviction and sentence. Finally, the trial court ordered appellant to pay restitution to the Ohio Victim of Crimes Compensation Program in the amount of $5,290.30, along with the costs of prosecution, appointed counsel fees, and any other fees pursuant to R.C. 2929.18(A)(4). A timely notice of appeal was filed on June 22, 2007.

{¶ 37} On appeal, appellant sets forth the following seven assignments of error:

{¶ 38} "Assignment of error no. 1:

{¶ 39} "The admission of testimony regarding *Battered Women's Syndrome* violated Mr. Richardson's rights to Due Process and to a Fair Trial as guaranteed by the Constitutions of the United States and the State of Ohio.

{¶ 40} "Assignment of error no. 2:

{¶ 41} "The admission of other-acts testimony violated Mr. Richardson's rights to Due Process and to a Fair Trial as guaranteed by the Constitutions of the United States and the State of Ohio.

{¶ 42} "Assignment of error no. 3:

{¶ 43} "The conviction for aggravated murder with prior calculation and design was against the manifest weight of the evidence.

{¶ 44} "Assignment of error no. 4:

{¶ 45} "The admission of expert testimony regarding blood-spatter evidence violated Mr. Richardson's rights to Due Process and to a Fair Trial as guaranteed by the Constitutions of the United States and the State of Ohio.

{¶ 46} "Assignment of error no. 5:

{¶ 47} "The admission of hearsay testimony of the victim, through the testimony of two police officers and Barbra Najmi, violated the Confrontation Clauses of the Constitutions of the United States and State of Ohio.

{¶ 48} "Assignment of error no. 6

{¶ 49} "Mr. Richardson was deprived of his right to the effective assistance of counsel as guaranteed by the Constitutions of the United States and State of Ohio.

{¶ 50} "Assignment of error no. 7:

{¶ 51} "The cumulative effect of the errors at trial was a violation of the appellant's right to a Fair Trial as guaranteed by the Fifth Amendment to the United States Constitution and by Art. I, § 10 of the Ohio Constitution."

{¶ 52} In the interest of clarity, we will address appellant's seven assignments of error out of order. First, we will address those assignments of error that raise evidentiary issues, followed by a determination of appellant's remaining assignments of error.

{¶ 53} In his fifth assignment of error, appellant asserts that the trial court erred by allowing into evidence hearsay statements made by the deceased victim, Rivera, through the testimony of Giesige, Poole and Najmi. In support, appellant argues that the admission of Rivera's hearsay statements violated the Confrontation Clauses of the Constitutions of the United States and the state of Ohio because Rivera was not available to testify at trial, and he did not have an opportunity to subject Rivera to cross-examination.

{¶ 54} Generally, the trial court has broad discretion in ruling on evidentiary matters. *State v. Bruce*, 8th Dist. No. 92016, 2009-Ohio-6214, ¶ 54. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 55} An accused's right to confront and cross-examine witnesses against him at trial is guaranteed by both the Sixth Amendment to the United States Constitution and the Ohio Constitution, Section 10, Article I. *City of Toledo v. Sailes*, 180 Ohio App.3d 56, 2008-Ohio-6400, ¶ 12. The initial analysis to be made in determining whether this right has been violated by the admission of out-of-court statements that are not subject to cross-examination "is not whether [the statements] are reliable but whether they are testimonial in nature." Id., ¶ 13, citing *Crawford v. Washington* (2004), 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶ 56} In *Crawford*, the United States Supreme Court recognized several categories of statements that are inherently testimonial, including "testimony at preliminary hearings, before grand juries, and at former trials, as well as statements elicited during police interrogations." *State v. McKenzie*, 8th Dist. No. 87610, 2006-Ohio-5725, ¶ 5, citing *Crawford*, supra, at 52. In addition, the United States Supreme Court identified additional categories that might also be testimonial in nature, including "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, supra, at 51. Later, in *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224, the Supreme Court expanded its holding in *Crawford* by stating that the Confrontation Clause does not apply to non-testimonial statements that are made for the purpose of enabling police to meet an "ongoing emergency." Id., at 822. However, such statements are testimonial in nature "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution." Id.

{¶ 57} We note initially that Najmi testified at trial as to the extent of Rivera's injuries on both April 27 and May 23, 2006. She also testified that appellant was Rivera's boyfriend at the time of both incidents; however, she never saw appellant hit Rivera. Accordingly, we need not consider whether Rivera made statements to Najmi which were testimonial in nature.

{¶ 58} As to Rivera's statements made to police on April 27, 2006, the record contains Poole's testimony that he was responding to a call about a female "stumbling" in the street when he found Rivera, who was bleeding from her nose, mouth and head. Poole stated that he was "trying to ascertain how she got injured" when Rivera told him she was beaten by her boyfriend.

{¶ 59} As to Rivera's statements to police on May 23, 2006, the record contains testimony that Giesige and his partner were called to Rivera's apartment because of a domestic disturbance, when they heard appellant say he wanted to bash in Rivera's skull. Immediately upon entering the apartment, they heard Rivera, who was covered in blood and holding appellant at bay with a knife, say "I'm glad you guys came because he would have killed me."

{¶ 60} Upon consideration, we find that Rivera's statements to police were not testimonial in nature, since they were made under circumstances that indicate their primary purpose was to obtain police assistance during an emergency situation. However, the determination that Rivera's statements were nontestimonial does not end our analysis, since the out-of-court statements of an unavailable declarant, whether testimonial or nontestimonial, still constitute hearsay, because they were "statement[s], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C).

{¶ 61} In cases where a hearsay statement is found to be nontestimonial in nature, it may not be admitted at trial unless it "falls within a firmly rooted hearsay exception."

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); Evid.R. 802. One of those exceptions is an "excited utterance," which is defined as a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2); *State v. Steele*, 8th Dist. No. 91571, 2009-Ohio-4704, ¶ 42.

{¶ 62} In order "[f]or an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while still under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have personally observed the startling event." *State v. McKenzie*, supra, at ¶ 29; *State v. Brown* (1996), 112 Ohio App.3d 583, 601. As with all evidentiary rulings, the trial court's determination as to whether a nontestimonial statement qualifies as an excited utterance will not be overturned on appeal absent an abuse of discretion. *State v. McKenzie*, supra, at ¶ 27.

{¶ 63} As to the incident on April 27, 2006, Poole testified at trial that Rivera was "confused, upset, like she wasn't really sure where she was at or what was going on" when he found her wandering around on the street. One month later, on May 23, the officers overheard appellant threatening Rivera through the apartment door. Immediately after opening the door, they heard Rivera say appellant would have killed her if help had not arrived. On both occasions, the hearsay statements reported at trial were made spontaneously, without any prompting by police, and without any time for thought or

reflection on the part of the declarant. Under such circumstances, the statements have the requisite degree of trustworthiness to qualify as excited utterances. *State v. McKenzie*, supra.

{¶ 64} Upon consideration of the foregoing, we cannot say that the trial court abused its discretion by allowing Poole, Giesige and Najmi to testify as to events and statements made on April 27 and May 23, 2006. Appellant's fifth assignment of error is not well-taken.

{¶ 65} In his second assignment of error, appellant asserts that his constitutional rights to due process and a fair trial were compromised by the admission of other-acts evidence. Specifically, appellant argues that the trial court erred by denying his motion in limine and allowing the prosecution to present the testimony of Najmi, Detective Poole and Sergeant Giesige as to events that transpired between appellant and Rivera on April 27 and May 23, 2006, because those events were not circumstantially or temporally related to Rivera's murder.

{¶ 66} As set forth above, the trial court's decision to admit or exclude evidence will not be overturned on appeal absent a finding of abuse of discretion. *State v. Bruce*, 8th Dist. No. 92016, 2009-Ohio-6214, ¶ 54. Similarly, the trial court's denial of a motion in limine is within the sound discretion of the trial court. *Thakur v. Health Care and Retirement Corp. of Am.*, 6th Dist. No. L-08-1377, 2009-Ohio-2765, ¶ 16. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a

finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 67} Despite the trial court's considerable discretion in such cases, "evidence of a criminal defendant's prior criminal acts is generally inadmissible." Id.; *State v. Bruce*, supra. Exceptions to this exclusion are set forth in Evid.R. 404(B), which states that:

{¶ 68} "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."

{¶ 69} The Ohio Supreme Court has held that, in order for the exception set forth in Evid.R. 404(B) to apply, there must be "substantial proof that the alleged other acts were committed by the defendant." *State v. Lowe* (1994), 69 Ohio St.3d 527, 530. (Other citations omitted.) Evidence of other acts may be used "'to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense.'" Id., at 531, quoting *State v. Smith* (1990), 49 Ohio St.3d 137, 141. In *Lowe*, the Ohio Supreme Court set out the distinction between the impermissible use of such evidence to show that a defendant is the *type* of individual who would commit the charged offense, as opposed to the proper use of such evidence to show that he or she *is the actual individual* who committed the offense. *Lowe*, supra, at 530. Accordingly, other-acts evidence may be used to establish a "behavioral fingerprint" which "can be used to identify the

defendant as the perpetrator * * * through the characteristics of acts rather than through a person's character." Id. at 531.

{¶ 70} In addition, Ohio courts have held that the other acts must be temporally and circumstantially related to the operative facts of the charged offense. *State v. Hawn* (2000), 138 Ohio App.3d 449, 461; *State v. Burson* (1974), 38 Ohio St.2d 157; *State v. Curry* (1975), 43 Ohio St.2d 66; *State v. Smith*, supra. In *Hawn*, the defendant's girlfriend, Sue Jack, died of a gunshot wound. Hawn was convicted of the murder by a jury. On appeal, the Second District Court of Appeals found that the identity of Jack's killer was not at issue, since Hawn claimed that Jack committed suicide. The appellate court also found that prior incidents of domestic violence between Hawn and Jack, including "hair-pulling and black-eye incident[s]," were "factually and chronologically separate from the operative facts the crime [was] alleged to have involved" and were therefore inadmissible for the purpose of showing that Hawn was Jack's killer. *Hawn*, supra, at 463. The appellate court further stated that, "even if the *identity* of the perpetrator of the crime alleged had been in issue, the other acts which this [three month-old] evidence involves was inadmissible to prove it." Id.[1]

[1]The appellate court also noted that motive, intent, and absence of mistake or accident as possible justifications for admitting the other-acts evidence were not in issue during Hawn's trial. Id.

{¶ 71} Unlike the scenario in *Hawn*, the identity of Rivera's killer is directly at issue in this case.[2] Accordingly, in an attempt to identify appellant as Rivera's killer, and also to show plan, prior calculation and design, the prosecution introduced other-acts evidence, which included: (1) Poole's testimony that he saw a beaten and bleeding Rivera on April 27, 2006, and that Rivera identified appellant as the person who beat her; (2) Najmi's testimony that she saw "stomp marks" on Rivera's face on April 27, 2006, and that Rivera was living with appellant at the time; (3) Giesige's testimony regarding that she overheard appellant threaten to "bash in" Rivera's skull on May 23, 2006, and that Rivera said appellant would have killed her if police had not arrived in time to stop him; (4) Barker's testimony concerning Rivera's physical condition when she first rented the apartment in Executive Towers; and (5) Clark's and Losey's testimony that, on August 17, 2006, they overheard appellant threaten to kill Rivera while they were talking to Rivera on the telephone.

{¶ 72} On consideration of the foregoing, we find that the other-acts evidence offered by the prosecution was sufficiently related in time and circumstance as to be used to identify appellant as the individual who beat Rivera to death in Toledo Spain Park on August 17, 2006. Accordingly, the trial court did not abuse its discretion by allowing

[2]The fact that Rivera was murdered was not disputed at trial. Appellant not only denied killing Rivera, he raised the issue at trial of whether her killer was a former boyfriend named Jose. Ohio courts have held that any claim by the accused that "amounts to 'someone else did it, not me' raises the issue of identity." *State v. Griffin* (2001), 142 Ohio App.3d 65, 74.

such evidence to be used at trial, and appellant's second assignment of error is not well-taken.

{¶ 73} In his fourth assignment of error, appellant asserts that the trial court erred by allowing Smith to testify as an expert in blood-spatter evidence. In support, appellant argues that his rights to "Due Process and a Fair Trial as guaranteed by the Constitutions of the United States and State of Ohio" were violated because Smith did not have the requisite experience or training to qualify as an expert in blood-spatter evidence pursuant to Evid.R. 702.

{¶ 74} Evid.R. 702 states that a witness may testify as an expert "by reason of his or her 'specialized knowledge, skill, experience, training, or education.' Neither special education nor certification is necessary to confer expert status upon a witness. The individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its fact-finding function." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 148, citing *State v. Baston* (1999), 85 Ohio St.3d 418, 423; *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 54. As with other evidentiary rulings, the trial court's determination that a witness is qualified as an expert will not overturned on appeal absent a finding of abuse of discretion. *Baston*, supra.

{¶ 75} At trial, Detective Smith testified as to his observations at the crime scene, including the location of the attack, the position of clumps of Rivera's blood-soaked hair and a pair of woman's sandals, and the procedure involved in collecting and preserving

evidence at the crime scene. The prosecutor then asked Smith a question concerning his observation of "blood spatter" on appellant's face. In response, Smith defined "blood spatter" as follows:

{¶ 76} "Blood spatter is it's not just droppings of blood like if you would cut your hand and it rolled down your hand. Spatter means blood can be sprayed onto something.

"And there is such thing as low-velocity, medium-velocity and high-velocity blood spatter, and there's basically a common sense difference between what those are. * * *

{¶ 77} "The spatter, the difference between that is a large drop of blood or amount of blood, because of it's [sic] weight, because it's large, can travel a longer distance."

{¶ 78} At that point, the defense objected to Smith's testimony on the basis that Smith was not qualified to testify as to the nature of blood spatter evidence. The prosecution responded by offering the following foundation testimony:

{¶ 79} "Question: Detective Smith, I'm going to step back a second here. How many – you've been to how many crime – major crime scenes?

{¶ 80} "Answer: I would have to say hundreds.

{¶ 81} "Question: How many of those crime scenes actually involved blood?

{¶ 82} "Answer: I would have to say many. I've never put a number on it, but due to the nature of the business that we're involved in, I get, we respond to a lot of assaults and homicides, and they often involve blood.

{¶ 83} "Question: Are you aware of the concept of what blood spatter is?

{¶ 84} "Answer: Yes, I am aware of that concept.

{¶ 85} "Question: How are you aware of that?

{¶ 86} "Answer: Through my experience of going to crime scenes.

{¶ 87} "Question: And you often compared blood at crime scenes through your employment to determine what type of spatter it is?

{¶ 88} "Answer: Yes. Looking at blood spatter, you can tell a lot.

{¶ 89} "Question: Detective Smith, have you done any type of evaluations with blood spatter at other crime scenes?

{¶ 90} "Answer: Yes, I have.

{¶ 91} "Question: Have you testified to that in other cases?

{¶ 92} "Answer: Yes. I've testified about blood I've located at crime scenes."

{¶ 93} After the above exchange, Smith testified as to difference between "blood spatter," which "appears to be a dot or drop of blood," and "contact transfer," which he defined as "swipes, wipes or smears." Smith also testified that the blood on appellant's face on August 18, 2006, appeared to be caused by either medium-velocity or high-velocity impact blood spatter. Smith also testified that appellant had blood underneath his eye, on his cheek and chin and behind his left ear. Later, Smith described the process of collecting and securing the blood evidence from the crime scene. Smith also described the process of collecting DNA evidence from appellant to compare to the blood samples.

{¶ 94} On consideration of the foregoing, we find that Smith had sufficient experience and expertise to testify as to the nature of blood spatter evidence and its use in evaluating a crime scene. Accordingly, the trial court did not abuse its discretion by

allowing Smith to testify as to those issues at trial, and appellant's fourth assignment of error is not well-taken.

{¶ 95} In his first assignment of error, appellant asserts that his constitutional rights to due process and a fair trial were violated by the introduction of testimony regarding Battered Women's Syndrome ("BWS"). In support, appellant argues that, pursuant to R.C. 2901.06, testimony concerning BWS is admissible in Ohio only if: (1) the accused enters a plea of not guilty; (2) the accused claims self-defense; or (3) to explain the actions of a witness in cases where the witness's credibility has been challenged. In addition, appellant argues that the testimony concerning BWS violated Evid.R. 401, 402 and 403, because it is not relevant in this case and was highly prejudicial to the defense; and an insufficient foundation was laid for the introduction of BWS testimony, in violation of Evid.R. 104(B).

{¶ 96} The state responds by arguing that the use of BWS testimony in this case meets the criteria set forth by this court in *State v. Caudill*, 6th Dist. No. WD-07-009, 2007-Ohio-1557. We disagree with the state's position, for the following reasons.

{¶ 97} In *Caudill*, supra, we stated that, under the proper circumstances, expert testimony regarding BWS is admissible at trial by the prosecution "'to help a jury understand a victim's reaction to abuse in the relation to her credibility.'" *Caudill*, supra, at ¶ 39, quoting *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, at ¶ 29 and 35, citing *State v. Koss* (1990), 49 Ohio St.3d 213, 218. Nevertheless, even though expert testimony concerning BWS technically meets the requirements of Evid.R. 702, it cannot

be admitted unless it conforms to the other requirements of the Ohio Rules of Evidence. Id.

{¶ 98} In *State v. Koss*, supra, the Ohio Supreme Court held that BWS evidence may be used by a defendant to establish self-defense. Id., at 218. See, also, R.C. 2901.06(B) and 2945.392. In *State v. Haines*, supra, the Ohio Supreme Court extended the application of *Koss*, by holding that BWS testimony is relevant pursuant to Evid.R. 401 if it is used to explain a complainant's inconsistent actions relating to credibility, such as endurance of prolonged abuse "'accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse * * *.'" Id., at ¶ 44, quoting *People v. Christel* (1995), 449 Mich. 578, 580. In such cases, the party that introduces BWS evidence has the burden to show that the witness's behavior is consistent with that of a BWS victim, and that the witness "'has behaved in such a manner that the jury would be aided by expert testimony which provides a possible explanation for the behavior.'" Id. at ¶ 47, quoting *State v. Stringer* (1995), 271 Mont. 367, 378.

{¶ 99} In this case, Rivera is a *deceased* victim. She is not the defendant in this case. Neither is she a "complainant," or a "witness" who testified against appellant at trial. As set forth in our determination of appellant's second and fifth assignments of error, the only statements made by Rivera that were admitted at trial were non-testimonial statements which were made under inherently trustworthy circumstances that qualify them as exceptions to the hearsay rule. Any attempt to explain or interpret Rivera's

behavior during her relationship with appellant through the introduction of BWS testimony is therefore irrelevant to the issue of who was responsible for her death.

{¶ 100} This court has carefully considered the trial court's record and, upon consideration, we conclude that the BWS testimony offered in this case does not meet the test of relevancy pursuant to Evid.R. 401, and the trial court erred by admitting such testimony. Nevertheless, the trial court's finding does not mandate an automatic reversal, since such an error can be rendered harmless "if we determine that it was harmless beyond a reasonable doubt." *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 78, citing *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. In determining whether an error is harmless beyond a reasonable doubt, we must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., citing *Chapman v. California*, supra, at 23; *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388.

{¶ 101} The record shows the following:

{¶ 102} Rivera was beaten to death in a park, across the street from an apartment she shared with appellant. Appellant was found sitting on the steps of the apartment building, shortly after the beating took place. He had blood on his face, which later was found to contain the victim's DNA. He was in possession of the victim's key fob, which he used to open the apartment so police could conduct a search. Surveillance tapes showed appellant with the victim shortly before she was murdered, wearing white clothing; however, when police found appellant, he was wearing dark clothing.

Appellant's white clothing was never found. Those same tapes show appellant, wearing dark clothing, leaving the apartment building with a trash bag, just before Rivera was found, beaten, in the park. As set forth above, admissible evidence was presented to show that appellant's relationship with the victim had been violent on several previous occasions.

{¶ 103} On consideration of the foregoing, we find that the state's case against appellant was so strong that it rendered the trial court's error in admitting Hinojosa's testimony regarding BWS harmless beyond a reasonable doubt. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 104} In his third assignment of error, appellant asserts that his conviction for aggravated murder with prior calculation and design was against the manifest weight of the evidence. In support, appellant argues that no evidence was offered to show that Rivera's killing was anything other than an act of "rage and passion." Appellant also argues that the lack of blood on his clothing, if anything, proves "post-crime deliberation"; and that "[w]hat occurs after the crime is not evidence of *prior* calculation." (Emphasis original.) We disagree, for the following reasons.

{¶ 105} In reviewing a conviction pursuant to a manifest weight standard, an appellate court, after "'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 miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary

power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Weight of the evidence indicates that the greater amount of credible evidence supports one side of an issue more than the other. *Thompkins*, supra, citing Black's Law Dictionary (6 Ed.1990) 1594. "Weight is not a question of mathematics, but depends on its effect in inducing belief." *State v. Phutseevong*, 6th Dist. No. L-03-1178, 2005-Ohio-1031, ¶ 22, quoting *State v. Thompkins*, supra.

{¶ 106} In applying the manifest weight standard, an appellate court sits as a "thirteenth juror" and may disagree with the factfinder's resolution of the conflicting testimony. *Thompkins*, supra. However, the reversal of a conviction, and subsequent granting of a new trial, must be by a concurrence of all three judges. Id. at 389.

{¶ 107} Appellant was convicted of aggravated murder pursuant to R.C. 2903.01(A), which states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another * * *." As used in the statute, "prior calculation and design" describes "the mens rea element of proof necessary to find a violation of R.C. 2903.01(A)." *State v. Taylor* (1997), 78 Ohio St.3d 15, 18.

{¶ 108} Although the phrase "prior calculation and design" is not defined in the Ohio Revised Code, "it is generally understood to encompass the calculated decision to kill." *State v. Jackson* (Jan. 20, 2000), 8th Dist. No. 75354, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph one of the syllabus. "The amount of care or the

length of time the offender takes to consider the act are not necessarily critical factors in themselves in determining prior calculation and design." *Phutseevong*, supra, at ¶ 24, citing *State v. Jackson*, supra. (Other citation omitted.) Accordingly, there is no "bright-line test" to establish the presence of "'prior calculation and design,' and each case turns on the particular facts and evidence presented at trial." Id., citing *State v. Taylor*, supra, at 20.

{¶ 109} In cases where the "evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph three of the syllabus. Circumstances that prove the accused "adopted a plan to kill" can include the amount of care involved in disposing of evidence after the crime was committed. See *State v. Martin*, 3d Dist. No. 12-02-01, 2003-Ohio-735, ¶ 35.

{¶ 110} The record in this case contains testimony of several witnesses that appellant threatened to kill Rivera on the night of August 17, 2006. As previously determined by this court, the record also contains admissible evidence that appellant beat Rivera on two prior occasions. In addition, video recordings taken by Executive Towers' security cameras on the night Rivera died show appellant and Rivera exiting the building together at 10:52 p.m. on August 17, 2006. Appellant was wearing a white FUBU jersey. At 12:15 a.m. on August 18, appellant, still wearing the white jersey, returned alone and

stayed inside for approximately three minutes, before leaving again. Twenty-seven minutes later appellant again returned to the building, still wearing the white jersey. At 12:52 a.m. an individual wearing dark clothing left the building carrying a garbage bag. By the time police arrived, appellant, wearing all dark clothing, was sitting on the front steps of the apartment building.

{¶ 111} After reviewing the entire record, weighing the evidence and all reasonable inferences, considering the credibility of witnesses and resolving conflicts in the evidence, we find that the greater amount of credible evidence supports the jury's determination that appellant was guilty of killing Rivera with prior calculation and design, as opposed to beating her to death in an unplanned fit of rage and passion. Accordingly, the jury did not lose its way and create a miscarriage of justice in this case. Appellant's third assignment of error is not well-taken.

{¶ 112} In his sixth assignment of error, appellant asserts that he received ineffective assistance of trial counsel. In support, appellant argues that counsel was ineffective for: (1) failing to challenge three prospective jurors who were allegedly incapable of impartiality, and (2) failing to object to hearsay testimony by Poole, Najmi and Giesige, in violation of the Confrontation Clauses of the Constitutions of the United States and the state of Ohio.

{¶ 113} We note at the outset that appellant's brief contains no discussion or references to the record to support his assertion that trial counsel failed to challenge three allegedly impartial jurors, as required by App.R. 16(A)(7). Accordingly, we exercise our

discretionary authority to disregard this argument. App.R. 12(A)(2); *Redmond v. Big Sandy Furniture, Inc.*, 4th Dist. No. 09CA13, 2009-Ohio-6824, ¶ 26.

{¶ 114} As to appellant's remaining arguments, a claim of ineffective assistance of counsel is reviewed under the two-part test articulated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 20520, 80 L.Ed.2d 674. To prevail on a claim of ineffective assistance of counsel, a defendant must show: "(1) that the defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to the defendant's case." *State v. Marez*, 6th Dist. No. S-09-005, 2009-Ohio-6976, ¶ 36, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph to of the syllabus. See, also, *Strickland*, supra, at 694.

{¶ 115} In order to show prejudice the defendant must demonstrate that, without counsel's alleged errors, "a reasonable probability exists that the result of the proceedings would have been different." *State v. McGee*, 7th Dist. No. 07 MA 137, 2009-Ohio-6397, ¶ 13, citing *Strickland*, supra. "Prejudice may not be assumed, it must be affirmatively shown." Id., citing *State v. Reine*, 4th Dist. No. 06CA302, 2007-Ohio-7221, at ¶ 41.

{¶ 116} On consideration of the foregoing, and our determination as to appellant's first five assignments of error, we find that appellant has not demonstrated error on the part of appointed counsel. Accordingly, we cannot say that counsel's performance fell below the standard of reasonableness, or that appellant was prejudiced by counsel's performance. Appellant's sixth assignment of error is, therefore, not well-taken.

{¶ 117} In his seventh assignment of error, appellant asserts that his right to a fair trial, as guaranteed by the Constitutions of the United States and the state of Ohio, was violated due to the cumulative effect of errors in the trial court. In support, appellant argues that the aggregate effect of the trial court's admission of BWS testimony and other-acts testimony; the failure of the state to carry its burden regarding the element of prior calculation and design; the trial court's decision to allow Smith to testify as an expert in blood-spatter analysis; the admission of Rivera's hearsay statements; and the ineffective assistance of trial counsel all constitute prejudice, which requires a reversal of his conviction.

{¶ 118} The Ohio Supreme Court has held that, "[a]lthough violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus; *State v. Bell*, 8th Dist. No. 92308, 2009-Ohio-6302. In this case, other than the trial court's harmless error in admitting BWS testimony, we found no other instances of error. Accordingly, the doctrine of cumulative error is inapplicable, and appellant's seventh assignment of error is not well-taken.

{¶ 119} The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Charles D. Abood, J. _____
CONCUR.
JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.