

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

State of Ohio

Court of Appeals No. E-11-020

Appellee

Trial Court No. 2010-CR-220

v.

Michael Martin

DECISION AND JUDGMENT

Appellant

Decided: March 15, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio State Public Defender, and Terrence Scott,
Assistant State Public Defender, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Michael Martin, appeals the March 16, 2011 judgment of the Erie County Court of Common Pleas which, following a jury trial convicting him of one count of murder, tampering with evidence with a firearm specification, and tampering with evidence, sentenced appellant to 11 years of imprisonment followed by a

15 year-to-life term for the murder count. For the reasons that follow we affirm, in part, and reverse, in part.

{¶ 2} The relevant facts are as follows. On June 18, 2010, appellant was indicted for the June 7, 2010 murder of Amanda Gibson. On June 25, 2010, appellant entered a not guilty plea to the charge. On January 10, 2011, appellant was indicted on three counts of tampering with evidence, R.C. 2921.12, and one count of having a weapon while under a disability, R.C. 2923.13. The additional counts stemmed from the removal of Gibson's body from the location of her murder, the disappearance of the victim's cell phone, and the deletion of text messages on appellant's cell phone.

{¶ 3} On December 28, 2010, appellant filed a motion to suppress statements made during a police interview and allegedly in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellant argued that on November 3, 2010, appellant requested to speak with police on another matter when, despite his previous requests for a lawyer, the officers began questioning him about the murder charge. In response, the state indicated that it was not intending to admit the statements unless they were used for impeachment purposes. A hearing on the motion was held on January 10, 2011.

{¶ 4} On January 26, 2011, appellant filed a supplemental motion to dismiss based on the testimony presented at the January 10, 2011 hearing that the officers at the Erie County Jail had recorded and listened to telephone calls between appellant and his counsel. At that hearing, Detective Jared Oliver first testified that telephone calls

between appellant and his girlfriend, Tami Bollinger, were being monitored, as well as jail visits, and that the information obtained formed the basis of obtaining a search warrant for the girlfriend's home of letters written between the two. Executing the warrant on December 10, 2010, the officers retrieved several handwritten notes. The letters included admissions by appellant that he moved the victim's body and that he had been carrying a handgun.

{¶ 5} Detective Oliver next stated that the officers had listened to a telephone conversation between appellant and his counsel; counsel commented that it was "highly unconstitutional." The state disagreed arguing that the officers listen to all telephone calls and that the state had not and would not review it.

{¶ 6} The merits of appellant's January 10, 2011 motion to dismiss were also addressed at the hearing. In the motion, appellant argued that his speedy trial rights were violated by the seven-month delay between appellant's initial arrest and indictment for murder and the filing of additional charges.

{¶ 7} A second hearing was held on January 26, 2011, and focused on the issue of the monitoring of appellant's telephone conversations. Detective Jared Oliver testified that he did listen to a December 10, 2010 telephone call between appellant and his attorney. Oliver stated that he listened only because he did not recognize the telephone number.

{¶ 8} Detective Oliver next testified that, based on telephone conversations between appellant and his girlfriend, Tami Bollinger, the police executed a search

warrant of her home to look for letters written by appellant. In one of the letters recovered, appellant stated that he found Gibson dead in his garage and that he panicked and moved the body in order to avoid being blamed for the murder. Detective Oliver stated that this information led to the tampering with evidence charge. In the letter, appellant further stated that he was in possession of a handgun; this statement formed the basis of the firearm specification.

{¶ 9} On February 7, 2011, the court granted the motion suppressing all statements made by appellant at the November 3, 2010 interview. As to the motion to dismiss the counts in the second indictment due to preindictment delay, the court found that the counts were based on newly discovered evidence following execution of the search warrants and the December 17, 2010 interview with Tami Bollinger. The court did, however, dismiss the tampering with evidence charge relating to appellant's cell phone finding that the delay was unreasonable.

{¶ 10} The trial in the matter commenced on February 15, 2011. The state presented the testimony of several officers involved in the investigation. The testimony showed that on June 7, 2010, the date of the murder, the victim, Amanda Gibson, was in appellant's garage retrieving items she had stored there; she was moving back to New Jersey in a few days. During police interviews, appellant presented inconsistent versions of his activities on that date.

{¶ 11} There were text messages retrieved from appellant's cell phone which indicated that at approximately noon on June 7, 2010, he had picked Gibson up and taken

her to his home. There was also video surveillance from an adjacent carry-out which depicted a vehicle similar to appellant's in the area at the same time. In addition, DNA evidence retrieved from under Gibson's fingernails could not exclude appellant as the source. The deputy coroner testified that appellant died by manual and ligature strangulation.

{¶ 12} The receptionist at appellant's psychologist's office testified that on June 7, 2010, he had an appointment at 3:30 p.m. but arrived at 3:00 p.m. She stated that appellant left the waiting area two times prior to the start of his session.

{¶ 13} Based on witness testimony, on June 7, 2010, at approximately 5:30 p.m., a vehicle similar to appellant's was seen parked at the location where Gibson's body was found. A cast of the tire treads found at the scene was consistent with the tires on appellant's pick-up truck. Further, extensive cellular telephone records were introduced tracking the movement of appellant's and the victim's phones. An acquaintance of appellant testified that appellant stated that if Gibson did not engage in sexual relations with him he would hit her in the head and throw her in a ditch.

{¶ 14} Additionally, letters between appellant and his girlfriend were introduced. In one of the letters appellant admitted to moving Gibson's body but claimed that members of the Outlaws motorcycle club killed her in his garage. He further stated that he was carrying a handgun when he moved the body.

{¶ 15} Following the trial and jury deliberations, appellant was convicted of murder, two counts of tampering with evidence and a firearm specification. Thereafter,

appellant was sentenced to imprisonment for a total of 26 years to life. This appeal followed.

{¶ 16} Appellant now raises five assignments of error for our review:

First Assignment of Error: The state failed to present any evidence of operability to support the firearm specification. Therefore, the conviction and sentence for the specification violated Michael Martin's rights to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

Second Assignment of Error: The trial court erred by denying Mr. Martin's Motion to Dismiss Counts Three and Four, and the firearm specification for violation of his right to a speedy trial. R.C. 2945.73(D); Sections 10 and 16 of Article I of the Ohio Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Third Assignment of Error: The state's introduction of unfairly prejudicial evidence directed at Mr. Martin's character and mental health denied Mr. Martin a fair trial and due process of law and violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Section 16, Article I of the Ohio Constitution, and Ohio Rules of Evidence 403 and 404(A).

Fourth Assignment of Error: The state's misconduct in its opening and closing arguments denied Mr. Martin a fair trial and due process of law, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution.

Fifth Assignment of Error: Trial counsel provided ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

{¶ 17} In appellant's first assignment of error he contends that insufficient evidence was presented to support the firearm specification attached to his conviction for tampering with evidence. Sufficiency of the evidence is a "test of adequacy" and a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 18} The gun specification appellant was convicted of required that the indictment or information state that "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense." R.C. 2941.141. Further, R.C. 2929.14(B) provides, in relevant part:

(1)(a) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

* * *.

(iii) A prison term of one year if the specification is of the type described in section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

{¶ 19} Ohio Revised Code Section R.C. 2923.11 defines a "firearm" as follows:

(B)(1) "Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.

(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.

{¶ 20} In this assignment of error, appellant contends that the state failed to provide any evidence of the operability of the firearm. Conversely, the state asserts that the circumstantial evidence presented was sufficient. R.C. 2923.11, as quoted above, specifically provides that proof of operability may be shown by circumstantial evidence; the gun itself need not be admitted into evidence.

{¶ 21} The Ohio Supreme Court has held that evidence of operability may be established by the testimony of lay witnesses who were able to observe the instruments and the circumstances surrounding the crime. *State v. Murphy*, 49 Ohio St.3d 206, 551 N.E.2d 932 (1990), syllabus. Further, evidence of an implicit threat to kill has been held sufficient to establish the operability of the gun used in the threat. *Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541, at paragraph one of the syllabus. The *Thompkins* court further clarified that a jury may rely on all the facts and circumstances in order to determine whether the firearm was operable or capable of being operable at the time of the offense. *Id.* at 385.

{¶ 22} Nonverbal threats, such as written notes, have been held as sufficient evidence of operability where the notes contained threats to shoot the victim. A bank robbery where a note is handed to the bank teller is a common example. *See State v. Obsaint*, 1st Dist. No. C-060629, 2007-Ohio-2661. In *Obsaint*, the court stated that the defendant's written admission that he had a gun, combined with the repeated written references that he would shoot the teller, was sufficient circumstantial evidence of possession and operability. *Id.* at ¶ 19.

{¶ 23} Further, in a case with conflicting evidence of operability, the court concluded that sufficient evidence was presented. *State v. Thomas*, 2d Dist. No. 19435, 2003-Ohio-5746. In *Thomas*, the domestic violence victim testified that she did not believe that the gun that the appellant pointed at her worked. *Id.* at ¶ 48. The responding officer testified that when he arrived on the scene, the victim was very upset when describing how the appellant pointed a gun at her face and threatened to kill her. *Id.* at ¶ 47. The court noted that although it was a “close question” sufficient evidence of operability had been provided. *Id.* at ¶ 50.

{¶ 24} In the present case, there was no direct evidence that appellant possessed a firearm on the day of the offense. In a letter to his girlfriend, written a month later, appellant indicated that he was carrying a handgun when he moved the victim’s body. The state argues that we can infer operability because of appellant’s representation that the Outlaws motorcycle club was after him and that was why he had the gun.

{¶ 25} Construing the evidence in favor of the prosecution, we must find that the evidence was insufficient to support appellant’s conviction for the firearm specification. Although appellant stated that he possessed a handgun when he was moving the victim’s body, there was insufficient evidence presented as to whether the gun was operable at the time of the offense. An after-the-fact letter written to his girlfriend, standing alone, does not satisfy the element of operability. Appellant’s first assignment of error is well-taken.

{¶ 26} In appellant’s second assignment of error he argues that the trial court erred by denying his motion to dismiss where the seven-month delay between his indictment

for murder and the indictment for the tampering with evidence and weapons charge denied him his right to a speedy trial. Conversely, the state contends that the second indictment was based upon newly discovered evidence and, thus, did not violate appellant's constitutional rights.

{¶ 27} The Supreme Court of Ohio has held that ““when new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge.”” *State v. Adams*, 43 Ohio St.3d 67, 68, 538 N.E.2d 1025 (1989), quoting *State v. Clay*, 9 Ohio App.3d 216, 218, 459 N.E.2d 609 (11th Dist.1983). An exception to the speedy-trial timetable for subsequent indictments was recognized in *State v. Baker*, 78 Ohio St.3d 108, 112, 676 N.E.2d 883 (1997), where the court stated:

When additional criminal charges arise from facts distinct from those supporting an original charge, or the state was unaware of such facts at that time, the state is not required to bring the accused to trial within the same statutory period as the original charge under R.C. 2945.71 et seq.

{¶ 28} Reviewing the trial court's February 7, 2011 judgment entry we cannot say that the court erred when it denied appellant's motion to dismiss. Although the state had its “suspensions,” the letter forming the basis of the tampering with evidence and weapons charge did not surface until after the execution of the search warrants and interview with Tami Bollinger. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 29} Appellant's third assignment of error asserts that the state's introduction of evidence relating to his character and mental health status was unconstitutionally prejudicial. Appellant takes issue with evidence presented by the state of his post-traumatic stress disorder and that he was seeing a psychologist, that he had been married four times, and that he had cut his hair and trimmed his beard for trial.

{¶ 30} We first note that many of the references to the transcript are from the state's opening statement which is not evidence and is addressed in appellant's fourth assignment of error below. As to the remainder of the evidence we note that "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). A trial court abuses its discretion when its attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In addition, we review the instances where defense counsel did not object for plain error. *State v. McKee*, 91 Ohio St.3d 292, 294, 744 N.E.2d 737 (2001). Plain error is found where, but for the error, the outcome of the trial would have been different. *Id.*

{¶ 31} Appellant first disputes the admission of testimony that on the date of the murder, appellant had a psychologist appointment. This evidence was played for the jury in the June 9, 2010 tape-recorded interview conducted by Detective Jared Oliver. The jury heard the following:

Mr. Martin: Yeah. And I just had a doctor's appointment and all this other stuff going on that morning and I just didn't have time for that.

Detective Oliver: Okay. What doctor did you go to?

Mr. Martin: Dr. Daniels right over here on Bogart Road.

Detective Oliver: Okay. If you don't mind me asking, what did you go to the doctor for?

Mr. Martin: I am working to get my disability, my SSI and I was diagnosed with Posttraumatic Stress Disorder and he was going through all that with me.

{¶ 32} The next reference occurred during the testimony of Brenda Kerlin, the receptionist at Dr. Daniels' office who stated that Daniels was a psychologist.

{¶ 33} Reviewing the testimony of appellant's mental health treatment we cannot find that its admission was either an abuse of discretion or plain error. The testimony was elicited for the purpose of presenting a timeline for appellant's whereabouts on the date of the murder. Further, Ms. Kerlin testified that appellant left the waiting room twice prior to going in for his appointment. The fact that he was visiting a psychologist was incidental to the purpose of the testimony. Thus, the probative value outweighed any prejudicial effect.

{¶ 34} Appellant next takes issue with the evidence presented showing that he changed his appearance prior to trial. Specifically, appellant contends that the state elicited testimony that at the time of the murder his hair was long and his beard unkempt because that type of appearance is often associated with criminality. Appellant points to the testimony of two witnesses: one who stated that appellant's hair and beard were

shorter than when he had seen him previously, and the arresting officer who testified that appellant had a full beard and “much longer” hair. The state also played an audiotaped telephone conversation between appellant and his girlfriend, Tami, where they discussed his appearance. Appellant explained to Tami that he cut his hair and trimmed his beard because people “judge books by their covers” and that he had to “conform to the standards of what they expect is normal.” Appellant further stated that the officers were upset about him cutting his hair because the case was a “slam dunk.”

{¶ 35} Upon review, we agree that, absent identification issues, the appearance of a defendant is not relevant to guilt or innocence. Further, appellant’s statements to his girlfriend about the reason for cutting his hair was to ensure that the jury did not “judge a book by its cover” and that he received a fair trial. It did not provide evidence of appellant’s guilt. However, though we find that the evidence was not relevant, we cannot find that its admission resulted in plain error.

{¶ 36} Finally, appellant argues that the reference to the fact that he was married four times was prejudicial in that it was elicited to show that he was a bad person and, thus, more likely to commit murder. The evidence was introduced through the testimony of Jenny Martin, appellant’s ex-wife, who stated that appellant had been married four times. We agree that evidence of appellant’s prior marriages is not relevant to whether he killed Gibson but find that the isolated reference was not prejudicial.

{¶ 37} Based on the foregoing, we find that the trial court did not abuse its discretion and there was no plain error as to the admission of evidence relative to

appellant's treatment by a psychologist, his altered appearance, or his marital history.

Appellant's third assignment of error is not well-taken.

{¶ 38} In appellant's fourth assignment of error he asserts that the state engaged in prosecutorial misconduct during opening and closing statements. "The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Eley*, 77 Ohio St.3d 174, 187, 672 N.E.2d 640 (1996), *overruled on other grounds*; *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990).

{¶ 39} Prosecutors generally are entitled to considerable latitude in opening statement and closing arguments. *State v. Ballew*, 76 Ohio St.3d 244, 255, 667 N.E.2d 369 (1996). In closing argument, a prosecutor may comment freely on "what the evidence has shown and what inferences can be drawn therefrom." *State v. Richey*, 64 Ohio St.3d 353, 362, 595 N.E.2d 915 (1992), *overruled on other grounds*. Prosecutors may not, however, invade the realm of the jury by rendering their personal beliefs regarding guilt and credibility, or alluding to matters outside of the record. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). Nevertheless, since isolated instances of prosecutorial misconduct are usually harmless, any alleged misconduct in the closing argument must be viewed within the context of the entire trial to determine if any prejudice has occurred. *See Ballew, supra* at 255; *State v. Lorraine*, 66 Ohio St.3d 414, 420, 613 N.E.2d 212 (1993). To determine if the alleged misconduct resulted in prejudice, an appellate court should consider the following factors: "(1) the nature of the

remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant.” *State v. Braxton*, 102 Ohio App.3d 28, 41, 656 N.E.2d 970 (8th Dist.1995).

{¶ 40} Appellant points to several alleged instances of misconduct including opening argument reference to appellant as having “delusions of grandeur,” being a “legend in his own mind,” and a manipulator. The prosecutor further stated that appellant had been married four times and was seeing a psychologist and that “he’s not the picture of stability.” During closing argument, the prosecutor repeatedly referred to appellant’s version of the events as “ridiculous” and nonsense. The prosecutor also criticized the note appellant wrote to his girlfriend explaining his actions as “stupid” a “joke” and not reasonable. The prosecutor again made references to appellant being a “legend in his own mind.” Further, the prosecutor commented on a state witness’s testimony as being “rock solid.”

{¶ 41} We first note that prior to opening statements, the trial court informed the jury that the statements were not evidence, they were simply an opportunity for the parties to set forth what they believed the evidence would show. Similarly, the court stressed that closing arguments were not evidence; rather, it was “what they believe their evidence has shown and any reasonable inferences from that evidence.”

{¶ 42} Upon review while we agree that some of the comments were improper, we cannot say that they were so prejudicial as to deny appellant a fair trial. First, the remarks regarding appellant’s alleged “delusions of grandeur” and being a “legend in his

own mind” had some support based on the evidence presented. The evidence tended to show that, although appellant told his girlfriend that the Outlaws motorcycle gang wanted him to be the head of the Sandusky chapter, the gang did not care for him. The comment that appellant was not stable was objected to and the objection was overruled. The prosecutor’s repeated references to appellant’s story to police and his girlfriend as ridiculous and nonsense, although the specific words used were over-zealous, was borne out by the inconsistencies presented through cell phone records, eyewitness testimony, DNA evidence, physical evidence, and appellant’s own statements. Accordingly, appellant’s fourth assignment of error is not well-taken.

{¶ 43} In his fifth and final assignment of error, appellant argues that his trial counsel was constitutionally ineffective. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 44} Appellant contends that his trial counsel was ineffective by failing to timely and properly renew the Crim.R. 29 motion for acquittal at the end of appellant's case-in-chief and by failing to object to the prosecutor's improper comments and impermissible evidence as discussed in appellant's third and fourth assignments of error.

{¶ 45} First, at the end of the state's case, appellant's counsel moved for an acquittal pursuant to Crim.R. 29. The court denied the motion. The defense then rested without presenting any evidence. The jury was then excused for the day and the parties reviewed the proposed jury instructions and settled various procedural, including evidentiary matters. The next day, prior to closing arguments, the defense renewed its motion for acquittal, incorporating all prior motions to dismiss. The motion was denied.

{¶ 46} Appellant asserts that counsel was ineffective by failing to specifically argue the issue of operability of the weapon in his motion for acquittal. We note that the general motion encompassed all the charges and preserved the issue for appeal. Thus, we cannot find that appellant was deprived the effective assistance of counsel.

{¶ 47} Appellant next argues that counsel was ineffective by failing to object to the state's improper comments during opening and closing arguments and impermissible testimony admitted during trial. We have reviewed the comments in our discussion of appellant's third and fourth assignments of error and find that, had counsel objected to the comments, there was no reasonable probability that he would have been acquitted. *Strickland, supra*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674. In addition, during counsel's closing argument he addressed, at length, the prosecutor's statements stating:

And I agree with Mr. Baxter that you should judge, you know, the credibility of the witnesses and you should listen to what we're saying, because I kept count during Mr. Baxter's closing argument. He said "obvious" seven times, "ridiculous" 13 times, "legend in his own mind" five times, "clear, no questions about it" 22 times.

{¶ 48} Defense counsel then stated that the use of these terms only emphasized the weakness of the state's case; that if appellant's guilt was so "obvious" the state would only have to rely on the facts. Upon review, we find that counsel's use of the prosecutor's closing against him was tactical in nature and used to attempt to cast doubt on the evidence presented at trial.

{¶ 49} Based on the foregoing, we find that appellant was not denied the effective assistance of trial counsel. Appellant's fifth assignment of error is not well-taken.

{¶ 50} On consideration whereof, appellant's convictions for murder and two counts of tampering with evidence are affirmed. Appellant's conviction for the firearm specification under R.C. 2941.141(B)(1)(a) is vacated as unsupported by sufficient evidence. The matter is remanded to the Erie County Court of Common Pleas to modify the judgment according to this decision. Pursuant to App.R. 24, the parties are ordered to each pay one-half of the costs of this appeal.

Judgment affirmed, in part,
and reversed, in part.

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

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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>.