

[Cite as *State v. Pratts*, 2016-Ohio-8053.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104235

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY C. PRATTS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-595679-B

BEFORE: Boyle, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 8, 2016

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Anthony Pratts, appeals his convictions. He raises two assignments of error for our review:

1. The trial court erred in both failing to instruct the jury to disregard a photograph on appellant's cell phone and abused its discretion in not granting appellant's motion for mistrial and declare a new trial on the ground that during deliberation the jury viewed a photograph on appellant's cell phone, unrelated to the cause herein, not entered into evidence, which had a material and adverse effect on the jury's rendering a guilty verdict.
2. The trial court erred in not granting appellant's Crim.R. 29 motion for acquittal on the ground [of] insufficient evidence in that the state's identification of appellant as the wrongdoer in the cause herein was based on insufficient evidence.

{¶2} Finding no merit to his arguments, we affirm.

I. Procedural History and Factual Background

{¶3} In May 2015, Pratts was indicted on two counts of drug trafficking in violation of R.C. 2925.03(A)(1) and (A)(2), and one count of drug possession in violation of R.C. 2925.11(A). The following facts were presented to a jury.

{¶4} Detective Jeffrey Follmer, the lead detective on this case, arranged for a confidential informant ("CI") to purchase 50 grams of heroin from Ashley Lisiecki and Alejandro Gonzalez on May 6, 2015. Lisiecki and Gonzalez lived in an upper level apartment of a home on Trowbridge Avenue in Cleveland, Ohio. Detective Follmer stated that he had used the CI on numerous other occasions, which had led to seven or eight arrests.

{¶5} Approximately one week before the controlled drug buy, the CI purchased seven grams of heroin from Lisiecki and Gonzalez. Based on this initial buy, Detective Follmer obtained a search warrant to search Lisiecki's and Gonzalez's apartment on May 6.

{¶6} Detective Robert Klomfas participated in the initial buy and the May 6 buy. The CI falsely informed Lisiecki and Gonzalez that he had met Detective Klomfas in prison, and that Klomfas wanted to purchase heroin. Detective Klomfas went into Lisiecki's and Gonzalez's apartment with the CI both times. Detective Klomfas searched the CI before each drug buy to ensure that he did not have any contraband on him.

{¶7} On May 6, the CI called Lisiecki around 8:30 p.m., and told her that his prison friend (Detective Klomfas) wanted to purchase a larger amount of heroin because the friend lived far from Cleveland. They agreed on a price of \$5,300 for 50 grams of heroin. Lisiecki told the CI that she would arrange to get the heroin, and that she would call him when it arrived.

{¶8} Detective Klomfas and the CI parked outside of Lisiecki's and Gonzalez's apartment, one house over, to wait for Lisiecki to call them. Detective Klomfas saw a vehicle pull into the driveway, and "it was there for a minute or two, left immediately." At 9:20 p.m., Lisiecki called the CI and told him that the heroin had arrived. Detective Klomfas notified the other detectives about Lisiecki's call. Detective Klomfas and the

CI then went into the apartment. The CI, Lisiecki, and Gonzalez went into the bedroom and conducted the heroin transaction.

{¶9} Detective Follmer had been posted outside of Lisiecki's and Gonzalez's apartment since 7:15 p.m. Detective Follmer saw a vehicle pull in the driveway around 9:20 p.m. About three to five minutes after the vehicle left, Detective Klomfas radioed that the heroin had arrived.

{¶10} Detective Maria Matos, who was conducting surveillance on Lisiecki's and Gonzalez's apartment, parked her undercover vehicle "five doors down" from the house around 8:30 p.m. Detective Matos was watching for "delivery" of the heroin. Detective Matos could not see the entrance to the apartment because it was at the rear of the house, but she could clearly see the driveway. Detective Matos saw a silver car pull into Lisiecki's and Gonzalez's driveway around 9:20 p.m. Detective Matos radioed the other officers that they had "arrival." Detective Matos did not see the driver get out of the vehicle because the driver pulled to the rear of the home, but she saw the silver car leave a couple of minutes later. Around that same time, she received the call from Detective Klomfas stating that Lisiecki had called to say that she had the heroin. Detective Matos testified that the silver car was the only car to pull in Lisiecki's and Gonzalez's driveway.

{¶11} Detective Follmer followed the silver car, stating that he never lost visual contact of the vehicle. The silver car stopped outside of a home on Seymour Avenue, about a mile from Lisiecki's and Gonzalez's apartment. The driver of the silver car got

out of the vehicle, and walked into the home. Detective Follmer testified that he could see the driver when he got out of the car and also when the driver walked up to the front porch of the home. Detective Follmer saw the driver come out of the home a couple of minutes later and enter a red SUV. Detective Follmer followed the red SUV and radioed other officers, who were in marked police cars, to stop the SUV. Once the red SUV was stopped, Detective Follmer arrested Pratts and seized his cell phone.

{¶12} In the meantime, Detective Klomfas notified the SWAT team that he and the CI left Lisiecki's and Gonzalez's home, and that the "deal was good." The SWAT team entered Lisiecki's and Gonzalez's home and secured it. Detectives recovered the buy money and arrested Lisiecki and Gonzalez.

{¶13} Detective Matos searched Lisiecki and interviewed her. Detective Matos testified that Lisiecki told her that "Big Daddy" supplied her and Gonzalez with the heroin. Lisiecki provided the following written statement to Detective Matos:

Today on May 6th Dave wanted 50 grams of heroin. I called my connection Big Daddy (Prat[t]s) and I told him I needed 50 g. Big Daddy said okay and he came to my house around 9:00 and he brought me the heroin. I then called Dave to come and get it. I gave him 44 gs and he paid me \$5,300 and after Dave left I took 1,200 out of the money for my profit and I gave my boyfriend Alex the rest of the money to give to Big Daddy. The police showed me a picture of the dope man that was him and I told him that was Big Daddy.

{¶14} Detective Follmer used his cell phone to take multiple pictures of Pratts, which he showed to Lisiecki. Lisiecki identified Pratts on Detective Follmer's cell phone as "Big Daddy," the person who supplied her with the heroin that night.

{¶15} Detective Follmer also seized Lisiecki's cell phone. Detective Follmer testified that he asked Lisiecki to give him Big Daddy's phone number, which she did. Detective Follmer then used Lisiecki's cell phone to call the number that Lisiecki gave to him. When he did, Pratts's cell phone, which Detective Follmer also had, rang. Detective Follmer made the same call — from Lisiecki's phone to Pratts's phone — twice. Detective Follmer identified the two calls, which were two of four possibilities, from Lisiecki's phone to Pratts's phone on Pratts's cell phone records.

{¶16} Prior to trial, Lisiecki recanted her original statement. Lisiecki testified that she did not know anyone named Big Daddy or Pratts. Lisiecki stated that she only wrote what she did in her original statement because police told her to write it. She said that Detective Matos kept saying "we know who your supplier is." Lisiecki testified that police did not show her the photo of Pratts until an hour after she gave her statement. When police showed her the photo of Pratts, she thought, "Holy crap, that ain't even the dude." When asked why she did not immediately tell police that they had the wrong guy, she said that she was scared.

{¶17} Lisiecki testified that she told her attorney within a few days that Pratts was not her drug supplier; her drug supplier is black, but Pratts is white. But she did not write her new statement until August 31, 2015, when she provided the following through her attorney:

On the day in question I bought 46 g of heroin from a black guy by the name of "Slim." I talked to him through other people and came to [my] house and sold me the drugs. Slim pulled up in a black or other dark car. Slim was 6'1" or 6'2". He was rather heavy but they called him Slim. I

do not know anything about him at all. Even though I identified Anthony Pratts he was not “Slim.” I never knew Pratts until the case started. The only reason I identified with him is because the female detective told me he was the guy, but he was not the person who sold me drugs. Anthony Pratts never sold me drugs that day. I do not know anything else about “Slim” but he is the one that sold me the heroin.

{¶18} Lisiecki testified that she could not give police any other information about “Skinny” except that he was a black man with many tattoos who supplied heroin to her. She said that “Skinny” changed his phone number often, so she did not know it. But she identified “Skinny’s” cell phone number on her cell phone records as * * * * * 3176.

{¶19} Gonzalez testified that he pleaded guilty to four drug-related felonies associated with this case; he had been in jail since May 6, 2015. Lisiecki had been his girlfriend for six years. They had lived together at the Trowbridge apartment for two years.

{¶20} Gonzalez testified that his old boss “Dave” and “another white guy” came to his and Lisiecki’s apartment on May 6, 2015, to purchase heroin. Dave gave Gonzalez the money for the heroin. Gonzalez counted the money. Lisiecki gave a “package” to Dave. Gonzalez said that Lisiecki kept some of the drug money for herself and he put the rest in his bedroom closet. Gonzalez further stated that Lisiecki told him that the remaining money was for Pratts.

{¶21} Gonzalez did not see who gave the heroin to Lisiecki on May 6, 2015, because Lisiecki went downstairs to retrieve it; the supplier did not come in their apartment. But Gonzalez said that on that day, and in May 2015 generally, Pratts was

his and Lisiecki's heroin supplier. Gonzalez further testified that Lisiecki told him on May 6, 2015, that Pratts provided the heroin to her that day.

{¶22} Gonzalez called Pratts "Ant," but Lisiecki called Pratts "Big Daddy." Gonzalez knew that Pratts lived on Seymour Avenue. Gonzalez had purchased heroin from Pratts three times before May 6, but said that Lisiecki had "more exchanges" with Pratts than he had. Gonzalez described Pratts to police as a "white, fat male, who looks Puerto Rican." Gonzalez agreed that Pratts looked "just as [he] had described him." Gonzalez identified Pratts in court.

{¶23} On cross-examination, Gonzalez agreed that when first being interviewed by Detective Matos, it was Detective Matos who first mentioned "Big Daddy" when she asked Gonzalez, "Come on, does Ashley have a cute nickname for him like Big Daddy?" Gonzalez further agreed that he never told detectives anything when he was arrested, but that about a week before trial, Detective Matos showed Gonzalez a photo of Pratts, and Gonzalez said, "[t]hat's him."

{¶24} At the close of the state's case, Pratts moved for a Crim.R. 29 acquittal, which the trial court denied.

{¶25} Four witnesses testified on Pratts's behalf. Craig Skubovius testified that he was friends with Lisiecki and Gonzalez. He said that he was at their apartment on Trowbridge on May 6, 2015. Skubovius was arrested that day, along with everyone else. He was in jail with Gonzalez and Pratts; he had never seen Pratts prior to that.

Skubovius stated that he heard Gonzalez and Pratts say to each other that they did not know one another.

{¶26} Pratts also testified at trial. Pratts denied ever using or selling heroin. He denied ever driving a silver car, or going to Trowbridge Avenue on May 6, 2015. Pratts also denied knowing Lisiecki or Gonzalez.

{¶27} Pratts stated that he purchased marijuana on May 6, 2015, from his friend, Kirt. Pratts stated that Kirt had a gold Chevy Malibu, was black, and had many tattoos. Pratts said that he got in the gold car briefly on May 6, 2015, outside of his home on Seymour Avenue, to purchase the marijuana. Pratts testified that Kirt was listed in his contacts on his cell phone with a phone number of * * * * * 3176.

{¶28} Three of Pratts's family members testified for Pratts. They essentially backed up Pratts's version of the events that took place on May 6, 2015.

{¶29} The jury found Pratts guilty of all charges. Prior to sentencing, Pratts moved for a mistrial and new trial. The trial court denied Pratts's motion.

{¶30} The trial court merged all three counts for purposes of sentencing. The state elected to proceed with drug trafficking of heroin between 10 and 50 grams in violation of R.C. 2925.03(A)(1), a second-degree felony. The trial court sentenced Pratts to two years in prison. It is from this judgment that Pratts now appeals.

II. Motion for Mistrial and New Trial

{¶31} In his first assignment of error, Pratts argues that the trial court abused its discretion when it denied his motion for mistrial and new trial. Pratts's defense counsel

asserted in the motion that after the jury rendered its verdict, he spoke with several jurors.

These jurors purportedly told defense counsel that “they were a solid ‘not guilty’ votes until they saw pictures of drugs on the defendant’s cellular phone that were not introduced as evidence during trial.”

{¶32} Pratts did not explicitly state which Crim.R. 33 provision on which he based his motion, but we construe it to be under Crim.R. 33(A)(5), which states that a new trial may be granted if an error of law occurred at trial that materially affected the defendant’s substantial rights. The grant or denial of a motion for mistrial under Crim.R. 33 rests within the sound discretion of the trial court. *State v. Murphy*, 4th Dist. Scioto No. 09CA3311, 2010-Ohio-5031, ¶ 83, citing *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987).

{¶33} At the outset, we note that Pratts did not object to his cell phone being admitted as evidence when the state informed the court which exhibits it wished to have admitted.¹ More significantly, Pratts never requested the trial court to limit what jurors could view on the phone. Pratts argues that only the contacts and text messages were discussed at trial, but he did not object to the entire cell phone being admitted into evidence. Accordingly, we review for plain error.

¹Pratts also argues on appeal that the trial court erred in failing to instruct the jury to disregard unrelated data on his cell phone. But as we pointed out, Pratts did not object to the cell phone being admitted, nor did he request any such instruction. Thus, we will review for plain error; the analysis is the same.

{¶34} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

Courts are to notice plain error under Crim.R. 52(B), ““with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”” *Id.* Thus, under a plain error analysis, Pratts would only be entitled to a new trial if the outcome would have been different had the jurors not viewed the drug photos.

{¶35} In determining whether Pratts was prejudiced by jurors viewing the drug photos on his cell phone, we cannot consider Pratts’s claim that jurors told his defense counsel after they were discharged that viewing the photos affected their vote. Assuming for the sake of argument that jurors told Pratts’s defense counsel that they changed their vote to guilty after seeing the photos, Evid.R. 606(B) plainly precludes Pratts from obtaining a new trial based on jurors’ testimony regarding a juror’s thought process or the reasoning behind a juror’s verdict.²

{¶36} Evid.R. 606(B) provides that a juror is generally incompetent to testify about the jury’s internal deliberations related to the verdict. The rule states that although a

²Here, Pratts did not attach any jurors’ affidavits to his motion for mistrial. Pratts’s motion was based on his defense counsel’s claims that he spoke with jurors and they told him that viewing the photos affected how they voted. Evid.R. 606(B) applies to either scenario — a purported statement or actual sworn affidavit.

“juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear on any juror” (only after some outside evidence of that act or event has been presented beyond the juror’s statement):

a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.

{¶37} Evid.R. 606(B) makes it clear that “[a] juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received” for the purpose of impeaching a jury’s verdict. This rule protects the sanctity of a juror’s mental process. *State v. McGail*, 2d Dist. Miami No. 2014-CA-27, 2015-Ohio-5384, ¶ 30. The United States Supreme Court has “explained that public policy considerations have long emphasized the necessity of shielding jury deliberations from public scrutiny.” *Id.*, citing *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987).

{¶38} Here, the cell phone had been admitted into evidence. Thus, because the juror’s purported statements involve what occurred when they were internally deliberating, the jurors would be precluded from testifying about this process for purposes of impeaching the verdict. Even if we agree that the jurors should not have viewed photos on Pratts’s cell phone, it would not change our analysis. It is only when jurors consider outside information when deliberating that they can testify to such matters (if

there is also corroborating evidence of such matter other than just the juror's statement). *See McGail* (one juror told other jurors that he went to the same church as the defendant, but said that he never saw the defendant there; another juror told other jurors that he had read newspaper articles about the case).

{¶39} Thus, in determining whether Pratts was prejudiced by photos of drugs that were on his cell phone, we must view the evidence that was presented at trial and decide whether jurors would still have found him guilty if they had not seen these photos. After review, we conclude that the outcome of the trial would have been the same.

{¶40} In this case, police sent a CI and Detective Klomfas to a home on Trowbridge Avenue with \$5,300 of buy money to purchase a large amount of heroin from Lisiecki and Gonzalez. The CI and Detective Klomfas sat outside, waiting for the call that the drugs had arrived. Other officers were surveilling the home. Detective Matos saw a silver car pull into the driveway of the home, and then saw it leave a few minutes later. Almost immediately after that, Lisiecki called the CI to tell him that the drugs had arrived. Detective Follmer followed the silver car until it stopped and never lost sight of it. Detective Follmer saw Pratts get out of the silver car, run into the house, come back out minutes later, and get into a red SUV.

{¶41} Detective Matos interviewed Lisiecki. Lisiecki told her that "Big Daddy" supplied her the drugs. Gonzalez also stated that "Big Daddy," who lived on Seymour Avenue, was the person who supplied the heroin that evening. Lisiecki identified Pratts as Big Daddy in a photo on Detective Follmer's cell phone. Lisiecki also gave Detective

Follmer “Big Daddy’s” cell phone number. When police arrested Pratts and Lisiecki, they confiscated both of their cell phones. Detective Follmer used Lisiecki’s phone to call the number for Pratts that Lisiecki gave to him. When he did, the cell phone that Detective Follmer seized from Pratts rang. Detective Follmer identified these two calls — from Lisiecki’s phone to Pratts’s phone — on Pratts’s cell phone call record, which was admitted into evidence.

{¶42} Based on the evidence presented at trial, the jury would have found Pratts guilty even if they had not seen the drug photos on his phone. Thus, we find no prejudice or plain error.

{¶43} Pratts makes several other arguments in his first assignment of error in support of his claim that the trial court erred when it denied his motion for a mistrial and a new trial. Pratts, however, failed to make these arguments in his motion for mistrial and a new trial. A party may not raise for the first time on appeal an argument that could have been raised below. *State v. Smith*, 61 Ohio St.3d 284, 574 N.E.2d 510 (1991). Thus, we need not address Pratts’s other arguments.

{¶44} Accordingly, the trial court did not abuse its discretion when it denied Pratts’s motion for mistrial and new trial. Pratts’s first assignment of error is overruled.

III. Sufficiency of the Evidence

{¶45} In his second assignment of error, Pratts argues that the state failed to present sufficient evidence of his identity.

{¶46} “[S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompson*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), citing *Black’s Law Dictionary* 1433 (6th Ed.1990). When an appellate court reviews a record upon a sufficiency challenge, “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.

{¶47} In this case, Pratts’s codefendants, Lisiecki and Gonzalez, identified “Big Daddy” as the person who supplied them with the heroin that they sold to the CI (“Dave”) and Detective Klomfas on May 6, 2015. Lisiecki’s original statement, where she stated that “Big Daddy (Prat[t]s)” sold her the heroin, was admitted into evidence. When Detective Follmer showed Lisiecki a photo of Pratts that he had just taken on his cell phone moments before, Lisiecki identified Pratts as “Big Daddy.” Gonzalez also identified Pratts in court as “Big Daddy” and as the person who supplied them heroin on May 6, 2015. This evidence was sufficient evidence, if believed, to establish that Pratts is the person who supplied the heroin to Lisiecki and Gonzalez on the night of the May 6 drug buy.

{¶48} Although Lisiecki recanted her original statement by the time of trial, testifying that a black man named “Slim” or “Skinny” sold her the heroin (Gonzalez

described “Big Daddy” as a “white, fat male, who looks Puerto Rican,” which he said still matched Pratts’s description at the time of trial), it was for the jury to decide which version of Lisiecki’s story was credible.

{¶49} Pratts argues that the state failed to establish his identity because when considering the “cold stand” factors, they weigh against a reliable identification. But the cold stand factors are not relevant in this case.³ Lisiecki knew Pratts, however, as the person who supplied heroin to her — or at least that is what she told police at the time of the drug buy. Lisiecki’s recantation goes to the manifest weight of the evidence, not sufficiency.

{¶50} Moreover, there was more than enough circumstantial evidence — beyond Lisiecki’s and Gonzalez’s testimony — to establish Pratts’s identity, as we discussed in the previous assignment of error.

{¶51} Proof of guilt may be made by circumstantial evidence, real evidence, and direct evidence, or any combination of the three, and all three have equal probative value.

State v. Nicely, 39 Ohio St.3d 147, 529 N.E.2d 1236 (1988); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus. Unlike direct evidence in which a witness testifies about a matter within the witness’s personal knowledge, circumstantial evidence requires the drawing of inferences that are reasonably permitted

³The cold stand factors are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated by the witness; and (5) the length of the time between the crime and the confrontation. *State v. Torres*, 8th Dist. Cuyahoga No. 88381, 2007-Ohio-2502, ¶ 85.

by the evidence. Although there are obvious differences between direct and circumstantial evidence, those differences are irrelevant to the probative value of the evidence — circumstantial evidence carries the same weight as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 2001-Ohio-4, 739 N.E.2d 749. Indeed, ““direct evidence of fact is not required[;] circumstantial evidence * * * may also be more certain, satisfying and persuasive than direct evidence.”” *State v. Lott*, 51 Ohio St.3d 160, 167, 555 N.E.2d 293 (1990), quoting *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330, 81 S.Ct. 6, 5 L.Ed.2d 20 (1960).

{¶52} Pratts’s remaining arguments that none of the officers described what he looked like, that Lisiecki recanted her identification of him, that Gonzalez “waffled back and forth” (which we disagree with Pratts that Gonzalez did), and that his witnesses support his version of the events, also go toward the manifest weight of the evidence and not sufficiency. When a jury is presented with competing versions of the truth, the jury — as the trier of fact — is in the best position to weigh the credibility of each witness and to resolve inconsistencies in their testimony.

{¶53} After viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found that Pratts was the one who supplied the heroin to Lisiecki and Gonzalez beyond a reasonable doubt.

{¶54} Accordingly, Pratts’s second assignment of error is overruled.

{¶55} Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR