# IN THE SUPREME COURT OF OHIO

**CASE NO. 2014-1364**

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| STATE OF OHIO, | } | |
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| Appellant, | } | On Appeal from the Lake County Court of Appeals |
| | } | |
| v. | } | Eleventh Judicial District |
| | } | |
| DANNA WEIMER, | } | Court of Appeals |
| | } | Case No. 2013-L-005 |
| Appellee. | } | |

## APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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## EXPLANATION OF WHY THE STATE'S APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR AN ISSUE OF GREAT PUBLIC INTEREST

None of the State's propositions of law are worthy of this Court's time. The first argues that any statements made to a jailhouse snitch, even an admission of the crime, somehow are done in furtherance of the criminal conspiracy, and can be admitted in evidence against the other defendants. The second contends that even though a statement is hearsay and legally inadmissible, a trial judge can admit it nonetheless. The third would brand as a criminal organization a mother and son who did drugs together, and occasionally stole from other people – never together, always separately – to obtain money to buy drugs.

This would not even be error correction for this Court. There was no error. Danna Weimer was convicted and sentenced to spend the rest of her life in prison[1] because a jailhouse snitch told the jury that Zach had confessed to him that he "and a buddy" broke into Eleanor Robertson's home and killed her, with the prosecution leaving no doubt as to who the "buddy" was. As will be discussed, the appellate court in finding this to be error acted in full accord with the universal view and case law on the co-conspirator exception: that admissions of the offense made to third parties do not fall within exception, because they are not done "in furtherance" of the conspiracy. One does not conceal his participation in a crime by telling other people about it.

The correct law was applied by the appellate court, and the correct result reached. There is no reason for this Court to accept jurisdiction in this matter.

## STATEMENT OF THE CASE AND FACTS

Sometime between three o'clock in the afternoon of June 12, 2012 and eight o'clock that

[1] She would be 96 years old at her first eligibility for parole.

evening, Eleanor Robertson's home was burglarized, and she was murdered.

Her body was not discovered until the following evening. Her neighbors had become concerned about her, and called the police. They entered the home and found Ms. Robertson's body stuffed under a mattress. She had been stabbed to death.

At about the same time as the Madison Township police found her body, the Euclid Police were arresting Zachary and Danna Weimer in the parking lot of a pawnshop in that city. Danna Weimer's car was loaded with items that were subsequently traced to Ms. Robertson's house. It was the State's theory at trial that the Weimers had collaborated in killing Ms. Robertson and burglarizing her home. In addition to aggravated murder and aggravated burglary, and two counts of tampering with evidence and two of receiving stolen property related to her activities afterwards, Danna Weimer was charged with ten other counts wholly unrelated to that crime: incidents of drug possession, and thefts from other people. That formed the basis of a charge of engaging in corrupt practices.

There was abundant proof of Zachary Weimer's involvement in the murder and burglary. Surveillance video at Ms. Weimer's home showed him arriving there just before 5:00 A.M. on the morning after the killing, and removing innumerable items that had been taken from Ms. Robinson's house out of the car; there is no rational explanation for how he would have acquired all of those items in that short a period of time had he not been the person who'd broken into the home. The most damning evidence was that his footprint was found on the mattress lying on top of Eleanor Robertson's body.[2]

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[2] Zachary Weimer was convicted of aggravated murder and fourteen other counts, and sentenced to imprisonment for life without parole. His conviction and sentence was affirmed by the 11th District Court of Appeals, Case No. 2013-L-008, 2013-Ohio-5651, and this Court denied jurisdiction on May 28, 2014, in Case No. 14-0158.

The case against Danna Weimer was much more tenuous. To be sure, she and Zachary had been seen near Ms. Robertson's house in the late morning preceding the crime, but that was hardly surprising: her son Greg lived diagonally across from Ms. Robertson, Danna Weimer provided transportation to Zachary, and Zachary at that time was staying at Gregg's house. There was no question that Ms. Weimer had helped Zachary dispose of the stolen items on the day following the crime, and of Ms. Robertson's van, but all of that occurred after the murder and the burglary, and Ohio's accomplice law does not allow culpability solely on the basis of acts committed after the crime.[3] As for the five-hour window for when the crime actually occurred, four State witnesses provided an alibi for Danna Weimer – according to them, she was with them smoking marijuana. The State also relied on three text messages that were sent from Ms. Weimer to Zachary sometime after the killing, the first at 8:30 P.M. and the last at 9:46 P.M. In truth, the texts were exculpatory. Ms. Weimer had learned that earlier that day Zachary Weimer had stolen a check from his brother and cashed it. Her final text message that night to Zachary was, "is s*** OK with you and Greg," not any inquiry as to the progress of the burglary of Ms. Robertson's house.

No murder case is complete with a jailhouse snitch, and the State summoned Richard Gould to fill this role and the gap in its proof. According to Gould, he befriended Zachary while they were cellmates at the county jail. Gould testified that Zachary eventually confided in him that "him *and his buddy* went to this house where this woman lived, elderly woman." (Emphasis added.) This testimony was admitted over objection, the State claiming it was admissible under

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[3] Ms. Weimer was convicted of numerous counts of receiving stolen property, and of tampering with evidence, and sentenced to three years for those crimes. Those convictions and sentences were not appealed, and she is still serving those sentences. In addition, she was convicted of numerous thefts and other crimes unrelated to the murder and burglary, and those convictions and sentences are unaffected as well.

the co-conspirator exception to the hearsay rule.

Danna Weimer was convicted of all counts. The trial court sentenced her to life imprisonment with possibility of parole after thirty years on the aggravated murder, eleven years on the aggravated burglary and engaging in corrupt activities counts, and maximum sentences on the remaining charges. With some counts run consecutively, Ms. Weimer's sentence life imprisonment with no possibility of parole for forty-four years.

On appeal, the 11th District found that Zachary Weimer's statement to Gould was not admissible under that exception, because the statement was not made *in furtherance* of the conspiracy. The appellate court reversed Ms. Weimer's convictions for aggravated murder and burglary, finding that the admission of Gould's testimony was prejudicial error. It vacated her conviction for engaging in corrupt activities, finding the evidence insufficient. It affirmed her convictions and sentences on the remaining counts, and remanded the case back for retrial of the aggravated murder and aggravated burglary charges.

## ARGUMENT

**APPELLANT'S PROPOSITION OF LAW NO. 1:** In determining whether a statement by a co-conspirator is non-hearsay pursuant to Evid.R.801(D)(2), a court must look to the totality of the circumstances surround the conspiracy, not the statement in isolation.

Evid.R. 801(D)(2)(e) excepts from the definition of hearsay "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. . ."[4] There is no question that a conspiracy does not necessarily end with the commission of the crime, *State v. Siller*, 8th Dist. No. 80219, 2003-Ohio-1948, ¶28; the conspiracy can continue even after arrest

[4] There is no separate hearsay exception for statements made by persons engaged in a pattern of corrupt activity; for logical reasons, it would appear that such statements would be subsumed within the co-conspirator exception.

because the parties can still attempt to conceal it.

But admission of a statement must still meet the requirement that it be made "in furtherance of" the conspiracy. The courts have consistently held that "in general, a co-conspirator's statements to a third party which simply describe the events that occurred are not made in furtherance of the conspiracy" *State v. Zan*, 2nd Dist. No. 24600, 2013-Ohio-1064, ¶44. See also *State v. Carter*, 72 Ohio St.3d 545, 551 (1995) (admission to police officer not admissible), *State v. Burns*, 5th Dist. No. 10CA130, 2011-Ohio-5926 (cellmate's testimony that one defendant had told him he had testified falsely against the other defendant not admissible); *State v. Braun*, 8th Dist. No. 91131, 2009-Ohio-4875, ¶113 (statements by one co-defendant bragging about the murder not made in furtherance of the conspiracy).

The logic behind this approach is a reflection of reality: one does not further the concealment of a crime by telling other people about it. In the context of this case, this presents a simple question: How did Zachary Weimer's statements to Richard Gould that "he and a buddy" broke into Eleanor Robertson's home further the conspiracy between the Weimers?

Rather than answer that question, the State makes the contention, unsupported by any case law, that Gould's statement must not be considered "in isolation," but in the "totality of the circumstances" and in "the context of the ongoing conspiracy." The State appears to argue that, by virtue of the fact that Zachary stored his letters – which were not only indicative of his guilt but "against jail rules" – in Gould's cell, Gould somehow became a member of the conspiracy, any statements made to him by Zachary were in furtherance of that conspiracy. Memorandum in Support of Jurisdiction, page 6.

This makes no sense. The best indication of the illogic of this position is the assertion that "Zachary confided in Gould *and gained his trust.*" Memorandum in Support of Jurisdiction,

page 7 (emphasis supplied). Zachary did not gain Gould's trust, it was the other way around. The fact that Zachary stored his letters in Gould's cell could certainly be in furtherance of the conspiracy, since that arguably helped conceal evidence of the crime.[5] But that does not make Gould a co-conspirator, and thus a conduit for any statements made to him by Zachary. Even given the "context" and "totality of the circumstances," the simple fact remains that what Zachary told Gould did not further the conspiracy in any way.

The greater difficulty is the logical extension of the State's argument. The problem of false testimony by jailhouse snitches is well-known; according to the Innocence Project, such testimony occurred "in more than 15% of wrongful conviction cases overturned through DNA testing." Understand the Causes, http://www.innocenceproject.org/understand/Snitches-Informants.php, last accessed 9/3/14. The State would expand the use of that testimony to allow it not only against defendants, but against co-defendants as well.

Had a police officer testified that Zachary Weimer told him "he and a buddy" broke into Eleanor Robertson's home, the error in admission of that testimony would be clear. It is no less clear in this case. There is no rational argument to be made that Zachary Weimer's statement to Richard Gould was made in furtherance of any conspiracy, and the overwhelming body of case law rejects it admission. The 11th District correctly applied the law, and the State's argument gives no reason to change that result.

**APPELLANT'S PROPOSITION OF LAW NO. 2:** The proper standard of review for analyzing the admission of evidence is abuse of discretion.

The State argues here that appellate court "appeared to apply a *de novo* review" in

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[5] The letters were in fact admitted at trial.

determining the admissibility of Gould's statement, and should instead have applied an abuse of discretion standard. There are two problems with this argument.

First, while the abuse of discretion standard is appropriate for reviewing a trial court's *factual* determinations, it is not appropriate for reviewing a trial court's *legal* conclusions. This Court, in *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, recently considered a similar situation with regard to merger of allied offenses, holding that while a trial court's determination of whether the crimes were committed with a separate animus was a factual determination deserving of deference, the trial court's determination of the first step of the analysis required by *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1062 – whether the offenses are allied – is a legal question reviewed *de novo*. See also *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71 (in reviewing ruling on motion to suppress, appellate court defers to trial court's factual findings but reviews application of facts to the law *de novo*).

The same applies here. The State raises the same "context" and "totality of the circumstances" argument as it did in the preceding proposition of law, to no more avail: as a *legal matter*, Zachary Weimer's statement to Richard Gould about "his buddy" was not done in furtherance of the conspiracy, because it did nothing to conceal it, and in fact made it more likely to be discovered. There are numerous cases holding that statements to third parties are not done in furtherance of the conspiracy, and thus are not admissible under that exception. That is a matter of law, and should be decided *de novo* by the appellate court.

This points to the second problem with the State's contention: how would a different standard of review changed the result? Again, there is no question that the statement was inadmissible; the State's argument really boils down to the assertion that a trial judge has

discretion to admit evidence that is inadmissible. While there are any number of references in the case law to abuse of discretion being "more than an error of law," that is all *dicta*; this writer has been unable to find a single case where an appellate court found that a trial judge's admission of evidence was error, but nonetheless concluded that the judge had discretion to do so. A decision that is contrary to established law is a decision which is "unreasonable, arbitrary, or unconscionable." The courts had the better argument when they held, "[n]o court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law." *State v. Beechler,* 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶70; *State v. Peterson*, 10th Dist. No. 12AP-646, 2013-Ohio-1807, 992 N.E.2d 425, ¶21.

There is no dispute that Gould's testimony was highly damaging to Ms. Weimer. It changed the issue at trial from whether Zachary Weimer had an accomplice to who that accomplice was, and the State had no difficult fingering the suspect; in closing argument, citing one of the letters Danna Weimer wrote her son, it told the jury

> Again, the tone of the letter, my bear cub forever, you're my best friend forever. You'll always be my buddy. Interesting use of words, buddy. *Especially when you listen to Gould's statement where Zac Weimer said me and my buddy committed this offense.*

If allowing the introduction of highly prejudicial and inadmissible evidence is not an abuse of discretion, it is difficult to see what would be.

**APPELLANT'S PROPOSITION OF LAW NO. 3:** In order to prove the existence of an "enterprise" to sustain a conviction for engaging in a pattern of corrupt activity in violation of R.C. 2923.52, the State is not required to prove that the organization is a structure separate and distinct from the pattern of activity in which it engages.

The State's argument here is that this Court should accept jurisdiction and hold the case for disposition of *State v. Beverly*, Case No. 2013-0827, which is currently pending and presents

the same question presented by the above proposition of law.

Again, though, it is difficult to understand what that would accomplish. There is a world of difference in the facts of *Beverly* and this case. There was no question that Beverly and his co-defendant, Imber, had engaged in a scheme whereby the two would act together in burglarizing homes and later pawning the contents they'd stolen. This resulted in numerous counts of burglary and receiving stolen property committed over a three-month period of time; in fact, in the last day before their arrest the pair committed five separate burglaries.

By contrast, here there was not even an allegation that Zachary and Danna Weimer committed any crimes together before the murder and burglary. To be sure, Danna Weimer's indictment included ten counts of predicate offenses, drug possession and receiving stolen property, which she committed prior to that date. No proof was submitted that Zachary Weimer was *aware* of those offenses, let alone that he participated in them. Zachary Weimer was also charged with engaging in a pattern of corrupt activity; none of the predicate offenses mentioned in Danna Weimer's indictment were included in Zachary's. In fact, the State dismissed the count of engaging in a pattern of corrupt activity against Zachary Weimer prior to trial.

In short, Danna Weimer's conviction of engaging in a pattern of corrupt activity was based on a finding that she was the only participant in the "enterprise." Acceptance of the State's contention would make any family an enterprise for purposes of Ohio's CPA, so long as any member of the family committed a crime. Whatever one believes about the legislature's purpose in promulgating the act, no serious contention can be advanced that any legislator who voted for it would have contemplated it being applied in this scenario.

## CONCLUSION

For the reasons discussed above, this case does not present a matter of public or great general interest, or a substantial constitutional question. Appellee respectfully requests the Court to decline jurisdiction.

Respectfully submitted,

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## SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Opposition to Jurisdiction was sent by ordinary U.S. mail, postage prepaid, to Teri R. Daniel, Assistant Prosecuting Attorney, Administration Bldg., 105 Main St., P.O. Box 490, Painesville, OH 44077, this 3rd day of September, 2014.

Russell S. Bensing