Supreme Court of Ohio Clerk of Court - Filed June 12, 2019 - Case No. 2019-0726

NO. 19-0726

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 106988

STATE OF OHIO,

Plaintiff-Appellee

-vs-

James Copeland

Defendant-Appellant

STATE OF OHIO'S MEMORANDUM IN RESPONSE TO JURISDICTION

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THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A MATTER OF GREAT AND GENERAL PUBLIC INTEREST

The offenses of Felonious Assault and Discharging a Firearm On or Near Prohibited Premises are offenses of dissimilar import. Each offense affects separate victims, and the harm that results from each offense is separate and identifiable. This Honorable Court has made it clear that "when [a] defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable," the offenses constitute offenses of dissimilar import within the meaning of R.C. § 2941.25(B) and do not merge for the purposes of sentencing. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph two of the syllabus.

In *State v. Carzelle,* 8th Dist. Cuyahoga No. 105425, 2018-Ohio-92, the Eighth District Court of Appeals held that Felonious Assault and Discharge of a Firearm On or Near Prohibited Premises are not allied offenses of similar import. Quoting *Ruff,* the court recognized that when a "defendant's conduct put more than one individual at risk, that conduct could support multiple convictions because the offenses were of dissimilar import." *Id.,* at ¶ 9, quoting *Ruff,* at ¶ 23. The Eighth District held that these convictions did not merge because "[t]he resulting harm of [the defendant's] felonious assault conviction was the gunshot to [the victim's] face" and "[t]he resulting harm [of the defendant discharging a firearm on or near prohibited premises] was to the public." *Id.,* at ¶ 10. *See, State v. James,* 8th Dist. Cuyahoga No. 102604, 2015-Ohio-4987, ¶ 34 (recognizing that "[b]ecause the offense of discharging a firearm over a public road or highway is a strict liability offense, the public was the victim for that offense.")

Each offense relates to a separate and identifiable victim: 1.) the individual injured as a result of the Felonious Assault, and 2.) the public as a result of the prohibiting shooting. Also, each harm is identifiable. The Felonious Assault results in the injury to a named individual, while a violation of Discharging a Firearm On or Near Prohibited Premises results in placing the public at risk, which is exactly the type of harm the latter offense was designed to prevent. As such, the lower courts determination that these offenses are of dissimilar import falls in line with this court's analysis set forth in *Ruff.*

Copeland is also asking this Honorable Court to review whether the evidence presented at trial was sufficient to support jury instructions concerning "flight" and "complicity." As the Eighth District recognized, the evidence presented below supports both instructions. Copeland merely disagrees and is asking this Honorable Court to engage in nothing more than an error correction analysis.

Finally, Copeland challenges the competency of his appellate counsel. The Ohio Rules of Appellate Procedure provide Copeland with a mechanism to do so. He has chosen not to utilize that mechanism. App.R. 26(B) specifically allows for a defendant in a criminal case to apply for a reopening of their appeal based on ineffective assistance of appellate counsel. "An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

"It is an established rule of long-standing in this state that a criminal constitutional question can not be raised in the Supreme Court unless it is presented and urged in the court below." *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 (1977). *See also City of Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965), paragraph two of the syllabus

(this Court "will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court").

Since Copeland could have challenge the effectiveness of his appellate counsel utilizing the provisions set forth in App.R. 26(B), this Honorable Court should not entertain this argument now.

Copeland does not present this Honorable Court with a substantial constitutional question or a matter of great and general public interest. Rather, he is merely requesting this Court to review the court of appeals decision. It is for this reason that this Court should deny jurisdiction over this case.

STATEMENT OF THE CASE AND RELEVANT FACTS

The court of appeals sufficiently laid out the statement of this case and the relevant facts in its decision affirming Copeland's convictions and sentences, *State v. Copeland ("Opinion"),* 8th Dist. Cuyahoga No. 106988, 2019-Ohio-1370:

> **¶ 2** On May 17, 2017, the Cuyahoga County Grand Jury indicted Copeland and his codefendant, Kenneth Sims, on two counts of murder in [**2] violation of R.C. 2903.02(A) and (B); two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2); one count of discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3); and one count of having weapons while under disability in violation of R.C. 2923.13(A)(2). The murder and felonious assault charges carried one- and three-year firearm, notice of prior conviction, and repeat violent offender specifications. Additionally, the having weapons while under disability count carried one- and three-year firearm specifications.
>
> **¶ 3** Copeland pleaded not guilty to the charges and waived his right to a jury trial for the having weapons while under disability charge, as well as the repeat violent offender and notice of prior conviction specifications attached to the murder and felonious assault charges. The case proceeded to trial, during which the state presented testimony from 20 witnesses and Copeland presented testimony from one witness.

¶ 5 According to testimony presented at trial, Copeland, Erica Moore, and another male went to the home of Neyda Barnes, William Earl's mother, in the early afternoon on May 5, 2017, looking for Earl. Earl had earlier agreed to buy a car at an auction for Moore in exchange for money, and Moore expected the car to be ready on May 5. Earl was not at Barnes's house when they arrived, and according to Barnes, Copeland became upset and began acting aggressively toward her. Barnes testified that she went back and forth with Copeland until she saw "the gun on the side of him[,]" and she immediately "shut up * * * [and] got really nervous" and that Copeland told her that she "could be got just like anybody else could be got." Barnes explained that she took that as meaning that "[h]e could kill [her] just like he could kill anybody else[.]" Barnes stated that the conversation ended after Moore calmed Copeland down and that Copeland, Moore, and the other gentleman left in the car, driving in reverse down the street so that she did not "see the license plate."

¶ 6 A short time later, Earl arrived at his mother's house with his fiancée and mother of his three children, Maleika Gooden. After Earl found out what happened, he left with Gooden, Tyrone Washington, and Jesse Green and went to Moore's house. Gooden testified that she had a 9 mm firearm in her purse that day.

¶ 7 When they arrived at Moore's house, Earl went up to the front porch and asked Moore about the men who accompanied her earlier. During that conversation, Kenneth Sims, Moore's cousin, exited the house, and Earl asked if Sims was one of the guys that she took with her, but Sims said he was not. Gooden said that as Earl spoke to Moore, Sims pulled her aside and "lifted up his shirt and showed [her] that he had a weapon" and told her that Moore felt as if Earl and Gooden had "finessed her out of $1,500." Gooden then got into a "heated argument" with Moore about the car deal.

¶ 8 Eventually, Earl told Gooden, Washington, and Green they were leaving, and they all got back in the car. As Earl walked toward the driver's seat, he was still arguing with Moore's other cousins, who were on the porch of the house next door. A number of witnesses testified that during this time, they saw Copeland and another male walking down the street toward Earl. Witnesses stated that they heard Copeland say something to Earl along the lines of "either * * * 'I'm here or I'm him'" or "What's up now?"

¶ 9 Within moments, gunfire started. Both Gooden and Kenneth Sims testified that they saw Copeland and the other male shooting at Earl. While witnesses also testified that they saw Earl shooting back, Gooden testified that she never saw Earl with the gun and did not see him shoot or point a gun that day. She

also said that the 9 mm firearm that the police recovered was hers and that she typically kept it in her purse. She said that the 9 mm firearm ended up on the ground underneath the car because she "fumbl[ed]" it after hearing the first shots. Sims also admitted that he had a gun — a "380" — on him at that time and that his gun "went off" but that he was not shooting at anybody. He explained that his gun went off because he "hit the ground" after the shots started with his gun in hand.

¶ 10 After the gunfire stopped, Copeland, the other male with Copeland, and Sims "all took off running" together through a neighboring backyard. Sims stated that he ran because he "was on probation at the time" and was not supposed to have a gun. He said that while running from the scene, he asked Copeland what happened and that Copeland responded, "It was your cousin['s] fault." He said after a couple minutes of running, he split from Copeland and the other guy who continued to run in the same direction together.

¶ 11 Police arrived soon after and interviewed a number of witnesses. Gooden identified Copeland as "one of the guys who walked up to Baldwin [Avenue] before the shots were fired." She stated that while she did not write that Copeland was one of the shooters on the photo array, she was "in distress" and that she did see Copeland shoot. She also testified that she identified Sims's nephew, Jamir Brown, as being present during the shooting in a photo array, on which she wrote "[s]een the hand and arm of the guy with the blue hoodie and heard shots and fire." During trial, however, Gooden testified that she did not recall seeing Brown fire a weapon.1

¶ 12 Moore said she saw Earl shooting a gun, but that she did not see Copeland or Sims with a gun. She also said she did not see Gooden, Brown, or Washington with a gun. She explained that while Earl was "not the only person that shot * * * [he was] the only one that I saw with a gun."

¶ 13 During a photo lineup, Tyrone Washington identified Copeland and wrote that he "remember[ed] seeing him on Knowles [Avenue]."

¶ 14 Sims turned himself into Cleveland police a few days later, but during his initial interviews, he said that he was not truthful and lied about the incident because he was "scared" and on probation. Sims explained that he told detectives that Copeland was one of the shooters, but that officers failed to include that information in their report. Sims identified Copeland as one of the individuals shooting and said he was wearing "a blue jacket and some dark pants." He said he did not know the second individual with Sims, but had seen that individual with Copeland before. Sims also denied that he told a

corrections officer at the jail, Brandon Gordon Wheat, that he, not Copeland, shot Earl while he was being detained.

¶ 15 Detective Joseph Marche testified that police "knew that there were at least two to three other firearms [other than the one police recovered near Earl's body] * * * due to the fact that there [were] two different shell casings on the scene." He explained that there were "shell casings from a 380 handgun and a 9 millimeter so that's what brought [police] to the conclusion that there was possibly two other firearms that were involved."

¶ 16 Police arrested Copeland a few days later and collected the blue Nautica jacket that he was wearing.

¶ 17 Curtiss Jones, a supervisor for the Cuyahoga County Medical Examiner's Office's trace evidence unit, testified that he performed a gunshot residue test on a blue Nautica jacket that Copeland was wearing the day policearrested him. He said that he collected residue from the sleeves and cuffs of the jacket and that it came back positive. Jones testified that Earl's hands came back positive for gunshot residue. He also said that there were no gunshot residue particles found from the kits collected from Jamir Brown and Theodore Jackson, Sims's stepfather. He said the kit taken from Gooden came back positive for gunshot residue. He said he did not receive a kit for Tyrone Washington.

¶ 18 On cross-examination, Jones agreed that he was not able to establish when gunshot residue particles came to exist on a surface and that finding gunshot residue does not necessarily mean that an individual has recently fired a gun. He also agreed that one could test positive for gunshot residue simply by being in close proximity to another individual firing a gun.

¶ 19 Erica Armstrong, a deputy medical examiner forensic pathologist for the Cuyahoga County Medical Examiner's Office, performed Earl's autopsy. She said that Earl suffered three gunshot wounds to his left chest, left abdomen, and right foot and that the manner of death was homicide and that Earl died as a result of the gunshots.

¶ 20 The state then rested its case, and Copeland moved for an acquittal under Crim.R. 29, which the trial court denied.

¶ 21 Copeland then called his sole witness, Brandon Gordon Wheat, who was a Cleveland corrections officer in May 2017. Wheat testified that he knew Kenneth Sims prior to his incarceration because they went to the same grade

school. Wheat testified that while Sims was incarcerated, Sims said, "I shot him" three to four times. Wheat believed that Sims was referring to Earl.

¶ 22 Copeland then rested and renewed his Crim.R. 29 motion, which the trial court again denied.

¶ 23 The jury found Copeland not guilty of murder under R.C. 2903.02(A) and (B) and felonious assault under R.C. 2903.11(A)(1). The jury found Copeland guilty, however, of felonious assault in violation of R.C. 2903.11(A)(2) and the attached one-year firearm specification, but not guilty of the three-year firearm specification. The trial court found Copeland guilty of the repeat violent offender and notice of prior conviction specifications attached to that felonious assault count. The jury also found Copeland guilty of discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3). The trial court found Copeland guilty of having weapons while under disability in violation of R.C. 2923.13(A)(3) and the attached one-year firearm specification, but not guilty of the three-year firearm specification.

¶ 24 At sentencing, the trial court found that Copeland's convictions for felonious assault and having weapons while under disability did not merge. After hearing arguments from both sides, the trial court also found that Copeland's convictions for felonious assault and discharge of a firearm on or near prohibited premises did not merge either.

¶ 25 The trial court sentenced Copeland to five years for felonious assault and one year for the firearm specification; eight years for discharging a firearm on or near prohibited premises; and three years for having weapons while under disability and one year for the firearm specification. The court ordered that all of those terms run consecutively to one another, giving Copeland an aggregate prison term of 18 years. The trial court also advised Copeland that he was subject to five years of mandatory postrelease control for his conviction for discharging a firearm on or near prohibited premises, three years of mandatory postrelease control for his felonious assault conviction, and three years of discretionary postrelease control for his conviction for having weapons while under disability.

Opinion, at ¶¶ 3 – 25.

Copeland appealed. On appeal, Copeland raised four assignments of error challenging the court's decision to instruct the jury with a flight instruction, the court's instruction on complicity, allied offenses, and that the convictions were against the manifest weight of the

evidence. The Eight District Court of Appeals rejected Copeland's arguments and affirmed the trial court's judgment. *See, Opinion.*

On May 28, 2019, Copeland filed a Notice of Appeal and a Memorandum in Support of Jurisdiction asking this Honorable Court to grant jurisdiction over the instant case. He presents the following proposition of law:

> *APPELLANT'S PROPOSITION OF LAW I*: The trial court's refusal to merge felonious assault and discharge of a firearm on or near a prohibited premises as allied offenses of similar import deprived Appellant of his constitutional due process rights.
>
> *APPELLANT'S PROPOSITION OF LAW II*: The trial court's constitutionally-defective jury instruction with regard to Appellant's "complicity" in the decedent's shooting and "flight" from the gunfire unfairly prejudiced his right to due process.
>
> *APPELLANT'S PROPOSITION OF LAW III:* Appellant counsel rendered ineffective assistance by omitting assignments of error for (1) trial counsel's failure to submit key evidence to the jury and (2) prosecutorial misconduct.

The State responds, requesting this Honorable Court to deny jurisdiction over the instant case, as this case does not present a substantial constitutional question nor a matter of great and general public interest.

LAW AND ARGUMENT

> ***APPELLANT'S PROPOSITION OF LAW I*:** The trial court's refusal to merge felonious assault and discharge of a firearm on or near a prohibited premises as allied offenses of similar import deprived Appellant of his constitutional due process rights.

Felonious Assault and Discharge of a Firearm On or Near a Prohibited Premises are not allied offenses of similar import. The offenses involve separate victims, thereby resulting in offenses of dissimilar import. *See, State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892. As such, this Honorable should deny jurisdiction over Copeland's first proposition of law.

R.C. § 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, this Honorable Court held that when "determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors—the conduct, the animus, and the import." *Id.,* paragraph one of the syllabus. This Court made clear that if the two offenses involved separate victims or if the harm that results from each offense is separate and identifiable, the offenses will be considered of dissimilar import and will not merge. *See id.* at paragraph two of the syllabus. As such, animus is no longer the only consideration that a court must consider.

In support of its position, the Eighth District relied on its decision in *State v. Carzelle. I*n *State v. Carzelle,* 8th Dist. Cuyahoga No. 105425, 2018-Ohio-92, the Eighth District Court of Appeals held that Felonious Assault and Discharge of a Firearm On or Near Prohibited Premises are not allied offenses. Quoting *Ruff,* the court recognized that when a "defendant's conduct put more that one individual at risk, that conduct could support multiple convictions because the offenses were of dissimilar import." *Id.,* at ¶ 9, quoting *Ruff,* at ¶ 23. Based on that, the court held that these convictions did not merge because "[t]he resulting harm of Carzelle's felonious assault conviction was the gunshot to [the victim's] face" and "[t]he

resulting harm [of the defendant discharging a firearm on or near prohibited premises] was to the public." *Id.,* at ¶ 10. *See, State v. James,* 8th Dist. Cuyahoga No. 102604, 2015-Ohio-4987, ¶ 34 (recognizing that "[b]ecause the offense of discharging a firearm over a public road or highway is a strict liability offense, the public was the victim for that offense.")

Copeland alleges that this reasoning is "inconsistent with the precepts of [*Ruff*]." Appellant's Memorandum in Support, at pg. 8. In support of his argument, he cites a number of cases that were decided prior to this court's decision in *Ruff.* Prior to *Ruff,* this Honorable Court held that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under O.R.C. 2941.25, the conduct of the accused must be considered." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 44. *Ruff* has since made clear that this is only one of three factors a court may consider, holding that courts must evaluate three separate factors—the conduct, the animus, and the import." *Ruff,* paragraph one of the syllabus. Interestingly, Copeland cites no authority, post *Ruff,* in support of his position.

This Court has made clear that if the two offenses involved separate victims or if the harm that results from each offense is separate and identifiable, the offenses will be considered of dissimilar import and will not merge. *Ruff,* at paragraph two of the syllabus. As such, the Eighth District correctly held that Copeland's convictions for Felonious Assault and Discharge of a Firearm On or Near a Prohibited Premises involved separate victims, resulted in separate harms, and constitute offenses of dissimilar import. As such, this Honorable Court should deny jurisdiction over Copeland's first proposition of law.

***APPELLANT'S PROPOSITION OF LAW II*:** The trial court's constitutionally-defective jury instruction with regard to Appellant's "complicity" in the decedent's shooting and "flight" from the gunfire unfairly prejudiced his right to due process.

In a criminal case, when jury instructions are requested, the instruction must be given when they are "correct, pertinent, and timely presented." *State v. Howard,* 8th Dist. Cuyahoga No. 100094, 2014-Ohio-2176, ¶ 35, quoting *State v. Joy,* 74 Ohio St.3d 178, 181, 657 N.E.2d 503 (1995). It is within the sound discretion of a trial court on whether to give the requested jury instruction. As such, a reviewing court reviews the granting of the challenged jury instruction under an abuse of discretion standard. *See Howard, supra,* at ¶ 35. Such an abuse occurs when the trial court's decision is "unreasonable, arbitrary, or unconscionable." *Bowman v. Cuyahoga Cnty. Fiscal Officer,* 8th Dist. Cuyahoga No. 102492, 2015-Ohio-2866, ¶ 9, citing *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

A. Complicity Instruction

"A person aids or abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime and shares the criminal intent of the principal." *State v. Langford,* 8th Dist. Cuyahoga No. 83301, 2004-Ohio-3733, ¶ 20, citing *State v. Johnson,* 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796. "Aiding or abetting may be shown by direct or circumstantial evidence" and the intent to aid or abet "may be inferred from the circumstances surrounding the crime." *Opinion,* at ¶ 42.

Copeland submits that the evidence present at trial was "insufficient to support the Sims-complicity theory as instructed by the trial court." Appellant's Memorandum in Support at pg. 13. He is mistaken. In rejecting this assertion, the lower court reasoned:

> Copeland participated in the gun battle and instigated the entire dispute by first threatening Barnes with a gun and then showing up to Moore's home.

> Further, a number of other witnesses testified that, moments before the shooting began, they saw Copeland walking down the street toward Earl with another individual and that Copeland told Earl that he was the individual who went to Earl's mother's house. That evidence undermines Copeland's argument that he was "merely walking down the street."
>
> [W]e do agree with Copeland that there was not sufficient evidence that he aided or abetted Sims; however, there was sufficient evidence that he aided or abetted the unidentified individual who was with him when he walked down Baldwin Avenue. While Copeland is correct that there was not "evidence of discussions at the scene regarding a concerted effort of those present to shoot William Earl[,]" Copeland and the unidentified male arrived together with firearms and both shot at Earl after approaching him and informing Earl that they were the ones who confronted Earl's mother earlier that day. Sims testified that he saw Copeland "and the guy that was walking with him" shooting at Earl and that Earl was shooting back at them. He said he saw both Copeland and the male both shoot "a few" times and that after the shooting, both Copeland and the male ran together in the same direction. Similar to *Hoston* and *Capp*, the evidence shows that Copeland "supported [or] assisted" the unidentified male by participating in the gun battle against Earl. The lack of an express agreement between Copeland and the unidentified male is not determinative of complicity; instead, their concerted actions against Earl establish their support and assistance of one another. Further, the fact that the unidentified male walking with Copeland was not charged does not prevent Copeland from being charged or convicted of complicity with that individual. *See State v. Lamarr*, 3d Dist. Logan No. 8-04-39, 2005-Ohio-6030, ¶ 8 ("[I]n order to convict a defendant as an accomplice, the State need not prove who the principal offender was but only that there was *a* principal." (Emphasis sic.))

Opinion, at ¶¶ 46 - 47.

Given the evidence presented at trial, the court of appeals correctly determined that there was sufficient evidence to support a jury instruction on complicity.

B. Flight Instruction

The jury instruction on flight in the case at bar was also warranted. Flight has been defined as "some escape or affirmative attempted to avoid apprehension." *State v. Hill,* 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, ¶ 49. As such, a trial court does not abuse its

discretion in giving an instruction on flight and consciousness of guilt "if there is sufficient evidence presented at trial that the defendant attempted to avoid apprehension." *Id.*

Even if a reviewing court determines that a jury instruction had been erroneously given, a conviction in a criminal case will not be reversed unless the jury instructions constituted prejudicial error. *State v. Jackson,* 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, ¶ 49. When determining "whether an erroneous jury instruction was prejudicial, a reviewing court must examine the jury instructions as a whole." *Id.* Prejudice will occur only when it results in a manifest miscarriage of justice. *Id.* As a result, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." *Id.,* quoting Crim.R. 52(A).

Here, the evidence presented at trial clearly supported a jury instruction on flight. As the lower court explained:

> [T]he state presented evidence that Copeland as well as a number of other individuals present during the shooting fled the scene. Specifically, Sims testified that after the shooting, he, Copeland, and the unidentified male who arrived with Copeland, "all took off running" together through a neighboring backyard and that Copeland and the other male eventually split from Sims and ran together in another direction.
>
> Put simply, * * * the trial court's flight instructions allowed the jury to determine if Copeland fled the scene to avoid police or for his own safety to avoid being shot. Therefore, we find that the trial court did not abuse its discretion, and we overrule Copeland's first assignment of error.

Opinion, at ¶¶ 34 -35.

The evidence presented at trial supported both jury instructions and flight and complicity. Copeland merely disagrees and is asking this Honorable Court to engage in

nothing more than an error correction analysis. It is for these reasons that this court should reject his second proposition of law.

> ***APPELLANT'S PROPOSITION OF LAW III:*** Appellant counsel rendered ineffective assistance by omitting assignments of error for (1) trial counsel's failure to submit key evidence to the jury and (2) prosecutorial misconduct.

In his third proposition of law, Copeland alleges that his appellate counsel was ineffective. Ohio Rules of Appellate Procedure, Rule 26(B) specifically allows for a defendant in a criminal case to apply for a reopening of their appeal based on ineffective assistance of appellate counsel. "An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). Copeland has failed to utilize this mechanism. Instead, raising the issue on appeal to this court. As such, it is not properly before the court at this time.

"It is an established rule of long-standing in this state that a criminal constitutional question can not be raised in the Supreme Court unless it is presented and urged in the court below." *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 (1977). *See also City of Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965), paragraph two of the syllabus (this Court "will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court").

Here, Copeland could have raised this issue via the mechanism supplied by the Ohio Rules of Appellate Procedure. He chose not to, and the Eighth District was without an opportunity to address the issues raised. Since Copeland can raise this issue in the lower court and has failed to do so, this court should deny jurisdiction over his third and final proposition of law.

CONCLUSION

Copeland does not present this Honorable Court with a substantial constitutional question or a matter of great and general public interest. Rather, he is merely requesting this Court to review the court of appeals decision. It is for this reason that this Court should deny jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response has been sent via U.S. regular mail this the 12th day of June, 2019, to:

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