

IN THE OHIO SUPREME COURT

Supreme Court Case No. _____

STATE OF OHIO

Appellant

v.

SYDNEY NICOLE POWELL

Appellee

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District
Court of Appeals No. 30910

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, STATE OF OHIO**

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EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED

The Ninth District Court of Appeals reversed Appellee Sydney Powell's murder conviction based on its erroneous conclusion that she had the "unconditional right" to present sur-rebuttal expert testimony that was cumulative to the extensive expert testimony she already elicited in her case-in-chief. Indeed, the proposed sur-rebuttal expert testimony related only to issues that Powell raised in her own cross-examination of the State's expert witness. *State v. Powell*, 2024-Ohio-6013, ¶ 26 (9th Dist.). By issuing its decision, the Ninth District broke with more than a century of precedent, vacated a murder conviction entered by a jury after hearing extensive testimony during an eight-day trial, and issued inaccurate guidance to trial courts suggesting that criminal defendants have an unconditional right to present sur-rebuttal evidence whenever they assert an affirmative defense. Thus, this Court should accept the State's appeal from the Ninth District's outlier decision so that it can clarify the appropriate scope of a defendant's right to present expert testimony in the sur-rebuttal portion of a jury trial.

This matter relates to a murder that occurred on March 3, 2020 at the victim's residence in Akron, Ohio. Powell repeatedly beat her mother, B.P., with a frying pan in her parents' bedroom before going to the kitchen, getting a kitchen knife, and returning to repeatedly stab B.P. 23 times in the neck. Unfortunately, B.P. died from the attack.

Powell immediately began to cover her tracks. During the attack, B.P. received a phone call that Powell answered by pretending to be her. Police were called to the house, but Powell fabricated a new story—that someone had broken into the house and attacked B.P. Covered in her mother's blood, she even broke a window at the house and left a slider door open in a ploy to conceal what she had done.

When Powell's story came undone again and police discovered that she committed the murder, she moved to a claim of insanity based on a diagnosis of schizophrenia. The case proceeded to a jury trial. After the State presented evidence regarding Powell's actions, she presented testimony from three expert witnesses in her case-in-chief to attempt to carry her burden of establishing insanity. The State rebutted Powell's evidence with the testimony of a different psychological expert who opined that Powell was not suffering from schizophrenia at the time of the offense and that she did not satisfy the legal standard for an insanity defense.

Then, Powell requested a rarity—to recall her expert witnesses who had already provided over 250 pages of testimony to address issues that were raised during her own cross-examination of the State's expert witness. In essence, Powell requested the ability to re-present cumulative evidence, reopen her case, and counter evidence that she elicited in her own cross-examination of the State's witness. The trial court properly rejected Powell's request for such an extraordinary action, reasoning that the jury had already heard extensive evidence regarding her insanity claim. *See* R.C. 2945.10 (outlining order of presentation of evidence at trial without providing for sur-rebuttal).

On appeal, the Ninth District departed from well-established precedent to conclude that the trial court's decision was an abuse of discretion. *See State v. Spirko*, 59 Ohio St.3d 1, 28 (1991) ("A court does not, *ipso facto*, abuse its discretion in denying a criminal defendant the opportunity to present surrebuttal testimony."). It has now issued a decision that arguably directs trial courts in four counties of this state to always grant criminal defendants the right to re-present evidence in the sur-rebuttal portion of a trial whenever they present an affirmative defense. This Court should take this case to clarify that such direction is inappropriate under long-standing trial practice rules.

Additionally, the Ninth District compounded its erroneous reasoning about a criminal defendant's "unconditional right" to present sur-rebuttal evidence by failing to consider whether the denial of sur-rebuttal evidence in this matter constituted harmless error. This Court and several appellate courts have applied harmless-error review when defendants have raised appellate challenges to the denial of sur-rebuttal evidence. *E.g.*, *Spirko* at 29; *State v. Moore*, 2012-Ohio-3604, ¶ 10 (2d Dist.); *State v. Baksi*, 1999 WL 1299297, *8 (11th Dist. Dec. 23, 1999); *State v. Blanton*, 111 Ohio App 111, 120 (4th Dist. 1960). Thus, this Court should accept the State's appeal to clarify that appellate courts must apply harmless-error review when considering whether to reverse a jury's guilty verdict based on the trial judge's denial of sur-rebuttal evidence.

This murder case, heard by a jury of Powell's peers over the span of two weeks, is a matter of great public and general interest. The Ninth District's erroneous decision not only undoes the deliberative work of those jurors but also has the potential to serve as a vehicle to entirely rewrite the order of trials throughout the State of Ohio. This Court should not let that decision stand, clarify the legal issues involved, and accept jurisdiction to review the two propositions of law proposed below.

STATEMENT OF THE CASE AND FACTS

At trial, the following facts were established to produce Powell's convictions.

I. Powell Is Suspended from University of Mount Union and Refuses to Tell Her Parents.

After graduating from an Akron-area Catholic high school, Powell enrolled at the University of Mount Union in 2018. (Trial Tr., p. 342.) During her first two semesters at Mount Union, Powell developed academic problems and was placed on probation. When she was unable to improve her academic standing in the Fall 2019 semester, Mount Union suspended her and unenrolled her from classes. (State's Exhibits 3, 4.) Powell did not inform her friends or her parents about her academic probation or suspension. (Trial Tr., p. 342-345, 524.)

Although she was unenrolled from classes, Powell still reported to Mount Union's campus at the beginning of the Spring 2020 semester like nothing had changed. (*Id.* at 523-524.) Her friends noticed, though, that Powell's name tag was removed from outside of her dorm room, and that she did not attend as many sorority events as she had in the past. Still, Powell refused to disclose her unenrollment. Instead, she continued to follow the same routine of living in her dorm room and leaving for classes. Powell explained away those differences to her friends by saying that there was some "confusion" with the university. (*Id.* at 523-527.)

Mount Union officials soon found out that Powell was still living in the dorm. Michelle Gaffney, an administrator with the university's student life department, contacted Powell and had a meeting to address her failure to move out of campus housing. During that meeting, Powell first claimed that she was still a student and that the situation was worked out with her professors. But, Ms. Gaffney confirmed in her records that Powell was not being truthful and Powell eventually acknowledged that she was indeed suspended. (*Id.* at 407-409.)

Late in February 2020, Ms. Gaffney again learned that Powell still had not moved out of campus housing. She confronted Powell at her dorm and offered to call her parents to assist Powell with disclosing the suspension to them. But, Powell “did not want us to, she absolutely did not want us to do that.” (*Id.* at 417.) After a third meeting, Powell finally moved out of her dorm room, and explained that she was going to live at home. (*Id.* at 418.) Despite moving out of the dorm and being suspended from Mount Union, Powell still failed to inform her parents of her situation.

II. Powell Murders B.P. and Tries to Conceal Her Actions.

During the morning hours of March 3, 2020, Powell’s father, Steven Powell, learned that he could not log into Mount Union’s online system for tuition payments. He called Mount Union and learned, finally, that Powell was no longer enrolled at the university. (*Id.* at 350-352.) Because of a family tracking app on his phone, Steven knew that Powell was home at that time, so he drove there to confront her about the situation. He then called B.P., who left work to also tend to Powell. (*Id.* at 354-357.) Steven left the house around 11:30 a.m. before B.P. arrived.

B.P. called Mount Union and left a phone message asking, “how could [Powell] become unenrolled[?]” The assistant who took the message noted that B.P. was sitting next to Powell during the message because she could hear them talking. (State’s Exhibit 5.) Ms. Gaffney and John Frazier, Mount Union’s Dean of Students, called B.P. back upon receiving the message. Mr. Frazier testified as follows about what happened after he made that call:

And when [B.P.] answered, I introduced myself. I said, “[B.P.], this is John Frazier. I’m returning your call from the University of Mount Union. And [Ms. Gaffney] spoke up and said, I said my associate dean is with me. And [Ms. Gaffney] said hello. [B.P.] said, thank you, I believe.

And before the conversation could go beyond that, you know, we heard like a thump. And I can’t describe it really accurately, but it was like a guttural noise or an exhale. And it sounded like the phone dropped.

Subsequent to that, you know, I heard what I would describe as a number of thumping sounds that went on for, I don't know, maybe 15 seconds or so. And then I heard, you know, like screaming and crying. And the screaming and crying you know, sounded like it got farther and farther away from the phone, and then ultimately came back to the phone.

And when the screaming and crying got closer to the phone, then I heard several, I wouldn't describe them as thumps, but they sounded like you know, like a hard item hitting something, right?

(*Id.* at 459.) The call dropped, so Mr. Frazier attempted to call B.P. back. His first two attempted phone calls were unanswered. But, he described the third call as follows:

On the third attempt, the phone was picked up and she said, I heard someone say hello, this is [B.P.] and I knew it wasn't [B.P.] And I said, this is not [B.P.] I said, Sydney, is that you? And click, the phone hung up again.

(*Id.* at 460.) Sensing danger from the phone calls, the Mount Union officials called the Akron Police Department to request a welfare check at the Powell residence.

Steven heard from his friend in the Akron Police Department that there was a welfare call dispatched for his residence. In response, he called Powell who initially told Steven that B.P. was on the phone with Mount Union. When he explained that the police were called to the house, Powell "got hysterical and said someone had broken into the house." (*Id.* at 359-360.)

Police responded and discovered that one of the back windows at the residence was broken and a slider door was open. (*Id.* at 242.) As with her lies to her father, Powell again repeated to a responding officer that someone had broken into the house and that Powell found B.P. on the ground. (*Id.* at 265-267.) Investigating officers found B.P.'s body in the bedroom with a significant amount of blood loss. (*Id.* at 245-247.) A kitchen knife and frying pan were found near her body and identified as the murder weapons. (State's Exhibits 10, 11.) Several samples were taken from blood evidence at the scene and submitted to the Ohio Bureau of Criminal Investigation for analysis. That analysis found Powell's and B.P.'s DNA in several of the samples. (State's Exhibit 8.)

B.P.'s body was removed from the scene and sent to the Medical Examiner's Office for an autopsy by Chief Deputy Medical Examiner Robert Schott. Dr. Schott noted "many stab wounds and several incised wounds, primarily on the neck and lower face." (Trial Tr., p. 494.) He specifically found the following: 23 separate stab wounds and three incised wounds on the front and side of neck, and four stab and two incised wounds on the left shoulder, left arm, and left hand. Those wounds caused injuries to the jugular veins and carotid arteries, which led to death by loss of blood to the brain. (*Id.* at 494-495.) He concluded that the cause of death was "multiple sharp and blunt force injuries" and that the manner of death was "homicide." (*Id.* at 499.)

III. Powell Claims That Her Actions Were Due to a Severe Mental Disease.

Powell quickly abandoned her claim of a break-in leading to B.P.'s murder and asserted an insanity defense. She presented opinions from three retained experts, Dr. James Reardon, Dr. Thomas Swales, and Dr. Robin Belcher-Timme, as well as testimony from her treating psychiatrist, Dr. Anthony Smartnick, in support of her claim.

The State rebutted her claim with the expert report of Dr. Sylvia O'Bradovich, a psychologist with Summit Psychological Associates. (State's Exhibit 19.) She noted that the clinical expert opinions from Powell's experts were based on accepting Powell's word during clinical interviews as well as psychological testing that occurred years after the offenses occurred while hers were not. (Trial Tr., p. 1044-1045.) Based on her review of the extensive records associated with this matter, Dr. O'Bradovich concluded that Powell was not suffering from a severe mental disease at the time of the murder and that she did appreciate the wrongfulness of her actions. (State's Exhibit 19, p. 24-25.) The State also elicited testimony that Powell had

never demonstrated psychotic symptoms before the murder and that even the evening before the murder, Powell was acting “normal” during a gathering with friends. (Trial Tr., p. 360, 538-539.)

The Summit County Grand Jury indicted Powell on two counts of Murder, one count of Felonious Assault, and one count of Tampering with Evidence. The jury found Powell guilty of all four counts. The trial court imposed a life prison term with parole eligibility after 15 years.

On appeal, Powell raised four assignments of error, including one relating to the denial of her request to present sur-rebuttal testimony in the form of testimony from her same expert witnesses. The Ninth District Court of Appeals sustained the assignment of error relating to the denial of sur-rebuttal testimony, did not address the other three assignments of error as moot, reversed Powell’s convictions, and remanded the matter to the trial court for further proceedings. *Powell*, 2024-Ohio-6013, at ¶ 28 (9th Dist.). The State now seeks this Court’s review.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I

A Criminal Defendant Does Not Have an Unconditional Right to Recall Expert Witnesses in the Sur-Rebuttal Portion of a Trial.

In 1871, this Court declared: “The practice of recalling witnesses for the purpose of repeating, by assuming the name and character of rebutting, is, to say the least, reprehensible.” *Morris v. Faurot*, 21 Ohio St. 155, 161 (1871). From that genesis, in 1953, the General Assembly statutorily defined the proper order of criminal trial proceedings as follows:

- (A) Counsel for the state must first act for the prosecution, and may briefly state the evidence by which the counsel for the state expects to sustain it.
- (B) The defendant or the defendant’s counsel must then state the defense, and may briefly state the evidence which the defendant or the defendant’s counsel expects to offer in support of it.
- (C) The state must first produce its evidence and the defendant shall then produce the defendant’s evidence.
- (D) The state will then be confined to rebutting evidence, but the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.

R.C. 2945.10. This statutory provision is plain and unambiguous that a criminal defendant does not have the right to present sur-rebuttal evidence, as Ohio courts have long recognized. *See, e.g., State v. Blanton*, 111 Ohio App. 111, 120 (4th Dist. 1960) (“This statute contains no provision for sur-rebuttal or rejoinder testimony whichever you choose to call it.”). That is the case even when the defendant decides to present an affirmative defense for which he carries the burden. *See, e.g., State v. Burge*, 1995 WL 29206, *6 (2d Dist. Jan. 25, 1995) (holding that the defendant’s self-defense claim did not render the “trial court’s decision to follow the statutory order of proceedings” as “fundamentally unfair”).

Despite this firmly-established understanding of the order of criminal trials in Ohio, and indeed throughout the nation, the Ninth District decided that Powell had the unconditional right to present sur-rebuttal testimony in this matter. In doing so, the court recast Powell’s proposed testimony from her recalled expert witnesses as “rebuttal” evidence because it related to her affirmative insanity defense. *See Powell*, 2024-Ohio-6013, at ¶ 13 (9th Dist.). In doing so, the court relied on R.C. 2315.01, which is the statutory provision regarding the order of evidence in civil cases, and the case of *Shifflet v. Barnhart*, 1987 WL 33010 (5th Dist. Dec. 24, 1987), which is an unreported civil case from the Fifth Appellate District. *Powell* at ¶ 13. And, the Ninth District concluded that Powell had the unconditional right to the extraordinary presentation of evidence because her own trial counsel cross-examined the State’s expert witness in a way that elicited testimony about her methodology compared to the methodology of the defense experts. *Id.* at ¶ 24-25.

The Ninth District’s analysis misses the mark from the start. First, the legal analysis is minimal, relying primarily on a summary of the extensive testimony elicited at trial from the defense experts and the State’s sole expert witness before providing a cursory conclusional paragraph. *Id.* at ¶ 15-26. Second, it fails to account for the authorities cited above regarding the presentation of evidence in **criminal** cases and the extensive authority regarding the lack of a criminal defendant’s right to present sur-rebuttal evidence even within the context of asserting an affirmative defense. *See Burge*, 1995 WL 29206, *6 (2d Dist.); *see also State v. Moore*, 47 Ohio App.2d 181, 188 (9th Dist. 1973) (“It was not error for the trial court to refuse the right of surrebuttal to the defense. The profert shows that the defense desired to return [the defense expert] to the stand, to refute the testimony of [the State’s witness]. This matter was discretionary with the trial court, and the court exercised its discretion without abuse, so that the

interests of justice were duly served.”). And, most importantly, the analysis does not even acknowledge that Powell requested sur-rebuttal to simply address issues that she herself elicited through her own cross-examination of the State’s expert witness, which is not proper for sur-rebuttal. *See Moore*, 2012-Ohio-3604, at ¶ 20 (“In addition, some of the “new” facts [the defendant] identifies were brought out by the defense during [the witness]’s cross examination. But [the defendant] is not entitled to rebut these facts. A defendant is entitled to surrebut only new matter introduced ‘by the prosecution in rebuttal.’ The defendant cannot rebut matters she herself introduced.”), citing *Weimer v. Anzevino*, 122 Ohio App.3d 720, 726 (7th Dist. 1997) (“[A]ppellant cannot rebut evidence that was introduced by appellant’s own counsel. Appellant may rebut evidence adverse to her side, but that evidence must be introduced by the opposing party and not by appellant herself.”).

In sum, the Ninth District’s decision contravenes more than a century of authority, will lead trial courts astray, and transform trials in Lorain, Medina, Summit, and Wayne Counties to an endless sequence of rebuttal and sur-rebuttal. To clarify that proper scope of trial sequence in Ohio’s courts, this Court should accept jurisdiction to review the first proposition of law and take this opportunity to declare that criminal defendants do not have the unconditional right to recall their expert witnesses during the sur-rebuttal portion of trial.

PROPOSITION OF LAW II

A Trial Court's Decision to Deny Sur-Rebuttal Evidence to a Criminal Defendant Is Subject to Harmless-Error Analysis.

The United States Supreme Court and this Court have declared that “ ‘there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial.’ ” *State v. Hill*, 75 Ohio St.3d 195, 212 (1996), quoting *United States v. Hasting*, 461 U.S. 499, 508-509 (1983). Indeed, our legal system has engrafted that maxim into the Rules of Evidence and Rules of Criminal Procedure, both of which provide for the upholding of criminal convictions and judgments unless the appealing party is able to demonstrate prejudice from an error. *See* Crim.R. 52(A); Evid.R. 103(A). In line with that, courts have long recognized that a trial court's procedural decisions that are within their discretion are less likely to result in prejudicial error compared to decisions that affect the admission or exclusion of evidence or that implicate constitutional rights. *See State v. Morris*, 2014-Ohio-5052, ¶ 24 (“[T]he harmless-error rule was created in essence to forgive technical mistakes.”); *State v. Esparza*, 74 Ohio St.3d 660, 661-662 (1996) (outlining distinction between trial error and structural error).

The trial court's decision in this matter to preclude the presentation of sur-rebuttal evidence was the quintessential procedural, technical decision. Indeed, the Ninth District never indicated that it thought otherwise of that decision. The court never addressed any constitutional dimension to Powell's arguments about her request to present sur-rebuttal testimony or any requirement under any provision that she be able to present such testimony. Nevertheless, the Ninth District failed to consider whether the denial of sur-rebuttal testimony in this matter was harmless error. In doing so, it decided to seize on what would at best constitute a technical

mistake¹ to supplant the determination of a jury of 12 citizens who heard extensive testimony on the very issue from the very same people that Powell wanted to recall in sur-rebuttal.

Such an analytical leap undermines trial courts' discretion under R.C. 2945.10, the clear provisions of Evid.R. 103(A) and Crim.R. 52(A), and the decisional province of the jury. It also contradicts how this Court and other appellate courts have reviewed challenges on appeal to a trial court's denial of sur-rebuttal. *E.g.*, *Spirko*, 59 Ohio St.3d at 28-29; *Baksi*, 1999 WL 1299297, at *8; *State v. Blanton*, 111 Ohio App at 120. Finally, the Ninth District's failure to consider harmless error in the circumstances of this matter contravenes a significant ambit of authority holding that evidence of a defendant's concealment of his actions demonstrates that he is not legally insane at the time of his offenses. *E.g.*, *State v. Dunn*, 2020-Ohio-1183, ¶ 12 (12th Dist.) (affirming rejection of insanity defense where the State elicited evidence of the defendant's "attempts to conceal or hide evidence"); *State v. Myers*, 2010-Ohio-4602, ¶ 17 (10th Dist.) ("There is evidence, however, showing that appellant understood the wrongfulness of his actions. Appellant engaged in furtive conduct reflective of a consciousness of guilt."); *State v. Smith*, 2009-Ohio-1497, ¶ 14 (9th Dist.) ("A defendant's actions in cleaning up the evidence of his crime are inconsistent with a defense of insanity because a defendant's attempt to conceal the evidence of his crime tends to demonstrate that he understood the wrongfulness of his criminal conduct."). Here, Powell took a number of steps to conceal her involvement in the murder of B.P. She impersonated her mother to avoid Mount Union officials calling police, she lied to her father and police about an intruder breaking into the house and killing B.P., and she took steps to stage the house to support her claim of an intruder.

¹ The State is not conceding that the trial court made a mistake by denying Powell's request for sur-rebuttal, as indicated in the first proposed proposition of law. However, assuming that that decision was an error, it was at worst harmless.

Based on the underlying circumstances of the offenses and due to the jury hearing such extensive testimony from Powell's experts, the Ninth District should have applied harmless-error analysis to the trial court's decision to deny sur-rebuttal. It failed to apply long-standing law when it declined to do so, and this Court should instruct other districts to avoid committing the same error and reversing murder convictions after grueling multi-week jury trials. Thus, this Court should accept jurisdiction to review the second proposed proposition of law.

CONCLUSION

The State respectfully submits, pursuant to the argument offered, that this Court should accept jurisdiction of this case because this case is a felony and of great constitutional importance.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction by Appellant, State of Ohio, was forwarded by e-mail to Attorney David D. Eisenbrei, *deisenbrei@milliganpusateri.com*, on this 7th day of February 2025.

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