

**APPLICATION USING THE RULES OF EVIDENCE
AND PRESERVING THE RECORD 2016**

NEIL P. AGARWAL, LL.M., J.D., M.B.A., M.L.I.S., C.P.A.

AKRON BAR ASSOCIATION

IDENTIFICATION

State v. Tate, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888:

In this case, the court of appeals, sua sponte, vacated the convictions of appellee, James Tate II, after finding insufficient evidence proving his identity as the perpetrator. Because the evidence of this fact was overwhelming, undisputed, and not mentioned in the court of appeals' opinion, we reverse.

A witness need not physically point out the defendant in the courtroom as long as there is sufficient direct or circumstantial evidence proving that the defendant was the perpetrator. Even if we were to ignore Tate's statements or the witnesses who identified him in the courtroom, any rational fact-finder could have found proof of his identity as the perpetrator based on the real evidence in the record, including the library's surveillance video, the two ID cards, and the fliers that Tate gave the girls bearing his name.

The court of appeals also referred to the standard for determining whether a verdict is against the manifest weight of the evidence. But a prerequisite for any reversal on manifest-weight grounds is conflicting evidence, more specifically, evidence weighing heavily against the conviction, such that the jury clearly lost its way and created such a manifest miscarriage of justice. Here, there was no conflicting evidence on the issue of identity - Tate agreed that he was the man with B.P. This is light-years away from the exceptional case warranting reversal on manifest-weight grounds.

Finally, appellate courts should not decide cases on the basis of a new, unbriefed issue without giving the parties notice of its intention and an opportunity to brief the issue. We reverse not only because the evidence of Tate's identity was overwhelming, but also because neither party argued otherwise.

DEFENSE STRATEGY

State v. Wine, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207:

The issue we address in this case is whether a defendant who presents an “all or nothing” defense in a criminal trial has the right to prevent a trial court from giving lesser-included-offense jury instructions. We hold that a criminal defendant does not have the right to prevent a trial court from giving lesser-included-offense jury instructions; whether to include such jury instructions lies within the discretion of the trial court and depends on whether the evidence presented could reasonably support a jury finding of guilt on a particular charge.

A defendant's choice to pursue an all-or-nothing defense does not require a trial judge to impose upon the state an all-or-nothing prosecution of the crime charged if the evidence would support a conviction on a lesser included offense: If under any reasonable view of

the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given.

Whether or not a defendant raises a complete defense to the charged crime, the state has the burden to prove beyond a reasonable doubt all of the elements of the crime charged. The fact that the evidence could be interpreted by the jury as questionable on a single element does not mean that the defendant committed no crime. Simply put, a jury can both reject an all-or-nothing defense - e.g., alibi, mistaken identity, or self-defense - and find that the state has failed to meet its evidentiary burden on an element of the charged crime. In such a case, if due to some ambiguity in the state's version of the events involved in a case the jury could have a reasonable doubt regarding the presence of an element required to prove the greater but not the lesser offense, an instruction on the lesser included offense is ordinarily warranted.

State v. Gilbert, 143 Ohio St.3d 150, 2014-Ohio-4562, 35 N.E.3d 493:

In a plea negotiation, appellee, Kareem Gilbert, received the benefit of a bargain with the state but simply chose not to live up to his end of the deal.

After he was indicted on several charges, Gilbert agreed in a plea agreement to testify against his father, Ruben Jordan, in a murder case. In exchange, some of the charges against Gilbert were amended or dismissed. The trial court proceeded to sentence Gilbert without waiting for him to testify against his father as anticipated in the plea agreement. Later, after he began serving his time in prison, he refused to testify as promised. A year after he was sentenced, the state claimed that Gilbert had breached the plea agreement by failing to give truthful testimony against his father. He was brought back to court from prison, the trial court threw out the former plea, and Gilbert entered a second plea. He was resentenced, and he then appealed to the First District Court of Appeals. That court reversed the trial court's decision, holding that the trial court did not have the authority to reconsider its own final judgment. We agree.

Once the final judgment was entered and Gilbert was sentenced to prison, the trial court lost jurisdiction to vacate its judgment of conviction and to resentence Gilbert. There must be finality to a court's judgment. There is no authority for a court to revisit a sentence that has already been imposed based on a defendant's failure to fulfill his obligations under a plea agreement.

EVIDENCE

State v. Barry, Slip Opinion, 2015-Ohio-5449:

On February 25, 2013, Barry traveled to Middletown, Ohio, with her friend, James Valero, to pick up Jashean Green and Devonte Revez and drive them to Huntington, West Virginia. When they departed on the evening of February 27, Valero handed Barry a condom filled with heroin and told her to conceal it in her vagina, which she did. The men promised her a share of the heroin for helping them.

After midnight on February 28, State Highway Patrol Trooper Nick Lewis stopped their white Pontiac Grand Prix on U.S. Route 23 in Scioto County south of Lucasville after hearing its defective muffler and observing erratic driving. When he approached the car, Lewis smelled marijuana, and he therefore removed Barry, who was driving, from the car to question her about it, but she denied that anyone had smoked marijuana in the car. Lewis and another trooper searched the car for drugs and found a baggie containing marijuana residue.

After speaking with Barry, Green, Revez, and Valero, Lewis suspected that the men had given drugs to Barry to conceal inside her body, and he warned Barry that he could obtain a warrant for a body cavity search if she did not cooperate. Barry initially denied having any drugs inside her but on further questioning admitted that she had inserted them into her vaginal cavity, and she later produced a condom in the presence of a female police officer containing 56.36 grams of heroin.

The state indicted Barry for trafficking in heroin, possession of heroin, conspiracy to traffic in drugs, and tampering with evidence. At trial, Barry admitted that she “stuffed [the heroin] to conceal it so the police wouldn't see it,” that she “knew that that was an unmistakable crime,” and that she understood that “it was a crime to possess heroin and to stuff it.”

The jury returned verdicts finding Barry guilty of drug trafficking, drug possession, conspiracy, and tampering with evidence. The trial court determined that the trafficking, possession, and conspiracy convictions merged as allied offenses of similar import, and it imposed a sentence of six years for the trafficking conviction. It also imposed a consecutive term of three years for tampering with evidence, resulting in an aggregate nine-year term of incarceration.

The court of appeals affirmed Barry's tampering conviction, concluding that it was supported by sufficient evidence and was not against the manifest weight of the evidence. By committing the “unmistakable crimes of drug trafficking, drug possession and conspiracy to traffic in drugs” at the time she concealed the heroin in her body cavity, the court reasoned, Barry had “constructive knowledge of an impending investigation.” The

appellate court specifically rejected the claim that the “unmistakable crime” instruction misled the jury, because it concluded that the instruction “was a correct statement of the law.”

In order to convict Barry of tampering with evidence, the state's burden was to prove beyond a reasonable doubt that at the time Barry concealed the heroin, she knew that an investigation into her drug trafficking and possession was likely to be instituted.

We reject the proposition that by committing an “unmistakable crime” by concealing, transporting, or possessing heroin, Barry at that time had constructive knowledge of an impending investigation into at least one of those crimes. “Constructive knowledge” means “[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.”

Thus, the “unmistakable crime” instruction given here erroneously imputes to the offender constructive knowledge of a pending or likely investigation into the crime. Every offender has the right against self-incrimination and to remain silent pending an investigation, and therefore the state cannot use the silence of the accused as evidence to satisfy an element of a crime. This court “require[s] a jury instruction to present a correct, pertinent statement of the law that is appropriate to the facts.” But constructive knowledge is insufficient to prove that Barry knew that an investigation was ongoing or likely to be commenced at the time she concealed the heroin.

Ohio does not recognize the “unmistakable crime” doctrine in connection with the offense of tampering with evidence because that doctrine erroneously imputes to the perpetrator constructive knowledge of a pending or likely investigation into a crime; merely establishing that the crime committed is an unmistakable crime is insufficient to prove that the accused knew at the time the evidence was altered, destroyed, concealed, or removed that an official proceeding or investigation into that crime was ongoing or likely to be instituted. This court has never adopted or approved the unmistakable crime instruction, and we disavow its use in this instance.

Here, the state failed to prove that Barry was aware that an investigation into her drug trafficking and possession was likely at the time she concealed evidence of those crimes. When she hid the heroin in her vaginal cavity in Middletown, Ohio, only her coconspirators were present and could have reported her drug offenses, and nothing in the record shows that she thought it likely that she would be stopped by law enforcement. Notably, Trooper Lewis came to suspect Barry of possessing drugs only after he stopped her vehicle south of Lucasville hours later. Nor is there any evidence that Barry displayed willful ignorance by placing the heroin in her vaginal cavity with a subjective belief that an investigation was likely. Rather, she concealed the drugs with a purpose to avoid detection by law

enforcement and without knowledge of an impending or likely investigation. Thus, her conviction for tampering with evidence is not supported by sufficient evidence.

In re J.T., 144 Ohio St.3d 516, 2015-Ohio-3654, 39 N.E.3d 1240:

The juvenile in this matter was carrying a broken pistol in his waistband that was no longer capable of firing a round. That fact notwithstanding, he was charged with carrying a concealed deadly weapon and was found delinquent. Today, we apply a common-sense reality check to that fact pattern. When a person has an inoperable handgun tucked into his or her waistband and does not use it as a bludgeoning implement, it is not a deadly weapon. While it had been designed as a deadly weapon in that it was meant to fire a potentially lethal projectile, its essence as a deadly weapon ended when it became inoperable. In effect, since it was inoperable, it was no different from a stone or a brick. If it had been used as a bludgeon or otherwise used, possessed, or carried as a weapon, it could be considered a deadly weapon. As nothing more than a heavy object tucked into a waistband or a pocket, however, it was not. Just as it would be improper to convict someone of carrying a concealed weapon simply because he had a stone in his pocket, it is also improper to convict someone of that crime simply for having an inoperable pistol tucked into his waistband.

State v. Bevly, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516:

Johnson claims that the trial court erred by admitting evidence of media interviews that he gave shortly after Shanon's murder.

On November 13 and 14, 1997, Johnson spoke to three local television reporters. He stated that around 7:30 a.m. on November 12, 1997, he heard his dog barking and went to get her. Johnson said that he did not see anyone outside. He told them that later that night, he saw cameras flashing in the Marks's bathroom and a coroner's vehicle outside their house. Johnson told the reporters that he was shocked that this crime had occurred in the neighborhood and indicated concern about staying there with his family.

Over defense objection, the prosecutor introduced a video recording depicting the three media interviews both at Johnson's 1998 trial and his 2011 mitigation hearing.

A defendant's statements to reporters, like other conduct following the completion of a crime, may be relevant evidence of consciousness of guilt. And evidence of consciousness of guilt is evidence of guilt itself.

Cincinnati v. Ilg, 141 Ohio St.3d 22, 2014-Ohio-4258, 21 N.E.3d 278:

The city of Cincinnati appeals from a judgment of the First District Court of Appeals that affirmed a trial court order to exclude evidence obtained from an Intoxilyzer 8000 breath-analyzer machine as a sanction for the failure to comply with a discovery order directing the Ohio Department of Health (“ODH”) to provide Daniel Ilg with its computerized online breath archives data, also known as “COBRA data,” consisting of information transmitted by the machine to ODH for each breath test it performed.

In accordance with R.C. 4511.19(D)(1)(b), ODH approved the Intoxilyzer 8000 as a reliable testing device for determining the breath-alcohol concentration of an individual suspected of driving while under the influence of alcohol. In *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), we precluded an accused from presenting expert testimony attacking the general scientific reliability of breath-alcohol tests that have been conducted in accordance with methods approved by the director of ODH.

In this case, Ilg sought COBRA data from the specific Intoxilyzer 8000 machine that tested his breath in order to challenge whether it operated properly on the day of his arrest in an effort to establish that the test results in his case were inaccurate - not to question the scientific reliability of Intoxilyzer 8000 machines in general.

Every person accused of an offense involving an Intoxilyzer 8000 machine may challenge the accuracy and credibility of a breath test by showing that the breath-analyzer machine failed to operate properly at the time of testing or that the results had not been analyzed in accordance with methods approved by the director of ODH. In this case, Ilg sought discovery of relevant, admissible evidence, and the trial court ordered the city to produce it, but because neither the city nor ODH complied with the order to produce, the trial court excluded the results of his breath test, and the court of appeals upheld that decision. Here, the sanction is warranted, and we affirm the judgment of the appellate court.

State v. Morris, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153:

In determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record.

We disagree with the state's position that Ohio law is inconsistent on harmless error. Erroneous admission of Evid.R. 404(B) evidence is a singular problem. Prosecution evidence that a defendant has committed other crimes, wrongs or acts independent of the offense for which he is on trial is not generally admissible to demonstrate that the defendant has a propensity for crime or that his character is in conformity with the other acts. The

question is whether an improper admission affects the defendant's "substantial rights" so that a new trial is required as a remedy. Several principles emerge from our cases.

First, there must be prejudice to the defendant as a result of the admission of the improper evidence at trial. A judgment of conviction should not be reversed because of the admission of any evidence offered against the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby.

Second, an appellate court must declare a belief that the error was not harmless beyond a reasonable doubt.

Third, in determining whether a new trial is required or the error is harmless beyond a reasonable doubt, the court must excise the improper evidence from the record and then look to the remaining evidence. In a case dealing with the improper admission of privileged spousal testimony, we stated that the cases where imposition of harmless error is appropriate must involve either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction. We are also mindful that our role upon review of this case is not to sit as the supreme trier of fact, but rather to assess the impact of this erroneously admitted testimony on the jury.

State v. Harris, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256:

In this discretionary appeal from the First District Court of Appeals, we consider whether R.C. 2945.371(J) permits the state to introduce, in its case-in-chief, the testimony of the psychologist who conducted the court-ordered evaluation on the issues of competency and sanity when the defendant asserts, but then wholly abandons, the defenses. The appellant, the state of Ohio, advances the following proposition of law: "A psychologist's trial testimony regarding a defendant's feigned mental illness during a competency and sanity evaluation is admissible under R.C. 2945.371(J) when it does not include factual evidence of guilt. It is admissible during the state's case-in-chief to show the accused's intent to mislead and defraud authorities to escape prosecution."

For the reasons that follow, based on these facts, we hold that when a defendant asserts a mental-capacity defense or defenses, causing the court to order a psychiatric evaluation, but then wholly abandons that defense or defenses, a psychologist's testimony regarding the defendant's feigning of mental illness during the evaluation is inadmissible in the state's case-in-chief pursuant to R.C. 2945.371(J). We further hold that the admission of a psychologist's testimony opining on the defendant's feigning of mental illness under these circumstances violates the defendant's right against self-incrimination guaranteed by Article I, Section 10 of the Ohio Constitution and the Fifth Amendment to the United States Constitution and that the violation was not harmless error.

We also find to be without merit the state's contention that Harris's statements are admissible in the state's case-in-chief because they do not include factual evidence of guilt, but instead are evidence of his consciousness of guilt, which, the state contends, shows his intent to mislead authorities and escape prosecution. Consciousness of guilt is no different from guilt itself. Moreover, the state's claim that the evidence was offered not to prove guilt but to prove Harris's intent to avoid prosecution is disingenuous. The state reveals its true purpose when it argues in its brief to this court that Dreyer's testimony was relevant to show Harris's continuing efforts to manipulate witnesses and the court in order to cover up his guilt in Gulleman's robbery and murder.

After applying the analysis established in *Morris*, we hold that the improper admission of Dreyer's testimony was not harmless, as it affected Harris's substantial rights. Therefore, Harris is entitled to a new trial.

State v. Vanzandt, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267:

In this appeal, we address whether a court has discretion to unseal records of criminal proceedings for purposes other than those provided in R.C. 2953.53(D). We hold that the court does not have discretion to create additional exceptions to permit access to sealed records, and we therefore reverse the judgment of the First District Court of Appeals.

Appellant, Terrell Vanzandt, formerly known as Terrell Asberry, was charged with four criminal offenses related to drug trafficking and was subsequently acquitted by a jury. Vanzandt then moved to seal the records in that case pursuant to R.C. 2953.52. The motion was granted by the trial court on October 4, 2012, with no objection from appellee, the state of Ohio. But three days after the trial court entered judgment sealing Vanzandt's record, the state charged Vanzandt with another crime, alleging that Vanzandt had retaliated against the state's informant in the drug-trafficking case. More than three months later, on January 15, 2013, the state moved to unseal the record of Vanzandt's drug-trafficking case so that it could be used as evidence in the retaliation case. The trial court granted the state's motion over Vanzandt's objection, holding that evidence of the case was crucial to the state's pending retaliation case against Vanzandt.

Official records that have been sealed pursuant to R.C. 2953.52 cannot be made accessible for purposes other than those provided in R.C. 2953.53(D). Because the state in this case is not seeking access to Vanzandt's sealed records for one of the purposes set forth in the four exceptions, the state's motion to unseal the records should have been denied.

SENTENCING

State v. Bevly, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516:

This case involves a challenge to the constitutionality of R.C. 2907.05(C)(2)(a), a subsection of the statute defining “gross sexual imposition,” which subjects an offender to a mandatory prison term when evidence other than the testimony of the victim is admitted in the case corroborating the violation. We hold that the corroborating-evidence provision lacks a rational basis for distinguishing between cases on the basis of the presence or the absence of corroborating evidence and violates the due-process protections of the Fifth and Fourteenth Amendments to the United States Constitution. We further hold that in cases in which a defendant has pled guilty, imposing a mandatory prison term pursuant to R.C. 2907.05(C)(2)(a) when corroborating evidence of the charge of gross sexual imposition is produced violates the defendant's right to a jury trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

The state maintains that R.C. 2907.05(C)(2)(a) has a rational basis, in that it imposes more punishment on an offender when there is more evidence of guilt. But once an accused has been found guilty beyond a reasonable doubt of an offense, the quantity of evidence is irrelevant to the sentence.

We conclude that there is no rational basis for imposing greater punishment on offenders based only on the state's ability to produce additional evidence to corroborate the crime. Corroborating evidence is irrelevant to determining the culpability of the offender, the severity of the offense, or the likelihood of recidivism. It bears no relation to ensuring that punishment is graduated and proportional, and it does not serve any other theory of penal sanctions such as retribution, incapacitation, or rehabilitation. And the corroborating evidence offered here - Bevly's confession to police -is merely cumulative of his admission of guilt at the plea hearing and provides no additional information that proves the offense or justifies an enhanced penalty.

Thus, because R.C. 2907.05(C)(2)(a) lacks any reasonable relation to the apparent goals of the statute and denies equal protection of the law to those convicted of a crime, it is contrary to a constitutional sentencing scheme that must apply equally to all convicted and avoid arbitrary or vengeful sentencing of selected offenders.

We hold that because there is no rational basis for the provision in R.C. 2907.05(C)(2)(a) that requires a mandatory prison term for a defendant convicted of gross sexual imposition when the state has produced evidence corroborating the crime, the statute violates the due-process protections of the Fifth and Fourteenth Amendments to the United States Constitution. Furthermore, because a finding of the existence of corroborating evidence pursuant to R.C. 2907.05(C)(2)(a) is an element that must be found by a jury, we hold that the application of R.C. 2907.05(C)(2)(a) in this case violated Bevly's right to trial by jury

found in the Sixth and Fourteenth Amendments of the United States Constitution. We reverse the judgment of the court of appeals, and we remand the case to the trial court for imposition of its sentence in accordance with this opinion.

APPELLATE PROCEDURE

State v. Quaterman, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900:

Alexander Quaterman appeals from a judgment of the Ninth District Court of Appeals affirming his conviction and four-year sentence for one count of aggravated robbery with a firearm specification. A divided panel of the appellate court concluded that Quaterman failed to preserve his claims that Ohio's mandatory bindover procedures violate his due process and equal protection rights and the prohibition against cruel and unusual punishment.

The failure to challenge the constitutionality of a statute in the trial court forfeits all but plain error on appeal, and the burden of demonstrating plain error is on the party asserting it. Not only has Quaterman forfeited his constitutional challenge to Ohio's mandatory bindover procedure by failing to assert it either in the juvenile court or the general division of the common pleas court, but also he has failed to address the application of the plain-error rule to this case and has not given any basis for us to decide that the juvenile court's transfer of his case to adult court amounts to plain error in these circumstances. Because Quaterman failed to engage these dispositive questions, we decline to reach the merits of his constitutional claims.

Accordingly, the judgment of the appellate court is affirmed.

State v. Rogers, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860:

An accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; and, absent that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error.

DELINQUENCY

In re D.M., 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404:

Juv.R. 24 applies in bindover hearings. A prosecuting attorney is under a duty imposed by Juv.R. 24(A)(6) and the Due Process Clauses of the Ohio Constitution and the United States Constitution to disclose to a juvenile respondent all evidence in the state's possession that is favorable to the juvenile and material to either guilt, innocence, or punishment. We further hold that when the state or the juvenile claims that documents are privileged or otherwise not discoverable, it is an abuse of discretion for the juvenile court not to perform an in camera inspection of the documents to determine whether they contain discoverable evidence prior to ordering the party to turn over the documents to the opposing party or sanctioning the party for failing to comply with a discovery order.

Attorney Neil P. Agarwal has an undergraduate degree in Business Administration from Ohio State University (B.S.), a law degree from the University of Toledo (J.D.), a Masters of Tax Law from Case Western Reserve University (LL.M.), a Masters of Business Administration from Kent State University (M.B.A.), and a Masters of Library and Information Science from Kent State University (M.L.I.S.). He is also a certified public accountant (CPA), a licensed Ohio realtor, and an adjunct professor of business law at Kent State University and the University of Akron.

Attorney Agarwal was admitted to the practice of law in the State of Ohio in 1996. He is a member in good standing and admitted to practice in the United States Supreme Court, Ohio Supreme Court, U.S. District Court for the Northern District Court of Ohio, U.S. Sixth Circuit Court of Appeals, and is a member of the Akron Bar Association and the Ohio Association of Criminal Defense Lawyers.

He is married to Attorney Shubhra Agarwal, where they have a joint law practice, *Law Offices of Agarwal & Agarwal*.