

1 The State of Ohio, Appellee, v. Allen, Appellant.

2 [Cite as State v. Allen (1995), ____ Ohio St.3d _____.]

3 Criminal law -- Aggravated murder -- Death penalty upheld, when.

4 (No. 93-2377 -- Submitted April 25, 1995 -- Decided September 6,
5 1995.)

6 Appeal from the Court of Appeals for Cuyahoga County, No. 62275.

7

8 In June 1991, a Cuyahoga County jury returned guilty verdicts in
9 the trial of appellant, David W. Allen (“Allen”), for the aggravated robbery and
10 aggravated murder of eighty-four-year-old Chloe English (“English”) of
11 Bedford, Ohio. English knew Allen through her participation in a prison
12 ministry program. English ministered to five convicted felons, including Allen.
13 She visited and corresponded with Allen while he was in prison and they
14 stayed in touch after his release in 1989. On January 9, 1991, English received
15 a phone call from someone named “David.” According to English’s daughter,
16 the conversation left English shaking.

1 English was last seen alive at 5:45 p.m. on January 24, 1991, by
2 her friend Judy Sperry (“Sperry”) who had visited English in her home. At
3 6:45 p.m. the next day, English’s friend Cathy Curry found English lying dead
4 in her living room. The doors to English’s house were unlocked, which was
5 unusual because English always locked her doors and never opened them to
6 strangers.

7 After English’s body was found, Bedford police officers secured,
8 photographed, and searched the house. Detective Gerry Artl found English’s
9 eyeglasses on the floor and noted a large thumbprint on the inside of the left
10 lens. That thumbprint turned out to belong to David Allen. Police recovered
11 ten cigarette butts from English’s kitchen garbage. Saliva tests showed that
12 five of the butts had been smoked by a Type O secretor.¹ (The rest lacked
13 sufficient saliva for testing.) Two of the butts still had the “Doral” brand name
14 on them. Allen is a Type O secretor, and there was evidence that he smoked
15 Dorals. English disapproved of smoking and was a Type O non-secretor.

1 Although English's last known visitor was a woman, someone had
2 left the toilet seat up in English's bathroom. Moreover, the coffee pot in the
3 kitchen, empty when Sperry left, was half full when English's body was
4 discovered. Police found several items burnt in the fireplace, including the
5 remains of English's purse and wallet, a broken ashtray, a broken coffee cup, a
6 broken drinking glass, a wine bottle, and a knife with its handle burnt off.

7 Police found no money in the house, even though English always
8 kept about \$50 in her wallet for emergencies. English's credit cards and
9 checkbook were also missing.

10 Detective Timothy Oleksiak ("Oleksiak") obtained the names of
11 prisoners with whom English had corresponded. All but Allen were still in
12 prison. Oleksiak and Artl had the print on the eyeglasses compared with
13 Allen's; when the print was identified as Allen's, Oleksiak got an arrest
14 warrant.

15 On January 29, Allen was arrested. He was wearing a denim
16 jacket with a stain on one of the sleeves. That stain turned out to be Type O

1 blood, the same type Allen and English shared. Allen was carrying a bus
2 transfer issued between 6:04 and 7:00 a.m., January 25, on the No. 41
3 Warrensville bus route. The driver identified Allen as a passenger he had
4 picked up on January 25 at 6:04 a.m., at a stop 1.3 miles from English's house.

5 Allen also had a refund receipt for a Greyhound bus ticket. There
6 was no record of when the ticket was sold, but Allen got the refund on January
7 25, at 11:28 p.m. Moreover, when Detective Artl searched Allen's bedroom,
8 he found two packed suitcases under Allen's bed.

9 The jury returned guilty verdicts on two counts of aggravated
10 murder, R.C. 2903.01(A) and (B), each count having a death specification
11 under R.C. 2929.04(A)(7) (felony-murder). The jury also found Allen guilty of
12 aggravated robbery, R.C. 2911.01. After a penalty hearing, the jury
13 recommended the death penalty. The court accepted the recommendation and
14 imposed the death sentence. As to the aggravated robbery count, the court
15 imposed a sentence of fifteen to twenty-five years. The court of appeals
16 affirmed the convictions and sentences.

1 Ohio St.3d 263, 267, 643 N.E.2d 524, 528; State v. Poindexter (1988), 36 Ohio
2 St.3d 1, 3, 520 N.E.2d 568, 570. Accordingly, in this opinion we address only
3 those issues that warrant discussion.

4 I

5 The Guilt Phase

6 A. Jury Issues

7 1. Alleged Bias

8 In his first proposition of law, Allen contends that juror
9 Worthington should have been excused for cause because she could not be fair
10 and impartial and was biased against him. Juror Worthington’s brother had
11 been murdered, and the alleged killer was acquitted. On voir dire, Worthington
12 admitted to some bitterness, but said she could set her feelings aside and vote
13 solely on the evidence. Although Worthington was unsure if she could hold
14 back her emotions on hearing testimony similar to that at her brother’s trial, she
15 answered “no” when asked if her feelings would “impact” on the case.
16 Additionally, Allen points out that Worthington had two friends who were

1 police officers, and the prosecutor and detective who investigated her brother's
2 murder sometimes "checked-up" on her mother.

3 When the defense challenged Worthington, the court noted that
4 she "unequivocally stated that she could be fair and impartial." The court
5 found Worthington was "very straightforward" and "under[stood] the
6 responsibility here * * *."

7 The trial court's ruling on a challenge for cause will be affirmed if
8 supported by substantial testimony. State v. Tyler (1990), 50 Ohio St.3d 24,
9 31, 553 N.E.2d 576, 587. Here, the trial court found Worthington unbiased, a
10 finding supported by Worthington's testimony. Allen argues that the juror's
11 belief in her own impartiality is insufficient support, but the trial judge saw and
12 heard Worthington and could legitimately validate her statements. See Tyler at
13 30, 553 N.E.2d at 586; State v. Henderson (1988), 39 Ohio St.3d 24, 26-27,
14 528 N.E.2d 1237, 1241. Allen's first proposition of law lacks merit.

15

16 2. Voir Dire Issues

1 In his second proposition of law, Allen contends that veniremen
2 Skufca and Washington, who stated that they could not impose the death
3 penalty, were improperly stricken from the venire. See, generally, Witherspoon
4 v. Illinois (1968), 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. Allen claims
5 the trial court improperly restricted his questioning of them. However, defense
6 counsel questioned Skufca after she said she didn't believe she could impose
7 the death penalty. Although the court did excuse her after only two questions
8 by the defense, the defense apparently had no more questions and alleged no
9 deprivation of voir dire. During Washington's voir dire, the trial court
10 sustained objections to three defense questions; however, all three repeated
11 questions the judge had already asked. Allen also argues that the trial court
12 should have allowed the defense to ask Washington whether he understood
13 "that only the Judge can decide ultimately what the sentence is," because it
14 "downplayed to the jurors, the significance of their verdict * * *." This court
15 has previously found that such an instruction does not constitute prejudicial
16 error, State v. Landrum (1990), 53 Ohio St.3d 107, 122, 559 N.E.2d 710, 727,

1 although we have expressed a preference that this instruction be avoided. Id.,
2 citing State v. Williams (1986), 23 Ohio St.3d 16, 22, 23 OBR 13, 19, 490
3 N.E.2d 906, 912.

4 In part B of Allen’s second proposition of law, he complains that
5 the state peremptorily challenged a juror because she opposed the death
6 penalty. Allen waived this issue by not raising it at trial. See State v. Campbell
7 (1994), 69 Ohio St.3d 38, 40-41, 630 N.E.2d 339, 344. Furthermore, “[a]part
8 from excluding jurors based on race *** or gender ‘prosecutors can exercise a
9 peremptory challenge for any reason, without inquiry, and without a court’s
10 control.’” (Citations omitted.) State v. Lundgren (1995), ____ Ohio St. ____,
11 ____; ____ N.E.2d _____. The second proposition of law is overruled in its
12 entirety.

13

14 3. Judge’s Note to Jury

15 In his eighteenth proposition of law, Allen claims that he was
16 denied a fair trial because the trial court communicated with the jury outside

1 his presence. During penalty phase deliberations, the jury sent the judge a note
2 asking for “a copy of DSM III-R² and [d]ictionary[.]” The judge wrote back:
3 “You have received all of the exhibits that have been received into evidence
4 and you may not receive any others. No extraneous research may be done (i.e.,
5 looking up words in a dictionary etc.)”

6 A trial judge may not communicate with the jury in the
7 defendant’s absence. State v. Abrams (1974), 39 Ohio St.2d 53, 56, 68 O.O.2d
8 30, 32, 313 N.E.2d 823, 825; Bostic v. Connor (1988), 37 Ohio St.3d 144, 149,
9 524 N.E.2d 881, 886. However, if the communication is not “substantive,” the
10 error is harmless. State v. Jenkins (1984), 15 Ohio St.3d 164, 236-237, 15
11 OBR 311, 373-374, 473 N.E.2d 264, 324; accord Abrams, supra, and Bostic,
12 supra. In Bostic, we held that the court’s ex parte communication with the jury
13 was harmless error because there was “no possibility that the jury’s conclusion
14 was influenced by the court’s reply.” Id. at 150, 524 N.E.2d at 887. Likewise,
15 in this case there is no possibility that the court’s refusal to supply a dictionary

1 and DSM III-R could have influenced the jury’s conclusion. The eighteenth
2 proposition of law lacks merit.

3 **B. Evidentiary Issues**

4 **1. Sufficiency**

5 In his fourth proposition of law, Allen contends that the evidence
6 of each count and specification was legally insufficient to convict him. The
7 test for the sufficiency of evidence is whether any rational trier of fact, viewing
8 the evidence in the light most favorable to the prosecution, could have found
9 the elements of the crime beyond a reasonable doubt. Jackson v. Virginia
10 (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560, 573;
11 State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, 503.

12 As to the aggravated murder count, Allen claims the state did not
13 prove he was the killer. The strongest evidence of Allen’s guilt is the presence
14 of his partial thumbprint on English’s glasses. That print could not have been
15 left days before the murder as Allen argues. It was on the *inside* of the lens,
16 and English wore her glasses “constantly.” Moreover, the print covers nearly

1 half the lens. There was testimony that English was a tidy person, from which
2 the jury could infer that she would not have allowed a large thumbprint to
3 remain on her glasses for days. Allen’s mistaken claim that the print wasn’t
4 that large is based on a misreading of the fingerprint expert’s comment, “It’s a
5 very little area”; this comment refers to the area of the thumb represented by
6 the print, not the area of the lens covered. Allen also suggests that the expert
7 might have misidentified the print, since he found “only” in excess of twelve to
8 fourteen matching ridge characteristics out of a possible seventy-five to one
9 hundred twenty-five. However, the fingerprint expert testified that twelve
10 matches are enough for an identification.

11 There was also evidence presented that about two weeks before
12 her murder, English got a phone call from someone named “David” that left her
13 “shaking.” That suggests that Allen was hostile to English, despite their earlier
14 friendship. Furthermore, there was evidence that English was killed by
15 someone she knew. English never unlocked her doors to strangers, yet on the
16 evening that her body was discovered her doors were found unlocked, with no

1 signs of forced entry. English made coffee after Sperry left, and a coffee cup
2 was found burned in the fireplace in an apparent attempt to destroy
3 fingerprints. From that evidence the jury may have concluded that the killer
4 shared a cup of coffee with English, another indication that English knew her
5 killer.

6 Inside English's home, police found several Doral brand cigarette
7 butts, which had been smoked by a Type O secretor; Allen is a Type O secretor
8 ³ and there was testimony that he smoked Dorals. Someone burned an ashtray
9 in English's fireplace, apparently to destroy fingerprints. Moreover, English
10 disapproved of smoking, and even her daughter did not feel free to smoke in
11 her home. Based on this evidence the jury could conclude that the killer
12 smoked the cigarettes found in English's home.

13 There was evidence that Allen boarded a bus at a bus stop just 1.3
14 miles from English's home at 6:04 a.m., January 25, 1991, yet he was not going
15 to or from work. The coroner estimated that English died between midnight
16 and 6:00 a.m. on January 25. Allen points out that some of the coroner's

1 testimony indicates that English died between 12:38 p.m. and 10:38 p.m., on
2 January 24; however, the jury was entitled to accept the coroner's estimated
3 time of death. Even if English did die in the afternoon or evening of January
4 24, Allen's presence at the bus stop near English's home in the early morning
5 of January 25 could still be viewed by the jury as incriminating.

6 There was also some evidence that Allen had prepared to flee. He
7 had evidently purchased a Greyhound bus ticket (although he did turn it in for a
8 refund), and packed his bags. He did not go to work on January 25.

9 Finally, the jury could find prior calculation and design, necessary
10 for an aggravated murder conviction, based on the protracted nature of the
11 murder. English was beaten and strangled; her wrists were slashed; and she
12 was stabbed sixteen times, with three of the wounds being in her back.

13 Allen next contends that there was insufficient evidence that he
14 committed aggravated robbery; specifically, he claims there was no evidence
15 that he committed a theft. We find that there was sufficient evidence that Allen
16 committed a theft. English kept five credit cards, a checkbook, and a wallet

1 containing cash in her purse, yet none of these items were found in her house.

2 The burned remains of her purse and wallet were found in the fireplace.

3 English received a \$104 monthly pension and a monthly gift of \$100 from her

4 daughter Sharon. Her daughter Janet gave her \$100 for her birthday on January

5 9. Allen argues that English could have spent or given away all of her money,

6 but Janet testified that her mother always kept about \$50 on hand for

7 emergencies. From this evidence, the jury could reasonably find that money,

8 checks, and credit cards should have been present. The absence of these items

9 along with the burned purse and wallet and the evidence of Allen's presence in

10 English's home was sufficient for a reasonable jury to conclude that Allen

11 committed aggravated robbery.

12 Based on the foregoing we find that there was sufficient evidence

13 for the jury to find Allen guilty of aggravated murder and aggravated robbery.

14 Allen's fourth proposition of law is overruled.

15 2. Character Evidence

1 In his third proposition of law Allen claims he was denied a fair
2 trial because of the introduction of evidence that he was previously
3 incarcerated. This evidence came in through testimony that English met Allen
4 through her church's prison ministry program.

5 Allen challenges the prior-imprisonment evidence as inadmissible
6 "other acts" evidence. However, Evid. R. 404(B) allows "other acts" evidence
7 as proof of identity. Since English was apparently killed by someone she
8 knew, the prior-imprisonment evidence was relevant to explain that English
9 knew Allen through visiting him in prison.

10 Allen's argument under Evid. R. 403(A) also fails. Pursuant to
11 Evid. R. 403(A), the court is required to weigh the probative value of the
12 evidence against the danger of unfair prejudice, confusion of the issue, or
13 misleading the jury. When considering evidence under Evid. R. 403, the trial
14 court is vested with broad discretion and an appellate court should not interfere
15 absent a clear abuse of that discretion. State v. Morales (1987), 32 Ohio St.3d
16 252, 257-258, 513 N.E.2d 267, 273-274. Allen never denied English knew

1 him, and the state had other evidence of the fact. However, the judge took
2 steps to minimize unfair prejudice, forbidding the state to mention why Allen
3 had been in prison and instructing the jury: “[Y]ou may not infer that the
4 defendant is guilty of these offenses because he may have been convicted and
5 incarcerated in the past.” Thus, the trial court did not abuse its discretion by
6 finding that potential unfair prejudice did not substantially outweigh the
7 relevance of the testimony. Allen’s third proposition of law is overruled.

8 In his sixth proposition of law, Allen contends that the state
9 introduced irrelevant, prejudicial evidence of the victim’s good character
10 during trial. Allen failed to object to the alleged character evidence and
11 therefore waived this argument. See State v. Williams (1977), 51 Ohio St.2d
12 112, 5 O.O.3d 98, 364 N.E.2d 1364, vacated on other grounds (1978), 438 U.S.
13 911, 98 S.Ct. 3137, 57 L.Ed.2d 1156.

14 Furthermore, Allen’s claims regarding evidence of English’s
15 character have no merit. Evidence about a victim is admissible when it relates
16 directly to the circumstances of the crime and is not offered to elicit sympathy

1 from the jury. State v. Williams (1988), 38 Ohio St.3d 346, 354, 528 N.E.2d
2 910, 919-920. The evidence that Allen complains about was not offered to
3 elicit sympathy from the jury; rather, the testimony related directly to the
4 circumstances of the murder and the robbery. Testimony that English did not
5 drink or smoke was relevant, because a wine bottle and cigarette butts were
6 found in her house. Testimony that she was an immaculate housekeeper was
7 relevant to show that she likely would have wiped Allen's fingerprint off her
8 glasses had he placed it there before the murder. This was "habit" evidence,
9 admissible under Evid. R. 406, not character evidence.

10 Evidence showing English's religious devotion was also relevant
11 for non-character purposes. The "praying hands" design on the wallet
12 identified it as hers. Her dedication to helping sinners "straighten * * * out"
13 explained her friendship with Allen. Her habit of baking things for people was
14 relevant to her spending habits.

15 Cathy Curry, who found the body, testified that English taught
16 Sunday school, knew the Bible, taught Curry how to make pecan tarts, and

1 attended a monthly prayer meeting. The prayer meeting explained what Curry
2 was doing at English's house: Curry had come to take English to that meeting.
3 The other facts explained Curry's relationship with English and knowledge of
4 her habits. See State v. Waddy (1992), 63 Ohio St.3d 424, 444, 588 N.E.2d
5 819, 834.

6 English's friend Constance Dickson testified that English rose
7 early for morning devotions. This evidence of English's habit was relevant
8 because English had not put out her garbage on the morning of January 25.
9 English's habitual early rising explained why this non-occurrence was unusual,
10 narrowing the time of death.

11 Allen's sixth proposition of law lacks merit because the evidence
12 about English related directly to the circumstances of the crimes.

13

14 3. Photographic "Show-up" Identification

15 Police showed bus driver Gilbert Pittman a photo of Allen, whom
16 he identified as the person he picked up at 6:04 a.m. on January 25. In Allen's

1 ninth proposition of law, he claims the identification was tainted by the
2 “unnecessarily suggestive” use of a single photo instead of an array. See
3 Stovall v. Denno (1967), 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d
4 1199, 1206. However, Allen stipulated to the identification at trial and never
5 moved to suppress it. As a result, Allen’s claims of error are deemed to be
6 waived. State v. Cook (1992), 65 Ohio St.3d 516, 523, 605 N.E.2d 70, 79.

7 Even if Allen had raised this objection at trial, Pittman’s
8 identification testimony was properly admitted. Use of a single photo may
9 have been “suggestive”; however, reliable identification testimony may be
10 admitted regardless of the flaws in the identification procedure. State v. Jells
11 (1990), 53 Ohio St.3d 22, 26-27, 559 N.E.2d 464, 469-470. The test for
12 determining the admissibility of a photographic identification is “whether
13 under the “totality of the circumstances” the identification was reliable even
14 though the confrontation procedure was suggestive.” Id. at 27, 559 N.E.2d at
15 469. The factors to be considered include the opportunity of the witness to
16 view the criminal at the time of the crime and the witness’s degree of attention.

1 Id. Allen boarded the bus near a streetlight, was the only passenger for seven
2 minutes, and conversed with Pittman. Moreover, Pittman's identification of
3 Allen is verified by Allen's possession of the transfer slip. Accordingly, we
4 find that under the totality of the circumstances the identification was reliable,
5 and we reject the ninth proposition of law.

6 4. Authentication

7 In his seventh proposition of law, Allen claims the blood samples,
8 shoes, jeans jacket and bus transfer were not properly authenticated. See Evid.
9 R. 901. However, Allen never made this objection at trial, and thus waived this
10 issue absent plain error. See State v. Wiles (1991), 59 Ohio St.3d 71, 86, 571
11 N.E.2d 96-97, 116. Plain error occurs when, but for the error, the outcome of
12 the trial clearly would have been otherwise. State v. Long (1978), 53 Ohio
13 St.2d 91, 96-97, 7 O.O.3d 178, 181, 372 N.E.2d 804, 807-808. We find no
14 plain error in this instance. Although probative, the admission of these items
15 into evidence did not alter the outcome of this case. The blood sample was
16 used to link Allen's blood type to that found on the cigarette butts in English's

1 wastebasket. This evidence was not determinative of the case because the trace
2 evidence examiner testified that forty-five percent of whites have Type O blood
3 and, of that forty-five percent, seventy-two percent are secretors. The jeans
4 jacket, shoes and bus transfer are also not determinative of the case. These
5 items were introduced as the items worn by Allen when he was arrested. The
6 jeans jacket had Type O blood on it; however, both Allen and English had Type
7 O blood. The shoes had an unidentified black substance on them, possibly ash
8 from English's fireplace, and the bus transfer placed Allen at a bus stop 1.3
9 miles from English's home. Given the ample evidence of Allen's guilt in
10 addition to these items, we do not find plain error in the admission of these
11 items. The seventh proposition of law lacks merit and is overruled.

12 5. Other Evidentiary Issues

13 In his fifth, eighth, tenth and eleventh propositions of law Allen
14 claims various errors involving evidentiary issues. Each of these propositions
15 of law is discussed below.

1 In his fifth proposition of law, Allen contends that it was error for
2 the trial court to allow prosecution exhibits to be displayed in open court before
3 their formal admission into evidence, which did not occur until after the state
4 had rested its case. Allen failed to object to the display of the exhibits at trial
5 and consequently waived any claim, absent plain error. See State v. Esparza
6 (1988), 39 Ohio St.3d 8, 529 N.E.2d 192. There is no plain error because none
7 of the state’s exhibits were ruled inadmissible, so there can be no prejudice
8 since all the exhibits which were displayed eventually went to the jury.
9 Furthermore, Evid.R. 611 grants the trial court discretion over the mode of the
10 presentation of evidence. Evid.R. 611(A). The fifth proposition of law lacks
11 merit.

12 In his eighth proposition of law, Allen complains that the state’s
13 expert witnesses gave impermissible testimony. First, Allen claims that trace-
14 evidence-examiner Kay May’s (“May”) answers to several questions on
15 redirect should have been stricken because they were not based on a reasonable
16 degree of medical certainty. See Evid.R. 403. Specifically he complains about

1 May's responses that (1) items burned in English's fireplace, including a knife
2 and scissors, could not be tested for blood, and thus "could have" had blood on
3 them, and (2) it was "possible" that the black substance found on the bottom of
4 shoes which allegedly belonged to Allen was ash.

5 May did not provide an improper opinion that blood had been on
6 the knife and scissors; she merely explained that she did not find blood on the
7 objects but could not rule out the possibility that blood could have been on the
8 objects at some time. She did not testify that the substance on the shoes was in
9 fact ash; she said she could not rule that possibility out. We do not find any
10 error in the admission of this testimony. See State v. D'Ambrosio (1993), 67
11 Ohio St.3d 185, 191, 616 N.E.2d 909, 915; State v. Bayless (1976), 48 Ohio
12 St.2d 73, 111-112, 2 O.O.3d 249, 270, 357 N.E.2d 1035, 1058-1059, vacated
13 on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155.

14 Allen also complains about the following question asked of
15 Detective Edward Walsh, the fingerprint expert: "[Y]ou don't go walking
16 around with a fingerprint on your eyeglasses normally, do you?" He answered,

1 “No. I do not.” Allen contends Walsh was not an expert “on whether people
2 immediately clean their glasses when a fingerprint gets on them. * * *” But
3 Walsh did not purport to give an expert opinion on that subject; his response
4 was specifically limited to his personal experience. The jurors were free to rely
5 on their common sense and experience in determining the length of time the
6 victim would have allowed Allen’s fingerprint to remain on her glasses.

7 Lastly, Allen argues that these responses from the experts were
8 “given an air of credibility” by the jury because they were offered by expert
9 witnesses. This argument lacks merit because the trial court cautioned the
10 jurors that expert testimony was entitled to no more weight than the testimony
11 of any other witness. Allen’s eighth proposition of law is overruled.

12 In his tenth proposition of law, Allen asserts that the state
13 introduced repetitive, gruesome photos of English’s body, as well as a crime-
14 scene videotape. Specifically, Allen argues that exhibits 1 through 16, photos
15 of the victim’s body, are gruesome and repetitive. “Under Evid.R. 403 and
16 611(A), the admission of photographs is left to the sound discretion of the trial

1 court.” State v. Maurer (1984), 15 Ohio St.3d 239, 264, 15 OBR 379, 401, 473
2 N.E.2d 768, 791. Allen has failed to show how the trial court abused its
3 discretion by admitting the photographs. The test Allen cites from Maurer,
4 which prohibits repetitive photos, is the standard for admitting gruesome
5 photographs. “Absent gruesomeness or shock value, it is difficult to imagine
6 how the sheer number of photographs admitted can result in prejudice requiring
7 reversal.” State v. DePew (1988), 38 Ohio St.3d 275, 281, 528 N.E.2d 542,
8 550; see, also, State v. Davis (1992), 62 Ohio St.3d 326, 348, 581 N.E.2d 1362,
9 1380. The photographs admitted in this case were not particularly gruesome or
10 shocking. The photographs clarified the testimony regarding the number, type
11 and placement of the wounds, and the cause of death. We find that the
12 probative value of the photographs outweighed any prejudice to Allen. State v.
13 Maurer, supra.

14 As to the videotape of the crime scene, Allen failed to object to its
15 introduction and therefore waived that claim. See State v. Wiles (1991), 59

1 Ohio St.3d 71, 86, 571 N.E.2d 97, 116. Allen's tenth proposition of law is not
2 well taken.

3 In his eleventh proposition of law, Allen contends that the trial
4 court erroneously admitted both physical exhibits and photographs of those
5 exhibits. He claims the photos were cumulative. Allen failed to object to the
6 admission of these exhibits and therefore waived this issue absent plain error.

7 State v. Watson (1991), 61 Ohio St.3d 1, 7-8, 572 N.E.2d. 97, 104.

8 Furthermore, we find that the photographs were admissible because they show
9 the items that were admitted into evidence in the location where they were
10 found. The photographs serve to show the condition of the items when they
11 were discovered and to authenticate the items. See State v. Murphy (1992), 65
12 Ohio St.3d 554, 581, 605 N.E.2d 884, 906. The eleventh proposition of law is
13 overruled.

14 **C. Instructional Issues**

15 In his thirteenth proposition of law, Allen claims the jury
16 instructions were deficient in several ways.

1 1. Lesser Included Offense

2 Allen requested that the trial court instruct the jury on murder as a
3 lesser included offense of aggravated murder. The trial court did so, but only
4 as to Count One (aggravated murder with prior calculation and design), and
5 refused to give any lesser-included-offense instruction on Count Two (felony-
6 murder). Allen claims that the trial court's refusal to give this lesser-included-
7 offense charge was erroneous.

8 An instruction on a lesser included offense is required where the
9 evidence presented at trial would reasonably support an acquittal on the crime
10 charged and a conviction on the lesser included offense. State v. Tyler, 50
11 Ohio St.3d at 36, 553 N.E.2d at 591. The lesser-included-offense instruction
12 for Count Two in this case was required if the jury could reasonably have
13 found that Allen killed English, but not while trying to rob her. See id.

14 Assuming arguendo that the trial court did err in failing to give the
15 lesser-included-offense instruction on Count Two, that error was harmless,
16 because the jury actually did find that a robbery took place when it convicted

1 Allen on Count Three - aggravated robbery. Given that the jury did find Allen
2 guilty of aggravated robbery, it follows that the jury would have convicted
3 Allen of aggravated murder on Count Two even if given the lesser-included-
4 offense option. Any error in not giving the lesser-included-offense instruction
5 did not enhance “the risk of an unwarranted conviction” on Count Two. See
6 Beck v. Alabama (1980), 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d
7 392, 402-403, limited on other grounds, Harmelin v. Michigan (1991), 501
8 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836.

9 2. “Acquittal First” Instruction

10 Although the trial court did instruct the jury on murder as a lesser
11 included offense to aggravated murder on Count One, Allen contends that
12 instruction barred the jury from considering murder without first acquitting him
13 of aggravated murder. Absent a showing of plain error, Allen waived this
14 claim because he failed to object to the instruction. Allen has failed to make a
15 showing of plain error. This court has previously held that an acquittal-first
16 instruction is erroneous. State v. Thomas (1988), 40 Ohio St.3d 213, 219-220,

1 533 N.E.2d 286, 292-293. In this case, however, the trial court did not give an
2 acquittal first instruction; rather, the court instructed the jury as follows: “If
3 you find the defendant not guilty of aggravated murder, you will then proceed
4 with your deliberations and determine whether * * * the defendant is guilty or
5 not guilty of murder.” Although not ideal,⁴ this instruction does not require
6 unanimous acquittal on the crime charged before the jury can move on to
7 consider the lesser included offense. See id. The Thomas court found an
8 instruction substantially similar to the one given in this case acceptable.

9 3. Denial of “Mercy” Instruction

10 Next, Allen complains of the trial court’s denial of his request to
11 instruct the jury that they could consider sympathy arising from the mitigating
12 evidence and that they could consider mercy. Allen also complains of the
13 court’s instruction that the jury “must recommend” death if aggravation
14 outweighed mitigation.

15 The jury’s decision should not be based on sympathy or mercy,
16 which are not mitigating factors and are thus irrelevant to sentencing. State v.

1 Landrum, 53 Ohio St.3d at 123, 559 N.E.2d at 728; State v. Lorraine (1993),
2 66 Ohio St.3d 414, 417-418, 613 N.E.2d 212, 216-217. Permitting the jury to
3 consider sympathy and mercy would violate the well-established principle that
4 the death penalty must not be administered in an arbitrary, capricious or
5 unpredictable manner. California v. Brown (1987), 479 U.S. 538, 541, 107
6 S.Ct. 837, 839, 93 L.Ed.2d 934, 939; Lorraine, 66 Ohio St.3d at 417, 613
7 N.E.2d at 216. Accordingly, there was no error in the trial court's denial of the
8 requested sympathy and mercy instructions. Furthermore, the court's
9 instruction that the jury must recommend the death penalty if the aggravating
10 circumstance outweighed the mitigating factors is consistent with R.C.
11 2929.03(D)(2) which sets forth the guidelines for imposing sentence in a
12 capital case.

13 4. Felony-Murder Instruction

14 Allen next claims the trial judge erred when, during her instruction
15 on the felony-murder specification (R.C. 2929.04[A][7]), she failed to state
16 that, to find Allen guilty, the jury must find that he was the principal offender

1 or that he killed with prior calculation and design. Allen claims this omission
2 is reversible error.

3 Again, Allen did not object at trial and therefore waived this issue,
4 absent plain error. State v. Underwood (1983), 3 Ohio St.3d 12, 3 OBR 360,
5 444 N.E.2d 1332.

6 The failure to give a jury instruction is not plain error, unless, but
7 for the error, the outcome of the trial would have been different. State v. Long,
8 53 Ohio St.2d at 97, 7 O.O.3d at 181, 372 N.E.2d at 808. The trial court's
9 omission does not constitute plain error, because the jury actually did find prior
10 calculation and design in this case. The jury convicted Allen of aggravated
11 murder, R.C. 2903.01(A), on Count One, and the judge expressly told the jury
12 that it had to find prior calculation and design if it found him guilty of that
13 count.

14 Allen's thirteenth proposition of law is overruled in its entirety.

15 **C. Prosecutorial Misconduct**

1 In his twelfth proposition of law Allen alleges several instances of
2 prosecutorial misconduct. Allen raised no objection to many of the comments
3 he challenges and therefore these alleged improprieties are waived, absent plain
4 error. State v. Williams, supra.; State v. Greer (1988), 39 Ohio St.3d 236, 530
5 N.E.2d 382. We have reviewed these prosecutorial comments and find no plain
6 error.

7 Allen also complains of the prosecutor's comment regarding his
8 lack of organic brain damage and the prosecutor's question concerning Allen's
9 prior not guilty by reason of insanity pleas. Allen objected in both instances
10 and both of these objections were sustained. Furthermore, Allen failed to
11 request the curative instruction he claims should have been given.

12 Lastly, the prosecutor's comment on Allen's unsworn statement
13 was within the guidelines of State v. DePew, supra, at paragraph two of the
14 syllabus, because the prosecutor merely commented that Allen's statement was
15 not made under oath, in contrast to testimony of all the other witnesses.

16 Allen's twelfth proposition of law is overruled.

1 **D. Ineffective Assistance of Counsel**

2 In his nineteenth proposition of law, Allen claims ineffective
3 assistance of counsel. In order to prevail on this claim Allen must show that
4 counsel's representation was deficient and that he was prejudiced by that
5 deficiency. Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct.
6 2052, 2064, 80 L.Ed.2d 674, 693. The Strickland court defined deficient
7 representation as representation which is unreasonable under prevailing
8 professional norms. In order to show prejudice, Allen must show a reasonable
9 probability that, but for counsel's unprofessional errors, the result would have
10 been different. A reasonable probability is a probability sufficient to
11 undermine confidence in the outcome of the case. Id. at 694, 104 S.Ct. at 2068,
12 80 L.Ed.2d at 698. Allen's claims of ineffective representation are discussed
13 below.

14 **1. Motions to Suppress**

15 Allen claims his counsel inadequately investigated the facts
16 behind a motion to suppress. Police seized several cigarette butts (some

1 smoked by a Type O secretor) from Allen's bedroom. Allen's counsel moved
2 to suppress that evidence, alleging a warrantless search. However, at the
3 hearing, counsel stated: "I'm unclear as to whether there was a warrant * * *."
4 The prosecutor later produced the warrant. Defense counsel examined it, then
5 withdrew the motion.

6 Allen claims his counsel was ineffective because he was ignorant
7 of the warrant's existence due to inadequate investigation. The record does not
8 show what investigations counsel made so we are unable to evaluate the
9 sufficiency of those investigations. Nor has Allen shown how he was
10 prejudiced. Since a warrant existed, defense counsel's knowledge of it is
11 inconsequential.

12 Next, Allen claims his counsel should have moved to suppress the
13 bus driver's identification of him based on the use of a single photograph.
14 Since we have previously found that this identification procedure was reliable
15 under the totality of the circumstances, defense counsel's failure to move to

1 suppress did not “render the [trial’s] result unreliable.” Strickland, 466 U.S. at
2 687, 104 S.Ct. at 2064. 80 L.Ed.2d at 693.

3 2. Ineffective Assistance in Penalty Phase

4 Allen next argues that it was ineffective for his counsel to ask
5 psychologist Dr. Robert Kaplan (“Kaplan”) whether Allen’s illness would be
6 “treatable” over a thirty-year imprisonment. Kaplan said it was “possible” but
7 uncertain, leading the prosecutor to ask if Allen could kill again. Kaplan
8 replied: “It’s certainly a possibility.” The asking of this question constituted
9 neither deficient performance nor was it prejudicial. This question was of some
10 benefit to Allen because Kaplan answered that it was possible that Allen’s
11 condition was treatable.

12 Allen has identified no act or omission that was both deficient and
13 prejudicial and his nineteenth proposition of law is overruled.

14 **II**

15 **Penalty Phase**

16 **A. Refusal to Appoint Neurologist**

1 In his fifteenth proposition of law, Allen argues that the trial court
2 erred by refusing to appoint a neurologist to investigate possible organic brain
3 damage as a mitigating factor. R.C. 2929.04(B)(3).

4 Just seven days before the date set for the penalty phase hearing,
5 Allen moved for appointment of a neurologist to determine, by means of a CAT
6 scan or MRI scan, whether he had brain damage. The motion was filed beyond
7 the deadline previously set for motions related to the penalty phase.

8 The court set the motion for a hearing. At that hearing, Allen introduced
9 reports and an affidavit of psychologist Dr. Robert G. Kaplan. Kaplan was first
10 employed by Allen’s parents and then appointed by the court at Allen’s request.
11 Kaplan did two examinations and some testing of Allen. In his report relating
12 to the first examination of Allen, Kaplan stated that, at age sixteen, Allen was
13 knocked unconscious by a head injury. That report did not address possible
14 brain damage. Kaplan’s second report gave the results of two tests. The first
15 was the Rorschach Ink Blot Test. Kaplan reported that Allen’s responses
16 indicated a simplistic, “black or white” view of life. Kaplan stated that such a

1 view is “characteristic of persons with limited intelligence or organic brain
2 impairment,” but there could also be un-organic causes as well. Kaplan then
3 reported on the results of the Bender Visual-Motor Gestalt Test (“Bender test”)
4 which is a screening measure for organic brain impairment. In this report,
5 Kaplan stated that the test results “would indicate little likelihood of any
6 organic brain impairment.” In the conclusions and recommendations section of
7 this report, Kaplan attributed Allen’s simplistic world view to a “motivation to
8 avoid problems.” Kaplan did not mention brain damage, nor did he suggest
9 that a neurologist be obtained or that further testing be conducted. However,
10 in an affidavit, dated just three days after his second report, Kaplan stated the
11 following:

12 “***That I have examined David Allen and administered
13 psychological tests which suggest the presence of organic brain damage, which
14 if present could cause him to lack substantial capacity to appreciate the
15 criminality of his conduct or to conform his conduct to the requirement of the
16 law.

1 “***That the absence or presence of organic brain impairment can
2 be determined by a qualified neurologist in conjunction with the administration
3 of a CAT or MRI scan.”

4 In considering Allen’s assertion that a neurologist should have
5 been appointed, we look to R.C. 2929.024, which entitles an indigent defendant
6 charged with aggravated murder to such “investigation services, experts, or
7 other services” as the trial court finds “reasonably necessary for [his] proper
8 representation * * * at trial or at the sentencing hearing. * * *” A defendant
9 must show, not just a mere possibility, but a reasonable probability that an
10 expert would aid in his defense, and that denial of expert assistance would
11 result in an unfair trial. State v. Broom (1988), 40 Ohio St.3d 277, 283, 533
12 N.E.2d 682, 691. Moreover, the determination of necessity lies in the trial
13 court’s discretion. R.C. 2929.024; see State v. Jenkins 15 Ohio St.3d at 193, 15
14 OBR at 336, 473 N.E.2d at 291.

15 The trial court did not abuse its discretion by denying Allen’s
16 motion to appoint a neurologist. First, the request was filed after the court’s

1 deadline for such motions. Second, Allen failed to specifically demonstrate the
2 reasonableness of the request. State v. Broom, 40 Ohio St.3d at 283 - 284, 533
3 N.E.2d at 691. Allen did not show a reasonable probability that an expert
4 would aid in his defense. Id. Although Allen’s ink blot test indicated a
5 “simplistic *** view of life” consistent with, but not necessarily caused by,
6 brain damage, the Bender test indicated “little likelihood” of brain damage, and
7 Kaplan’s second report seems to rule out brain damage. Given that the Bender
8 test is specifically designed to test for organic brain damage and that the results
9 of the ink blot test were not conclusive as to brain damage, we find no abuse of
10 discretion by the trial court in denying the motion to appoint a neurologist to
11 further investigate Allen’s claim of brain damage.

12 Although Kaplan’s affidavit states that test results suggest the
13 presence of organic brain damage and that testing by a neurologist could
14 determine the absence or presence of brain damage, the trial court could
15 properly disregard the affidavit. It adds nothing substantive to the reports, fails

1 to mention the Bender test, and ventures no opinion as to whether neurological
2 testing is necessary.

3 Accordingly, Allen’s fifteenth proposition of law lacks merit.

4 **B. Factual Errors in Sentencing Opinion**

5 In his twenty-first proposition of law, Allen claims that the trial
6 court’s sentencing opinion contains factual mistakes, improperly treats the facts
7 of the case as aggravating circumstances, and improperly weighs the mitigating
8 factors.

9 The trial court’s opinion does contain two minor factual errors.

10 The cigarette butts from Allen’s bedroom were not identified as Dorals. And,
11 there was no testimony that Allen boarded the bus “less than one mile from
12 Mrs. English’s home,” as the court stated. We find these minor flaws
13 inconsequential. Furthermore, this court’s independent review can correct
14 flaws in the trial court’s opinion. See State v. Lewis (1993), 67 Ohio St.3d 200,
15 204, 616 N.E.2d 921, 925.

16 **C. Court of Appeals’ Independent Review**

1 In his twenty-second proposition of law, Allen charges that the
2 court of appeals improperly performed its independent review under R.C.
3 2929.05(A). With its opinion, the appellate court filed a one-page
4 “supplemental journal entry,” summarily stating that the aggravating
5 circumstance outweighed the mitigating factors and that the sentence was not
6 disproportionate. Allen asks this court to remand to the court of appeals with
7 instructions to explain why it so found.

8 R.C. 2929.05(A) requires courts of appeals to independently
9 review death sentences; it does not expressly require a detailed explanation.
10 By contrast, R.C. 2929.03(F) requires that the trial court opinion explain why
11 aggravation does or does not outweigh mitigation. If the legislature had
12 intended that the court of appeals provide an explanation, it would have stated
13 that requirement, as it did for trial courts in R.C. 2929.03(F).

14 Allen incorrectly relies upon State v. Gillard (1988), 40 Ohio St.3d
15 226, 533 N.E.2d 272, and State v. D’Ambrosio, supra, to support his argument.
16 In Gillard, this court remanded because the court of appeals had not reviewed

1 the sentence at all. Here the supplemental entry says the court did perform an
2 independent review. In D'Ambrosio, it appeared that the court of appeals
3 reviewed the sentence without a full record. Allen makes no such claim here.

4 We find no deficiencies in the court of appeals' independent review
5 and, accordingly, we overrule Allen's twenty-second proposition of law.

6 **III**

7 **Independent Review**

8 Having found that the evidence shows beyond a reasonable doubt
9 that Allen committed the murder while committing or attempting to commit
10 aggravated robbery, R.C. 2929.04(A)(7), we now turn to our independent
11 assessment of whether that aggravating circumstance outweighs the mitigating
12 factors raised by Allen. Against the single specification Allen asks us to weigh
13 two mitigating factors: diminished capacity, R.C. 2929.04(B)(3), and residual
14 doubt of guilt.

15 **A. Diminished Capacity**

1 Dr. Kaplan testified regarding Allen’s claim of diminished
2 capacity. Kaplan testified that multiple mental diseases substantially impaired
3 his capacity to appreciate the criminality of his actions and conform to the law.
4 Dr. Kaplan diagnosed Allen as having post-traumatic stress disorder (“PTSD”).
5 Allen told Kaplan he was raped in prison in 1981; Kaplan did not know if this
6 was true, but noted that being raped can cause PTSD. Allen’s symptoms
7 included “intrusive recollections” of the trauma, excessive suspiciousness, and
8 feelings of inadequacy, shame, and rage.

9 Kaplan further testified that Allen’s “sense of limited ability to
10 handle” complex situations motivates him to oversimplify situations without
11 regard for reality, due to “personality disorganization” and possibly also to low
12 intelligence or brain damage. However, Kaplan said “intellectual laziness”
13 may also play a part.

14 On cross-examination, Kaplan testified that he “doubt[ed]” Allen
15 would have murdered English had a policeman been sitting in her house. This

1 testimony undermines Kaplan’s finding of substantially impaired capacity to
2 obey the law.

3 We assign only modest weight to Dr. Kaplan’s mitigation
4 testimony.

5 **B. Residual Doubt**

6 Allen also raises “residual doubt” of his guilt as a mitigating
7 factor. In an unsworn statement Allen insisted he was innocent and tried to
8 explain the evidence. Based on the evidence as set forth in the body of this
9 opinion, we find Allen’s explanations unpersuasive and we have no doubt of
10 his guilt.

11 Accordingly, weighing the aggravating circumstance against the
12 claimed mitigating factors, we conclude that the aggravating circumstance
13 outweighs the mitigating factors beyond a reasonable doubt.

14 **IV Proportionality Review**

15 We conclude that the death penalty is appropriate and
16 proportionate in this case. R.C. 2929.05(A). This court has consistently

1 upheld the death penalty in cases involving aggravated robbery-murder. See,
2 e.g., State v. Scott (1986), 26 Ohio St.3d 92, 26 OBR 79, 497 N.E.2d 55; State
3 v. Holloway (1988), 38 Ohio St.3d 239, 527 N.E.2d 831; State v. Van Hook
4 (1988), 39 Ohio St.3d 256, 530 N.E.2d 883.

5 Accordingly, the judgment of the court of appeals is affirmed.

6 Judgment affirmed

7 Douglas, Resnick and F.E. Sweeney, JJ., concur.

8 Moyer, C.J., Wright and Pfeifer, JJ., dissent.

9

10 **APPENDIX**

11 “Proposition of Law No. I

12 “A prospective juror should be removed for cause when she discloses
13 by her answer that she cannot be a fair and impartial juror or if the court has
14 any doubt as to the juror’s being entirely unbiased.

15 “Proposition Law No. II

1 “Defense counsel should be permitted to question prospective jurors
2 concerning their views on capital punishment and the trial court should not
3 excuse a juror for cause based on views concerning capital punishment until
4 such questioning is allowed and unless those views would prevent or
5 substantially impair the performance of their duties.

6 “Proposition of Law No. III

7 “The existence of a prior offense is such an inflammatory fact that
8 it should not be revealed to the jury unless specifically permitted under statute
9 or rule.

10 “Proposition of Law No. IV

11 “A conviction cannot stand when the state failed to present
12 sufficient evidence to meet the legal requirements to sustain a conviction.

13 “Proposition of Law No. V

14 “Evidentiary exhibits, sought to be introduced into evidence,
15 should not be displayed to the jury prior to their admission.

16 “Proposition of Law No. VI

1 “Victim character evidence is inadmissible in the guilt-innocence
2 phase of a capital trial.

3 “Proposition of Law No. VII

4 “A trial court should not admit evidentiary exhibits absent proper
5 authentication.

6 “Proposition of Law No. VIII

7 “Expert testimony should be excluded from evidence when no
8 basis or foundation for such testimony is established and its admission is
9 irrelevant.

10 “Proposition of Law No. IX

11 “The use of a single photograph for identification purposes is
12 impermissibly suggestive and destroys any reliability of the identification.

13 “Proposition of Law No. X

14 “Duplicative and repetitive gruesome photographs are inadmissible
15 in a capital prosecution.

16 “Proposition of Law No. XI

1 “When the state admits actual physical exhibits into evidence, the
2 introduction of photographs of those items, having no independent evidentiary
3 value, is error since it only serves to cumulate the quantity of evidence and
4 overstate the state’s case.

5 “Proposition of Law No. XII

6 “Misconduct by the prosecuting attorney in either the guilt-
7 innocence or penalty phase of a capital case will serve as the basis of a reversal
8 if it denies the capital defendant a fair determination of either his guilt or
9 innocence or the appropriate sentence in the case.

10 “Proposition of Law No. XIII

11 “A jury in a criminal case must be instructed to find every element
12 of the offense beyond a reasonable doubt.

13 “Proposition of Law No. XIV

14 “Erroneous jury instructions in either the guilt-innocence or penalty
15 phase of a capital case mandate reversal of the conviction and/or death
16 sentence.

1 “Proposition of Law No. XV

2 “An indigent defendant is entitled to the appointment of a defense
3 expert, at state’s expense, to assure he has a fair opportunity to present his
4 defense.

5 “Proposition of Law No. XVI

6 “The state may re-admit evidence from the guilt-innocence phase
7 of a capital case into the penalty phase only if they are relevant to the death
8 penalty specifications of which appellant was found guilty.

9 “Proposition of Law No. XVII

10 “A trial court’s use of the word ‘recommendation’ (when
11 describing the jury verdict) in voir dire and penalty phase jury instructions
12 denies a capital defendant a fair determination of his sentence by the jury.

13 “Proposition of Law No. XVIII

14 “A trial court should not engage in communications with a
15 deliberating jury without notice to and consultation with the parties involved.

16 “Proposition XIX

1 “A capital defendant is entitled to the effective assistance of
2 counsel throughout all stages of the capital prosecution.

3 “Proposition of Law No. XX

4 “When a capital defendant is indicted and later convicted under
5 both Sections of R.C. 2903.01 when there is but one victim, the trial court
6 should sentence the defendant under only one of the counts and vacate the
7 other.

8 “Proposition of Law No. XXI

9 “When a trial court opinion in a capital case is replete with errors
10 and fails to correctly weigh the aggravating circumstances and mitigating
11 factors the appropriate remedy is vacation of the death penalty.

12 “Proposition of Law No. XXII

13 “A capital appellant is constitutionally entitled to an independent
14 review of his conviction and death sentence by both the court of appeals and
15 the Ohio Supreme Court.

16 “Proposition of Law No. XXIII

1 “The Fifth, Sixth, Eighth and Fourteenth Amendments to the
2 United States Constitution and Sections 2,9,10 and 16, Article I of the Ohio
3 Constitution establish the requirements for a valid death penalty scheme. Ohio
4 Revised Code, Section[s] 2903.01, 2929.02, 2929.021, 2929.022, 2929.023,
5 2929.03, 2929.04 and 2929.05, Ohio’s statutory provisions governing the
6 imposition of the death penalty, do not meet the prescribed requirements and
7 thus are unconstitutional, both on their face and as applied.”

8

9 FOOTNOTES

10 ¹Trace-evidence expert Kay May testified that certain individuals
11 secrete their blood type in bodily fluids, such as saliva.

12 ²”DSM III-R” refers to the Third Edition of the Diagnostics and
13 Statistical Manual of the American Psychiatric Association. Dr. Kaplan, a
14 clinical psychologist who testified in this case, explained that it is a publication
15 used by mental health professionals for classifying psychiatric and emotional
16 problems and diseases and defects and determining their existence.

1 ³Trace expert Kay May testified that 32.4 percent of the white
2 population are Type O secretors.

3 ⁴A better instruction would incorporate the “inability to agree”
4 language adopted in Thomas, supra., at 220-221, 533 N.E.2d at 293.
5
6 State v. Allen.

7 WRIGHT, J., dissenting. The bedrock of our criminal justice system is the
8 constitutional right to a trial by jury. At the heart of this basic grant and due
9 process of law is the constitutional guaranty that the jurors who decide a
10 defendant’s fate will be fair, impartial and free from bias or prejudice. *Morgan*
11 *v. Illinois* (1992), 504 U.S. 719, 727, 112 S.Ct. 2222, 2228, 119 L.E.2d 492,
12 501; *Ross v. Oklahoma* (1988), 487 U.S. 81, 85, 108 S.Ct. 2273, 2277, 101
13 L.E.2d 80, 88; *Wainwright v. Witt* (1985), 469 U.S. 412, 418, 105 S.Ct. 844,
14 849, 83 L.Ed.2d 841, 845; *Turner v. Louisiana* (1965), 379 U.S. 466, 471-472,
15 85 S.Ct. 546, 549, 13 L.E.2d 424, 431; and *Irvin v. Dowd* (1961), 366 U.S. 717,
16 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 755.

1 A prospective juror should be removed for cause when he “discloses by
2 his answers that he cannot be a fair and impartial juror or will not follow the
3 law as given to him by the court.” R.C. 2313.42(J). Additionally, a
4 prospective juror should be excused “if the court has *any* doubt as to the juror’s
5 being *entirely unbiased*.” (Emphasis added.) R.C. 2313.43. In the present
6 case, the trial court deprived the defendant of important constitutional and
7 statutory rights when it failed to remove for cause a juror who clearly
8 demonstrated that she could not be impartial.

9 Before this trial began, the trial judge asked all of the prospective jurors
10 *en masse* to advise the bailiff if they had any personal problems with serving as
11 a juror. Ms. Worthington, one of the prospective jurors, approached the bailiff,
12 indicating that she had some problems with serving as a juror. She was then
13 brought before the judge. She advised the court that she was previously
14 unaware that she had been called to serve in a criminal case and that she did not
15 feel that she could serve as a juror in such a case because only a few years
16 earlier her brother had been shot and killed. The trial court did not take any

1 action, stating that her ability to serve as a juror, in light of her experiences,
2 would be addressed during the general voir dire.⁵

3 When Ms. Worthington was finally called as a juror, she was the twelfth
4 juror to be seated on the panel. At that point, the defendant had exhausted all
5 six of his peremptory challenges. Ms. Worthington was questioned in open
6 court in the presence of the balance of the seated jurors. During questioning,
7 she again related the facts surrounding her brother's murder and the fact that
8 she had sat through every day of that trial. She indicated without equivocation
9 that she did not feel that justice was done in that case because the accused had
10 been found not guilty. She stated without equivocation that she harbored
11 feelings of bitterness and resentment as a result of the outcome of that trial.
12 She further indicated that she was friendly with a number of police officers and
13 the detectives and the prosecutor who were involved with her brother's case.
14 The detective in her brother's case apparently was still in contact with her
15 mother. Ms. Worthington also stated that she did not know if she could hold
16 back her emotions when the coroner testified as she believed, apparently as a

1 result of listening to earlier questioning, that the facts in this case were very
2 similar to those in her brother's case. She then stated that the recent trial
3 involving her brother's murder could be a problem if she served as a juror in
4 the present case.

5 Counsel for appellant asked that this juror be excused for cause, citing,
6 among other reasons, her familiarity with potential state witnesses, her
7 bitterness arising from the not guilty finding in her brother's murder case, and
8 her emotional involvement as a result of her brother's case. As a result,
9 counsel argued that she did not have the "detachment from these proceedings
10 that ought to be required, particularly in a capital case." Defense counsel, of
11 course, also pointed out there were many other jurors available for seating in
12 the event that the trial court sustained their challenge for cause. The trial court
13 overruled the challenge, stating that "[t]he juror, when questioned,
14 unequivocally stated that she could be fair and impartial. *** I don't see a
15 problem with her serving."

1 I do not see how any fair-minded individual can suggest that Ms.
2 Worthington did not indicate a state of mind and view that cast the most
3 serious sort of question on her ability to render an impartial verdict. In *Palmer*
4 *v. State* (1885), 42 Ohio St. 596, paragraph three of the syllabus, this court
5 stated: “A person called as a juror in a criminal case, who clearly shows
6 himself, on his *voir dire*, not to be impartial between the parties, is not rendered
7 competent by saying that he believes himself able to render an impartial
8 verdict, notwithstanding his opinions, although the court may be satisfied that
9 he would render an impartial verdict on the evidence.” While it is true that the
10 state made every effort to extract a statement to the effect that this juror
11 believed herself capable of rendering an impartial verdict, I cannot think of a
12 situation similar to this where this court or any other court has indicated that a
13 juror with experience and perspective similar to Ms. Worthington should not
14 have been excused for cause.

15 It is interesting to note that when questioned about this matter during
16 oral argument to this court, the assistant prosecutor arguing this case indicated

1 that Ms. Worthington was the type of juror he “wanted” on the jury. I must
2 respectfully disagree. The state has an obligation to vigorously prosecute
3 crime. However, the state also has a duty to uphold the law and protect the
4 constitutional rights of those who are tried for crimes.

5 The state argues that our decision in *State v. Broom* (1988), 40 Ohio
6 St.3d 277, 533 N.E.2d 682, upholds the posture taken by the trial judge. In
7 *Broom*, we held that the relevant inquiry with respect to the impartiality of the
8 jury is focused on the jurors who eventually sat and decided the case, not those
9 jurors who were excused pursuant to peremptory challenges. *Id.* at 287-288,
10 533 N.E.2d at 695. Consequently, we stated: “[I]n order to state a
11 constitutional violation in this situation, the defendant must use all his
12 peremptory challenges and demonstrate that one of the jurors seated was not
13 impartial.” *Id.* at 288, 533 N.E.2d at 695. In *Broom*, the defendant’s
14 impartiality challenge was unsuccessful because he had exercised a peremptory
15 challenge to remove the juror who he alleged was biased.

1 Consistent with our holding in *Broom*, if a biased juror has sat on a jury
2 that ultimately sentenced a defendant who had preserved his right to challenge
3 the trial court's failure to remove the juror for cause, the defendant's sentence
4 must be overturned. Accord *Ross v. Oklahoma, supra*, 487 U.S. at 85, 108
5 S.Ct. at 2277, 101 L.Ed.2d at 88. That is exactly what occurred in this case.
6 The appellant had exhausted all of his peremptory challenges by the time Ms.
7 Worthington was seated on the panel. He challenged her for cause, but because
8 the trial court failed to remove her, she was a member of the panel that found
9 defendant guilty and sentenced him to death.

10 I do not relish taking a position that would require a retrial of this
11 particular matter. However, better to retry this matter now than two or three
12 years hence as a result of a successful action in habeas corpus. Furthermore,
13 this is a purely circumstantial case. There are serious questions concerning the
14 admissibility of certain evidence with respect to the defendant's background
15 and character and whether or not the defendant, if he did commit this crime, did
16 so in the course of an armed robbery.

1 Accordingly, for the foregoing reasons, I would reverse the decision of
2 the court of appeals and remand this matter for a new trial.

1 Moyer, C.J., and Pfeifer, J., concur in the foregoing dissenting opinion.

2 FOOTNOTE:

3 ⁵The action of the trial judge in this instance appears to be inapposite to
4 the judge's treatment of prospective juror Townes. Mr. Townes indicated he
5 had been convicted of manslaughter, and the trial judge immediately excused
6 him.

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