

**State of Ohio, Plaintiff-Appellee v. Stephen B. Cohen, Defendant-Appellant**

**No. 12-011**

**Court of Appeals of Ohio, Eleventh Appellate District, Lake County**

**April 29, 1988, Decided**

**PRIOR HISTORY:** [\*1]

Criminal Appeal from Lake County, Common Pleas Court, Case Nos. 85 CR 389 & 86 CR 109.

**DISPOSITION:**

JUDGMENT: Reverse and remand.

**COUNSEL:**

JOHN E. SHOOP, PROSECUTING ATTORNEY,  
JOHN HAWKINS, ASSISTANT PROSECUTOR,  
Painesville, Ohio for Plaintiff-Appellee.

JOHN S. NELSON, ESQ., JOHN J. HURLEY, JR.,  
ESQ., JAMES K. FARRELL, ESQ., Painesville, Ohio for  
Defendant-Appellant.

**JUDGES:**

HON. DONALD R. FORD, P.J., HON. JUDITH A.  
CHRISTLEY, J., concurs.

ROBERT E. COOK, J., dissents with dissenting  
opinion.

**OPINION BY:**

FORD

**OPINION:**

OPINION

FORD, P.J.,

On November 5, 1985, defendant-appellant, 17 year old Stephen B. Cohen, was indicted by the Lake County Grand Jury on one count of aggravated murder, R.C. 2903.01, Kidnapping, R.C. 2905.01, and attempted rape, R.C. 2923.02, after the Lake County Juvenile Court had relinquished jurisdiction and transferred the case to the General Division of the Common Pleas Court of Lake County (Case No. 85 CR 389). Subsequently, on January 31, 1986, a second indictment was returned against

appellant charging him with aggravated murder and kidnapping (Case No. 86 CR 109). The subject indictments were consolidated for purposes of trial.

To summarize, the foregoing indictments [\*2] resulted from the July 1985 slaying of 17 year old Michelle Hayes. The victim was found in a shallow grave in August 1985, her lower extremities having been severed and her body in an advanced state of decomposition. Appellant and one Scott Grant, Lake App. No. 11-252, were ultimately charged with being principal offenders in the victim's death.

The State presented a combination of witnesses who testified that the appellant had admitted to them that he had been involved in a killing. These accounts differed, but according to some of them he had expressly indicated that he had raped and killed a young girl and put her in a berry patch after having cut off her legs. Police officers testified to admissions made to them by the appellant concerning his involvement in the homicide.

In addition, the State presented the testimony of Raymond Scott who indicated that about the time in question in July he had heard screams emanating from the area where Michelle Hayes' clothes were found. Other pertinent forensic evidence was submitted on behalf of the State through various officers who participated in the investigation, and were involved in the discovery of the body of the deceased [\*3] as well as articles of clothing and personal items of hers.

The defense presented the testimony of the appellant which varied from the various statements made to friends and associates. He testified that the previous statements made by him were made "out of a feeling of guilt." In his testimony, the appellant stated that he observed Scott Grant and Michelle Hayes having sex in his bed and that he watched them for a short time. He indicated that he was noticed by Michelle Hayes and that he left the bedroom at the request of Scott Grant. He submitted that he heard a noise and went back to the bedroom and saw Michelle lying on the floor and that he determined she was dead after he attempted to take her pulse. He further testified that Scott Grant asked for his assistance in moving Michelle's body out of the utility room window of the

residence into the back yard. According to his narrative at that point of time, Scott Grant told him to go to the house and get a saw, a hat and the clothes of the deceased. He indicated that he had complied with that request and that he turned away as Scott Grant sawed off Michelle's legs. He stated that Scott Grant buried the body in a berry patch [\*4] and that both of them took her clothes and placed them in a drainpipe where they were ultimately discovered.

Although appellant filed a jury waiver on March 11, 1986, and a request for trial by a three judge panel, the trial court denied appellant's request. Thereafter, on March 31, 1986, trial commenced with jury selection in the Lake County Common Pleas Court. On April 9, 1986, the jury returned hits verdict finding appellant not guilty on each of the five counts contained in the indictments, but guilty of the two lesser included offenses of murder. The trial judge sentenced appellant, on April 11, 1986, to an indeterminate term of fifteen years to life imprisonment in the Chillicothe Correctional Institute.

On November 22, 1986, appellant filed a motion for a new trial which motion was ultimately denied by the trial court.

Appellant submits the following assignments of error:

1. The trial court committed reversible error in violation of the due process clause of the Fourteenth Amendment to the clause of the Fourteenth Amendment to the United States Constitution, and Ohio Evidence Rule 804(B)(3), by prohibiting the admission of statements by co-defendant Scott Grant [\*5] which exculpated the defendant.

2. The trial court's instruction that the law presumes a person would not implicate himself in a crime unless it were true and statements against interest are considered in law to be reliable are unconstitutional as violating the Fourteenth Amendment due process requirement that the State prove every element in a criminal offense beyond a reasonable doubt and contrary to Ohio law.

3. The trial court erred to the prejudice of defendant in limiting his peremptory challenges to four, in denying him the benefit of the venire provisions of O.R.C. 2945.18 and 2945.19, and in failing to sequester the jury during deliberations.

4. The trial court committed prejudicial error by denying defendant's request to be tried by a court composed of three judges.

5. The trial court erred to the prejudice of defendant in admitting into evidence the testimony of Raymond Scott as to his recollection after hypnotic sessions, or attempted hypnosis sessions, or attempted hypnosis questionably

successful, where such pre-hypnotic written recollection was substantially at odds with previous statement and was fundamentally unreliable, speculative, and [\*6] inadmissible because of the manner in which it had been secured.

6. The trial court erred to the prejudice of defendant-appellant in admitting into evidence, the testimony of Raymond Scott with reference to hearing, some time in the month of July, 1985, what he called a "despairing groan" in the night.

7. The trial proceedings in this case created prejudicial error to the rights of the accused in the failure of the trial judge to recuse himself and the failure thereafter to disqualify said judge under circumstances which would cause reasonable question to arise as to the impartiality of the trial judge.

8. The trial court committed error prejudicial to the defendant in permitting the coroner to testify that the decedent's cause of death was "homicidal violence" and that her death was the result of "some criminal act" and in admitting a death certificate containing such language.

9. Error prejudicial to the defendant was committed when the prosecutor, in closing argument, urged the jury to convict as a matter of civic duty.

10. The trial court erred to the prejudice of defendant in permitting the State, over objection, to adopt different and inconsistent [\*7] theories from those taken by it in the trial of a co-defendant (Scott Grant) as to who committed the crimes charged and where and how the same were perpetrated.

Appellant's first assignment of error urges that the trial court committed prejudicial error in excluding the admission of statements made by co-defendant, Scott Grant, which statements tended to exculpate or minimize appellant's involvement in the death of Michelle Hayes. The assignment is with merit.

The evidence reflects that Scott Grant made several statements to the police, oral or written, presenting several versions of the criminal incident in question to the Mentor Police Department. While each of the earlier subject versions incriminated appellant to a greater extent, when Grant was informed by the police that appellant here had made a statement incriminating Grant, Grant then made an oral and written statement which was devoid of any information implicating appellant with the death of Michelle Hayes. To this end, appellant sought to introduce the testimony of Robert Smith, Corrections Officer of the Mentor Police Department, and the written confession of Scott Grant both of which had the potential effect [\*8] of

exculpating appellant's participation in the criminal homicide.

With respect to proffered testimony regarding Grant's earlier statements, the trial court excluded these statements because it determined that those narrations only minimized appellant's involvement, but did not exonerate his participation. As for Grant's confession, the trial court excluded it on the ground that:

"The statement, since it is not spontaneous, is held by law not to be reliable."

In so ruling, the trial court agreed with the State's position that because the statements were not spontaneous they allegedly lacked the requirement of trustworthiness.

The United States Supreme Court's decision in *Green v. Georgia* (1979), 442 U.S. 95, presents a somewhat analogous fact pattern to the one now before this court.

In *Green*, *supra*, the defendant appealed the exclusion of certain testimony from a hearing held for purposes of determining whether capital punishment should be imposed against the defendant, following his conviction for murder. At this hearing, the defendant sought to introduce the testimony of a witness who testified at his co-defendant's trial to the effect that the co-defendant [\*9] had admitted committing the murder himself, outside of the presence of the defendant. The State of Georgia refused to allow the witness' testimony into evidence claiming it was inadmissible hearsay.

In reversing the Supreme Court of Georgia the United States Supreme Court advanced the following analysis:

"Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, \* \* \* and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it. In these unique circumstances 'the hearsay rule may not be [\*10] applied mechanistically to defeat the ends of justice.' [citations omitted]. *Id.* at 97. (emphasis added.)

Of particular interest here is that while under Georgia law declarations against pecuniary interest are recognized exceptions to the hearsay rule no such exception exists for

declarations against penal interest, thus forming the basis of the state's exclusions of the witness' testimony in *Green*, *supra*.

In this respect and relevant to the present issue is Evid. R. 804(B)(3), which provides that:

"(B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

(3) Statement Against Interest.

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. At statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculcate the accused, is not admissible unless corroborating [\*11] circumstances clearly indicate the trustworthiness of the statement."

As evidenced by the foregoing, out-of-court statements against the declarant's penal interest are admissible when three tests are met: (1) the declarant is unavailable; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true, and (3) if offered to exculpate the accused, the statement must be corroborated by circumstances clearly indicating its trustworthiness. See *State v. Smith* (September 1, 1987), Montgomery App. No. 9963, unreported; *United States v. Thomas* (C.A.6, 1978), 571 F.2d 285 (Pre-rule cases held that foundation requirements here also included a showing that the declarant had firsthand knowledge of the events); *G.M. McKelvey Co. v. General Casualty Co. of America* (1957), 166 Ohio St. 401; *Ferrebee v. Boggs* (1970), 24 Ohio App. 2d 18.

Applying this test to the present facts, the challenged testimony should here been admitted into evidence.

With respect to the first element of the subject test, Scott Grant was not available as a witness by virtue [\*12] of his actions in asserting his Fifth Amendment privilege against self-incrimination during the trial on this matter. Evid. R. 804(A). Parenthetically, he did not testify in his trial.

Directing attention to the second element of the test of admissibility, it has previously been held that admissible statements against penal interest are not solely limited to direct confessions of guilt, but include statements that have the effect of subjecting the declarant to criminal liability.

As stated in *United States v. Thomas*, supra:

"\* \* \* We do not read Rule 804(B)(3) to be limited to direct confessions of guilt. Rather, by referring to statements that 'tend' to subject the declarant to criminal liability, the rule encompasses diserving statements by declarant that would have probative value in a trial against the declarant." *Id.* at 288.

Those statements of Scott Grant, which were the primary evidence used by the State against Grant in his aggravated murder trial, clearly constitute statements against the penal interest of Grant. His ultimate confession expressly incriminated him when he stated that he struck the victim in the throat, and that both he and appellant were [\*13] shocked that she was dead.

Turning attention to the corroborating circumstances indicating the trustworthiness segment of the test, it is difficult for this court to conceive how the very same statements used in the Grant case for purposes of securing his conviction could be excluded in the present action on the basis of lack of trustworthiness. A fair reading of the Green case, supra, in this context indicates to us that it stands in part for the relevant and material proposition, as here, that the state had in fact admitted and vouched for the reliability and trustworthiness of the subject hearsay testimony in the Grant case and therefore it should have been admitted during Cohen's trial having satisfied the other indicia of admissibility. In this respect, it is noted that the trial judge in the present cause excluded Grant's statements concluding that, since the statements were elicited after a ten hour period of questioning, they were lacking in spontaneity. However, while co-defendant Grant sought to suppress the very same statement in Lake App. No. 11-252, which appellant attempted to introduce as evidence here, the trial court there ruled that they were admissible, [\*14] on the basis that they were reliable and voluntary despite the lengthy period of questioning.

With regard to the factor of spontaneity, we would point out that it is not set forth as one of the threshold elements in Evid. R. 804(B)(3) for admissibility of a co-defendant's exculpatory statements or confession. It may, however, be considered as a factor with other circumstances in determining the trustworthiness of such statements. *Lowery v. State of Maryland* (1975), 401 F. Supp. 604, at p. 608.

With reference to this general subject, the Staff Notes to Ohio Rule of Evidence 804(B)(3) provides in part:

"\* \* \* Note that the language is corroborating circumstances not corroborating evidence. Some kind of corroborating circumstances should exist as a condition to admissibility when the statement of the declarant which

exposes the declarant to criminal liability is deemed not to be very 'trustworthy'."

The primary undertaking of a trial court's analysis here is to apply the corroboration requirement in a manner to attempt to determine whether there are sufficient circumstances to overcome the motive to fabricate, whether because of fear, love, monetary inducement, etc. [\*15] *Lowery*, supra at 607. See, also, Advisory Committee Note, Federal Rule of Evidence 804(b)(3), which also states in part:

"When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."

Regarding the manner in which a trial court should evaluate corroborating circumstances, pronouncements in *United States v. McDonald* (1982), 688 F.2d 224, provide some insight as stated at pages 235 and 236:

"The matter of what constitutes corroborating circumstances which clearly indicate the trustworthiness of the statement was left for judicial (i.e. case by case) development. 11 Moore's Federal Practice § 804.06(3)[2]; at VIII-281. 'It is clear that the standard for corroboration must not be too high.' *Id.* at VIII-283."

\* \* \*

"Weinstein additionally has this to say:

'The court should only ask for sufficient corroboration to [\*16] 'clearly' permit a reasonable man to believe that the statement might have been in good faith and that it could be true. If, for example, the proof is undisputed that the person confessing to a shooting could not have been at the scene of the crime because he was in prison, it will be excluded. But if there is evidence that he was near the scene and had some motive or background connecting him with the crime that should suffice.'"

Addressing the final factor of Evid. R. 804(B)(3), trustworthiness of a challenged statement is to be determined on the basis of whether such statement is corroborated by surrounding facts and circumstances. We note that the following items from the record provide significant corroboration:

1. The oral and written confession rendered by Grant on August 20, 1985, at or after 8:30 p.m., as well as the admission subsequently of officer Robert Smith, all

unequivocally incriminated him in the homicide of Michelle Hayes with which he was charged and convicted.

2. All of the statements in issue were made to police or law enforcement officials, who were prepared to testify at appellant's trial about these statements.

3. There is no indication or finding [\*17] that the statements were not voluntarily given by Grant.

4. All of these statements were given by Grant after he was completely advised of his rights.

5. Grant's confession was reduced to writing by him, and he signed or initialed each page, and executed his signature at the end of it.

6. The contents of Grant's confessional statement included many items that were expressly consistent with the police investigatory findings that corroborated major details of the statement through other independent witnesses. For example, the victim's clothes were found where Grant's statement said they were, and there was no evidence of any news media communication on this subject; that one of the victim's socks was missing, which was his version; that he had struck the victim in the throat and the coroner found the victim had a disintegrated larynx; Grant stated he had worn a stocking cap to cover his hair, and one was found with other clothes of the victim; the narrative by Grant as to the specific dismembering of the victim's nude body with a saw, which comported in detail with her remains; the location of the body and the saw; blood on the shoes of Grant at the time of his arrest; [\*18] the proximity of the location of the victim's body to the residence where Grant was residing with Cohen at the time of the killing; that Grant as well as Cohen were acquainted with the victim; and the lack of any retraction by Grant of his confession.

7. As stated previously, the use of the statements by Grant in the State's prosecution and conviction of him in which proceeding the State in effect vouched for the reliability and trustworthiness of these statements.

It is wholly incongruent for the State to assert here a completely opposite syllogism on this subject.

Focusing next on the consideration of spontaneity, there is no question that Grant gave varying accounts about his knowledge and involvement to the authorities concerning this homicide between August 7 and August 20, 1985. It appears that this was the underpinning upon which the trial court relied in part in determining that the last statements were not spontaneous, together with the length of interrogation on August 20, and hence not trustworthy or admissible. We do not share this reasoning

on the state of the record in this case.

We note with appropriate emphasis the occasion when Grant was first told by Detective [\*19] Seymour that the appellant here within a small time interval before this given confrontation had indicated that Grant killed Michelle Hayes. Little time then elapsed before Grant then gave a lengthy oral confession, followed by his written version. Soon after completing his written confession, he volunteered a similar account of his involvement to corrections officer Robert Smith. Certainly, the time sequels here do not involve lengthy temporal intervals, and the manner in which these statements were made manifest pronouncements of an unconstrained character. In short, the record as this reviewed discloses that the statements were sufficiently spontaneous for admissibility considerations.

Assuming, arguendo, that our determination of the spontaneity of Grant's statements is not borne out by the record, we emphasize that the factor of spontaneity is not, per se, an element in the test for admissibility of such statements. It is an item to be evaluated in conjunction with all of the surrounding and corroborating circumstances. When the time sequels and varying accounts facts are viewed with all of the factors previously enumerated, and the flexible standard suggested to be applied, [\*20] there appears to be a most convincing accumulation of corroborating circumstances of trustworthiness which dictate the admissibility of Grant's inculpatory statements exculpating appellant.

Therefore, based on a thorough review of the attending facts and circumstances of the proffered contested statements of Scott Grant along with the factual evidence obtained by the police in their investigation of the criminal occurrence, the exculpatory statements to this appellant made by Grant were sufficiently trustworthy in nature to permit their introduction at trial.

The State has obviously argued for the exclusion of Grant's statements, and has submitted three basic arguments. We have already dealt with the first contention, which was that Grant's statement exculpating appellant followed too many varied versions to be spontaneous and trustworthy.

Next, the State submits that the statements involved should be excluded because it would be denied an opportunity to cross-examine Grant, since he has invoked his right to silence in both his trial and appellant's. It, thus, contends that these statements cannot be effectively rebutted. The lack of cross-examination has been the traditional redoubt [\*21] against the admission of any hearsay evidence. This has not prevented the development of given exceptions to the hearsay rule, or their admissibility predicated on threshold considerations based

largely on common sense as to inherent trustworthiness and necessity.

As one commentator has aptly stated on this subject:

"The guarantee of trustworthiness is traditionally presumed to be present for statements against interest because human experience indicates that a statement asserting a fact distinctly against the declarant's interest is unlikely to be deliberately fake or heedlessly incorrect. Consequently, statements conforming to Rule 804(B)(3) are admissible despite the fact that oath and cross-examination are wanting." 1 Weissenberger, *Ohio Evidence* (1987) 175.

See, also, the dissent of Mr. Justice Holmes in *Donnelly v. United States* (1913), 228 U.S. 243.

If we were to adopt the State's reasoning that such statements should not be admitted because they cannot be effectively rebutted principally through the exercise of meaningful and piercing cross-examination, then this would result in a position that would insure the denial of the admission of all co-defendant [\*22] exculpatory statements where the co-defendant refuses to testify in this defendant at hand's trial, or in his own trial, or both. This approach ignores the development of the rationale underlying Evid. R. 804(B)(3), as well as the real prospect of rebutting the impact of such statements with other substantial and competent evidence including that of motive, the potential for impeachment, the possibility of meaningful cross-examination of the defendant at hand, and the lack of possible credibility or voluntariness of the co-defendant's statement. We do not foresee the emasculating of the State's position under all circumstances and in all such cases.

In this context, the State relies on *State v. Young* (1983), 5 Ohio St. 3d 221, to bolster its position. The *Young* case is clearly distinguishable from this matter. In *Young*, supra, former testimony of a co-defendant was involved, which is the subject of Evid. R. 804(B)(1), rather than a statement or confession of a co-defendant; there the State was seeking the admission of the co-defendant's testimony against the defendant *Young*; and the right of confrontation was involved.

Here, the argument by the State that the admission [\*23] of Grant's statement would deprive it of its right to confrontation is simply misplaced. This right under the Sixth Amendment inures only to the accused or a defendant in a criminal trial, not to the State. *Pointer v. Texas* (1965), 380 U.S. 400, 404.

In view of the foregoing analysis, this court is of the view that the trial court committed reversible error in excluding the testimony of Robert Smith on this issue and the statements of Scott Grant that inculpated him. We

should be mindful, consistent with the thrust of former Chief Justice Celebrezze's concurring opinion in *Young*, supra, that only those portions of Grant's statements which inculpate him and exculpate the appellant here are admissible under Evid. R. 804(B)(3).

It has been asserted that constitutional error occurs when exculpatory declarations against penal interest are inappropriately denied admission in a co-defendant's trial. *Green*, supra; *Chambers v. Mississippi* (1973), 410 U.S. 284. Consequently, we conclude that the exclusion of these statements under these circumstances violated appellant's due process rights.

Appellant's second assignment contests the following instruction given by the [\*24] trial court to the jury:

"Now, this case involved certain statements against interest. And where a rational person makes an out-of-court statement, and through such statement or statements implicates himself in a crime, such statements are considered in law to be reliable (emphasis added) and may be used as evidence of the defendant's guilt, because the law presumes (emphasis added) that a person would not implicate himself in a crime unless it were true. However, you may consider the other factors in the case that have been submitted into evidence in evaluating such evidence; the circumstances under which statement or statements were made and the purpose for which the statements were made may also be considered by you.

The ultimate weight to be given to such statement or statements is within your province as part of your fact-finding responsibility."

The subject statements forming the basis of this assigned error and challenged jury charge involve various comments made by appellant to certain individuals to the effect that he had killed and raped a girl, that he had killed somebody, and that he had choked and killed a girl.

Appellant objects to the first underlined [\*25] portion of the foregoing instruction because it establishes a presumption of reliability with regard to appellant's statements against interest, and on the second part of this particular instruction because it results in the pronouncement of a legal presumption of guilt on the basis of such statement.

With respect to the first emphasized and challenged jury instruction, this court concludes that the trial court erred in its charge that appellant's statements against interest were considered to be reliable under law. Under Evid. R. 804(B)(3), these statements were admitted on the basis of reliability and trustworthiness.

The items pertaining to the portion of the trial court's charge in question, namely, "\* \* \* [W]here a rational

person makes an out-of-court statement, and through such statement or statements implicates himself in a crime, such statements are considered in law to be reliable \* \* \*," is a pivotal element bearing on the determination of trustworthiness. While they are meaningful factors in the trial court's role in deciding the legal competency of statements against penal interest for admissibility, they are not proper instructional elements to be directed to a jury [\*26] regarding its responsibility in evaluating such declarations as to their truthfulness. Because of the very diction involved in defining these competency factors, they create a significant hazard and a high probability of misdirecting a jury as to its proper role regarding such statements.

This analysis is supported by the following well-established principles of law:

"It is not for the court to determine whether the evidence adduced is true or not; this question is for the jury, since it is the sole judge of the weight of the evidence. But it is the duty of the court to determine what the evidence is, and what effect it should have, if it is true. Whether evidence tends to establish a fact is a question of law; whether it does establish it, is a question of fact. \* \* \*"

\* \* \*

"It is the province of the jury to consider testimony and draw their conclusions from it; the jurors are the sole judges of the weight of the testimony. Whether the guilt of the accused has been proved beyond a reasonable doubt is for the jury to determine. \* \* \*"

"While it is not the duty of a trial judge to sum up the evidence to the jury, yet it is not improper for him to do so, provided [\*27] it is fairly done and all the material evidence on both sides is fairly presented. When a single fact is selected and strongly commented on, the tendency is to distort its importance in the estimation of the jury, and to concentrate attention too intently upon it, to the undervaluing of other evidence. \* \* \* Under the Constitution's mandate of trial by an impartial jury, it necessarily follows that any expression of the trial court, and particularly any positive statement by the court to the jury which indicates or even intimates to the jury what opinion the court holds on the facts in evidence, is erroneous and in violation of the constitutional rights of the accused." 27 Ohio Jurisprudence 3d (1981), 203-209, Criminal Law, Sections 969, 971, 973.

Applying these maxims to the present facts, the trial court's first challenged instruction provided an unbalanced charge that invaded the fact-finding process of the jury. The language used by the trial court was fibered in the competency role reserved for the trial judge and not for the

jury, as opposed to the jury's primacy in determining the voluntariness and truthfulness of a confession or statement. In our view, you cannot conclusively [\*28] presume that a person who makes an incriminating statement is always being truthful since common experience shows us that these subject statements are made out of fear or the desire to shield another, as well as out of contrivance.

In view of the trial court's failure to provide the jury with a balanced charge in accordance with the foregoing, but having rendered one which had the effect of invading the fact-finding process of the jury, the first instruction at issue here was erroneous.

Addressing the second instruction, the trial court further erred in informing the jury that "the law presumes that a person would not implicate himself in a crime unless it were true."

Although the jury was charged that the law presumes that an individual would not implicate himself in a crime unless it were true, the trial court failed to proffer any explanation as to the meaning of a legal presumption. As stated in *Sandstrom v. Montana* (1979), 442 U.S. 510, 517:

"Petitioner's jury was told that 'the law presumes that a person intends the ordinary consequences of his acts.' They were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's [\*29] simple presentation of 'some' evidence; nor even that it could be rebutted at all. Given the common definition of 'presume' as 'to suppose to be true without proof,' Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways."

In the present cause, as in *Sandstrom*, supra, the jury here was simply informed that the law presumes a person would not implicate himself in a crime unless it were true. The record is devoid of any explanation concerning the meaning of a legal presumption or how appellant could rebut this presumption. Consequently, the language can only be interpreted as a mandatory or conclusive presumption. This approach ignores the basis consideration that such declarations against interest may be rebutted, and that the inclusion of the stock Ohio instruction on rebuttal presumption would have aptly accomplished this. See, *Ohio Jury Instructions* (1970), Section 409.67, which provides as follows:

"409.67 Rebuttal evidential presumption

1. If you find beyond a reasonable [\*30] doubt that \* \* \* (basic fact) \* \* \*, a presumption of law arises that \* \* \* (conclusion).

2. The law declares that you may regard \* \* \* (basic fact) \* \* \*, if established beyond a reasonable doubt, as sufficient evidence of \* \* \* (conclusion); however, it does not require you to do so. This presumption is in the nature of evidence and is sufficient proof of \* \* \* (conclusion) \* \* \* unless it is (balanced) (rebutted) by evidence of equal or greater weight.

3. The existence of the presumption does not relieve the State of the duty of establishing \* \* \* (conclusion) \* \* \* beyond a reasonable doubt."

The record in the cause sub judice reflects that the trial court's instruction that "the law presumes that a person would not implicate himself in a crime unless it were true," clearly conflicts with the holding of Sandstrom, supra, and the relevant rules of law on legal presumptions. Generally, conclusive presumptions which operate against a criminal defendant are clearly unconstitutional and, hence, grounds for reversal. Palmer, Ohio Courtroom Evidence (5 Ed. Rev. 1986) 52.1, Section 6.

Based on a thorough review of the jury charge and the applicable law in this matter, [\*31] the trial court erred in this challenged portion of the charge given to the jury.

In his third assignment of error, appellant alleges that the trial court committed prejudicial error in denying his request for six peremptory challenges, Crim. R. 24(C), in overruling his motion on venire, R.C. 2945.18 and 2945.19, and in refusing to sequester the jury during deliberations, Crim. R. 24(G)(2)(c). The assignment is not well taken.

The trial rights which appellant claims were prejudicially denied him are, by their own terms, only applicable to capital offenses.

The Ohio Supreme Court has previously interpreted a capital crime as an offense for which the death penalty may be imposed.

"Effective April 3, 1984, R.C. 2901.02(B) was amended to provide that a capital offense include only those offenses for which the death penalty may be imposed." State, ex rel. Corrigan, v. McAllister (1985), 18 Ohio St. 3d 239.

Applying McAllister, supra, to the present facts, appellant's situation does not fall within the definition of a capital offense. While appellant was charged with aggravated murder with specifications, appellant was under eighteen years of age when he was alleged [\*32] to have committed the crime. Since appellant was under the age of majority, the death penalty could not be imposed against him as a matter of law. Hence, the special trial rights afforded to a capital offender under Crim. R. 24 (G) (2) (c) and R.C. 2945.18 and 2945.19 are not applicable to the

instant action.

Appellant's fourth assignment of error challenges the trial court's failure to grant appellant's motion for trial by a three judge panel, alleging that appellant was entitled to such trial as a matter of law. Appellant's argument is predicated on R.C. 2945.06 which states, in relevant part, that:

"\* \* \* If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, \* \* \*"

As discussed in the previous assignment of error, appellant was incapable of receiving the death penalty by virtue of being less than eighteen years of age when the alleged crime was committed. As such, the right afforded under R.C. 2945.06 is not applicable to the present action. McAllister, supra. While appellant was entitled to have his case heard by a single judge, R.C. 2945.05, the record does not reflect that appellant requested [\*33] a bench trial.

Appellant's fourth assignment of error is without merit.

Appellant's fifth assignment of error asserts that the testimony of witness Raymond Scott should have been excluded since it was induced as the result of a hypnotic session conducted by the Mentor Police.

This witness testified that, on the date Michelle Hayes was murdered, he heard screams from the area where the victim's clothing was found and that he later heard a despairing groan in the approximate location where her body was ultimately discovered. Appellant posits that since the witness never testified to this effect prior to the time he was hypnotized, the subject testimony was the result of a hypnotic procedure which created a recollection rather than recalling to memory an actual event. The assignment is not well taken.

While appellant's argument under this assignment that the witness must have been under a hypnotic state since his recollection of the July and August 1985 events changed from time to time, appellant failed to establish that appellant was in fact under a hypnotic state at the time of the challenged statement.

"THE WITNESS" Well, I was fully aware of what was happening, and to me [\*34] that means I was not hypnotized. The thing is \* \* \*

THE COURT: Wait a minute, let's stop right here. This has gone on long enough. Were you, in fact hypnotized by Detective Foster?

THE WITNESS: I don't feel that I was."

Further, as testified by Detective Foster, who

conducted the hypnotic session:

"QUESTION: And on August 28, 1985, when you worked with Mr. Scott, will you tell the jury whether or not in your opinion, you placed him under hypnosis?"

ANSWER: No, I do not believe Mr. Scott was under hypnosis."

As previously stated by the Ohio Supreme Court:

"At the outset it must first be recognized that the witnesses did not testify at trial while under hypnosis nor did they relay any hypnotically induced recollection. Rather, they testified about matters recalled and related prior to and independent of hypnosis. This court declines to hold that a prior hypnotic session should necessarily render a witness completely incompetent to testify at trial concerning events recalled independently of hypnosis. We agree that any credibility issue could properly be resolved by the trier of fact and assigned weight appropriately." *State v. Maurer* (1984), 15 Ohio [\*35] St. 3d 239, 260.

In the case at bar, although the record demonstrates that the hypnotic session was conducted with Raymond Scott, no testimony was elicited to establish that the witness was, in fact, in a hypnotic state. Hence, it could reasonably be concluded that the challenged testimony was independent of hypnosis, the weight to be accorded the same being a matter for jury determination. *Maurer*, supra.

Appellant's sixth assignment of error objects to the admission of Raymond Scott's testimony, that he heard a "despairing groan" on the night Michelle Hayes was murdered which emanated from the area where the victim's body was eventually found, alleging that this testimony was so inconsistent with prior statements made by Scott as to render his testimony on this matter unreliable and inadmissible. The assignment is without merit.

Evid. R. 402 provides for the admissibility of "Relevant evidence," which is defined as:

"\* \* \* [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401.

In accordance with Evid. R. 402, the challenged [\*36] statement of witness Raymond Scott was relevant for the purpose of proving appellant's involvement in the death of Michelle Hayes, by virtue of appellant's statement to witness John French that the victim woke up while her legs were being sawed off. Contrary to appellant's assertion in this assignment, the witness' statement was one of credibility and not admissibility. The appellant had his opportunity to impeach this witness for inconsistencies.

The subject statement was properly admitted under the Rules of Evidence, the weight to be accorded the same being an issue for jury determination.

In the seventh assignment of error, appellant advances that he was prejudiced by the trial judge's failure to recuse himself from the case since the circumstances demonstrated that he was incapable of remaining an impartial trial judge. Appellant's argument is predicated on alleged animosity between the trial judge and appellant's attorney stemming from prior adversarial involvement in other cases with appellant's trial counsel.

The record establishes that the issue of the trial court's ability to hear the case with impartiality was adjudicated by the Chief Justice of the Ohio Supreme Court, [\*37] pursuant to Section 5, Article IV of the Ohio Constitution.

"The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the court of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of court estimated by law."

In *Beer v. Griffith* (1978), 54 Ohio St. 2d 440, the court commented on the foregoing constitutional provision, stated that:

"Since only the Chief Justice or his designee may hear disqualification matters, the Court of Appeals was without authority to pass upon disqualification or to void the judgment of the trial court upon that basis. \* \* \* " *Id.* at 441-442.

See, also, *Kettering v. Berger* (1982), 4 Ohio App. 3d 254.

In accordance with the foregoing, this court refrains from passing upon the issue raised by appellant in this assignment.

In appellant's eighth assignment of error, he submits that the trial court committed prejudicial error in permitting the coroner to testify that the victim's death was caused by "homicidal violence," that her death resulted from "some criminal [\*38] act," and in admitting a death certificate to this effect, Appellant's objection is predicated on the following testimony of the coroner:

"Q. (By Prosecutor Hawkins): Now Dr. Adelson, based upon your education and your training and your experience as a Pathologist, were you able to form an opinion to a reasonable medical and scientific certainty as to the cause of death of girl you autopsied on August 25, 1985?"

A. I was.

Q. And what is that opinion, sir?

Mr. Hurley: Objection.

The Court: Overruled.

A. I believe that the child dies as result of some type of homicidal violence. I cannot be specific as to the exact nature of it, but all the circumstances indicate to me that she was the victim of some type of homicidal trauma.

Q. I want you to explain to the jury what you mean by homicidal violence or homicidal trauma?

A. When I put together my observations of a young -- a child to me, with her legs sawed off, and I was informed from reliable sources that she had been found in a shallow grave, et cetera, et cetera, I could only conclude that her death was the result of some criminal act --

Mr. Hurley: Objection.

The Court: Overruled.

A. -- with [\*39] the assailant or assailants, not knowing from my own knowledge how many, attempting to hide the evidence of the crime by burying her. As someone said 'other crimes only whisper, murder shrieks out.' This said to me, 'I have been done to death in foul and evil fashion.'

Mr. Hurley: Objection, and ask that he stricken.

The Court: Well, overruled."

Pursuant to R.C. 313.19, the coroner's verdict constitutes the legally accepted cause of death in the State of Ohio.

"The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death."

Relevant to the present issue is *State v. Woodards* (1966), 6 Ohio St. 2d 14, where the Supreme Court of Ohio addressed similar fact pattern, stating that:

"The admission into evidence of statements [\*40] in a death certificate or a coroner's report that the decedent was beaten by an unknown assailant or that there was extensive beating involving the entire body does not constitute prejudicial error, where there is testimony as to the condition of the decedent's body at the time of death and as to the cause of death, and where such statements in the documents do not connect the defendant with the death of

the decedent." *Id.* at paragraph four of the syllabus.

In the case sub judice, the victim was discovered in a shallow grave with her body decomposed and her legs severed. The coroner's testimony, which was admitted into evidence over appellant's objections, concerned the fact that Michelle Hayes' death was the result of violent means and that her body was found in an advanced stage of decomposition. No testimony was elicited from the coroner which implicated appellant in the victim's death. *Woodards, supra.*

Further determinative of the argument raised by appellant is *State v. Austin* (1976), 52 Ohio App. 2d 59, where it was held that coroner's testimony on the cause of death which was concluded to be a homicide is proper despite the coroner's inability to establish [\*41] the exact cause of death due to an advanced state of decomposition of the victim's body. In addressing the fact that the victim in *Austin* was found in a reservoir wrapped in a sheet and blanket and weighted down, the court stated that:

"Obviously, the victim did not place herself in this position. The finding of a body in this condition surely is sufficient to establish, beyond a reasonable doubt, that death occurred as a result of the criminal agency of another. \* \* \* " *Id.* at 65.

Applying *Austin, supra*, to the present action, seventeen year old Michelle Hayes clearly did not sever her own legs and then bury herself in a shallow grave. Logic dictates that her death was the result of homicidal violence, as the coroner could properly conclude from the circumstances surrounding the case. Consequently, the trial court did not commit error in admitting the testimony of Dr. Adelson. *Woodwards and Austin, supra.*

In the ninth assignment of error, appellant assails the prosecutor's conduct in closing arguments, alleging that certain prosecutorial statements resulted in error prejudicial to appellant. Here, appellant points to two comments made by the prosecutor, [\*42] to the effect that:

"\* \* \* And If you all are the type of people that want to let this particular defendant go, just because the State of Ohio has prosecuted two people in relation to an aggravated murder, then you should have told me that last week during jury selection, because I covered that.' (Tp. 1596-1597). (emphasis supplied)

\* \* \* 'And he wants you to believe that he doesn't know what happened. Now, if you want to believe that, you go ahead and acquit that man. But don't go home and call it justice.'" (Tp. 1613). (emphasis supplied).

While appellant may be correct in his assertion that the first statement made by the prosecutor was to some degree

improper, it is recognized that attorneys should be afforded some latitude and freedom of expression during closing arguments. *State v. Woodards* (1966), 6 Ohio St. 2d 14, 26. This court, however, finds nothing objectionable with respect to the second challenged comment made by the prosecutor.

We reject appellant's contention that the prosecutor's comments during closing arguments had the effect of urging the jury to convict appellant as a matter of civic duty. Viewing the prosecutor's argument in its totality, [\*43] the statements which appellant now contests merely asks the jury to maintain the community and not to convict as a matter of public duty or demand. *State v. Moritz* (1980), 63 Ohio St. 2d 150, 157.

Since the record before this court demonstrates that the prosecutor's comments were not so improper as to prejudicially affect the substantial rights accorded to appellant, the ninth assignment of error lacks merit. *State v. Smith* (1984), 14 Ohio St. 3d 13.

Appellant's final assignment of error is largely based on *State v. Grant*, Lake App. No. 11-252, asserting that the State adopted alternative and inconsistent theories of the same victim's death in these respective cases. Admittedly, appellant is correct in asserting that the State advanced different theories as to the cause of Michelle Hayes' death. In *Grant*, the State argued that the defendant had killed the victim by a martial arts blow to her neck, and the defendant was convicted of involuntary manslaughter. However, in the instant action, the State argued that the victim did not die as a result of defendant's blow to the victim's neck, but that her death resulted when appellant eventually cut off her [\*44] legs, in order to hide her body, leaving the victim to bleed to death.

We are not persuaded by appellant's position on this issue. Relevant to this conclusion is *Johnson v. State* (Md. 1985), 495 A.2d 1, involving the same issue presently advanced by appellant. The pertinent portion of *Johnson* is as follows:

"Johnson claims that at Mayers' trial the State presented evidence that only Mayers killed the victim and that Mayers was the sole principal in the first degree. Johnson contends that this tactic should preclude the State from now pursuing a first degree murder charge against him."

"After reviewing the record, we fail to see any basis for Johnson's characterization of the State's case against Dwayne Mayers. During the latter's trial, the State informed the Mayers' jury on several occasions, including opening and closing argument, that Mayers acted jointly with Johnson in perpetrating the Rosenblatt murder. While more focus was placed upon Mayers and his particular involvement in the crime, the State's presentation only

demonstrated that it was Mayers who was being tried at that time. The proof, rather than indicating duplicity on the part of the State, merely [\*45] reflected the realities of a trial where there is only one defendant, but many actors in the alleged criminal incident." *Johnson*, supra, at 12.

As demonstrated by the foregoing rationale, appellant's position that due process is violated by the State's presentation of varying theories in different cases involving individual defendants does not rise to the crest of violating basic tenets and consideration of due process. Hence, appellant's final assignment is not well taken.

In accordance with the foregoing, the judgment of the trial court is reversed on the first and second assignments of error and the cause is remanded for further proceedings consistent with this opinion. The judgment of the trial court is affirmed in all other respects.

**DISSENT BY:**

COOK

**DISSENT:**

DISSENTING OPINION

COOK, J.

I respectfully dissent to the majority opinion.

The majority concludes the judgment of the trial court should be reversed for two reasons. First, because the court erred in not permitting the admission of statements of co-defendant, Scott Grant, allegedly exculpating appellant in the killing of Michelle Hayes. Second, because the court erred in instructing the jury that the law presumes that [\*46] a person would not implicate himself in a crime unless it were true.

As to the admission of statements by co-defendant, Scott Grant, Evid. R. 804(B)(3) permits a "statement against interest" of an unavailable witness to be offered to exculpate the accused as an exception to the hearsay rule. However, said rule provides that such a "statement against interest" "is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

In the instant cause, corroborating circumstances do not clearly indicate the trustworthiness of Scott Grant's statements. It should first be noted that appellant's assigned error refers to all of the statements made by Scott Grant to the police, not just to his final statement which is devoid of any inculpatory statement as to appellant. Second, Grant gave a number of oral and written statements to the police, presenting several versions of the subject crime. The earlier versions implicated appellant. His last version was devoid of any information implicating appellant, but it did not

state that appellant had not participated in the killing of Michelle Hayes. Third, the prosecution presented the testimony of [\*47] several witnesses that appellant had admitted to them that he had been involved in the killing, some of them testifying that he had expressly indicated that he had raped and killed a young girl and buried her in a berry patch after having cut off her legs.

In my opinion, the circumstances stated above prevented the trial court from finding that "corroborating circumstances clearly indicate the trustworthiness of the statement." In view of the above circumstances, the court could not find any of the statements of Grant "clearly" trustworthy. The court did not err in refusing to admit said statements.

The second reason for the majority's reversal of the judgment of the trial court is that the court erred in instructing the jury that statements of a rational person implicating himself in a crime are reliable because the law presumes a person would not do so unless it were true. Appellant contends said instruction violates the Fourteenth Amendment due process requirement that the state prove every element of the criminal offense.

Appellant relies on *Sandstrom v. Montana* (1979), 442 U.S. 510, as support for his assigned error. In *Sandstrom*, the United States Supreme [\*48] Court held that a jury instruction to the effect that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated the Fourteenth Amendment due process requirement that the state has the burden of proving each element of a crime beyond a reasonable doubt. The court reasoned that the instruction did not describe a permissive inference since the jury could only have interpreted the

presumption in the instruction as a conclusive presumption since it was not told it had a choice or that it might infer that conclusion. Therefore, the jury would conclude the instruction was an irrebuttable direction by the court to find intent on the part of the defendant.

The court in *Sandstrom* further held that such a conclusive presumption would conflict with the presumption of innocence, would invade the fact finding function of the jury and the jury might interpret the presumption as shifting the burden of persuasion as to the element of intent to the defendant.

In the instant cause, the court's instruction was not limited, as in the *Sandstrom* case, to an instruction which could only have been interpreted by the jury as a conclusive presumption, an un rebuttable [\*49] direction by the court that the admissions by appellant were reliable because the law presumes that a person would not implicate himself in a crime unless it were true. On the contrary, the court, in effect, did describe a permissive inference because the jury was told it had a choice as to the weight to be given to appellant's admissions. It was told that in deciding the weight to be given appellant's statements, it could consider other factors in the case such as the circumstances under which the statements were made and the purpose for which they were made.

In my opinion, the trial court, in the instant cause, did not violate the Fourteenth Amendment due process requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

I would affirm the judgment of the trial court.