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**Court of Appeals**

**REPLY BRIEF OF APPELLANT FILED**  
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By: WILLIAM NORMAN 0088113

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STATE OF OHIO

CA 17 105769

vs.

JEIMIL HUNT

**Judge:**

**Pages Filed: 12**

IN THE COURT OF APPEALS  
EIGHTH JUDICIAL DISTRICT OF OHIO  
CUYAHOGA COUNTY

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CASE NO. CA-17-105769

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**STATE OF OHIO,**

Plaintiff-Appellee

v.

**JEIMIL HUNT,**

Defendant-Appellant.

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Appeal from judgment of the Cuyahoga County Court of Common Pleas

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**REPLY BRIEF OF APPELLANT**

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## STATEMENT OF THE CASE

The State of Ohio's misunderstanding of the law in this case is demonstrated in the first sentence of its brief, and shows that the entire basis of their opposition to Appellant's meritorious arguments rests on its implicit request that this Court overturn the well-established precedent which states that the appeals court will not presume regularity in the face of an Ohio App. R. 9(C) record.

## ARGUMENT

As there are multiple cases consolidated in this appeal, Counsel has placed the case number as the first heading in each section for the benefit of the reader.

### **I. CR-94-305667 (Aggravated Murder with Specifications).**

#### **A. The Court Fatally Erred in Not Taking Evidence to Prove Hunt Guilty Beyond A Reasonable Doubt.**

The panel's failure to follow the special procedures required when a defendant pleads guilty to a capital murder count invalidates Hunt's guilty plea. The Ohio Supreme Court has clearly stated that a panel accepting a guilty plea to a capital murder charge must take evidence and testimony establishing the pleading defendant's guilty beyond a reasonable doubt, and must further enter a journal entry reflecting compliance with this procedure. *State v. Green*, 81 Ohio St. 3d 100 (1998); *See also R.C. 2945.06*. Courts must strictly comply with the procedures set forth by statute for waiving a trial and entering a plea of guilty in a capital murder case. *See State v. Pless*, 74 Ohio St. 3d 333, (1996). The failure of a trial court to adhere to the statutory procedures is an error in the exercise of jurisdiction to be addressed on direct appeal, and "upon remand, the trial panel is required to proceed from the point at which the error occurred. *Pratts v. Hurley*, 102 Ohio St.3d 81, at 86 (2003) quoting *State v. Filiaggi*, 86 Ohio St.3d 230, at 240, (1999); *see also State v. Parker*, 95 Ohio St. 3d 524, 769 N.E. 2d 846 2002.

In the instant case, a three-judge panel accepted Appellant Hunt's guilty plea to capital murder, with specifications, absent requiring any evidence, witnesses, or testimony establishing Hunt's guilt beyond a reasonable doubt. *See Statement of the Record*. The judgment of conviction journal entry confirms the same. (R. #69). The panel's failure to require evidence, witnesses, and testimony establishing Appellant Hunt's guilt of capital murder, with specifications, beyond a reasonable doubt constituted an error in the exercise of jurisdiction which requires reversal of conviction and remand for plea anew. *See Green, Parker, Filiaggi supra*.

1. *The State's argument in opposition must fail because the record is not silent.*

The State contends that this Court should rule against controlling precedent and find that even where a Rule 9(C) statement is available to establish the record, this Court should presume regularity as it does in the case of a silent record. This argument is not only directly contradicted by controlling precedent but would render 9(C) statements completely irrelevant in allowing this Court to review a trial court's decision.

The State argues that *State v. Ali* 2012-ohio-2510 (8<sup>th</sup> Dist.) controls in this case, but this case is easily distinguishable from *Ali*. In *Ali*, the Appellant argued that the trial court failed to notify him of the mandatory nature of his PRC term, or of his appellate rights pursuant to Crim. R. 32. *Id.* at ¶6. This Court quickly dispatched this argument as having no merit due to the failure of the appellant to transmit the record necessary for evaluating the lower court's decision. *State v. Ali*, 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510, ¶ 6; *citing State v. Williams*, 8<sup>th</sup> Dist. No. 96323, 2011-Ohio-3267, ¶9.

In stark and critical contrast to *Ali*, this case contains a full-record provided under Ohio App. R. 9(C) by the Honorable Kathleen Ann Sutula where she goes into great detail as to the procedure used by the three-judge panel in Hunt's case. *See generally, Statement of Proceedings*.

Where the record is not silent and instead consists of a Rule 9(C) statement, *Ali* is inapposite, and *State v. Carlozzi*, *State v. Costella*, and App. R. 12(A) control. While the State bemoans this Court's decision to grant Hunt a delayed appeal, and pleads with the Court to apply the presumption of regularity which applies on a silent record, "[t]he record in the case sub judice is not silent since the trial court has filed a statement of proceedings pursuant to App. R. 9(C) & (E)." *Costella supra* at \*9. *Costella* went on to quote this Court's precedent from *State v. Dickard*, 10 Ohio App. 3d 293, 462 N.E. 2d 180 (1983):

"Where, for purposes of appeal, the appellant submits a proposed statement of the evidence to the appellee, pursuant to App. R. 9(C), and the appellee, in turn, submits timely objections to appellant's statement [\*10] of the evidence, it is then the duty of the trial court, upon submission by the parties, to settle any disagreements and to approve the statement conforming to truth and accuracy. Where, however, the trial court finds both appellant's and appellee's proposed statements to be unsatisfactory and submits its own statement of the evidence for appeal purposes, *the court of appeals, pursuant to App. R. 12(A), is bound to accept the trial court's statement of the evidence.* (Emphasis added)."

*State v. Costella*, 8th Dist. Cuyahoga Nos. 61898, 61899, 61900, 61901, 1993 Ohio App. LEXIS 3388, at \*9-10 (July 1, 1993); quoting *State v. Dickard supra*.

Accordingly, no presumption of regularity applies, and App. R. 12(A) requires review under application of the facts contained in the statement of proceedings approved by the trial court. *Id.*; *see also*, *State v. Carlozzi*, 1992 Ohio App. LEXIS 395 (8<sup>th</sup> Dist.) (holding that the statement of proceedings provided by the trial court prevented application of the presumption of regularity and further prevented a finding that the trial court substantially complied with the mandates of Crim. R. 11(c) where the statement of proceedings: a) did not state the trial court complied with Crim. R. 11(c); b) did not state with specificity that the appellant entered a knowing, voluntary and intelligent waiver of his Constitutional rights; and c) did not state with specificity that the appellant was apprised of the range of allowable and required punishments.)

Thus, as the state's argument in opposition necessarily relies on a presumption of regularity, the state's challenge must fail under the controlling precedent on this issue in this jurisdiction, and this Court should reverse Hunt's conviction and remand the case for further proceedings.

2. *The trial court failed to follow the clear statutory dictates for accepting a guilty plea in a capital case where it failed to take evidence to establish Hunt's guilt beyond a reasonable doubt.*

While a guilty plea is normally all that is required for a trial court to find a defendant guilty of an offense and enter conviction, the Ohio legislature has made the conscious and deliberate decision to require more in capital cases. "When the offense charged is a capital offense, R.C. 2945.06 and Crim. R. 11(c)(3) require the State to prove guilt of an aggravated murder charge... even when an accused pleads guilty." *State v. Ketterer*, 111 Ohio St. 3d 70 (2006). The trial court in this case did not hear testimony, take evidence, or require witnesses in this case to establish Hunt's guilt of capital murder, beyond a reasonable doubt. The reasoning of the trial court is clear, albeit contrary to binding precedent. "[A]ll that is required is a guilty plea as a guilty plea is a complete admission of guilt." *See Statement of Proceedings* at H6. While the trial court may be correct that taking evidence is redundant, this procedure is a redundancy expressly required by the Ohio legislature, and without evidence beyond Hunt's guilty plea, this Court is bound by precedent to reverse Hunt's conviction, and remand the case to the trial court to plea anew. *See State v. Green*, 81 Ohio St. 3d 100 (1998). *Compare also Pratt v. Hurley*, 102 Ohio St. 3d 81 (2004); *Kelley v. Wilson*, 103 Ohio St. 201 (2004).

3. *The trial court completed the Green error in failing to enter a journal entry verifying Green compliance.*

The trial court completed the *Green* error discussed in the previous section where it failed to journalize compliance with *Green's* requirement that it take evidence to establish Hunt's guilt

beyond a reasonable doubt. *See Green, Pratt, Kelley, supra*. The trial court's failure in this regard is a related, yet separate and independent basis to reverse and remand. *Id.*

**B. Insufficient evidence exists for Hunt's conviction for capital murder.**

While a guilty plea normally prevents a defendant from appealing his case on sufficiency grounds, “[w]hen the offense charged is a capital offense, R.C. 2945.06 and Crim. R. 11(c)(3) require the State to prove guilt of an aggravated murder charge... even when an accused pleads guilty.” *State v. Ketterer*, 111 Ohio St. 3d 70 (2006). Thus, on appeal of a capital case, sufficiency challenges are expressly permitted even after a defendant pleads guilty. *Id.* This is true even where the State agrees to forego its request for imposition of the death penalty. *State v. Parker*, 95 Ohio St. 3d 524 (2002).

Further, the State must provide sufficient evidence to prove the defendant's guilt beyond a reasonable doubt on the substantive aggravated murder charge as well as each specification. Thus, a defendant is “expressly permitted” to challenge the sufficiency of the evidence provided in support of each capital specification. *See State v. Montgomery*, 148 Ohio St.3d 347, 361-362 (2016). *Compare also, Kelly v. Wilson*, 103 Ohio St.3d 201, 202 (2004) (citing *State v. Parker*, 95 Ohio St.3d 524 (2002)).

In the instant case, Hunt plead guilty to aggravated murder with specifications, but as no other evidence was offered in support of his conviction, his plea standing alone is insufficient for conviction. *Id.*

The State of Ohio made a choice to seek capital charges against Hunt, and with that choice comes the duty to provide evidence even upon a guilty plea. The State failed in its duty, offering no witnesses, evidence, or other testimony to prove Hunt committed aggravated murder with specifications, (or a lesser-included offense). The State's failure requires reversal of Hunt's

conviction and dismissal of indictment with prejudice. *See e.g., Green supra, Adams supra. See also, State v. Ketterer* at 80-81; *State v. Montgomery supra* at 360-362.

**C. Hunt's Guilty Plea Is Constitutionally Invalid as it was Not Entered Knowingly, Voluntarily, and Intelligently.**

The State does not dispute that, in accepting Hunt's guilty plea, the trial court failed to inform Hunt of, and ensure he understood: (a) the elements of aggravated murder, with specifications; (b) the range of allowable punishments; (c) the mandatory and consecutive sentence which applied due to the firearm specification; (d) the effect of his guilty plea; and (e) the affirmative defense which applied under O.R.C. 2923.03(E); and (f) the factual basis for the charge against him. Instead, the State reasserts its argument raised as to the other assignments of error, which asks this Court to overrule well-established and controlling precedent, and presume regularity in the proceedings. *Contra Costella, Carlozzi supra.*

The trial court made clear as to why it did not give several of the necessary advisements in the statement of proceedings submitted in this case when it stated: (a) it had no duty to explain the elements of aggravated murder, with specifications, and that no factual basis was required; (b) no stipulation of facts or evidence was required, notwithstanding the absence of evidence, testimony, and witnesses proving beyond a reasonable doubt aggravated murder with specifications; (c) it had no duty to inform Hunt of the mandatory consecutive sentence which attached to the firearm specification; and (d) no evidence beyond Appellant Hunt's guilty plea was required for conviction. *See Statement of Proceeding, citing State v. Brown, 2017-Ohio-2850 (8<sup>th</sup> Dist.); State v. Felder, 2015-Ohio-4701 (8<sup>th</sup> Dist.); Ohio Crim. R. 11(B)(1); State v. Johnson, 40 Ohio St. 3d 130 (1988).*

The trial court was wrong.



In addition to the usual requirements under Rule 11, this Court has specifically identified several fatal errors that a trial court may make during a plea colloquy including: a) failure to inform of the range of allowable punishments. *Compare e.g. State v. Tokar*, 2009-Ohio-4369 (8<sup>th</sup> Dist. 2009); b) failure to inform of the mandatory and consecutive sentence required by R.C. 2941.141. *Compare e.g. State v. Norman*, 2009-Ohio-4044 (8<sup>th</sup> Dist.); *State v. Douglas*, 2007-Ohio-714 (8<sup>th</sup> Dist.); c) failure to inform of the affirmative defenses available under R.C. 2923.03(E). *Compare e.g., State v. Reynolds*, 1987 Ohio App. LEXIS 7464 (8<sup>TH</sup> Dist.).

While any of these errors standing alone could preclude a knowing, voluntary, and intelligent plea, requiring reversal, when these errors are combined with the trial court's failure to advise Hunt of the elements of capital murder with specifications, whether he was charged as complicit or principle, the effect of his guilty plea, and a complete failure to require a factual basis, the errors collectively operate to show that the plea was definitively not entered knowingly voluntarily and intelligently.

#### **D. COMPLETE NON-COMPLIANCE WITH CRIM. R. 11(C)(3) & (4).**

Under the App. R. 9(C) record, approved and submitted, complete non-compliance with Crim. R. 11 is evident. *State v. Costella*, 1993 Ohio App. LEXIS 3388 (8th Dist. 1993)(where App. R. 9(c) statement filed, record no longer silent; also App. R. 9(c) statement noted Rule 11 inquiries and compliance); *accord State v. Dickard*, 10 Ohio App. 3d 293, 295 (8th Dist. 1983); *State v. Summers*, 3 Ohio App. 3d 234, 235 (1981). The record does not reflect compliance with Crim. R. 11(c)(3) & (4), which in turn requires reversal as a separate and independent matter to the previously stated reasons. *See e.g. Carlozzi, supra; State v. Sarkozy*, 117 Ohio St. 3d 86, 90 (2008).

## **II. CR-91-273936-C AND CR-94-307512-B**

Similarly, to the errors identified in the preceding section, the record as to these cases shows that Crim. R. 11(C) defects infect the validity of Hunt's guilty plea, and also shows that Hunt's plea in these cases was not knowingly, voluntarily, and intelligently entered.

First, the statement of proceedings for CR-94-307512-B (aggravated robbery, with a firearm specification), does not state or even mention compliance with Crim. R. 11 in the taking of Hunt's guilty plea. This complete non-compliance with Crim. R. 11(C) requires reversal without regard to prejudice. *Sarkozy, supra*. Accordingly, reversal is required for this defect alone.

Second, the statement of proceedings fails to state and reflect that the trial court informed Hunt of the mandatory consecutive sentences which attached per the firearm specification; and as misinformed, Hunt agreed to plead guilty. *Cf., Douglas; Norman supra*.

In *Norman*, the defendant argued on appeal that his pleas were not knowingly, intelligently, and voluntarily entered because the trial court did not inform him that the sentence for failure to comply had to be served consecutively to his sentences for tampering with evidence and drug trafficking.

*Norman* vacated the defendant's guilty pleas after finding that the trial court erred in failing to inform the defendant of the requirement of a consecutive sentence. *Id.*

This is precisely what happened here.

Accordingly, reversal is required. *See Douglas, supra*: “[W]e find that although the defendant was informed that there were firearm specifications attached to his indictment and additional prison terms of one or three years... the trial court's explanation of the maximum penalties was inadequate.”

Finally, the statement of proceedings for CR-91-273936-C fails to reflect even minimal compliance with Crim. R. 11(C), nor does it reflect that Appellant Hunt's guilty plea was knowingly, voluntarily, and intelligently made with knowledge of the affirmative defenses available under R.C. 2923.03(E), *See e.g., Carlozzi, supra.*

Incorporating the previous arguments, this guilty plea was not knowingly, voluntarily and intelligently made, requiring reversal. *Compare e.g., Sarkozy; Reynolds, supra.*

### **CONCLUSION**

The state's position on this appeal can be summarized in one sentence. The State of Ohio asks that this Court overturn well-established and controlling precedent, and presume regularity in the face of a record from an Ohio App. R. 9(C) statement. In stark contrast, Hunt has provided extensive case law support from this Court's binding precedent in support of each of his claims. Thus, the state's arguments fail, and this Court should reverse the convictions in this cases, and either dismiss the cases for insufficiency as argued above, or remand the case for a new trial.

It is so requested.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

A copy of the foregoing was electronically filed with the Clerk of Courts for the Eighth District Court of Appeals on May 8, 2018, and will be served electronically to all parties.

/s/ William Norman  
William Norman, Esq.



