

IN THE SUPREME COURT OF OHIO

State of Ohio, :
Appellee, :
-vs- : Case No. 2005-2264
Nicole Diar, : **This is a capital case.**
Appellant. :

On Appeal From The Court Of
Common Pleas Of Lorain County
Case No. 04CR065248

State's Memorandum in Opposition to Reconsideration

Dennis P. Will, #0038129
Lorain County Prosecuting Attorney

Office of the
Ohio Public Defender

Anthony D. Cillo, #0062497
Assistant Prosecuting Attorney
Counsel of Record

Linda E. Prucha, #0040689
Supervisor, Death Penalty Division
Counsel of Record

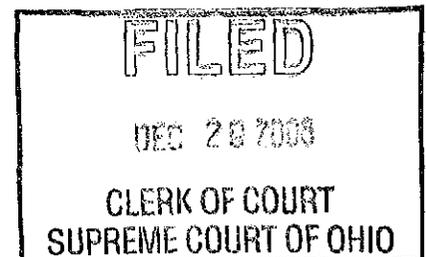
Justin C. Thompson, #0078817
Assistant State Public Defender

Lorain County Prosecutor's Office
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5389 / (440) 323-1015 – Fax

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394 / 728-3670 – Fax

Counsel for Appellee

Counsel for Appellant



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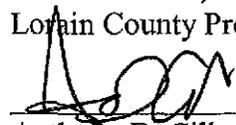
State's Memorandum in Opposition to Reconsideration

On December 10, 2008, this Court affirmed Nicole Diar's convictions in this case. Diar has requested that this Court reconsider its merits ruling affirming her convictions. The State of Ohio hereby responds pursuant to Sup. Ct. Prac. R. XI § 3(A). The reasons in support of this response are more fully set forth in the attached memorandum in opposition.

Respectfully submitted,

Dennis P. Will, #0038129
Lorain County Prosecuting Attorney

By:



Anthony D. Cillo, #0062497
Assistant Prosecuting Attorney
Counsel Of Record

225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5389 / (440) 323-1015 - Fax

MEMORANDUM IN OPPOSITION

PROPOSITION OF LAW NO. IV

The defendant's due process rights were not violated.

Appellant's motion for reconsideration raises no new issues for this Honorable Court's consideration. All the issues raised by Appellant were previously considered and rejected by this Court. Although this Court determined that there were a few instances where the prosecutor may have asked a leading question or made a comment that shouldn't have been made, this Court held that Appellant received a fair trial and her due process rights were not violated during the guilt phase.

Nonetheless, Appellant contends that this Honorable Court erred in determining that she received a fair trial. Appellant argues that her substantive and procedural due process rights to a fair trial were violated when Appellee committed various acts of misconduct during the trial of her capital proceeding. Appellant's contentions lack merit.

The test for prosecutorial misconduct is whether the remarks/actions were improper and, if so, whether they prejudicially affected the accused's substantial rights. State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084, citing State v. Smith (1984), 14 Ohio St.3d 13. The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084, quoting Smith v. Phillips (1982), 455 U.S. 209.

Moreover, some instances of misconduct were not objected to and therefore all but plain error is waived. State v. Childs (1968), 14 Ohio St.2d 56, paragraph three of the syllabus. Crim. R. 52(B) provides as follows:

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Crim. R. 52(B)

To find plain error, it must be clear that the verdict would have been different but for the error. State v. Long (1978), 53 Ohio St.2d 91. The plain error doctrine is only to be applied with the utmost of caution and only to prevent a clear miscarriage of justice. Id. An error is plain error only if it is obvious, State v. Barnes, 94 Ohio St.3d 21, 27, 2002 Ohio 68, and, "but for the error, the outcome of the trial clearly would have been otherwise." State v. Bethel, 110 Ohio St. 3d 416, 2006 Ohio 4853, quoting State v. Long (1978), 53 Ohio St.2d 91.

This Court found that the prosecutor engaged in misconduct when asking Dr. Matus about consulting with other experts, thereby introducing the qualifications of other unnamed experts. This Court correctly concluded that Dr. Matus' testimony helped the defense as the state was unable to show that Jacob died of a blow to the head. Because there was no prejudice and the testimony actually helped the defense, this Court correctly found that no plain error occurred.

Next Appellant contends that the prosecutor improperly asked leading questions after objections were sustained. Appellant argues that in questioning Dolence, a forensic radiographer, the prosecutor engaged in prejudicial misconduct by repeatedly asking questions after objections were sustained. This Court ruled that there was no prejudice because prior testimony established the evidence elicited through the leading questions. Appellant complains that in ruling that no prejudice existed this Court failed to consider the allegedly prejudicial effect of repeated violations. Contrary to Appellant's assertions this Court did consider and reject Appellant's cumulative error argument. State v. Diar 2008 Ohio 6266 ¶ 223, ____ Ohio St.3d _____. This Court stated, "Diar argues that the cumulative impact of the prosecutor's misconduct prejudiced her. However, the record shows that Diar received a fair trial, and any

error was nonprejudicial.” *Id.* at ¶ 223. This Court specifically found that Appellant received a fair trial and that no prejudice resulted from the few instances of misconduct found.

Appellant claims that questions asked of Faulkner and Harkless were improperly leading, however, this Court found that the questions, while leading, elicited obvious answers and that no prejudice resulted. *Diar*, at ¶ 171. In the absence of prejudice no plain error exists.

Appellant argues that because the prosecutor asked improperly leading questions of witness Cantrell plain error exists. This contention is likewise without merit. This Court correctly found that the leading questions covered mostly irrelevant matters. It was entirely irrelevant to the jury how witness Cantrell would behave if faced with the same situation as Appellant. Appellant claims that while the questions involved irrelevant matters, the facts were highly prejudicial. Appellant fails to expound on how she was prejudiced by irrelevant matters.

Next Appellant claims that she was prejudiced by leading questions asked of Detective Garcia, arguing that this Court failed to consider the cumulative effect of the leading questions. This argument is without merit. This Court did consider the cumulative effect of all errors and determined that Appellant received a fair trial and that her substantial right to a fair trial was not violated. *Diar* at ¶ 223. This Court stated, “*Diar* argues that the cumulative impact of the prosecutor’s misconduct prejudiced her. However, the record shows that *Diar* received a fair trial, and any error was nonprejudicial.” *Id.* at ¶ 223.

During questioning of Detective Garcia this Court found that the prosecutor’s first question was leading, the second question was not leading. *Id.* at ¶ 178. Although certain questions about head trauma, gasoline and Appellant’s vehicle, asked of Detective Garcia, were leading, this Court deemed them not to be plain error because there was no prejudice. *Id.* at ¶ 179. This is because Dr. Matus’ earlier testimony addressed the head injury, and misconduct in

the other questions did not pervade the trial to a degree denying due process. *Id.* at ¶ 205. Since there was no plain error Appellant's claim of cumulative error as to these lines of questioning is without merit. This Court appropriately noted that there was "compelling" evidence presented to establish Appellant's guilt. This Court further noted that "* * * there is no reason to believe that the outcome of the trial was affected by the prosecutor's leading questions." *Id.*

Appellant complains that the prosecutor asked witness Huff about the absence of gasoline and her habit of giving money to male friends. This Court correctly concluded that Huff's opinion was of little relevance. This Court also correctly found that the question asked of Huff regarding her current opinion of Appellant's guilt had no bearing on the facts underlying the convictions. *Diar* at ¶ 208. Appellant claims this Court erred in so finding because the opinion question usurped the function of the jury. This argument is without merit. The trial court correctly instructed the jury that it had the sole duty to determine Appellant's guilt or innocence.

Appellant makes much of the "clean house" and good mother line of questioning, however this Court appropriately determined that no error occurred because objections were sustained and the questions were not repeated. *Id.* at ¶ 209.

While this Court found that the prosecutor did ask a sarcastic question about Appellant going out the night of her son's funeral, no prejudice occurred because earlier testimony established her reasons for going out. *Id.* at ¶ 210. Where no prejudice is found it follows that Appellant received a fair trial. In addition, this question was asked to rebut a line of questioning by Appellant's counsel about Appellant being a good mother. (Trial Tr. Vol. X p. 51-52) The doctrine of invited error prohibits a party who induces error to benefit from that error on appeal. *State ex rel. Fowler v. Smith* 68 Ohio St.3d 357, 359, 1994 Ohio 302.

Appellant makes the argument that this Court failed to consider *Caldwell v. Mississippi*

(1985), 472 U.S. 320, which mentioned in part of the opinion that a stricter standard is required for review of a prosecutor's closing argument in a capital case. Caldwell dealt with closing arguments during the sentencing phase of a capital trial, not the guilt phase. Appellant's death sentence has been overturned, thus Caldwell is inapplicable. Also, this Court has previously found that Caldwell is inapplicable in Ohio because Ohio's statutory framework for imposition of a death sentence is different than that used in Mississippi. State v. Rogers (1986), 28 Ohio St.3d 427.

Moreover, this Court correctly stated that "[b]oth parties have latitude in responding to arguments of opposing counsel." Id. at ¶ 217, citing State v. Loza (1994), 71 Ohio St.3d 67, 78. This Court noted that prosecutor's are given latitude in summing up the evidence and what inferences may be drawn from the evidence. Diar at ¶ 213. This Court further stated that any improper comments during closing arguments were corrected by the jury instruction that arguments of counsel are not evidence. Id. at ¶ 211 and ¶ 215. Juries are presumed to follow instructions of law. Loza supra.

Appellant argues that the instances of misconduct found by this Court were "extensive" and "pervasive". (Appellant's Brief at p. 7) Appellant cites to a few instances where leading questions were improperly used by the prosecutor and argues that misconduct was flagrant and extensive. This argument lacks merit. It should be noted that out of well over one thousand pages of trial testimony Appellant can only point to nine or ten instances of alleged misconduct during the questioning of witnesses. This is certainly not "extensive", and "pervasive" as Appellant claims.

Appellant further claims that the prosecutor engaged in "flagrant" and "deliberate" acts of misconduct during questioning and closing argument. This claim is not supported by the record

either. Appellant can only point to a few isolated instances of alleged improper questions and one instance of an improper comment during closing argument. These few and limited instances simply do not rise to the level of “flagrant” or “deliberate” misconduct, and this Court did not make such a finding. Furthermore, this Court unanimously rejected Appellant’s cumulative error argument. Diar at ¶ 223, 248. This Court stated, “Diar argues that the cumulative impact of the prosecutor’s misconduct prejudiced her. However, the record shows that Diar received a fair trial, and any error was nonprejudicial.” *Id.* at ¶ 223. This Court also stated, “We affirm Diar’s convictions and remaining sentences.” *Id.* at ¶ 248.

Moreover, no plain error exists when leading questions help to develop the witness's testimony, and the answers concern matters easily proved by other testimony. State v. Drummond, 111 Ohio St. 3d 14, 2006 Ohio 5084., citing State v. Smith, 80 Ohio St.3d 89, 1997 Ohio 355 (no abuse of discretion in permitting leading questions on direct where the witness appeared nervous with answers). When viewed in the context of the entire trial, it cannot be said that Appellant’s substantial rights were violated by leading questions. Appellant has not, and cannot, demonstrate that the result of the trial would have been otherwise had the prosecutor not asked leading questions of witnesses during direct and re-direct examination. As such, no error may be predicated on this contention.

The cumulative error doctrine requires multiple instances of violation of the Rules of Evidence, which individually do not rise to the level of prejudicial error, however, taken together deprive the defendant of a constitutional right to a fair trial. State v. DeMarco (1987), 31 Ohio St.3d 191, at paragraph 2 of the syllabus. In the present case this Court correctly ruled that the prosecutor’s misconduct did not pervade the trial to such a degree that Appellant was denied due

process. State v. Diar 2008 Ohio 6266 ¶ 205, ___ Ohio St.3d ___, citing State v. LaMar, 95 Ohio St.3d 181, 2002 Ohio 2128 ¶149.

In LaMar the prosecutor engaged in improper and unprofessional behavior and ignored trial court admonitions regarding improper questions. The prosecutor in LaMar engaged in misconduct on no less than twelve occasions, including admonitions to refrain from asking improper questions. However, this Court rejected LaMar's claim of cumulative error and held that the errors were not pervasive and that the defendant was not prejudiced by the errors. Id.

Appellant refers this Court to the decision of the United States Supreme Court in Berger v. United States, 295 U.S. 78, at 85 for the proposition that sustaining of objections is insufficient to cure "pervasive misconduct." (Appellant's Brief at p. 8) In Berger the prosecutor intentionally misstated testimony, assuming facts not in evidence and conducting himself in a thoroughly improper manner. Id. The conduct of the prosecutor in Berger was very egregious. The prosecutor essentially made up facts and questioned witnesses regarding events that never occurred. Id.

In the present case this Court correctly found that no prejudice resulted from any improper conduct by the prosecutor. Appellant points out a few minor instances in which the prosecutor engaged in misconduct and tries to bootstrap them into a claim of cumulative error. Each and every claim raised by Appellant was addressed and rejected by this Honorable Court. Moreover, this Court specifically rejected Appellant's claim that the errors taken cumulatively were prejudicial. Diar at ¶ 223.

Following a long line of precedence, the United States Supreme Court has recognized that:

* * * the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, **there**

can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.

United States v. Hastings (1983), 461 U.S. 499, citing Brown v. United States (1973), 411 U.S. 223, 231-232; Bruton v. United States (1968), 391 U.S. 123, 135. [Emphasis added]

When viewed in the context of the entire trial, it cannot be said that Appellant's substantial rights were violated by leading questions or an isolated remark during closing argument. Appellant has not, and cannot, demonstrate that the result of the trial would have been otherwise had Appellee not asked leading questions of witnesses during direct and re-direct examination or made the remark during closing argument. As such, no error may be predicated on this contention.

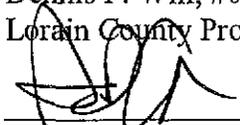
CONCLUSION

For all the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court deny Appellant's motion for reconsideration.

Respectfully submitted,

Dennis P. Will, #0038129
Lorain County Prosecuting Attorney

By:



Anthony D. Cillo, #0062497
Assistant Prosecuting Attorney
Counsel Of Record
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5389 / (440) 323-1015 – Fax
COUNSEL FOR APPELLEE

PROOF OF SERVICE

This is to certify that a true and accurate copy of the foregoing Response to Motion for Reconsideration was sent via facsimile transmission (614) 728-3670, to Linda E. Prucha, this 29th day of December, 2008.



Anthony D. Cillo, #0062497
Assistant Prosecuting Attorney