

ORIGINAL

IN THE SUPREME COURT OF OHIO

MEGAN GOFF,

APPELLANT-DEFENDANT,

VS.

CASE NO 09-1977

STATE OF OHIO,

ON APPEAL FROM THE
LAWRENCE COUNTY COURT
COURT OF APPEALS,
FOURTH APPELLATE DISTRICT

APPELLEE-PLAINTIFF

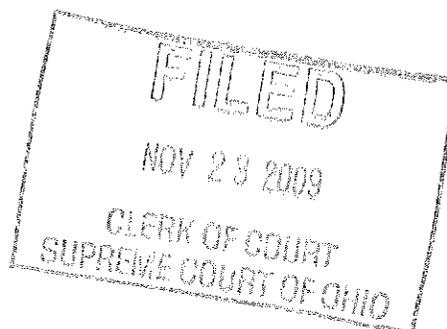
COURT OF APPEALS
CASE NO. 2007 AP 07 0039

MEMORANDUM IN RESPONSE OF APPELLEE, STATE OF OHIO

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NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED, AND THIS CASE IS OF NO PUBLIC OR GREAT GENERAL INTEREST.

Although Appellant raises nine propositions of law, her claim that a substantial constitutional question is involved is based almost entirely on her assertion that a criminal defendant cannot be compelled to submit to the State's psychiatric examination when she gives notice of her intention to argue battered woman syndrome at trial. When this Court reviews the comprehensive 82-page decision of the Court of Appeals affirming Appellant's conviction, it will be abundantly clear that no substantial constitutional question is present in this case upon which this Honorable Court should or would grant jurisdiction to decide the case on the merits.

Moreover, this case is not one of public or great general interest. As with any aggravated murder case, it did generate the normal amount of local, albeit temporary, interest that one might expect, but nothing more. In fact, Appellant herself offers very little, if any, basis for the Court's finding that this case is one of public or great general interest.

First Proposition of Law: It is a violation of a Defendant's right against self-incrimination under the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution to compel her to submit to a psychological examination, conducted by the State's expert, in response to the defendant raising a defense of self-defense supported by evidence of Battered Woman Syndrome.

The question of whether a criminal defendant can be compelled to submit to the State's psychiatric examination when she gives notice of her intention to argue battered woman syndrome (BWS) at trial was specifically and quite clearly answered by the 9th District Court of Appeals in the case of *State v. Manning* (Ohio App. 9, Dist. 1991), 74 Ohio App. 3d 19. In *Manning*, the defendant allegedly shot and killed her husband while he was asleep. It became apparent in pretrial proceedings that the defendant would contend at trial that she was a victim of BWS. She was first examined by a psychiatrist of her counsel's choice, and when the report of her psychiatrist was not provided to the prosecutor, the State objected to its admission at trial. Manning's attorney then stated to the court that an independent examination by a State

psychiatrist would be acceptable if the date for filing the overdue defense psychiatric report could be continued, to which the Court agreed.

A few days later Manning's attorney reversed his position and filed a brief claiming that an examination of Appellant by the State's psychiatrist would violate her constitutional guarantee against self-incrimination. The trial court rejected that argument and ruled in favor of the State.

On appeal, the Lorain County Court of Appeals held that "when a defendant introduces psychiatric evidence and places her state of mind directly at issue, as here, she can be *compelled* to submit an independent examination by a State psychiatrist" (emphasis added). Quoting from another court decision, the court further opined that "it is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony. The principle also rests on "the need to prevent fraudulent mental defenses."

Appellant misconstrues the basis for the *Manning* decision by incorrectly arguing that the court's decision in that case rested on the defendant's consent to the State's psychiatric examination. While at the trial court level, Manning's attorney first agreed to the independent examination by the State's psychiatrist and then switched positions and argued it would violate her right against self-incrimination, the court of appeals decision was not based in any way upon the issue of consent. The court of appeals did not hold that when a defendant consents to a psychiatric examination, then the State can conduct one, but instead held that "when a defendant introduces psychiatric evidence and places her state of mind directly at issue, she can be compelled to submit to the examination."

Appellant rests her argument that her Fifth Amendment right against self-incrimination was violated largely on the United States Supreme Court's holding in *Estelle v. Smith* (1981) 451 U.S. 454. However, as was argued by appellee in the court of appeals and embraced by that court, the *Estelle* case holding actually supports, rather than contradicts, appellee's position.

In *Estelle*, prior to the trial, a psychiatrist interviewed the defendant and concluded he was competent to stand trial. After he was convicted, the State then offered testimony from the psychiatrist in its *case in chief* during the penalty phase of the capital murder case. In the present case, the State did not offer any psychiatric evidence in its case in chief, but instead the State's psychiatrist, Dr. Resnick, testified only in rebuttal after the Appellant had raised BWS, including the testimony of her psychiatrist, Dr. Bobby Miller.

The *Estelle* court recognized this important distinction when it stated the following:

“Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several courts of appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. Respondent, however, introduced no psychiatric evidence, or had he indicated he might do so. Instead, the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death.”

Thus, the *Estelle* decision stands for the principle that the Fifth Amendment right against self-incrimination is violated only when the State offers its psychiatric testimony in its case in chief, and there is no indication that the defendant will offer any psychiatric evaluation of his or her own, but does not stand for the proposition, as Appellant argues, that a criminal defendant cannot be required or compelled to submit to the State's psychiatric examination if the issue of the defendant's state of mind will be raised at trial by the defendant. Therefore, the holding in *Manning* is in no way inconsistent with the holding in *Estelle*.

In *United States v. Davis* (6 Cir. 1996), 93 F. 3d 1286, which was also offered as persuasive authority by Appellant in her court of appeals brief, the court concluded that “while neither Rule 12.2(c) nor 18 U.S.C. Section 4241 and 4242 authorizes a district court to order a pretrial examination of a defendant concerning his or her mental state at the time of the offense, the statutes and rule do not displace extant inherent authority to order a reasonable, non-custodial examination of a defendant under appropriate circumstances. The extent of this authority, of

course, must be determined on a case by case basis.” Thus, the *Davis* court did not foreclose under federal law a court’s inherent authority to order the compelled psychiatric examination requested by the State regarding the state of mind of defendant.

It is also noteworthy that the *Davis* court acknowledged in its decision that *Estelle, supra*, “also intimates that a defendant can be required to submit to a sanity examination *and presumably some other forms of mental examination*, when his silence may deprive the State of the only effective means it has of controverting his proof on issue that he (she) interjected into the case” (emphasis added). While Appellant attempted to claim that *Davis* favors her position, it clearly does not, and in fact, supports appellee’s contention that the court-ordered mental evaluation of Appellant did not violate her right against self-incrimination.

Second Proposition of Law: It is a violation of R.C. Section 2945.371(J) and a defendant’s right to a fair trial and due process of law under the Ohio and United States Constitutions, to permit the State’s psychiatric expert to expound on inconsistencies between the statements to the State’s expert elicits from a defendant during a compelled psychological examination and the defendant’s prior statements and other evidence gathered by the prosecution.

When the court reads the testimony of defense expert, Dr. Miller, as well as his report (admitted as defense exhibit 228) and the report and testimony of Dr. Resnick, it will become apparent that Resnick’s reference to inconsistencies and other statements of the Appellant was only for the purpose of both rebutting Dr. Miller’s testimony and supporting Dr. Resnick’s opinion that he could not form an opinion as to whether or not Appellant suffered from BWS. Both experts’ reports are very detailed in their references to case materials, including not only prior statements made by the Appellant, but the statements made by Appellant to each respective psychiatrist.

There is simply nothing inappropriate or contrary to law or the rules in the testimony of Dr. Resnick as a rebuttal expert witness. After thoroughly discussing all of the information relevant to his conclusion, including the inconsistencies, Dr. Resnick, at pages 34 and 35 of his

report, gives several possible explanations for why Ms. Goff shot her husband, but simply could not reach a conclusion she suffered from BWS. In the final paragraph of his report, he prefaces his conclusions by stating “it is my opinion that if Ms. Goff’s allegations of events is correct...,” which illustrates he was not taking a position with the court as to the ultimate credibility of the Appellant.

Similarly, in his testimony he does not give an opinion as to the credibility of Appellant when he stated “I would say that the whole concept of whether she is a battered woman depends upon whether His Honor, in this case, finds her credible...(Tr. 3168). By making the foregoing statement to the court, Dr. Resnick was demonstrating his understanding that it was the court, not he, who was to determine the credibility of the Appellant.

Appellant further directs this court’s attention to *State v. Cooley*, (46 Ohio St. 3d 20), in which the Ohio Supreme Court stated that “a defendant’s statements made in the course of a court-ordered examination may be used to refute his assertion of mental capacity, but not be used to show he committed the acts constituting the offense.” In the first place, it is significant to note that the decision in *Cooley* was in respect to the interpretation of R.C. 2945.39(D), not in relation to psychiatric testimony in an alleged BWS case.

More importantly, in the case at bar the Appellant’s statements were not used to show that she committed the acts constituting the offense. The acts she committed that constituted the offense, including loading two handguns, appearing at her husband’s door after fifty-nine days of separation, uninvited, and shooting him 15 times, though he was unarmed, were not in dispute when Dr. Resnick testified on rebuttal. Appellant had given two statements to Detective Bollinger in which she confessed to all of the above. She also testified regarding what she had done prior to and during her husband’s killing. Other experts (the medical examiner and the defense witness, Larry Dehus), as well as Dr. Miller’s testimony and report, further confirmed all of these “acts” of Appellant. It is ridiculous, then, to claim that Dr. Resnick’s testimony, on rebuttal, and after all of the other evidence had been presented, was offered for the purpose of

showing that Megan Goff committed the acts constituting the offense.

Finally, in its decision the court of appeals, citing *State v. Hancock* (2006), 108 Ohio St. 3d 57, 2006-Ohio-160, found that no error occurred because Ms. Goff did not deny the killing and because Dr. Resnick's recounting of Ms. Goff's statements mirrored some of the statements she made during the trial. Appellant's rights were simply not violated in any way by Resnick's testimony.

Third Proposition of Law: R.C. Section 2945.371(A) does not authorize, and a court does not have inherent authority to compel a psychological examination of the defendant when the defendant has raised the defense of self-defense, supported by BWS expert testimony, and to order an exam to the contrary is a violation of a defendant's right to due process of law and a fair trial.

The Appellant's third proposition of law is very similar, if not identical to the argument in her first proposition of law. Appellee would reiterate its argument in response to the first proposition of law. The third proposition of law must be rejected.

Fourth Proposition of Law: When an expert is permitted to testify to motive and state of mind over the objection of defendant in violation of Ohio rule of evidence 702(a) and *State v. Wilcox* (1982), 70 Ohio St. 2d 182, the defendant is denied the right to due process of law and a fair trial.

As previously stated in this memorandum, Dr. Resnick's reference to inconsistencies and other statements of the Appellant was only for the purpose of both rebutting Appellant's expert's testimony and supporting Resnick's opinion that he could not form an opinion as to whether or not Appellant suffered from BWS. Moreover, Resnick specifically acknowledged that he was not rendering an opinion as to the credibility of the Appellant but that her credibility was clearly within the province of the court, when he stated that "I would say that the whole concept of whether she is a battered depends upon whether His Honor in this case finds her credible..."(Tr. 3168). The fourth proposition of law does not support this court's granting jurisdiction to hear the case on the merits.

Fifth Proposition of Law: The outcome of a trial can be prejudiced by a prosecutor's misconduct, no matter when it occurs during the trial process, violating the defendant's Fifth and Sixth Amendment Rights to Due Process and a Fair Trial and Counsel, respectively, as incorporated by the Fourteenth Amendment.

In the first place, it is simply an incorrect statement to claim, as Appellant does in her memorandum, that the prosecutor "testified, misstated the facts, added his personal beliefs, and the judge failed to control him and take charge of the proceedings." The record does not support these allegations in any way or to any degree.

In addition, even in a case where there is arguable prosecutorial misconduct, this court held in *State v. Wiles* (1991), 59 Ohio St. 3d 71, that "in a bench trial, an appellate court initially presumes that the trial court considered only relevant, admissible evidence in reaching its conclusion. The prosecutor's misconduct must be so egregious, and/or his statements and arguments were so unsupported by the record to have tainted the judge's decision before the presumption can be overcome."

The case at bar was tried as a bench trial to Judge Frederick Crowe, an experienced and seasoned trial judge. The assertion that Judge Crowe's decision could have been affected by prosecutorial misconduct, even if it had occurred, is preposterous. This is particularly true in light of the fact that the evidence of Appellant's guilt was overwhelming.

Sixth Proposition of Law: The outcome of a trial is prejudiced by multiple erroneous evidentiary rulings, violating the defendant's Federal and Ohio Constitutional rights to due process, a fair trial, and counsel.

The court of appeals dedicated ten pages of its decision in addressing the issues raised by this proposition of law. Most of the evidentiary rulings that Appellant complained about on appeal were not objected to at the trial, and therefore, the plain error standard has to be met on appeal. Appellant did not demonstrate how any alleged plain error would have affected the trial's outcome, and therefore, the argument that plain error occurred must fail. With respect to any ruling made by the trial judge to which there was an objection, the court of appeals properly

found that there was no showing that the trial judge abused his discretion in overruling any of those objections.

Seventh Proposition of Law: When the defendant proves self-defense by a preponderance of the evidence, the defendant must be acquitted, and to hold otherwise is a violation of the defendant's Fifth and Sixth Amendment Rights to Due Process and a fair trial, respectively, as incorporated by the Fourteenth Amendment, and the Ohio Constitution, Article I, Section 10, 16, and the Ohio Rules of Evidence.

It is not disputed that in order to prove the affirmative defense of self-defense, the Appellant must have established at trial, by a preponderance of the evidence, that she was not at fault in creating the situation giving rise to the altercation, that she had a bona fide belief that she was in imminent danger of death or great bodily harm, and that her only means of escape from such danger was the use of such force and that she must have not violated any duty to retreat or avoid the danger. Appellant did not prove any of the three elements.

It is uncontroverted that Appellant had not lived with the victim for 59 days immediately prior to killing him and on the early evening of March 18, 2006, Appellant loaded two guns, parked in a carport at her father's house next door to the Goff residence, walked across her father's lawn and knocked on Bill Goff's door. Just inside the door, and before Bill Goff could remove his hand from the doorknob, Appellant emptied both guns, hitting Mr. Goff in the chest and head area numerous times, instantly killing him.

These undisputed facts clearly demonstrated that Appellant was at fault in creating the situation giving rise to the altercation and that she did violate a duty to avoid the danger (even though there was no danger the victim could shoot her, as he had no operating weapons at his residence). Although she did attempt to offer evidence through her expert that she suffered from BWS, the content of telephone conversations with the victim on March 17, and her actions on March 18 are not consistent with the belief by her that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was the use of such force. The trial judge had no alternative but to reject Appellant's claim of self-defense.

Eighth Proposition of Law: When evidence is insufficient to sustain a finding of guilt, the Federal and Ohio Constitutions require the conviction to be reversed with prejudice to future prosecution.

Appellant contends that the evidence was insufficient for the court to conclude beyond a reasonable doubt that Appellant was guilty of aggravated murder. The facts set forth in the appendix to the court of appeals' decision provide an ample basis in the record for proof of all of the elements of aggravated murder beyond a reasonable doubt.

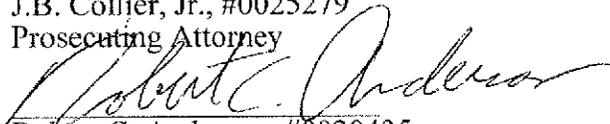
Ninth Proposition of Law: Ineffective assistance of counsel in violation of a defendant's Sixth Amendment Right to Counsel as incorporated by the Fourteenth Amendment, can be found when trial counsel's cumulative errors prejudice the outcome of the trial and deny the defendant a fair trial.

In *Strickland v. Washington* (1984), 466 U.S. 668, the United States Supreme Court established a two-prong test when the issue of ineffective assistance of counsel is raised. The court held that in order for a conviction to be set aside the defendant must show, "first that counsel's performance was deficient, and second, that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial." None of the "failures" that Appellant alleges her trial attorney committed meets the *Washington* two-prong standard. Appellant offers no explanation about how her trial counsel's performance was deficient or how the deficient performance prejudiced her right to a fair trial.

CONCLUSION

Appellee respectfully requests this honorable court to decline jurisdiction to decide the case at bar on the merits.

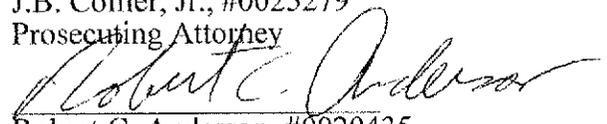
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PROOF OF SERVICE

A copy of the foregoing Memorandum was served upon Ms. Paula Brown, Attorney for Appellant, Kravitz, Brown & Dortch, LLC, 65 East State Street, Suite 200, Columbus, OH 43215-5240, on this 19th day of November, 2009, by regular US mail.

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