

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. **10-1537**
Plaintiff-Appellee : On Appeal from the Hamilton
vs. : County Court of Appeals, First
BRYAN SWINFORD : Appellate District
Defendant-Appellant : Appeal Case Number C090622

MEMORANDUM IN SUPPORT OF JURISDICTION

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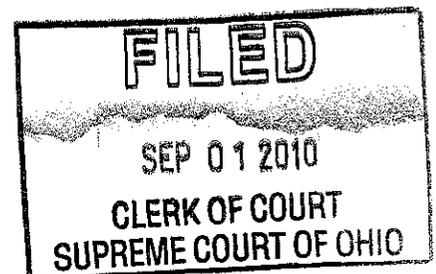
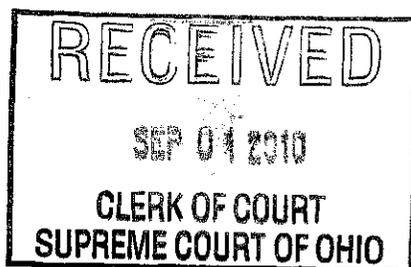


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IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO.
Plaintiff-Appellee :
vs. :
BRYAN SWINFORD : MEMORANDUM IN SUPPORT
Defendant-Appellant : OF JURISDICTION

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST AND DOES INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court has made it very clear prosecutorial misconduct in closing arguments will not be tolerated. The concern stated is “it is just a matter of time before it affects the outcome of a trial.” *State v. Fears*, 86 Ohio St. 3d 329, 715 N.E.2d 136 at page 336 (1998). This was after noting a “mounting alarm” over the increasing instances of misconduct by prosecutors. *State v. DePew*, 38 Ohio St.3d 275, 528 N.E.2d 542 (1988).

This Court has provided guidance to appellate courts with a test to apply when finding a prosecutor has improperly shifted the burden to the defense in a trial. Courts and the public must be confident the incidents of misconduct are being reviewed fairly with mandated standards. Consistent application of the law is necessary to ensure the public’s confidence in the integrity of our court system.

New rules of law, new tests to apply or new factors to consider when reviewing an instance of prosecutorial misconduct should come from this Court and not courts of appeal.

Instead the First District Court of Appeals on its own has created a new test to apply when reviewing instances of prosecutorial misconduct in closing argument.

In order for our criminal justice system to work, the public must maintain confidence the trials conducted are fair. That if a trial is unfair, the cause of the unfairness will be addressed, corrected and steps will be put in place to ensure it does not happen again.

The often used quote from *Berger v. United States* expresses the sentiment of the general public; The Prosecutor's duty in a criminal case is to seek justice. As a result, the prosecutor should "prosecute with earnestness and vigor" but may not use "improper methods calculated to produce wrongful convictions." Very few citizens when asked would disagree with the United States Supreme Court's confirmation of the serious nature of misconduct by prosecutors stated in the *Darden v. Wainwright* decision; When improper methods are used, it renders the trial unfair and makes the resulting conviction a denial of due process and may require reversal.

The First District Court of Appeals disregarded the constitutional analysis announced by this Court and the United States Supreme Court when confirmed instances of misconduct occur in closing argument. Instead of applying the tests and factors provided to it by superior courts, the First District Court of Appeals has created a new test and a new rebuttable presumption to apply when a prosecutor has engaged in misconduct by shifting the burden to the defense in closing arguments. Such a test in removes the fear of reversal from the prosecutor when conducting a closing argument. Instead of affirming decisions which were designed to reduce or eliminate the instances of misconduct, the First District Court of Appeals has established a new rule which calls only for an instruction from the trial court to disregard and reminds jurors of their oath. No additional sanction remains viable.

The First District Court of Appeals has done serious damage to the public' confidence that future trials will remain fair by creating a new rule of law.

STATEMENT OF THE CASE AND FACTS

Bryan Swinford was indicted and charged with Felonious Assault, Aggravated Robbery, Aggravated Kidnapping and Aggravated Burglary. Following the arraignment, it was determined no property was taken and the Aggravated Robbery charged was dismissed.

The matter proceeded to a jury trial on July 6, 2009. After testimony, admission of exhibits, arguments of counsel and instructions from the court, the jury returned verdicts of not guilty of Aggravated Burglary and Aggravated Kidnapping and a verdict of guilty on the offense of Felonious Assault. After reviewing the presentence report, considering the victim impact statement and the statement of Mr. Swinford, a sentence of four years incarceration was imposed.

Sometime either on June 9th or 10th 2008 Amy Miller suffered a severe injury to her head. For over a month she was unable to conclude how it occurred. After a month of exposure to her family and friends who all believed Bryan Swinford hit her, Ms. Miller called police and told police Bryan Swinford hit her. She still claims no other memory of those 3 days with the exception of remembering Bryan Swinford hit her.

Mr. Swinford cooperated with the police investigation. He had no blood on him or injuries to any part of his body. He gave a statement to police, permitted them to photograph him and provided the police with evidence of his whereabouts over time period they were investigating. He told police how he had ended his relationship with Ms. Miller a month before, moved out almost everything he owned and had moved on with his life. He continued to work as a chef at the Banker's Club and attend culinary classes at the local university. At Ms. Miller's request he spent time with her on June 8, 2008 but the two got into an argument. Ms. Miller was upset to learn Mr. Swinford had begun to see other women soon after breaking up with her. It

was this argument which led to Mr. Swinford confirming to Ms. Miller it was her behavior which led to the relationship ending.

The police and prosecutor operated under the belief Ms. Miller suffered her injury on the evening of the 8th into the early morning of the 9th but was not discovered until late morning of the 10th. No one investigated any other possibility. Given Ms. Miller's rapid decline after her mother found her in the home and then transported her to the hospital, it was just as likely she was injured much closer in time to her mother coming into her home. Given Ms. Miller's activities documented by her phone use, the second scenario proved logically more likely.

Police learned after Mr. Swinford left Ms. Miller, her ex-boyfriend came by with her son, spent time talking with Ms. Miller and eventually had sex with her. Her ex-boyfriend claimed he left her in good condition. From this point until Ms. Miller was discovered on June 10th in her home with the injuries, no witness confirms her whereabouts. Her son, Cadon, a third grader was home the entire time but was not called as a witness during the trial. Her cell phone records indicate she called her voicemail, her employer and spoke to her mother. Ms. Miller and the prosecution claim these actions occurred after she was assaulted. The defense presented them as reasons to doubt when Ms. Miller was injured. Further the defense presented evidence Ms. Miller had fallen down her basement stairs in the past and suggested it was possible she may have done so again but police failed to investigate the possibility.

In their investigation, the police took photographs but did not collect any evidence. The hospital found some blood under Ms. Miller's fingernails and submitted it for testing. The crime lab produced a DNA report indicating the sample had at least two contributors, one of whom was female. The police never followed up on the report in order to conduct more testing.

The Conduct at Issue

During the course of the trial, the quality of police work was at issue. The handling of evidence, collection of evidence, follow up investigations and preserving evidence were all the subject of attorney questioning. The defense presented an alibi in addition to supporting its position the evidence did not amount to proof beyond a reasonable doubt. The only witness claiming Mr. Swinford was responsible was the complaining witness who is bi-polar, who has a history of drug, alcohol abuse and has suffered memory loss as a result of a severe head injury.

The prosecuting attorney presented his closing argument the day after all evidence had closed. The Prosecution asserted during their closing the blood evidence was available for DNA testing by the defense and they could use DNA testing to exonerate their client.:

“If they were so convinced that Bryan was going to be excluded on DNA, they could have had it tested as well. We know that didn’t happen either, so none of those witnesses come into court.”

The defense objected and the trial court called counsel to sidebar:

THE COURT: You just shifted the burden.

MR. HEILE: I did not shift the burden. Obviously the jury instructions explain what needs to be explained, where the burden is. And maybe that if they wanted to test it, it could have been tested.

THE COURT: They don’t have to do anything

THE COURT: I am going to give them a limiting instruction.

THE COURT: I think it can be cured by an instruction. It will be struck.

The trial court denied the mistrial motion and instead struck the comment while reminding the jury the state has the burden of proof and the defense is not required to prove anything.

The jury in this case deliberated for three days. At one point indicated it was deadlocked. The judge provided additional instructions before the jury returned not guilty verdicts on two of the three charges.

The First District Decision

On appeal Bryan Swinford raised three issues; the decision to overrule the motion for mistrial was error, the sole verdict was against the manifest weight of the evidence and there was insufficient evidence to support the lone guilty verdict.

The First District Court of Appeals issued a Judgment Entry affirming the convictions and the decision of the trial court to overrule the motion for new trial. It agreed with the trial court the conduct of the prosecutor was improper but because the jury received a curative instruction and there was no evidence the jury failed to follow the instruction, it found there was no prejudice to Bryan Swinford.

ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW

Appellant's First Proposition of Law: Where a prosecutor has engaged in misconduct during closing argument and the defense timely objects, the prosecution has the burden of proving beyond a reasonable doubt the jury would have convicted without the improper comment.

The conduct of prosecutors during closing argument has been the subject of many rulings from this Court. In *State v. DePew*, this Court sounded a "mounting alarm" over incidents of misconduct; "We have previously voiced our disapproval of the various forms of misconduct by counsel in such cases. * * * Apparently, our efforts in this regard have been something less than successful, and the avenues for prevention and correction by trial courts, appellate courts and this court are relatively few." *supra*, 38 Ohio St.3d 275, 288, 528 N.E.2d 542, 556 (1984).

"Roughly ten years later this Court expressed its increasing frustration with the repeated incidents of misconduct during closing arguments. Time and time again this court has commented on the impropriety of a prosecutor's argument throughout the course of a capital case. Time and time again we have given prosecutors the benefit of the doubt, declaring their conduct to be nonprejudicial in view of overwhelming evidence of guilt. However, despite our best efforts to clarify the limits of acceptable advocacy, and our stern warnings to avoid such inappropriate conduct in the future, some prosecutors continue to unabashedly cross the line of vigorous but proper advocacy. In doing so, they taint the fairness of our criminal justice system." *State v. Fears*, 86 Ohio St. 3d 329; 1999 Ohio 111; 715 N.E.2d 136 (1999)

The First District agreed with the trial court's finding the prosecutor in Swinford's case engaged in "burden shifting" during his closing argument. However, it failed to recognize the test to apply in reviewing such incidents of misconduct.

This Court affirmed the prosecutor has the burden of proving beyond a reasonable doubt the jury would have convicted the defendant without the misconduct. *State v. Maurer*, 473

N.E.2d 768, 792, 15 Ohio St.3d 239 (Ohio 1984). Instead of determining whether the prosecutor demonstrated beyond a reasonable doubt the misconduct did not affect the verdict the First District determined a jury instruction cured the violation in Swinford's case.

In its decision, the First District created a new test to apply to cases of misconduct. Citing the proposition a jury is presumed to follow the instructions given to it, the appellate court found nothing in the record demonstrated the jury failed to follow the instruction. This new appellate test removes from the prosecutor the burden of proof and now places it on the defense to prove a jury failed to follow the court's instructions. In summary, where a prosecutor engages in misconduct and there is an attempt to cure the harm with an instruction, the defense has the burden of demonstrating the jury failed to follow its instruction. This is contrary to this Court's decisions in this area and entirely inconsistent with the goals expressed in *DePew*, *Fears* and many, many other decisions on prosecutorial misconduct.

In determining whether the questioned remarks were prejudicial, an appellate court must consider all relevant factors, including the nature of the remarks, whether an objection was made by counsel, whether any corrective instructions were given, and the strength of the evidence against the defendant. *State v. Maurer, supra*. Closing arguments must also be looked at in their entirety to determine whether the remarks were prejudicial. *Id*. In reviewing allegations of prosecutorial misconduct, it is the court's duty to consider the complained of conduct in the context of the entire trial. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464 (1986).

The test affirmed in *Maurer* the same stated and followed by the 6th Circuit in *US v. Henry*, 545 F.3d 367, 376 (6th Cir. 2008). First there is analysis to determine whether the comment(s) by the prosecutor are improper. Then there is a determination if the comment caused harm or was flagrant. In making this determination, the reviewing court is mandated by

this Court and every federal court to decide if the prosecutor misled the jury and prejudiced the defendant; if the remarks were isolated or extensive; whether the comment was accidentally made or intentional; and, the overall strength of the evidence against the accused. Finally, the court is to consider whether it appears beyond a reasonable doubt the jury would have convicted the defendant even without the improper comments. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974) and *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940 (1982).

No one disputes the comments made in closing arguments during Swinford's case are improper. However, there has never been a judicial review of the factors required by this Court as directed by the United States Supreme Court. Instead the First District Court of Appeals removed the burden of proving the misconduct had no effect on the verdict. Instead the First District Court of Appeals created a new test to apply; where a curative instruction is given, there is a presumption the error has been cured unless it can be shown the jury did not follow the instructions of the court.

Appellant's Second Proposition of Law: Where there is a finding of prosecutorial misconduct in closing argument a curative instruction does not create a rebuttable presumption the harm caused has been remedied

In its review of the circumstances in Swinford's trial, the First District agreed with the trial court and Swinford the prosecutor had engaged in misconduct by shifting the burden to the defense. The First District then looked at the trial as a whole and determined there was no violation of Swinford's right to a fair trial. It noted the trial court gave a curative instruction and later instructed the jury on the burden of proof in the case. It then stated "Jurors are presumed to follow the trial court's instructions. And we find nothing to demonstrate the contrary in this case." (Entry at pages 2-3)

This statement by the First District Court of Appeals has created a new test to determine whether a defendant's right to a fair trial has been violated by prosecutorial misconduct during closing arguments. It abandoned the four step analysis outlined in *Henry*, the review of the fairness of the trial required by *Phillips* and the burden of proof just recently reaffirmed in *Carson v. Hudson*, 2009 WL 33367 (S.D. Ohio 2009). *Maurer*, *Henry* and *Carson* are all affirmations of the dictates of *Berger v. U.S.*, 295 U.S. 78, 55 S.Ct. 629 (1935) and *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464 (1986).

The new test creates a presumption a curative instruction will remedy the harm caused by prosecutorial misconduct. It eliminates the analysis set forth by the United States Supreme Court and this Court. It eliminates the burden of proof on appeal where the defense timely objects. Instead of requiring proof beyond a reasonable doubt the misconduct did not affect the verdict, now the defendant must prove the jury failed to follow the instruction. It goes even further than creating a presumption which can be rebutted and instead has announced a new presumption

which cannot be rebutted. As this court knows a verdict in Ohio cannot be questioned by evidence the jurors may not have followed its instructions. *See* Evidence Rule 606(B) and *State v. Spencer*, 118 Ohio App.3d 871, 694 N.E.2d 161 (1998).

In failing to engage itself in the analysis mandated by the United States Supreme Court and this Court, the First District Court of appeals has created a new rule of law: A curative instruction will presumptively cure any harm that may have been caused by a prosecutor's improper closing argument. The words of the United States Supreme Court in *Darden* have been rendered impotent. "When improper methods are used [by the prosecutor] it renders the trial unfair and the resulting conviction a denial of due process and requires reversal." *supra* at 181. In the face of this Court's comments and concerns expressed in *DePew*, *Fears* and scores of other reported cases, a prosecutor will no longer be in fear of reversal or a new trial provided the trial court offer an instruction to the jury to disregard such improper comments.

CONCLUSION

The prosecution is normally entitled to a certain amount of latitude when making a closing argument. This makes sense. They have the burden, trials are many times hotly contested matters conducted by passionate advocates. There may areas of advocacy where the question of improper conduct is unclear. Closing argument is not one of those areas. The Supreme Court and this Court have clearly defined the boundaries of proper closing arguments. Also, the judicial responsibility when reviewing such instances has been clearly defined. The goal has always been to reduce or eliminate occurrences of misconduct. Fear or reversal or a mistrial must be in place to ensure a prosecutor not cross the line and render a trial unfair.

The Supreme Court and this Court have clearly defined the tests and factors to apply in instances where a prosecutor has been found to have engaged in misconduct and the defense has properly objected. The final analysis permits a court to assess whether the trial provided an accused was fair. The First District Court of Appeals in its decision has removed the incentive for a prosecutor to check his/her zealously. It also has eliminated the test for fairness and created a presumption that attempts to correct the error have corrected it thus eliminating the need for appellate review.

The elimination of appellate tests, creation of new legal presumptions must come from this Court. If not, inconsistent results occur. This Court should accept jurisdiction of this case, apply the recognized tests when misconduct is present and come to the conclusion the trial in this matter was unfair thus requiring a new trial be held on the sole remaining accusation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'William R. Gallagher', with a stylized flourish at the end.

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CERTIFICATE OF SERVICE

I hereby certify I have served a copy of this Memorandum in Support of Jurisdiction by US mail to the Hamilton County Prosecuting Attorney, 230 East 9th Street, Cincinnati, Ohio 45202 this 31st day of August 2010.

A handwritten signature in black ink, appearing to read 'W. Gallagher', with a stylized flourish at the end.

William Gallagher
Attorney for Bryan Swinford

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

Plaintiff-Appellee,

vs.

BRYAN SWINFORD,

Defendant-Appellant.

APPEAL NO. C-090622
TRIAL NO. B-0806053

JUDGMENT ENTRY.



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant Bryan Swinford was found guilty of felonious assault. The trial court sentenced him to four years' incarceration and ordered restitution. Swinford now appeals.

Amy Miller, Swinford's former girlfriend, testified that she and Swinford had been arguing in her basement one evening. The argument culminated in Swinford hitting her over the head with what Miller thought may have been a large, heavy flashlight. Miller suffered extensive injuries to her face and skull.

Miller could not initially recall the incident. And when she did begin to remember what had happened, her memory returned sporadically. State's witness

¹ See S.Ct.R. Op. 3(A), App.R. 11.1(E), and Loc.R. 12.



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Raj Narayan, a neurologist, testified that this type of spotty memory recall was normal in patients with Miller's type of head injury.

Swinford's defense centered on attacking Miller's credibility and on casting doubt on the police investigation of the crime. Swinford also claimed that he was at his mother's apartment when the attack occurred.

In his first assignment of error, Swinford asserts that the trial court should have declared a mistrial due to prosecutorial misconduct during closing argument. Swinford takes issue with the following remark: "If they [the defense] were so convinced that Bryan was going to be excluded on DNA, they could have had it tested * * * . We know that didn't happen either, so none of those witnesses come [sic] into court."

We agree with Swinford that this was improper since it suggested to the jury that Swinford needed to prove that he was innocent. But our analysis does not stop here. We must determine if this improper statement was so egregious that it deprived Swinford of a fair trial.²

Viewing the closing argument and the trial in their entirety, as we are required to do³, we hold that this single statement did not violate Swinford's right to a fair trial. Following defense counsel's objection, the court instructed the jury to ignore the improper statement, and it also issued a lengthy and proper curative instruction. Later, the jury was again properly instructed that the state had the burden to prove Swinford guilty beyond a reasonable doubt. Jurors are presumed to follow the trial

² See *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 94 S.Ct. 1868; *State v. Smith*, 87 Ohio St.3d 424, 2002-Ohio-450, 721 N.E.2d 93; *State v. Freeman* (2000), 138 Ohio App.3d 408, 741 N.E.2d 566.

³ See *Freeman*, supra.

court's instructions.⁴ And we find nothing to demonstrate the contrary in this case. Swinford's first assignment of error is overruled.

In his second and third assignments of error, Swinford claims that the jury's verdict was against the weight and sufficiency of the evidence. It was not. Miller testified that Swinford had hit her over the head with a heavy object. It was undisputed that Miller had sustained severe injuries. This was sufficient evidence to support Swinford's felonious-assault conviction.⁵ And while Swinford presented a version of the events that, if believed, would have exonerated him, there is no indication that the jury "clearly lost its way" in choosing to believe the state's case so as to create a "manifest miscarriage of justice" warranting a new trial.⁶ Swinford's second and third assignments of error are therefore overruled.

The judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 21, 2010

per order of the Court _____
Presiding Judge

⁴ *State v. Herring*, 94 Ohio St.3d 246, 254, 2002-Ohio-796, 762 N.E.2d 940.

⁵ See R.C. 2903.11(A)(1); *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

⁶ *Martin*, supra; *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.