

NO.

IN THE SUPREME COURT OF OHIO

11-1537

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95133

STATE OF OHIO,

Plaintiff-Appellant

-vs-

JOAQUIN HICKS,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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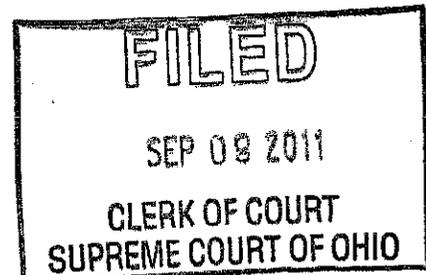
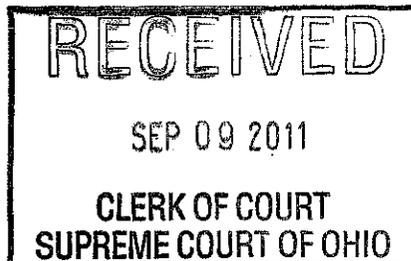


TABLE OF CONTENTS

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST1

STATEMENT OF THE CASE AND RELEVANT FACTS2

LAW AND ARGUMENT.....6

 Proposition Of Law I: No Prosecutorial Misconduct Is Present Where The
 Testimony Of A Previous Witness Establishes A Factual Predicate For Asking A
 Question On Cross-Examination.....6

 1. Legal standard for prosecutorial misconduct.....7

 2. An attorney’s question in cross-examination is not improper if he has a
 good-faith belief in its factual predicate.7

 3. The Eighth District erroneously reversed on the ground that the prosecutor
 had not introduced any evidence to lay the foundation for his question on cross-
 examination.7

 4. The record affirmatively demonstrates that there was a good-faith basis for
 the question.....8

 5. The record itself is the primary basis for establishing the existence of an
 attorney’s good-faith belief in the factual predicate of a question asked on cross-
 examination.11

 6. The question did not so greatly affect the proceedings so as to deprive the
 defendant of a fair trial.12

CONCLUSION13

CERTIFICATE OF SERVICE14

Appendix

Journal Entry and Opinion, *State v. Hicks*, Cuyahoga App. No. 95133, 2011-Ohio-
3578.....1-18

Journal Entry, *State v. Hicks*, Eighth District Court of Appeals No. 95133, Denial of
State’s Motion for Reconsideration.....19

**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT
PUBLIC INTEREST**

Is it prosecutorial misconduct for an attorney to ask a question on cross-examination as to the effect of a fact already testified to by a previous witness, if that effect could potentially impugn the integrity of the opposing counsel? To ask a question on cross-examination, an attorney is required only to have “a good-faith belief that a factual predicate for the question exists.” *State v. Gillard* (1988), 40 Ohio St.3d, 226, 231, 533 N.E.2d 272.

In this aggravated murder case, however, the Eighth District Court of Appeals concluded that it was prosecutorial misconduct for the prosecutor to ask an expert witness about the effect that reviewing discovery materials with an attorney prior to trial might have on the ability of witnesses to recall details from those materials. This question came after a previous witness had already admitted to reviewing all discovery materials for trial provided to her by defense counsel. The Eighth District found that there was no evidence to support asking the question and concluded that it was prosecutorial misconduct that “wrongfully impugned the credibility of the defense counsel,” and thereby deprived the defendant of his right to a fair trial. *State v. Hicks*, Cuyahoga App. No. 95133, 2011-Ohio-3578, at ¶ 43.

The State respectfully submits that Supreme Court Review is necessary to establish that when a prosecutor asks a question on cross-examination, the prosecutor is not required to lay an evidentiary foundation for the question beforehand. The attorney is required only to have a good-faith belief that a factual

predicate for the question exists. Such a belief can best be established by an examination of the record. If a previous witness has testified as to the existence of a material fact, the State submits that it is not prosecutorial misconduct to cross-examine another witness about the potential effect of a fact that has then been put into evidence.

Accordingly, the State of Ohio requests that this Honorable Court accept jurisdiction and review this case on its merits.

STATEMENT OF THE CASE AND RELEVANT FACTS

On September 28, 2009, the Cuyahoga County Grand Jury indicted Joaquin Hicks on three counts of aggravated murder, two counts of kidnapping, two counts of aggravated robbery, and one count of attempted murder. The charges arose out the February 22, 2009 double shooting of Jeremy Pechanic and Jory Abely in Perk Park in downtown Cleveland, which left Pechanic dead and Abely seriously injured. The case proceeded to trial on February 21, 2010. The jury returned a verdict of not guilty of the three counts of aggravated murder, but guilty of the lesser-included offense of murder, as well as a verdict of guilty on the remaining five counts.

Testimony at trial indicated that the two victims were celebrating a friend's birthday party at Scorchers bar in Cleveland on the night of the shooting. (Tr. 774). The group arrived around 12:30 in the morning hours of February 22 and sat at a table. (Tr. 779). At several points throughout the night, a man dressed in red and black and calling himself "Daquan" attempted to approach their table and talk to them. (Tr. 777, 778). When one of the group's members told Daquan to leave them

alone, he left the bar area and went outside with Pechanic and Abley. (Tr. 779). Witnesses testified that Pechanic began to smoke marijuana with Daquan as they stood outside the bar. (Tr. 980). Daquan told Pechanic that he could sell him a quarter-ounce of marijuana for \$200. (Tr. 987). Daquan and Pechanic then went back inside the building where Daquan watched Pechanic withdraw \$260 from an ATM. (Tr. 576).

Daquan approached a group of three men—Cornelius King, Reginald Day, and Perry King—sitting at a table in the bar and spoke to them about buying drugs for Pechanic. (Tr. 1065). The group decided to rob Pechanic. Because no one in the group had any drugs on them at the time to arrange a sale, they decided to call Ralfeal King, the younger brother of Cornelius King. (Tr. 1069). Cornelius knew Ralfeal had experience with robbing people at gunpoint in the past, and told the other members of the group that Ralfeal was on his way to commit the robbery. (Tr. 1069, 1083). Daquan, who Cornelius identified as being the defendant, Joaquin Hicks, asked Cornelius where Ralfeal would be once they got outside. (Tr. 1070).

Cornelius King testified that when his brother Ralfeal arrived at the bar, he identified him to Hicks. (Tr. 1085). Hicks then walked over to where Pechanic and Abley were standing. (Tr. 1086). Abley tried to talk Pechanic out of buying drugs from Hicks at this point, but feared there might be a fight if he continued to protest. (Tr. 1149). After a short conversation, the three began to walk across the street towards Perk Park. (Tr. 1086). King, his brother Ralfeal, Reginald Day, and Perry King followed them into the park. (Tr. 1086, 1088).

Abley, who survived the shooting, testified that he and Pechanic became nervous as they waited in the park with Hicks. (Tr. 1152). Eventually, the other four men arrived and stood with the group as Hicks stated, "We got you now." (Tr. 1153). Ralfeal King then produced a gun, pointed it at Pechanic, and demanded his money. (Tr. 1154). Pechanic handed his money over, saying, "Okay, here take it." (Tr. 1154). King replied, "Take this," and shot Pechanic twice, once in the shoulder and once in the head. (Tr. 1155). Abley heard someone tell him to get on his knees. (Tr. 1156). King and the others began to walk away from the scene when Reginald Day told King not to leave any witnesses. (Tr. 1094). King then walked back over to where Abley was kneeling and shot him in the head. (Tr. 1094). Pechanic was killed, and Abley survived with a serious brain injury.

The State's case at trial was that Joaquin Hicks was the person who identified himself as "Daquan" and lured Pechanic and Abley into the ambush on the night they were shot. In support of that case, the State called four witnesses who identified Hicks as "Daquan." Hicks offered an alibi defense and produced a series of witnesses who claimed he was elsewhere on the night in question. One of the defense witnesses, Denise Taylor, testified that she had been provided the discovery materials provided by the State to the defense prior to trial:

Q. Okay. Now, there's been some testimony that you've - - that you viewed discovery in this matter. Have you?

A. Yes, I have.

Q. How much?

A. Discovery, I probably viewed it all.

Q. Okay. Who gave it to you?

A. My lawyer.

Q. Who is your lawyer?

A. John Paris.

Q. Okay. Is he your lawyer?

A. Well, he's - - I hired him to defend my nephew.

Q. Do you consider him your lawyer?

A. Yes, I do.

Q. Okay. And he shared all the discovery with you; correct?

A. Yes, sir.

(Tr. 1642-3). The prosecutor then asked Taylor if she had shared that discovery with the other witnesses or told them what to say. She denied doing so. (Tr. 1643).

The defense then called an expert on eyewitness identification, Dr. Solomon Fulero, who testified as to what factors could potentially impact the memory of a witness. (Tr. 1668, 1669). Dr. Fulero testified that witness statements made immediately after an event occurs are the most likely to be accurate: "The closer to the time the description is given, the more likely it is to be accurate, because the less likely it is to be affected by anything that happens here." (Tr. 1676). Dr. Fulero also testified on direct-examination that "post-event information . . . can alter the witness' memory," and that "you don't want to introduce information to the witness because they may incorporate that information into their memory" (Tr. 1685, 1686).

On cross-examination, the prosecutor asked Dr. Fulero if it would be proper for witnesses to be interviewed together regarding their recollections. He replied that "witnesses should be interviewed separately, shouldn't know what anyone else says, shouldn't talk among themselves." (Tr. 1726). He further agreed with the prosecutor that it could prejudice the ability of a witness to recall events accurately

if she were shown police reports and statements of other witnesses in discovery.

(Tr. 1727-8). Thereafter, the following exchange occurred:

Q. Would it surprise you to learn, in dealing with memory, that this attorney out there was standing with a bunch of different witnesses - - MS. PASSALAUQA. Objection, your Honor.

MR. PARIS. Objection.

THE COURT. Overruled.

Q. Was standing with a bunch of different witnesses telling them what to testify to?

MS. PASSALAUQA. Objection, your Honor. It is not true.

THE COURT. Okay.

MS. PASSALAUQA. This is my ticket, Judge, and that is a blatant lie.

(Tr. 1733).

A heated sidebar ensued, after which Dr. Fulero testified that he felt it would be permissible for alibi witnesses to view discovery prior to trial. (Tr. 1737).

Hicks was convicted of murder. On direct appeal, the Eighth District reversed, finding that the prosecutor had engaged in prosecutorial misconduct by asking a question of an expert witness that suggested that the defense attorney had been instructing witnesses on what to say. *State v. Hicks*, 8 Dist. App. No. 95133, 2011-Ohio-3578, at ¶¶ 29-51.

Now before this Honorable Court is the State's request that this Honorable Court accept discretionary jurisdiction and hear this case on its merits.

LAW AND ARGUMENT

Proposition Of Law I: No Prosecutorial Misconduct Is Present Where The Testimony Of A Previous Witness Establishes A Factual Predicate For Asking A Question On Cross-Examination.

1. Legal standard for prosecutorial misconduct.

To obtain reversal for prosecutorial misconduct, a defendant first must show that the prosecutor's comments were in fact improper, and then must show that the comments so greatly affected the proceedings as to deprive the defendant of a fair trial. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. The touchstone of the analysis is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S. Ct. 940, 71 L.E.2d 78. The State submits that the prosecutor's conduct in this case does not meet the legal standard for prosecutorial misconduct.

2. An attorney's question in cross-examination is not improper if he has a good-faith belief in its factual predicate.

"[A] cross-examiner may ask a question if the examiner has a good-faith belief that a factual predicate for the question exists." *Gillard*, supra, at 231. Where the prosecutor's good-faith basis for asking a question is not challenged, the existence of that basis is presumed. *Id.* Moreover, cross-examination "shall be permitted on all relevant matters" under Evid.R. 611(B), and the scope of cross-examination is within the sound discretion of the trial court. *State v. Cassano* (2002), 96 Ohio St.3d 94, 112, 772 N.E.2d 81.

3. The Eighth District erroneously reversed on the ground that the prosecutor had not introduced any evidence to lay the foundation for his question on cross-examination.

In reversing, the Eighth District made no attempt to deal with the issue of whether the prosecutor had a good-faith basis for asking the question. The Court

simply stated that “there was absolutely no evidence that defense counsel engaged in such misconduct.” *Hicks*, at ¶ 43. This approach ignores the well-established rule that no evidentiary foundation is required to ask a question on cross-examination. Moreover, because the Eighth District did not determine whether a good-faith basis for the question existed, it appears to have presumed the existence of bad faith based specifically on a lack of evidence to support the prosecutor’s question. *Id.*

The Eighth District’s approach mistakenly mirrors the now-defunct rule of *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364, where this Court held that it was prosecutorial misconduct to attempt to communicate through innuendo without presenting evidence of the allegations implied therein. *Id.* at 119. This Court overruled that standard in *Gillard*. Because cross-examination often requires the examiner to probe into the testimony of a witness without already having hard proof of fact, requiring an attorney to establish a factual foundation before asking a question was found to be an unworkable standard. *Gillard*, 40 Ohio St.3d at 231. This Court explained that *Williams* was based in part on the 1971 version of the A.B.A. Standards Relating to the Prosecution Function, which had since been revised to incorporate the good-faith standard. *Id.* at 230. As a result of this Court’s decision in *Gillard*, there is no longer any requirement that an attorney establish an evidentiary foundation for a question before it is asked on cross-examination.

- 4. The record affirmatively demonstrates that there was a good-faith basis for the question.**

At trial, the defense called the defendant's aunt, Denise Taylor, to testify as an alibi witness. On cross-examination, the prosecutor attempted to impeach Taylor's recollection of the weekend of the murder by asking if she had viewed evidence provided in discovery, to which she replied that she had. When the prosecutor asked her how much of the discovery she had viewed, she stated "I probably viewed it all," and that it was given to her by trial counsel. (Tr. 1642-3). Taylor denied sharing the discovery materials with anyone else or coordinating her story with them based on those materials. (Tr. 1643).

Although Taylor denied that she had been told what to say, her admission that defense counsel had provided her with all discovery to review prior to trial demonstrates the prosecutor's good faith basis to have asked the defense expert witness on memory if reviewing discovery material prior to trial could affect a witnesses' testimony. Dr. Fulero had already conceded on cross-examination that it would be improper for an eyewitness to be shown police reports and statements of other witnesses, because doing so could interfere with the witness' honest recollection of events. (Tr. 1727-8). The prosecutor had firmly established the basis for his line of questioning before asking Dr. Fulero about the effect of such coaching. Moreover, the prosecutor's good-faith basis for the question was founded on his firsthand observations of the defense counsel and their witnesses during the trial.¹

¹The prosecutor filed a Motion to Modify the Record Pursuant to App. R. 9(E) containing the trial prosecutor's affidavit swearing to the fact that during a recess on the day of Denise Taylor's testimony, he had personally witnessed defense counsel in the hallway reviewing what appeared to him to be police reports and

The Eighth District did not address any aspect of Taylor's testimony in reversing. It simply concluded that there was "absolutely no evidence" of any misconduct by the defense. *Hicks*, at ¶ 43. This conclusory dismissal of the prosecutor's basis for the question does not address the standard laid down by this Court in *Gillard*. It effectively presumes bad faith in an instance where the court finds there is no evidence on the question without fully examining the record.

Moreover, the Eighth District stopped its analysis there, and did not make any attempt to determine whether the questions were otherwise relevant and admissible. Evid.R. 401 defines relevant evidence as "evidence 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." The credibility of the defense alibi witnesses was crucial to the defendant's case. Evidence that those witnesses had been given access to police reports and witness statements prior to their testimony was relevant and admissible to attack the credibility of those witnesses. It was also relevant to impeach Dr. Fulero's testimony regarding the accuracy of witness memory. If an alibi witness was improperly given access to police reports and witness statements containing dates, times, and specific accounts of what the defendant was alleged to have been

eyewitness statements with prospective defense witnesses. He further heard defense counsel tell the witnesses words to the effect of "here is how you're going to answer. . . ." These observations were the impetus for the trial prosecutor's questioning of Taylor as to whether she had viewed discovery in the case. As of this writing, the trial court has not yet ruled on the State's Motion to Modify the Record.

wearing, doing, or saying on the night in question, this was clearly a proper basis for impeaching the testimony of a defense expert on witness memory.

5. The record itself is the primary basis for establishing the existence of an attorney's good-faith belief in the factual predicate of a question asked on cross-examination.

Where an attorney's good-faith basis for asking a question is not challenged, the existence of that basis is presumed. *Gillard*, 40 Ohio St.3d at 231. In an instance when the prosecutor's good-faith basis is challenged, however, there are no magic words that can be used to establish a good faith belief that would justify asking a question on cross-examination. In the more than 20 years since *Gillard* was decided, this Court has not dealt with the issue of how a prosecutor may establish a good-faith basis in the face of a defense objection. This Court has, however, found that a good-faith belief can be established independently by the record itself. See *State v. Jackson* (2005), 107 Ohio St.3d 53, 81, 836 N.E.2d 1173 (defense attorney could have established good-faith basis for asking witness whether she had been offered consideration by the state for her testimony by introducing evidence that such a deal existed); *State v. McNeil* (1998), 83 Ohio St.3d 438, 447, 700 N.E.2d 596 (prosecutor had a good-faith basis for asking a witness whether she knew if the defendant sold drugs where a witness had previously testified that defendant had been arrested for selling drugs).

Neither defense counsel nor the trial court ever requested that the prosecutor explain his basis for asking the question. No discussion of why the question was asked appears on the record. Nor did the defense attorney ever offer an explanation

as to what the prosecutor heard her discussing in the hallway with her witnesses. The prosecutor did, after the conclusion of trial, submit his own affidavit attesting to why the question was asked, but the contours of cross-examination should not be determined by affidavits submitted after-the-fact. In the event that the good-faith belief in the factual predicate of a question asked on cross-examination is challenged by the opposing party, the basis for the question can best be shown by a full examination of the record. No overt assertion of the prosecutor's good-faith belief is required.

6. The question did not so greatly affect the proceedings so as to deprive the defendant of a fair trial.

The State respectfully submits that even if the question posed to Dr. Fulero was improper, it was nevertheless not reversible as prosecutorial misconduct because it did not so greatly affect the proceedings as to deprive the defendant of a fair trial. In making this determination, this Court must consider the effect of any misconduct in the context of the entire trial. *State v. Keenan* (1993) 66 Ohio St.3d 402, 410, 613 N.E.2d 203.

The alleged misconduct in this case is based exclusively on a single question that was asked of a defense expert witness on cross-examination. The question came only after the prosecutor had laid the basis for it by asking Dr. Fulero about the effect of witnesses seeing discovery in advance of their testimony. Any prejudice that may have been caused by the question was further minimized when Dr. Fulero testified that viewing discovery prior to trial would not, in his opinion, improperly

affect the testimony of alibi witnesses. (Tr. 1737). The issue was never raised again in front of the jury.

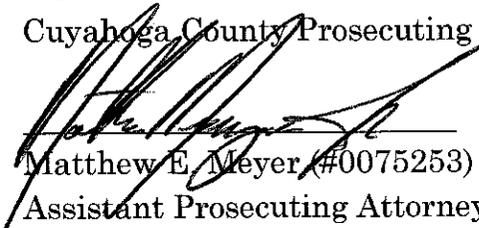
This Court has repeatedly emphasized that to rise to the level of reversible error, prosecutorial misconduct must pervade the entire trial to such an extent as to deny the defendant due process of law. See *State v. LaMar* (2002), 95 Ohio St.3d 181, 213-216, 767 N.E.2d 166 (prosecutor's improper questions during cross-examination and improper denigration of defense counsel during closing did not warrant reversal where such remarks did not pervade the entire trial); *State v. Getsy* (1998), 84 Ohio St.3d 180, 194-195, 702 N.E.2d 866 (prosecutor's closing remarks denigrating defense counsel were not a basis for reversal where the comments were isolated and not pervasive). The State respectfully submits that any misconduct in this case was not sufficient to pervade the atmosphere of the entire trial so as to warrant a reversal for prosecutorial misconduct.

CONCLUSION

The State respectfully submits that Supreme Court Review is necessary to establish that when a prosecutor asks a question on cross-examination, the prosecutor is not required to lay an evidentiary foundation for the question beforehand. The State therefore submits that this case is worthy of Supreme Court review and respectfully requests that this Honorable Court accept jurisdiction to hear this case on its merits.

Respectfully submitted,

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Cuyahoga County Prosecuting Attorney

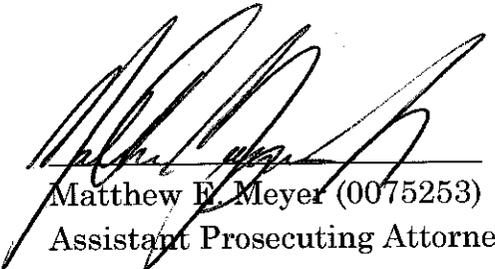


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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 8th day of September, 2011 to David Doughten, Esq., 4403 St. Clair Ave., Cleveland, Ohio 44113.



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[Cite as *State v. Hicks*, 2011-Ohio-3578.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95133

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOAQUIN HICKS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528016

BEFORE: Boyle, J., Kilbane, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: July 21, 2011

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Joaquin Hicks, appeals his conviction and sentence.

Finding merit to the appeal, we reverse and remand the case for a new trial.

Procedural History and Facts

{¶ 2} In September 2009, Hicks was indicted on eight counts. Specifically, he was charged with one count of aggravated murder, in violation of R.C. 2903.01(A); two counts of aggravated murder, in violation of R.C. 2903.01(B); two counts of kidnapping,

in violation of R.C. 2905.01(A)(2); two counts of aggravated robbery, in violation of R.C. 2911.03(A)(1) and (A)(3); and one count of attempted murder, in violation of R.C. 2923.02(A). The counts carried numerous specifications, including felony murder, mass murder specifications, firearm specifications, a notice of prior conviction, and a repeat violent offender specification. Hicks pleaded not guilty to all the charges.

{¶ 3} Prior to trial, the state moved to dismiss the capital specifications, i.e., the felony murder and mass murder specifications. The defense also moved to bifurcate the repeat violent offender specifications, having the matter tried to the bench, and stipulated to Hicks's prior convictions. The trial court granted both motions, and the matter proceeded on the remaining charges before a jury.

{¶ 4} We summarize the following facts from the evidence presented at trial. We will discuss the facts further in our disposition of the stated assignments of error.

{¶ 5} The charges arise out of the fatal shooting of Jeremy Pechanic and the shooting of Jory Abely in Perk Park, across from Scorchers bar in downtown Cleveland, during the early morning hours of February 22, 2009. The events leading up to the shootings began with Jeremy and Jory meeting friends downtown to celebrate the birthday of a friend and co-worker, Chauna Whitlow. Although the party started at another bar during the evening of February 21, the group — Jeremy, Jory, Chauna, and two other friends, Stacey Donaldson and Tenette White, eventually decided to go to Scorchers. They arrived at Scorchers around midnight and remained there until the bar

closed at 2:30 a.m. Stanley Donaldson, Stacey's brother, met them there along with one of his friends, Myrt Price.

{¶ 6} While at Scorchers, a man identified as being black, in his 20's to 30's, wearing a "skull cap" and navy/black jacket with a red shirt underneath, who referred to himself as "Daquan," approached the group's table on several occasions, trying to engage in conversation.¹ According to some of the witnesses, Daquan was especially friendly with Jeremy, who had, at certain points throughout the night, left the table to socialize with other people, including Daquan. The two had gone outside together to smoke and Jeremy had bought Daquan at least one drink. Stanley Donaldson testified that he ultimately asked Daquan to leave the group alone, finding him to be suspicious. According to Stanley, Daquan appeared to be homeless and trying to scam the group for free drinks and money.

{¶ 7} At some point, Daquan and Jeremy had gone outside where Daquan shared a marijuana cigarette with Jeremy. According to Rodney Rhines, who came upon Daquan and Jeremy outside smoking, he heard them discussing marijuana — Daquan told

¹ Although some of the witnesses interviewed gave differing names, Cleveland police homicide detectives assigned to the case testified that the most consistent pronunciation of the suspect's name provided by the witnesses was "Daquan." We further note that not all of the state's witnesses knew the suspect's name. For the sake of clarity, we refer to the suspect as Daquan in the recitation of the facts, even in reference to those witnesses who did not know his name but were clearly referring to the same suspect.

Jeremy that he could get him a quarter ounce of marijuana for \$200. Rhines also learned that Daquan had just been released from prison after serving a lengthy sentence.

{¶ 8} The three then went inside the building in search of an ATM machine, where Jeremy withdrew \$260 in cash. According to Rhines's testimony, immediately after withdrawing the cash, Jeremy suspected that Daquan had stolen his ATM card and began to push him. Jeremy, however, quickly found his card, gave Daquan \$20, and then returned inside the bar where he bought all three of them a drink.

{¶ 9} Thereafter, according to codefendant Cornelius King, Daquan approached his table, where he was seated with his cousin, Reginald Day, and his brother, Perry King.

Their table was located near the birthday group. Cornelius testified that Daquan approached Reginald and stated that "two white guys were interested in buying some drugs." This, in turn, escalated to Cornelius deciding that he, Perry, and Reginald should rob the "white guys" under the guise of a drug transaction and eliciting the help of the Kings' younger brother, Ralfeal, who had a gun and previous experience with robberies. Using Day's cell phone, Cornelius called Ralfeal and told him to come downtown and to bring his gun.

{¶ 10} Jory testified that Jeremy had told him that he "smoked up" outside of Scorchers and that he was trying to purchase more marijuana. Jory cautioned Jeremy to be careful. At closing time, Jeremy exited the bar with Jory. According to Jory, while outside, a man wearing red approached Jeremy and stated, "I got the stuff for you."

(This man is the same individual identified as Daquan by the other witnesses.) Jory further testified that this man gave him a dirty look when Jory tried to talk Jeremy out of buying any drugs from him.

{¶ 11} Jeremy and Jory ultimately ended up in Perk Park across the street from Scorchers, along with Cornelius, Perry, Reginald, and Daquan. They were met there by Ralfeal, who pulled a gun on Jeremy and Jory. Jory testified that someone in the group demanded money, which Jeremy voluntarily turned over, saying, "here, take it." Ralfeal, the shooter, then responded by saying, "take this," shooting Jeremy first in the chest and then a second time, causing Jeremy to fall to the ground. Jory next remembers being ordered to kneel on the ground. Ralfeal then shot him in the back of his head.

{¶ 12} Jeremy ultimately died as a result of the shooting. Jory survived but sustained a serious brain injury, causing him to suffer from a condition called prosopagnosia, which prevents him from recognizing someone based upon the person's facial features.

{¶ 13} Three days following the shooting, Cornelius, Perry, and Reginald turned themselves into the police station, initially lying as to their involvement in the offenses. They, along with Ralfeal, were all arrested and charged with aggravated murder, which carried the possibility of the death penalty.

{¶ 14} Cleveland police detectives Raymond Diaz and Ignatius Sowa testified as to their extensive investigation, which included, among other things, interviewing numerous

witnesses and identifying the suspect most consistently referred to as “Daquan.” The police believed that this man, i.e., Daquan, orchestrated the robbery, which ultimately resulted in the shootings of the victims. Based on the information provided by Rodney Rhines, who indicated that the suspect had told him that he had just been released from prison two days earlier after a lengthy sentence, Det. Sowa sent a subpoena to the Ohio Department of Rehabilitation and Correction, seeking a list of all the inmates released from prison during the month of February 2009. From the list provided, the detectives identified Joaquin Hicks as a possible suspect based on his release date, his county of residence, term of imprisonment, and the nature of his offenses, i.e., aggravated robbery. Hicks also has the middle name of “Taa-Rhan,” which the detectives thought he might have used but was misheard as “Daquan.” In August 2009, they pulled a picture of Hicks and compiled a photo array and presented it to various witnesses, including Rodney Rhines and Stanley Donaldson. Donaldson positively identified Hicks as being Daquan in the photo array and one of the individuals he saw leaving the park immediately following the shooting.

State’s Case: Hicks is Daquan

{¶ 15} At trial, the state’s theory was that Hicks is the same person as Daquan — the person responsible for facilitating the robbery and delivering Jeremy and Jory to Perk Park where Ralfeal was waiting for them with a firearm. The state’s case primarily hinged on eyewitness identification. In addition to Stanley Donaldson’s photo array

identification as well as in-court identification of Hicks as the suspect, the state presented the testimony of Cornelius, Rhines, and Tenette White — all of whom made in-court identifications of Hicks as being Daquan. The state also argued that Hicks's recent release from prison and the similarity of his middle name to Daquan correlated with facts describing the suspect. The state further presented testimony to discredit Hicks's alibi, establishing that Hicks sent a text message to Amber Pollard during the time that the two were allegedly taking a bath together.

Defense's Case: Misidentification

{¶ 16} In contrast, Hicks maintained that the state was prosecuting the wrong person — that he was not at Scorchers on February 22, 2009, that he had an alibi for the time period in question, and that — based on the defense's eyewitness expert's testimony — the witnesses' identification of him were not reliable. Specifically, Hicks testified that he had never been to Scorchers after being released from prison on February 19, 2009. According to Hicks, on February 21, 2009, he called Amber Pollard, a romantic interest and friend, to come over to his aunt's house. She came over later in the evening and the two took a long bath together, then had sex, and eventually fell asleep. He testified that he did not leave his aunt's house at all on the evening of February 21st or the 22nd; instead, he left the residence on February 23rd when he had to go see his parole officer.

{¶ 17} Through the presentation of eleven defense witnesses, including Hicks, the defense presented a picture that Hicks was welcomed home by his family and friends and that, as soon as he arrived home to his aunt's house, there was a constant flow of visitors celebrating Hicks's release from prison. (At age 18, Hicks was sent to prison and served ten years for felonious assault and aggravated robbery counts.) The defense further established that Hicks had an inheritance of approximately \$21,000 waiting for him and that, in addition to the money that he received upon being released from prison, relatives gave him money as well as clothes to help him start his new life. These witnesses consistently testified as to their interaction with Hicks starting on Thursday, February 19, 2009 — the day that he was released — continuing into the weekend — ending on Sunday, February 22, 2009. These witnesses corroborated Hicks's testimony, including the fact that Hicks and Pollard were in the bathtub together at some point during the evening of February 21st, and that Hicks had never left his aunt's house on Saturday evening.

{¶ 18} In addition to the ten alibi witnesses, the defense presented the testimony of Jacquelyn Mancuso, a server working at Scorchers on the evening of February 21, 2009 and early morning hours of February 22nd. Mancuso testified that Daquan was at Scorchers on February 21, 2009 — a fact that she shared with the police within 24 hours of the shooting — but that Hicks was not Daquan.

Jury's Verdict and Sentencing

{¶ 19} The jury found Hicks not guilty of aggravated murder, as contained in counts one, two, and three of the indictment, but guilty of the lesser included offense of murder, in violation of R.C. 2903.02(B). The jury further found Hicks guilty on all the remaining five counts. The trial court separately found Hicks guilty as to the notice of prior conviction and repeat violent offender specifications. The trial court subsequently sentenced Hicks to a total of 61 years to life in prison.

{¶ 20} Hicks appeals, raising the following eight assignments of error:

{¶ 21} “[I.] The prosecutor’s accusation that defense counsel falsely manufactured the alibi defense in front of the jury deprived the defendant of a fair trial.

{¶ 22} “[II.] The trial court erred in allowing a state witness to hypothesize why the appellant acted as he did.

{¶ 23} “[III.] The trial court erred by overruling the defense motion challenging the state’s exercising of peremptory challenges of African-American jurors.

{¶ 24} “[IV.] The trial court erred by overruling a defense motion to dismiss a prospective juror for cause.

{¶ 25} “[V.] The trial court erred by failing to hold a hearing to determine whether the jury’s verdict was tainted by an outside influence.

{¶ 26} “[VI.] The convictions are against the manifest weight of the evidence.

{¶ 27} “[VII.] The actions of counsel deprived the appellant of his right to effective assistance of counsel.

{¶ 28} “[VIII.] The trial court erred by sentencing the appellant to consecutive sentences without making a complete record of its findings as required by R.C. 2929.14(E).”

Fair Trial

{¶ 29} In his first assignment of error, Hicks argues that the prosecutor’s accusation that defense counsel falsely manufactured the alibi defense — made in front of the jury — deprived him of a fair trial.

{¶ 30} The test for prosecutorial misconduct is whether the prosecutor’s remarks or questions were improper, and if so, whether they prejudicially affected substantial rights of the accused. *State v. Treesh*, 90 Ohio St.3d 460, 480-481, 2001-Ohio-4, 739 N.E.2d 749. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, 709 N.E.2d 484. Indeed, “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. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96, certiorari denied (1985), 469 U.S. 1218, 105 S.Ct. 1199, 84 L.Ed.2d 343. Therefore, our duty is to consider the trial record and to determine whether Hicks’s substantial rights were violated, thereby depriving him of a fair trial. We note, however, that a defendant’s substantial rights cannot be prejudiced where the remaining evidence,

standing alone, is so overwhelming that it constitutes defendant's guilt, and the outcome of the case would have been the same regardless of evidence admitted erroneously. *State v. Williams* (1988), 38 Ohio St.3d 346, 349-350, 528 N.E.2d 910.

{¶ 31} Hicks specifically complains of the following question posed by the prosecutor during the state's cross-examination of defense eyewitness expert Dr. Solomon Fulero:

{¶ 32} "[Prosecutor] Would it surprise you to learn, in dealing with memory, that this attorney out there was standing with a bunch of different witnesses — .

{¶ 33} "[Defense counsel] Ms. Passalaqua: Objection, your Honor.

{¶ 34} "[Defense counsel] Mr. Paris: Objection.

{¶ 35} "The Court: Overruled.

{¶ 36} "[Prosecutor] Was standing with a bunch of different witnesses telling them what to testify to?

{¶ 37} "[Defense counsel] Ms. Passalaqua: Objection, your Honor. It is not true.

{¶ 38} "The Court: Okay.

{¶ 39} "[Defense counsel] Ms. Passalaqua: This is my ticket, Judge, and that is a blatant lie."

{¶ 40} Immediately following defense counsel's response, the judge called the counsel to sidebar where he admonished defense counsel for her reaction to the prosecutor's question. The trial judge further warned defense counsel that if she did not

calm down, he was going to hold her in contempt. The trial court reiterated that the objection was overruled and told the prosecutor to ask the next question.

{¶ 41} Contrary to the state's contention, we find the questions to be improper and that any prejudice created by the questions was further enhanced by the trial court's failure to sustain the defense counsel's objection and provide a curative instruction to the jury.

{¶ 42} Under Evid.R. 611(B), cross-examination shall be permitted on all relevant matters and matters affecting credibility. "The limitation of * * * cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *State v. Acre* (1983), 6 Ohio St.3d 140, 145, 451 N.E.2d 802. But "[i]t is improper for an attorney, under the pretext of putting a question to a witness, to put before a jury information that is not supported by the evidence." *State v. Smidi* (1993), 88 Ohio App.3d 177, 183, 623 N.E.2d 655. And "[p]rosecutors must avoid insinuations and assertions calculated to mislead." *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶ 43} Here, the state contends that these questions were proper because it was posed to an expert witness in the field of memory and that "an attorney telling a witness what to testify about would affect a person's memory." But aside from the fact that it was improper for the prosecutor to make such an accusation in the presence of the jury,

there was absolutely no evidence that defense counsel engaged in such misconduct. See *State v. Davis*, 10th Dist. No. 01AP-579, 2002-Ohio-1920 (reversing murder conviction and remanding for a new trial where prosecutor's cross-examination of appellant assumed facts that were not in evidence and insinuation was prejudicial, especially given that state's case was largely circumstantial and conflicted in various respects). Notably, the prosecutor never raised any concern with the court outside the presence of the jury as to his belief that the defense counsel was improperly telling the defense witnesses what to say. Nor did the prosecutor ever offer any evidence in support of this serious allegation.

We find the questions wrongfully impugned the credibility of the defense counsel and improperly implicated the credibility of the defense witnesses offered in support of Hicks's alibi.

{¶ 44} We now turn to the critical question of whether this line of questioning deprived Hicks of a fair trial. According to the state, Hicks's substantial rights were not violated because the evidence against him was overwhelming. Specifically, the state relies on the four identifications made of Hicks and the fact that there was at least one inconsistency in Hicks's alibi — i.e., a text message sent from Pollard during the time that Hicks was allegedly taking a bath with her. We find the state's argument, however, unpersuasive.

{¶ 45} This is not a case where the evidence against Hicks was so overwhelming that it constitutes Hicks's guilt and the outcome of the case would have been the same

regardless of the prosecutor's improper questioning and the trial court's failure to sustain the objection. To the contrary, the evidence presented at trial conflicted in various respects, and there was no physical evidence that directly linked Hicks to any of the offenses. Indeed, many of the state's witnesses who were at Scorchers or in the area could not positively identify Hicks as being the suspect, i.e., Daquan. As for the identifications made of Hicks, only one of the witnesses, namely, Stanley Donaldson, identified Hicks as the perpetrator prior to trial in a photo array conducted in August 2009. But Stanley could not identify Hicks in a live lineup conducted in September 2009 and picked another individual instead. The other three identifications were all made during trial while the defendant was seated at the defense table next to his attorneys.

Notably, Rhines was presented with a photo array containing Hicks's picture in August 2009, but he could not identify Hicks.

{¶ 46} Further, while the majority of the eyewitnesses' descriptions of the suspect's clothing was consistent among those who identified Hicks at trial, i.e., red sweatshirt, dark coat, and "skull" cap, their testimony as to his actual physical appearance on the date of the offenses varied. For example, Rhines, who admitted to being a crack addict and was seeking his next "score" at the time of the incident, described the suspect as having short hair, a mustache, and "very light" hair under his lower lip, referring to it as a "goatee." He specifically stated that the suspect did not have a "scruffy beard." Conversely, Stanley Donaldson testified that the suspect, i.e., Daquan, had a full beard

that was not groomed. And Tenette White, despite identifying Hicks at trial as the suspect in question, could not recall his physical features, such as whether he had facial hair or his hair line under his skull cap.

{¶ 47} Likewise, codefendant Cornelius King, who did not know the suspect prior to the incident, positively identified Hicks at trial but conceded that he could not remember what Hicks was wearing the night of the offense. Cornelius acknowledged that he “did not look at him that much” and did not remember ever speaking to him. Cornelius also admitted to getting high before going to Scorchers and consuming several beers — both of which are factors that affect a person’s memory according to the eyewitness expert testimony presented at trial.

{¶ 48} These noted inconsistencies or flaws among the state’s witnesses, however, are distinct and in addition to the completely contrary evidence presented by the defense. For example, aside from Hicks’s testimony and his ten alibi witnesses — all of whom placed Hicks at his aunt’s house and nowhere near Scorchers at the time of the offense — Mancuso’s testimony established that Hicks was not Daquan. (Notably, Mancuso was completely unrelated to Hicks and had no apparent bias or motivation to testify on his behalf.) She further testified that, having worked at Scorchers since August 2008, she knew Daquan as a “hustler” who frequented Scorchers periodically and that “Daquan,” a.k.a. “Quan,” was at the bar on February 21, 2009 — not Hicks. Given that Hicks had been in prison for the last ten years, he could not have been the person whom Mancuso

knew as Quan and saw periodically in Scorchers. Further, Mancuso's description of Daquan was very similar to the description provided by Stanley Donaldson, which included that he had "pockmarks" or "bumps" around his nose. But as evidenced by Hicks's prisoner release identification card, and even conceded by Det. Sowa, Hicks did not have any visible bumps or pockmarks on his nose.

{¶ 49} Similarly, while the state's witnesses consistently testified that Daquan had some hair, albeit short, all of the defense witnesses — who knew Hicks and saw him on February 21, 2009 — testified that he was bald, consistent with the way he looked in his prisoner release identification card taken ten days before he was released.

{¶ 50} Here, given that the state's case hinged primarily on the eyewitness identification testimony — evidence that was highly contested at trial by the defendant and his alibi witnesses — the jury's decision came down to a weighing of the credibility of the witnesses. Thus, this is not the case where the state's evidence is so overwhelming that we could otherwise ignore the improper attack on the credibility of the defense counsel. Indeed, the core of Hicks's defense rested on his credibility and the credibility of his alibi witnesses. And therefore the unsupported insinuation that defense counsel coached defense witnesses to lie directly affected Hicks's entire defense, thereby depriving him of a fair trial. See *Davis*, supra, citing *State v. Hunt* (1994), 97 Ohio App.3d 372, 375, 646 N.E.2d 889 ("where the core of the case rests with the credibility of the defendant and witnesses, the prosecutor's conduct was prejudicial and deprived

appellant of a fair trial”). And, we note again that any prejudice caused to Hicks by the insinuation that defense counsel coached Hicks’s alibi witnesses to lie was further heightened by the trial court’s failure to sustain the objection and provide a curative instruction. See *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (trial court’s failure to sustain an objection and provide curative gives prosecutor’s comment its approval in the jury’s eyes).

{¶ 51} Accordingly, we conclude that Hicks’s substantial rights were violated, thereby depriving him of a fair trial. The first assignment of error is sustained.

{¶ 52} Having sustained this assignment of error, we find that the remaining assignments of error are moot.

Conviction reversed and case remanded for a new trial.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, A.J., and
MELODY J. STEWART, J., CONCUR

