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A prosecutors accusation in front of the jury that defense counsel instructed defense
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**EXPLANATION OF WHY THIS CASE IS A NOT A CASE OF PUBLIC OR
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CONSTITUTIONAL QUESTION**

This Court has long been held improper for a prosecutor to comment on personal beliefs or "tactics" of defense counsel. State v. Brown (1984), 34 Ohio St. 3d 13. The prosecutor may not accuse defense counsel of fabricating a defense on behalf of his client. State v. Keenan (1993), 66 Ohio St. 3d 402.

In Mr. Hick's trial, the prosecutor accused defense counsel, in front of the jury, of concocting and coordinating an alibi on behalf of the defendant. Pursuant to the State's Memorandum in Support of Jurisdiction, the good-faith basis was that defense counsel had allegedly provided the state's discovery to a person friendly with the defendant. This alleged allowance of a defense witness to see discovery documents somehow is equated with purposely instructing a witness to commit perjury.

It is interesting to note that the prosecutor failed to provide this "good-faith" basis at the trial level when the incident occurred, failed to raise it on its brief in the Eighth District Court of Appeals, failed to provide this basis at the oral argument to the Eighth District Court of Appeals and failed to even attempt to supplement the record with the self-serving affidavit until after the decision of the Eighth District Court of Appeals.

Only now, to this Court, is the sharing of discovery being provided as the basis for the improper questioning by the prosecution. This basis was never presented to the Court of Appeals in briefing or at argument. The affidavit addressed in footnote 1 of the State's Memorandum in Support of Jurisdiction was not, and is not part of this record. The Court of Appeals rejected the

State's attempt to supplement the record with a self-serving affidavit. Again, the state failed to make this record at any proceeding until *after* the release of the decision.

This Court has long held that the failure of a party to timely move to supplement the record if need be, results a waiver of that portion of the claim. State v. Osborne, 49 Ohio St.2d 133, 142, (1976) Nevertheless, the prosecutor is attempting to backdoor information into the record which has not ever been part of the record.

Even if the discovery allegation was accurate, it still could not form a good-faith basis for asking a defense expert if that expert were aware that defense counsel had instructed defense witnesses to commit perjury. Specifically, the prosecution made the following accusation against defense counsel.

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. PASSALAQUA: 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. PASSALAQUA: Objection, your Honor. It is not true.

THE COURT: Okay

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

(Emphasis added)

The objections to the comments were overruled. A defense mistrial motion was also overruled.

Providing friends and family with provided discovery is a far cry from instructing them

how to testify and to lie under oath.

If the prosecutor believed defense counsel was behaving unethically, if not illegally, the matter should have immediately been brought to the attention of the trial judge. An evidentiary hearing should have been held. Minimally, the court conducted a voir dire of the parties at the time of the allegation. The fact that at the time of the improper questioning the prosecutor made no mention of the supposed basis for the questions, even in the face being called a “blatant” liar by defense counsel, speaks volumes.

The Eighth District addressed the issue properly. This was a highly contested case. The State’s entire case rested upon the testimony of co-defendants who made deals to avoid the death penalty or a sentence of life without parole. No witness accused Hicks of being the shooter. The state introduced no physical evidence connecting Hicks to the offense. The misconduct here clearly infringed upon Hick’s right to a fair trial. The Eighth District Court of Appeals had no option but to grant a new trial. This is not a case in which this Court should exercise its discretion to accept jurisdiction as the appellate ruling was properly based upon existing precedent.

STATEMENT OF THE CASE AND FACTS

Appellee Hicks accepts the procedural background as set forth by the Appellant.

Factual Background

The state charged the appellant Joaquin Hicks with the kidnapping, Aggravated Robbery and killing Jeremy Pechanec the early morning hours of February 22, 2009. He was also charged with the kidnapping and attempted murder of Jory Aebly. The identity of the person "Daquan" was at the heart of the case. The prosecution argued that Daquan was in fact Joaquin. The defense argued misidentification. Daquan was a panhandler/hustler who frequented Scorcher's bar, where the parties meet, on a regular basis, including when Hicks was in prison. The defense also argued an alibi, as Hicks was at another location at the time of the homicide.

State's Case

Matthew Calabretta was a guest at the Embassy Suites at East 12 and Chester in downtown Cleveland the night of February 21, 2009. Calabretta, his fiancée and a couple of friends then went to Scorcher's bar. He left Scorcher's about 1:00 am and went to his room with the group. The group was watching television when they heard some noise. They looked outside and saw four or five black girls arguing with a male. The male punched one of the woman in the face before climbing into a car and leaving. Calabretta thought that was the end of the incident.

Five or ten minutes later, Calabretta heard about three gunshots. He heard two shots, then a third. He watched four black males exiting the park across the street from his ninth floor window. The males were soon joined by a fifth male who joined the others in walking down the street. Three of the males wore hoods, two did not.

Jillian Rovnak, Calabretta's fiancée also saw the fight and heard the gunshots. She

believed that all the males leaving the park wore hoods and sweat pants. Rovnak did not see Hicks in Scorchers that night.

Detective Raymond Diaz of the Cleveland Police Department was the lead detective in the case. As part of his investigation, he obtained surveillance video from Scorcher's Bar. The tape was played for the jury. Jerry Pechanic was seen in the video after returning from an ATM machine in the lobby of the hotel where he had withdrawn \$260.00 about 1:50 am. As Pechanic walked back in the front entrance of the bar, a man known as Daquan pointed at Pechanic before looking over to a group of people whom Daquan was associated with. Rodney Rhines, followed Daquan.

Pechanic actually purchased two drinks for Rhines, Daquan and himself. The Daquan character wore a black knit cap and a red shirt.

The video was not of the highest clarity. Efforts to enhance its visibility were not successful. The face of Daquan could not be seen clearly. Hicks was not identified in any surveillance videos for surrounding businesses, although many of the others were identified.

Daquan was said to have a short hair cut beneath his cap. Hicks has a BMV photo which depicted him with a shaved head. His prison release picture from just two days before showed him to be completely shaven.

Detective Diaz noted that Rodney Rhines was shown a photo array. Rhines was unable to pick out Hicks as the assailant, even out of 40 prison release photographs from February of 2009. Mark Anderson, another witness from the bar, was also unable to select Hicks from the array. Myrt Price, a member of the party, was unable to select the defendant out of a photo array.

Detective Diaz also acknowledged that no physical evidence connected Hicks to the

crime scene or bar.

Stacey Donaldson was celebrating with friends in downtown Cleveland the night of the shootings. She met her brother Stanley with the others, including the victims, at Scorchers. While there, she remembered one particular person who kept coming over to the table to talk to the victims, Aebly and Pechanec. Seated at a nearby table were two white males and two black males, one of whom introduced himself as Daquan. At one point during the evening, she saw both victims talking to Daquan.

Around 2:30 am, the party started to break up. Aebly and Pechanec were already outside. They were surrounded by a group of four or five black men who had been seated in the bar earlier. Daquan was acting like he was best friends with Aebly and Pechanec. He was wearing a black jacket that had red in it and a hat.

The group of males began to walk across the street to a park with Aebly and Pechanec. Donaldson called out to them out of concern, but no one responded or even looked back. She walked down the sidewalk to see what they were doing. Then she heard two pops. The males started to leave the area. One of the males was lagging behind. Pechanec was on the ground and Aebly was standing next to him. Aebly then got on his knees. The lagging male shot him in the head. Stacey observed the above from about a distance of 50 feet.

Stacey Donaldson's brother, Stanley, chose Hicks out of a photographic array in August of 2009. However, he chose a male other than Hicks from a live line-up.

Chauna Whitlow accompanied the others at Scorchers, celebrating her birthday. She worked with Aebly and Pechanec at the Cleveland Clinic. Later in the evening, she went outside of the establishment to have a cigarette with the two men. A black male wearing a red sweatshirt

or hoodie joined them. From an in-court identification, she believed that the male in the red hoodie was the defendant, but she could not be sure.

Co-Defendant Testimony

Cornelius King was originally capitally indicted but entered a plea bargain to murder. At Scorchers, King said that Hicks approached him and stated that two white guys were interested in buying some drugs. Because King did not actually sell drugs, he instead called his younger brother Ralfeal to come down to assist in a robbery. King testified that it was a “possibility” that Hicks heard about the plan.

Defense Case

The defense called numerous witnesses to establish the defense of alibi. In addition, the appellant Hicks testified on his own behalf. Hicks denied ever being at the Scorcher’s bar and denied being involved in the homicide. Hicks noted that he was bald on the day of the homicide with a full beard, not a goatee as some witnessed had identified with the man in the red jacket. Hicks was with a female at another residence when the homicide occurred.

The facts will be further discussed in the following Propositions of Law.

ARGUMENT

Proposition of Law I:

A prosecutor's accusation in front of the jury that defense counsel instructed defense alibi witnesses to provide false testimony is grounds for a mistrial where there is no basis in the record to support the allegation.

The men and women who compose the jury trust that the prosecutor is conducting the trial properly. Thus, the prosecutor is in a position of great influence. As the Berger decision states:

It is fair to say that the average jury in a greater or less degree, has confidence that these obligations, which so painfully set upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger at 633.

As the Sixth Circuit has observed, "the principles set forth in Berger forbid the government's injection of improper or prejudicial material that deprives an accused of his or her right to a fair trial." United States v. Solivan, 937 F.2d 1146, 1151 (6th Cir. 1991).

Here, the prosecutor directly accused defense counsel in front of the jury of committing a crime. The implication was that the prosecutor had evidence that defense counsel had instructed the defense witnesses to commit perjury, by coordinating their testimony. There was no evidence of this whatsoever. The implication, which was not corrected by the trial judge, would impinge on defense credibility throughout the trial. The prosecutor successfully undercut the entire defense by point-blank accusing defense counsel of manufacturing it.

During the cross-examination of defense eyewitness identification expert Solomon

Fulero, the prosecution made the following accusation against defense counsel.

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. PASSALAQUA: 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. PASSALAQUA: Objection, your Honor. It is not true.

THE COURT: Okay

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

The objections to the comments were overruled. (T. 1736) A defense mistrial motion was also overruled. (T. 2170)

First of all, it is clear by phrasing the question with the phrasing “in dealing with memory” that the prosecutor was attempting to fit a square peg in a round hole. The expert was not a witness at the scene. He was not an alibi witness. He made no assessment on witness credibility. He was merely testifying as to problems with the identification process. Whether an alibi witness was credible or lying because of coaching had absolutely no relation to his testimony.

It is significant that even though all objections were overruled, the prosecutor made no attempt to bring out the issue through the witnesses allegedly being seen discussing testimony with defense counsel. (The question of whether a witness had been coached is far different than a statement guised in a question that the witnesses was told to lie by a party.) The prosecutor also

failed to issue a subpoena of a witness to the alleged incident as a rebuttal witness or for a voir dire hearing on the issue.

Defense counsel called the accusation a “blatant lie.” Period. The prosecution made no attempt to defend himself, when he was flat out called a blatant liar by defense counsel.

At the close of the evidence, the defense revisited the issue. Defense counsel again expressed her dismay at the accusation.

MS. PASSALAQUA:

But if I may, Judge, that’s not what Danny said. Danny stood up, points at me and said would it be right that this attorney fed all of the alibi witnesses their testimony. That’s what Mr. Cleary said. And at that point it should have been a mistrial. That having been said, I’ll sit back down.

The defense made the record as it understood it to be. The prosecutor did not respond. He made no attempt to correct defense counsel or even disagree with her rendition of the facts.

In his appeal to the appellate court, Hicks raised the above issue of misconduct. The prosecutor’s response included no attempt to dispute or to supplement the record. The prosecutor’s response in the brief was a rather curt:

Clearly, an attorney telling a witness what to testify about would affect a person’s memory. That was the point of the question. The questions posed is not different than the question asked by defense counsel in nearly every criminal case. That question being, whether or not a victim in the case spoke to the prosecutor and did the prosecutor tell them what to say. However, when a prosecutor asks the same question of a memory expert, Appellant feels it is improper.

Appellee Brief, p. 19

This paragraph is significant for two reasons. First, the prosecutor did not argue that he had a good-faith basis for the question. The prosecutor argued simply that the question was proper, because the defense asks if the prosecutor told the victim what to say “in nearly every

criminal case.” This Court can judge from its experience whether this statement is accurate.

More importantly, there is a difference between asking a witness if they were coached and accusing counsel of deliberately planting false testimony. In other words, if defense counsel were to state rather than ask, “Didn’t I see the prosecutor telling you what to say” all kinds of problems would arise. Even in the appellee brief, the prosecutor did not allege this type of question would be proper.

The prosecutor based his argument on the fact that there was nothing wrong with his question. He did not even infer that he had a good faith basis for the question and, again, made no attempt to supplement the record with anything contradicting the record as it existed until after an unfavorable decision was published.

Improper to Argue Defense Dishonest

It has long been held improper for a prosecutor to comment on personal beliefs or "tactics" of defense counsel. State v. Brown, 34 Ohio St. 3d 13 (1984). The prosecutor may not accuse defense counsel of fabricating a defense on behalf of his client. State v. Keenan (1993), 66 Ohio St. 3d 402 (Defense counsel paid to argue what client wants, paid to get him off the hook; reversible error) For instance, in State v. LaMar (2002), 95 Ohio St.3d 181, 211 this Court held that the prosecutor's juxtaposition of his "honest" case with the defense's case, particularly when viewed in light of the pointed criticism of one of LaMar's defense attorneys, unfairly suggested that the defense's case was untruthful and not honestly presented. In the context in which they were stated, the prosecution's comments imputed insincerity to defense counsel and were therefore improper.

This Court set forth the standard of review in misconduct cases. In State v. Smith (1984),

14 Ohio St.3d 13, it was noted that “[i]mportant to our disposition of the instant issue is our observation in Smith that ‘it is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution's improper remarks. Instead, it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty.’ Id.”

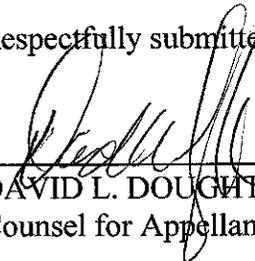
In State v. Keenan, supra, this Court reversed a capital conviction because the prosecutor argued that defense counsel was paid to “get him [the defendant] off the hook.” This Court, quoting the Supreme Court of the United States, noted that “. . .improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.” Keenan at 406.

Here, in a tightly contested trial that hung on identification and the credibility of suspect individuals, it cannot be found, beyond a reasonable doubt, that the jury would have found Hicks guilty of the charges if the improper comments accusing defense counsel of having orchestrated the content of the testimony of the alibi witnesses had not been heard by the jury.

CONCLUSION

Pursuant to the preceding Propositions of Law, the defendant-appellant, Joaquin Hicks, respectfully requests that this Honorable Court deny jurisdiction of this case as the matter was properly decided in the court of appeals.

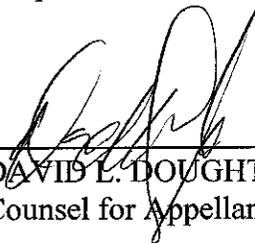
Respectfully submitted,



DAVID L. DOUGHTEN
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum Opposing Jurisdiction was served upon William D. Mason, Esq. Cuyahoga County Prosecutor, Justice Center-9th Floor, 1200 Ontario Street, Cleveland, Ohio, 44113 on this 27 day of September, 2011.



DAVID L. DOUGHTEN
Counsel for Appellant