[Cite as *State v. Lordi*, 2000-Ohio-2678.]

COURT OF APPEALS
MAHONING COUNTY, OHIO
SEVENTH APPELLATE DISTRICT

	:	**JUDGES:**
STATE OF OHIO	:	**Hon. Lawrence Grey, Retired**
	:	**Hon. W. Scott Gwin, J.**
Plaintiff-Appellee	:	**Hon. W. Don Reader, Retired**
	:	**(All sitting by Supreme Court**
-vs-	:	**Assignment)**
	:	
FRANK LORDI	:	**Case No. 99CA62**
	:	**99CA247**
Defendant-Appellant	:	
	:	

O P I N I O N

CHARACTER OF PROCEEDING:	**Criminal appeal from the Mahoning County Common Pleas Court, Case No. 98CR295**
JUDGMENT:	**Affirmed**
DATE OF JUDGMENT ENTRY:	**December 4, 2000**

APPEARANCES:

For Plaintiff-Appellee	**For Defendant-Appellee**
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Reader, J.

{¶1} This case is before this court following the partial grant of a motion for reconsideration filed by appellant Frank L. Lordi. We granted reconsideration solely as to the assignment of error raised in the supplemental brief of appellant, which was inadvertently omitted from the earlier opinion of this court. The statement of the facts underlying this appeal was included in the original opinion, and is incorporated herein. The sole assignment of error before this court on reconsideration is:

ASSIGNMENT OF ERROR

{¶2} "THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATE OF OHIO BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, GUARANTEES AN ACCUSED CERTAIN RIGHTS CALCULATED TO ENSURE HE OR SHE RECEIVES A FAIR TRIAL, ENUMERATED AS FOLLOWS:

{¶3} 'IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY A RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHERE THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL.' "

{¶4} Appellant alleges 44 separate instances of prosecutorial misconduct which he claims occurred during his trial. Appellant failed to object at trial to the issues he raises in his brief. Accordingly, we must find plain error in order to reverse. *State v. Long* (1978), 53 Ohio St. 2d 91. Plain error does not exist unless but for the error, the outcome of the trial clearly would have been otherwise. *State v. Nicholas* (1993), 66 Ohio St. 3d 431.

{¶5} For ease of discussion we will group the 44 claims into categories, as the prosecutor did in his brief, and address each category together.

{¶6} App. R. 16 (A)(7) requires the appellant's brief to include an argument containing the contentions with respect to each assignment of error and the reasons in support of these contentions, with citations to the part of the record on which the appellant relies. App. R. 12 (A)(2) provides that the court may disregard a claim of error if the party raising it fails to identify the error in the record, or fails to argue the assignments separately by brief. Items 3, 23, and 43, do not include citations to the record where appellant claims the improper conduct occurred. Item 1, found on page 5 of appellant's brief, includes a citation, but the quoted statement is not found on the page. Item 2 includes a question and answer, but appellant makes no argument as to why this question constituted prosecutorial misconduct. Accordingly, Items 1, 2, 3, 23, and 43 are not properly raised, and we will disregard the items.

{¶7} Items 33, 34, 35, 36, 37,38,39,40, and 42 all refer to questioning by appellant's counsel of a prosecution witness, on cross-examination. At a minimum,

a claim of prosecutorial misconduct requires that the conduct be the prosecutor's conduct, not defense counsel's conduct. Similarly, Item 29 claims error in a ruling of the trial court, and does not properly raise a claim of prosecutorial misconduct.

{¶8} The test for prosecutorial misconduct is whether the remarks are improper, and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St. 3d 160, 165, *cert. denied,* 498 U.S. 1017. The prosecution is entitled to a certain degree of latitude in summation as to what the evidence has shown, and what reasonable inferences may be drawn therefrom. *Id.* The prosecutor must avoid insinuations and assertions calculated to mislead the jury, may not express his or her personal belief or opinion regarding the guilt of the accused, and may not allude to matters not supported by admissible evidence. *Id.* at 166.

{¶9} In Items 4, 9, 13, 17, 18, 19, 24 - 27, 31, 32, 41, 43, 44, appellant argues that the prosecutor misstated the law or the facts. We note that Items 4, 9, 13, 17 - 19, and 44, occurred during closing argument, during which time the prosecutor has wide latitude.

{¶10} As to Items 4, 24, and 25, appellant argues that the prosecutor improperly stated that appellant could not wear two hats, "meaning that he could not vote on a public contract while he had a personal business interest in such contract." This is not a misstatement of the law, as R.C. 2921.42 (A)(1) prohibits a public official from authorizing any public contract in which he has an interest. In Item 9, appellant generally argues that the prosecutor made various misstatements

of the jury instructions and evidence, which he does not specifically identify. Accordingly, appellant has not met his burden of demonstrating error. As to Item 13, appellant argues that the prosecutor improperly stated that Fred DeBonis was hired by appellant, when a majority vote of the county commissioners was required to hire DeBonis. This was a fair comment on the evidence, as Fred DeBonis testified that appellant's brother-in law told him to submit his job application directly to appellant, and DeBonis did in fact submit his application directly to appellant. As to Item 17, appellant objects to the prosecutor's statement that appellant viewed himself as "king of the county." While appellant is correct that this is factually incorrect, as appellant was not in fact the "king of Mahoning County", given the wide latitude accorded the prosecutor in closing argument, we find no prejudicial error.

{¶11} In Item 18, appellant objects to the prosecutor's use of the county commissioner's general ethical handbook, as this handbook is merely a contract, and does not have the force of law. However, these statements were clearly identified as relating to the language of the commissioner's contract, and not the law. The trial court properly instructed the jury on the law according to the Ohio Revised Code, and appellant has not demonstrated prejudice. In Item 19, appellant claims that the prosecutor speculated on conversations, which were not supported by the evidence, concerning a change order. However, this comment related to counts 17 and 18 of the indictment, and appellant was not convicted on these counts. Appellant was therefore not prejudiced by this remark.

{¶12} In Item 26, appellant claims that the prosecutor's statement in opening

argument that appellant solicited business for ABC by saying, "don't forget about my brother," is misleading. This claim is without merit. The prosecutor indicated that the evidence would show that appellant told Bill Kovass not to forget about his brother, and the action constituted solicitation. Kovass later testified that appellant told him not to forget about his brother for fire extinguishers. The State's description in opening statement accurately portrayed the evidence the state intended to present. In Item 27, appellant argues that the prosecutor improperly stated the facts when he said that ABC Fire Extinguishers are listed as "lined up" by the county, and the Meander Inn could not open without paying ABC. However, William Kovass later testified that he signed the security agreement with the county, including appellant's fire extinguishers, prior to getting loan money from Mahoning County. This was not a misstatement of the evidence the prosecution intended to present.

{¶13} In Items 31 and 32, appellant argues that the prosecutor implied that appellant was not ethical by questioning David Freel, Executive Director of the Ohio Ethics Commission, concerning whether appellant ever requested opinions on ethical issues, or ever disclosed information concerning a potential conflict. Appellant has not demonstrated that the prosecutor committed any misconduct in the questioning of this witness. Appellant has not claimed error in the admission of the testimony of Freel.

{¶14} As to Items 41 and 43, nothing in the record supports appellant's notion that there is a "first time offender rule" which would allow him to commit a crime but

not be prosecuted. The issue of the one-time offender rule was raised by appellant during cross examination of Mr. Freel, and any further questioning of Mr. Freel concerning this alleged rule was therefore invited.

{¶15} As to Item 44, the State was merely arguing that the signed contracts admitted into evidence were sufficient to prove the State's case beyond a reasonable doubt. This was not an improper appeal to passion and prejudice, but rather was an argument concerning what the evidence had shown and what conclusions the jury may draw therefrom.

{¶16} In Items 5, 6, 7, 8, 10, and 11, appellant argues that the prosecutor made improper and inflammatory statements in closing arguments. As to Item 5, the prosecutor stated in closing argument that appellant's pattern demonstrated that he did not give two cents for the ethics laws of the State. This was a fair comment, as appellant testified that he did not feel there was anything wrong with voting on a contract in which his company had an interest. Tr. 872. Items 6 and 7 refer to the prosecutor's argument concerning appellant's involvement in Democrats for Change, and the prosecutor's statement that the jury not let appellant get away with political patronage. These comments fell within the wide latitude given to the prosecutor in closing argument, as substantial evidence was presented concerning appellant's political activity in Democrats for Change.

{¶17} In Item 8, appellant points to the prosecutor's question to the jury concerning why John Gillespie would lie. Appellant argues that the failure to ask the jury the same question as to DeBonis and Venerosa, all witnesses to the same

count, raises issues of "obvious concern." Taken in context, the prosecutor was merely arguing that John Gillespie had no motivation to come into court and lie. We fail to see what issues of "obvious concern" are raised by the prosecutor's failure to ask the same question concerning other witnesses.

{¶18} In Item 10, appellant argues the prosecutor improperly inferred that you cannot get elected in Mahoning County unless you are corrupt. The transcript page cited by appellant does not support this claim. In Item 11, appellant argues that the prosecutor inferred that an investigation equated with guilt, as the prosecutor argued that the FBI and the Ohio Ethics Commission would not get involved if the charges were not true. Appellant has misquoted the prosecutor's statement. The prosecutor stated, "You think the FBI is going to get involved in all this malarkey. The FBI? The Ohio Ethics Commission ? They're picking on him because Lordi has this attitude." Tr. 937 This was a fair comment on appellant's claim that the investigators were trying to stretch the law to put it around appellant's neck as a noose, and appellant's own testimony that the FBI was trying to intimidate him.

{¶19} In Items 16, 20, and 21, appellant argues that the prosecutor made improper statements concerning his personal belief that appellant was guilty. In Item 16, the prosecutor stated that you cannot get elected in Mahoning County and "not be able to coerce an ant." Tr. 918. This was a fair rebuttal to argument by appellant's counsel, who stated that appellant could not coerce an ant. Tr. 279. As to Item 20, the prosecutor did not express his personal opinion, but rather stated that appellant is guilty, and the State had proved guilt beyond a reasonable doubt.

The State is clearly permitted to tell the jury what verdict they are requesting. As to Item 21, the prosecutor stated, "I can assure you I don't want one conviction, I want 16 convictions because that defendant is guilty." Tr. 972. Again, this was a fair rebuttal to appellant's argument, in which counsel told the jury the prosecutor only wanted a finding of guilty as to one count, in order to justify the high cost of the prosecution.

{¶20} Finally, appellant argues in Items 12, 14, 15, 22, 28, 30, that the prosecutor elicited inadmissible evidence. As to Items 12, 14, and 22, these items relate to the prosecutor's comment on car phone records, which appellant argues were inadmissible. These car phone records were admissible as impeachment evidence, and had been clearly identified to the jury as related to violations of county policy. Regarding Item 15, appellant argues that the prosecutor tried to pass off Dale Lightbody as a credible witness. Appellant was acquitted of the coercion count, on which Lightbody testified, and therefore was not prejudiced. As to Item 28, appellant argues that the prosecutor mentioned that Venerosa had been convicted, but failed to mention that DeBonis was under indictment. Appellant has not demonstrated misconduct. Finally, as to Item 30, the question regarding the suspension of special investigator Terry Payor was in response to a comment by appellant's attorney in opening statement, where he stated that the lead investigator on the case had been investigated.

{¶21} Appellant has not demonstrated that the prosecutor committed any misconduct, or that he was prejudiced thereby.

{¶22} Appellant also argues that the court's ruling on the State's motion *in limine* violated his constitutional right to confront witnesses and to compulsory process. Appellant has failed to preserve this issue for appeal. The Ohio Supreme Court has held that after a motion *in limine* is granted, it is incumbent upon the defendant, who has been temporarily restricted from introducing evidence by virtue of a motion a motion *in limine,* to seek the introduction of evidence by proffer or otherwise, in order to enable the court to make a final determination as to its admissibility, and to preserve any objection on the record for purposes of appeal. E.g. *State v. Grubb* (1986), 28 Ohio St. 3d 199, 203. In the absence of such a proffer, the appellant has waived the issue for appeal. *Id.*

{¶23} The assignment of error raised in appellant's supplemental brief is overruled. Upon reconsideration, we adhere to our prior opinion, and the judgment of the Mahoning County Common Pleas Court is affirmed.

By Reader, V.J.,

Gwin, V.J., and

Grey, V. J., concur