[Cite as *State v. Givens*, 2010-Ohio-5527.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-05-145 CA2009-05-146
- vs -	:	O P I N I O N
	:	11/15/2010
DECARLOS GIVENS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. 2008-08-1391

Robin N. Piper III, Butler County Prosecuting Attorney, Gloria Sigman, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Office of the Ohio Public Defender, Jeremy J. Masters, 250 East Broad Street, Suite 400, Columbus, Ohio 45215, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Decarlos Givens, appeals his convictions in the Butler County Court of Common Pleas for two counts of domestic violence and one count of violating a protection order.

{¶2} On June 27, 2008, appellant's girlfriend and the mother of his child, Shavenna Singletary, filed a police report after she and appellant got into an argument

that became physical. In Singletary's written statement, she stated that appellant jumped on her and punched her in the face three times. As a result of this incident, the Hamilton Municipal Court issued a Domestic Violence Civil Protection Order ("DVCPO") on July 25, 2008, which required appellant to stay away from Singletary and refrain from contacting her. On November 27, 2008, appellant and Singletary were again together and again got into an argument. Singletary sustained injuries to her face at some point that day, although she claimed at one time appellant hit her in the face and another time stated she received the injuries in a fight with another woman.

{¶3} Appellant was indicted on two counts of Domestic Violence in violation of R.C. 2919.25(A), and one count of Violating a Protection Order in violation of R.C. 2919.27(A)(1).

{¶4} At appellant's trial, Singletary testified that during the June 27, 2008 incident, she hit appellant first and that she believed appellant hit her as a "reflex." Singletary testified that she did not include this information in her written statement and did not tell the officers that she hit appellant first. Singletary later testified that she and appellant did have contact after the issuance of the DVCPO and that appellant did hit her in the face with a closed fist on November 27, 2008.

{¶5} At the conclusion of appellant's trial, the jury returned guilty verdicts on all counts. Appellant appeals his convictions and raises two assignments of error.

{¶6} Assignment of Error No. 1

{¶7} "THE STATE'S MISCONDUCT DURING ITS CLOSING ARGUMENT DENIED MR. GIVENS THE RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 16, ARTICLE I OF THE OHIO

CONSTITUTION."

{¶8} In his first assignment of error, appellant argues the state made inflammatory comments during its closing argument. Specifically, appellant argues the prosecutor committed reversible error in comparing appellant to famous criminals and suggested that an acquittal would be tantamount to living in a state of lawlessness.

{¶9} Initially, we note that appellant failed to object to the prosecutor's comments during closing argument. Accordingly, appellant must demonstrate that any error committed amounts to plain error. Crim.R. 52(B); *State v. Morgan*, Clinton App. No. CA2008-08-035, 2009-Ohio-6050, ¶39. Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments. *Morgan* at ¶39.

{¶10} The state is normally entitled to a certain degree of latitude in making its closing argument. *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶19, citing *State v. Smith* (1984), 14 Ohio St.3d 13. However, "[i]t is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused." *Baldev* at ¶20, citing *Smith* at 14. Further, "[i]t is improper for a prosecutor to state that the defendant is a liar or that he believes the defendant is lying. Id. Also, "[i]t is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." *Smith* at 14. "[T]he prosecution must avoid insinuations and assertions which are calculated to mislead the jury." Id. Moreover, "a prosecutor may not make excessively emotional arguments tending to inflame the jury's sensibilities * * *." *State v. Tibbetts*, 92 Ohio St.3d 146, 168, 2001-Ohio-132.

{¶11} The following are excerpts of the pertinent comments made by the

prosecutor in his closing and rebuttal arguments. The prosecutor presented his arguments with visual aids, which are not part of the record.

{¶12} "It's been a long two days. This case was about domestic violence, but it really wasn't. It is kind of like those fights you have with a spouse or a significant other. You fight about the shoes under the coffee table or the dishes in the sink, but it's really not about the dishes or the coffee table. This case, like I told you from the beginning, is about truth. It is about the rule of law.

{¶13} "So let's start with the truth. Truth has taken a beating lately, hasn't it? You guys recognize her, right? Martha Stewart. Next to Oprah Winfrey, [Stewart] is probably the most wealthy, powerful woman in the world. Ms. Stewart, worth millions—hundreds of millions. A little insider trading to make a few thousand and lied about it. And it was the lie that caused her to trade in her wardrobe for an orange jumpsuit.

{¶14} "This is senator Roland Burris and now impeached Governor Rod Blagojevich of Illinois. Of course, you know the story of Mr. Blagojevich trying to sell President Obama's senate seat. Senator Burris was asked under oath and said he never had any contacts with Governor Blagojevich at all. And then we heard, his brother called me, but there was no mention of any money at all.

{¶15} "Then they start to leak in the press maybe those tapes the U.S. Attorney has might have some of him on there. Then we find out, well, he did ask me to raise money, but I said no because that is not kosher. And then last week, we heard him say, well, I did say I would try to raise money, but I wasn't able to. We don't even know how that story is going to end.

{¶16} "Alex Rodriguez, 2007 [on] '60 Minutes,' tells Katie Couric point blank, I never used steroids. I never used HGH. Absolutely not. And then against the rules,

this anonymous test that he took in 2003 was leaked, for better or for worse, and he had tested positive.

{¶17} "So then he is on ESPN telling Peter Gammons, yeah, I did take something. I really don't want to get into the details until nine days later when he had a press conference last week which, by all accounts for those people who follow baseball and steroids, the sports writers, nobody even believes that story.

{¶18} "John Edwards ran for vice president in 2004, was running for president in 2008, and was one of the contenders. 'The National Enquirer' * * * says he cheated on his wife while she was battling cancer. He sanctimoniously denied it. Then they had to have a press conference and admit it actually happened.

{¶19} "And then there is this guy who you may not recognize, but * * * [t]hat is Bernie Madoff. He of the massive, huge financial fraud he perpetrated on people. Big Wall Street investment guy. And by lying to his clients over and over for years about false returns, he bilked thousands of people out of billions with a B dollars. * * * His name will probably become a verb in 20 years as to how you screw somebody over because his financial fraud is the worst in human history.

{¶20} "Folks, truth has been taking a beating lately. So when it comes to this case, this trial, this trial is about June 27th, 2008. It is about Thanksgiving 2008. It is about Decarlos Givens. It is about Shavenna Singletary. But the trial itself is a search for truth. You are all here under an oath, a duty. You come from various backgrounds and walks of life, but you are all citizens. And as citizens, you have the task of finding truth. Because truth, as much as it wants to be found, isn't the only one working around here.

{¶21} "There are people, as we have just seen, rich, poor, famous, not so

famous, who do not want the truth to come out. You've got to find it. So how are you going to do that? You've sat here for two days. I will be honest with you, this is probably one of the most tortured two days you've sat through.

{¶22} "* * *

{¶23} "Let's start with the easy stuff because * * * there is hard stuff here in a second. There are two main stories here. And unfortunately, the main witness here, Shavenna Singletary, is talking on both sides. And you have to sort out which one is true.

{¶24} "* * *

{¶25} "Do you think for a minute [appellant] cares if you find the truth? For a minute? No. He has no interest in you figuring out how Shavenna got these black eyes on those two days. He doesn't care. He doesn't care. So why should you? We will get to that in a second.

{¶26} "* * *

{¶27} "The rule of law is, as I like to think of it, the walls that protect civilization from chaos. No medieval castle. I think of it as the walls. And an example, you will see President George Bush, who was our president the last eight years. * * * Last November, his term ran out, and we had an election. And we all voted. And we picked somebody new. And you know what the law says, the Constitution? It says, on January 20th pal, you pack up your stuff and go home because you are done. And you know what happened on January 20th? He left. And President Barak Obama came in. And he did so with parades and music and celebration and balls, tuxedoes, [and] gowns.

{¶28} "He didn't come into power because the D.C. Metro Police took his side. He didn't come into power because the U.S. military took his side. They didn't have to

throw the Bushes out the front door. George Bush left. And Barack Obama stepped in because the rule of law said that is the way it works.

{¶29} "Do you know what happens when you don't have the rule of law? You get Zimbabwe. For those of you who don't know what this is about, Robert Mugabe has been ruling Zimbabwe for 28 years. And do you know who won? Not him. This guy, Morgan Tsvangirai. He won the election. Did he take power? No.

{¶30} "For anybody who has seen this in the news, they have spent the past year negotiating. Negotiating. And the result? They are going to share power. Folks, that is what it is like when the rule of law is ignored. That is what it looks like.

{¶31} "Anybody remember what New York City was like in the '80s, the reputation? You can't walk down the street during the day let alone at night because you get mugged. And what happened? Regardless of whatever you think of Mayor Rudy Giuliani, when he was mayor, they changed that city. And how did they do it? You all know.

{¶32} "They started enforcing things like panhandling laws and broken windows and graffiti, the little stuff really that in the big picture don't [sic] matter, but they do. Because that is what I talked about, the rule of law. It doesn't crash from the top. It rocks from the bottom. The little stuff.

{¶33} "Decarlos Givens wants you to ignore the law. He wants you to ignore the protection orders. Why should you care about this case? Remember we talked about that up front. To be honest, there will be in some or all of you a natural inclination to look at Shavenna Singletary and her performance through the life of this case and go, I don't want no [sic] part of this.

{¶34} "[I]f she don't [sic] care, if she is going to be on these phones for 12

hours—and you will hear her. She doesn't sound scared. She is not threatened. Nobody is accusing Decarlos of threatening her. She is participating in these phone calls. Then what are we doing here? The rule of law. That is what we are doing here.

{¶35} "Here in Ohio, we have a law. A little law that says y'all [sic] can't smack around the mothers of your kids. A little thing called domestic violence. You can't do it. You can't do it. And when a court orders you not to do certain things, you got to do it."

{¶36} This court has had multiple opportunities to address cases in which a prosecutor has expressed his or her personal opinion during closing argument or made statements exceeding the scope of the evidence presented at trial. In *State v. Mason*, Butler App. Nos. CA2004-06-154, CA2004-06-164, 2005-Ohio-2918, we found the prosecutor committed misconduct in expressing his personal belief as to the credibility of a witness. While we found the prosecutor's statements to be improper, we did not reverse the defendant's conviction as the prosecutor expressed his personal opinion based on evidence presented at trial. In making this finding, we emphasized that, "[a] prosecutor's improper comments are considered particularly damaging when they are not supported by the record." Id. at ¶28, citing *State v. Stephens* (1970), 24 Ohio St.2d 76. Further, we recognized that while some cases of prosecutorial misconduct cannot be remedied by a cautionary instruction by the trial court, the case in *Mason* is not one of those cases. Id.

{¶37} In *State v. Schnecker*, Butler App. No. CA2004-10-264, 2005-Ohio-6427, ¶40, we reviewed a prosecutor's statements during closing argument, which included comments that "the jury would have to believe that the police involved in this case were 'dirty cops' if the jury accepted the appellant's theory of the case and the testimony of appellant and her witness." Further, the prosecutor attacked the credibility of defense

counsel. We found these comments to be "marginally permissible" since the comments were based on evidence at trial. Id. at ¶42. However, we stated that "this opinion should not be interpreted as condoning the comments presented by the prosecutor" and we cautioned the parties to stay within the bounds of proper argument. Id. at ¶42-46.

{¶38} In *State v. Smith*, Butler App. No. CA2007-05-133, 2008-Ohio-2499, ¶17, this court reversed a defendant's conviction based on the prejudicial effect of prosecutorial misconduct when the prosecutor "improperly introduce[d] an element of additional wrongdoing in a case in which appellant's purpose for providing the information to police, and his credibility in his denial of culpability were essential to a determination of guilt." Additionally, we noted that "the trial court instructed the jury that arguments of counsel are not evidence, but no curative instruction was requested or given immediately after the prosecutor's comments were made, and in fact, the prosecutor continued with his closing as provided in several additional pages of transcript." Id. at ¶18. We further noted that "where improper insinuations and assertions of personal knowledge by prosecution are apt to carry great weight against the accused when they should properly carry none, some more definite guidance in the form of specific, curative instructions from the court was required." Id., citing *Smith*, 14 Ohio St.3d at 15.

{¶39} More recently, in *State v. Smith*, Butler App. No. CA2008-03-064, 2009-Ohio-5517, ¶105, this court reviewed a prosecutor's remarks indicating a witness testified seeing appellant firing a weapon from inside a vehicle when in fact no witness provided such testimony. Despite being troubled by the remarks and finding them to be improper, this court found the prosecutor's misstatements do not rise to the level of plain error because the trial court instructed the jurors not to rely on the closing argument as

evidence and because the jury acquitted appellant of the firearm specification related to discharging a weapon from inside the vehicle. Id. at ¶107. However, we emphasized that "our conclusion that the prosecutor's misstatements during closing arguments did not deprive appellant of a fair trial should not be construed as an approval of the prosecutor's conduct during closing arguments." Id. at ¶108.

{¶40} After reviewing the entire record, including the statements above, we agree that the prosecutor made several improper statements during his closing and rebuttal arguments. In the arguments, which totaled approximately 41 transcribed pages, the prosecutor substantially exceeded the scope of the evidence presented at trial. Moreover, the prosecutor's inflammatory statements and analogies served no purpose but to confuse the issues for the jury. The prosecutor improperly expressed his personal opinion that Singletary was not a credible witness. In addition, the prosecutor improperly characterized appellant as a liar by stating that appellant does not care if the jury finds the truth, stating that appellant wants the jury to ignore the law, comparing appellant to well-known individuals who have been accused of or convicted of offenses involving dishonesty, and warning the jury that acquitting appellant is the equivalent of living in a lawless state.

{¶41} Also, according to the record, the trial court provided the following instruction before the parties presented their closing arguments:

{¶42} "So all the evidence and testimony has been presented to you. Arguments are merely that, just what I said in my opening remarks to you during the voir dire process. They are not evidence. They are merely each side's summation of what they think the evidence shows."

{¶43} After considering the prosecutor's closing argument and rebuttal as a

whole, we find the trial court's general instruction regarding closing arguments was not specific enough to cure the prosecutor's improper statements. See *Smith*, 2008-Ohio-2499, ¶18. Given the nature and extent of the prosecutor's closing and rebuttal arguments, more definite guidance for the jury was necessary to cure the error created by the prosecutor's statements. Id.

{¶44} However, we find that the prosecutor's improper statements in this case do not amount to plain error, as appellant has not demonstrated that he clearly would not have been convicted absent the statements or that he did not receive a fair trial as a result of the statements. Rather, the record includes evidence supporting appellant's convictions, including credible evidence that appellant hit Singletary in the face on two occasions, and that appellant violated the DVCPO by failing to stay away from Singletary and calling her from the jail multiple times. Also, we find the prosecutor's expression of his personal opinion as to Singletary's credibility, while improper, did not deprive appellant of a fair trial. Singletary admitted in her testimony that she changed her account of both incidents on multiple occasions and even lied under oath.

{¶45} According to the record, Singletary filed a police report indicating that appellant punched her in the face multiple times on June 27, 2008, and photographs taken that day depict her with redness and swelling around her left cheek and eye. Singletary further testified that she and appellant had regular contact after the DVCPO was ordered, and that the two of them spent time together on November 27, 2008. Singletary testified that on that day, appellant punched her in the face while they were arguing in a car. Photographs taken five days later depict Singletary with bruising and redness around her right eye.

{¶46} In addition, the record indicates that appellant called Singletary from the

Butler County Jail 199 times between December 24, 2008 and February 9, 2009. Singletary testified that during one of these conversations, appellant told Singletary not to talk to the prosecutor about this case and instructed Singletary to go to his attorney's office and sign affidavits. According to the record, one affidavit indicates that the June 27, 2008 incident was Singletary's fault because she hit appellant first and his act of hitting her was a reflex, and the second affidavit indicates that Singletary initiated contact with appellant on November 27, 2008 and that she sustained the injury to her face during a fight with another woman that day. Singletary testified that she later called appellant to tell him she signed the affidavits and that he became mad after she told him the affidavits did not state that Singletary wished to drop all charges against appellant. In addition, appellant wrote a letter to Singletary's mother in which he told Singletary not to show up to testify in court and that if she did testify, she would be charged with perjury and put in jail.

{¶47} We have repeatedly admonished prosecutors who have exceeded the scope of the evidence presented at trial and expressed personal opinion during closing arguments and we do so once again in this case. Yet, despite the prosecutor's improper statements, we find that appellant has failed to demonstrate that he would not have been convicted of the offenses in the absence of these statements or that he was deprived of a fair trial.

{¶48} Appellant's first assignment of error is overruled.

{¶49} Assignment of Error No. 2:

{¶50} "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE STATE'S IMPROPER STATEMENTS DURING ITS CLOSING ARGUMENT. SIXTH AND FOURTEENTH AMENDMENTS,

UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I, OHIO CONSTITUTION."

{¶51} In appellant's second assignment of error, he argues his trial counsel was ineffective for failing to object to the prosecutor's improper statements during the state's closing and rebuttal arguments. Appellant maintains his trial counsel's deficient performance in failing to object was prejudicial.

{¶52} To prevail on an ineffective assistance claim, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of appellant's trial. Id.

{¶53} In order to first demonstrate an error in counsel's actions, an appellant must overcome the strong presumption that licensed attorneys are competent, and that the challenged action is the product of sound trial strategy and falls within the wide range of reasonable professional assistance. *Strickland* at 690-91. In establishing resulting prejudice, an appellant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Id. To that end, the trial must be shown to be so demonstrably unfair that there is a reasonable probability that the result would have been different absent the attorney's deficient performance. Id. at 693.

{¶54} "[I]t is within counsel's realm of tactical decision-making to choose to avoid interrupting closing arguments." *State v. Brown*, Warren App. No. CA2002-03-026, 2002-Ohio-5455, ¶22. Further, the failure to object to statements that amount to

prosecutorial misconduct "'does not constitute ineffective assistance of counsel per se, as that failure may be justified as a tactical decision.'" Id., quoting *State v. Gumm*, 73 Ohio St.3d 413, 428, 1995-Ohio-24.

{¶55} Moreover, even if we find trial counsel's performance to be deficient, appellant still must demonstrate that the outcome of the trial would have been different if trial counsel had objected to the prosecutor's statements. See *Strickland* at 694; *Smith*, 2009-Ohio-5517 at ¶118. As we found above, appellant has failed to demonstrate that he would not have been convicted of the offenses in the absence of these statements. Likewise, we find that appellant has failed to demonstrate that the outcome of the trial would have been different had trial counsel objected to the prosecutor's statements.

{¶56} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.