[Cite as *State v. VanLoan*, 2009-Ohio-4461.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-10-259
	:	O P I N I O N
- vs -		8/31/2009
	:	
ROD EDWARD VANLOAN,	:	
Defendant-Appellant.	:	

CRIMINIAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-05-0843

Robin N. Piper, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, Hamilton, Ohio 45012-0515, for plaintiff-appellee

Fred Miller, Baden & Jones Building, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Rod Edward VanLoan, appeals his conviction, in the Butler County Court of Common Pleas, for child endangering and murder. We affirm appellant's conviction.

{¶2} On May 5, 2007, appellant caused his 14-month-old daughter to fall and hit her head. As a result of the fall, appellant's daughter clenched her hands, her eyes began "rolling back" and she became non-responsive. After attempting to resuscitate her, appellant

took his daughter to Mercy Hospital Fairfield for treatment. She was later transferred to Cincinnati Children's Hospital Medical Center, where she subsequently died from her injuries. Appellant was indicted for child endangering in violation of R.C. 2919.22(B)(1) and murder in violation of R.C. 2903.02(B). Following a four-day trial and testimony from 13 witnesses, which included several experts, the jury found him guilty on both counts. Appellant was sentenced to 15 years to life for the murder, and an eight-year concurrent sentence for the child endangering. Appellant filed a timely appeal raising two assignments of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT INTERFERED WITH AND INTERRUPTED THE APPELLANT'S CROSS-EXAMINATION OF THE STATE'S EXPERT WITNESS."

{¶5} Appellant argues that the trial court improperly questioned a state witness, thereby prejudicing his rights and depriving him of due process and a fair trial. We find appellant's argument without merit.

{¶6} "Evid.R. 614(B) permits a trial judge to interrogate a witness as long as the questions are relevant and do not suggest a bias for one side or the other."[1] *State v. Blankenship* (1995), 102 Ohio App.3d 534, 548, citing *Sandusky v. DeGidio* (1988), 51 Ohio App.3d 202, 204. "In a trial before a jury, the [trial] court's participation must be limited, lest the court, consciously or unconsciously, indicates its opinion on the credibility of a witness." *State v. Prokos* (1993), 91 Ohio App.3d 39, 44. "Where a jury might infer the court's opinion of a witness through the persistence, tenor, range, or intensity of its questions, the interrogation is prejudicially erroneous." Id., citing *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, paragraphs three and four of the syllabus. "While the court can ask neutrally

1. Although trial courts are permitted to pose relevant, unbiased questions to a witness, courts must exercise the utmost caution and gauge the potential impact on the jury before engaging in any such examination of a witness.

phrased questions, its questions should not suggest disbelief in a witness's testimony." *Prokos* at 44.

{¶7} "In the absence of any showing of bias, prejudice, or prodding of a witness to elicit partisan testimony, it will be presumed that the trial court acted with impartiality in propounding to the witness questions from the bench in attempting to ascertain a material fact or to develop the truth." (Internal brackets omitted.) *State v. Baston*, 85 Ohio St.3d 418, 426, 1999-Ohio-280, quoting *Jenkins v. Clark* (1982), 7 Ohio App.3d 93, 98. Additionally, "[a] trial court's interrogation of a witness is not deemed partial for purposes of Evid.R. 614(B) merely because the evidence elicited during the questioning is potentially damaging to the defendant." *Blankenship* at 548.

{¶8} The right to question a witness, pursuant to Evid.R. 614(B), rests within the sound discretion of the trial court. *Prokos* at 44. Thus, our review of this issue is limited to whether the trial court abused its discretion in making inquiries to a witness. *State v. Davis* (1992), 79 Ohio App.3d 450, 454. A trial court abuses its discretion when it exhibits an attitude which is unreasonable, arbitrary, or unconscionable. Id.

{¶9} During cross-examination of the state's expert, Dr. Michael Kenny, a forensic psychologist, the following language appeared in the trial transcript:

{¶10} "[MS. COOK-REICH Appellant's Attorney]: Do you have any idea or ability to determine whether [appellant's daughter] was average?

{¶11} "[THE WITNESS]: By my examination she appeared to be average for her age.

{¶12} "[MS. COOK-REICH]: Would you agree with me that –

{¶13} "THE COURT: Let me interject something just for a minute. I thought about this earlier. I'm only trying to clarify again, and hopefully for the sake of the jury as fact finders here. A question – where you are going now leads me back to something that I was left puzzled with. There was a question that was asked once or twice, maybe more times. I

don't really know what the question meant.

{¶14} "The question – I don't want to be a grammarian for no purpose here. But the question was, I believe, would you agree that Wormian bones are a variant of normal. Now, that expression – we got an answer, but I don't know what the question means.

{¶15} "A variant of normal. That, to me, means that a person with Wormian bones has a normal skeletal structure, but it is a variant of normal. Had you said variant from normal, I would have taken that to mean that it is not normal.

{¶16} "I mean am I making any sense to somebody or am I on some other planet here? I mean, to me, I took your question to mean, would you agree that a person with Wormian bones has normal bones, but this is just a variant form? It is not typical normal. It is another normal, but it is still normal. Is that what that question meant? Or did the question mean that it isn't normal? That it is abnormal?

{¶17} "MS. COOK-REICH: You are asking me, not the doctor?

{¶18} "THE COURT: I'm really asking – I really want to know what the answer meant. But I didn't understand the question. And if they didn't understand the question, either, I'm not sure that any answer is understandable. So I will just ask the doctor: How did you understand the question, and what did your answer mean?

{¶19} "THE WITNESS: To me, the presence of Wormian is a variation of normal. It does not make them abnormal. There are many bone diseases that give you abnormal bones. But the bones themselves appear normal. And certainly at the autopsy, things appeared quite normal in this particular case.

{¶20} "Many times, the X-ray evaluations are different from when you do an autopsy. The autopsy means to see for one's self. Many times there are fractures missed that we see many times that the X-rays don't see. So the presence of what they term different variations perhaps I saw with my own eyes and did not appear abnormal to me.

{¶21} "THE COURT: Thank you. Again I apologize for the interruption.

{¶22} "MS. COOK-REICH: That's all right."

{¶23} Appellant argues that the trial court erred in posing its question because the court interrupted an "intense" cross-examination of the state's witness which effectively caused his attorney to be distracted from her line of inquiry. Appellant also contends that the trial court's question implied appellant's counsel was trying to confuse or mislead the jury, and that the court's question enhanced the witness' credibility. Finally, appellant suggests that the trial court should have posed the question after the witness had been fully examined, or asked the question in a side-bar conference.

{¶24} We are unaware of any rule which prohibits a trial court from interrupting counsel at any point during the trial, especially in an attempt to clarify testimony elicited from a witness. It is clear from the testimony that appellant's counsel's line of questioning reminded the trial court of a question it intended to ask earlier, regarding the meaning of the phrase "Wormian bones are a variant of normal."[2] After a careful reading of the trial court's question, we believe that the court was only attempting to help the jury understand what the phrase actually meant. Although the trial court could have chosen a point in time closer to the earlier testimony on the subject, and/or perhaps selected its words more carefully in framing its question, we believe the question was relevant and did not suggest any bias on the part of the trial court. Indeed, far from confusing the jury, the trial court's question helped clarify an issue, which up to that point had not been explained in any great detail. Based on the trial court's question, appellant's counsel asked additional questions of the witness regarding the effect of Wormian bones on his findings. Although appellant's counsel was

2. We observe that the first detailed description of what Wormian bones are did not occur until the fourth day of trial with the presentation of the defense witness, Dr. John Plunkett, a forensic pathologist. Dr. Plunkett explained to the jury that Wormian bones are a result of the plates in the skull having additional cranial sutures encasing small pieces of bone plates.

momentarily diverted from her original line of questioning, which the trial court helped to remind her of later, she was able to resume her examination of the witness and later had two opportunities to ask further questions.

{¶25} Finally, we note that contained within the trial court's jury instructions, which were read to the jury verbatim, was the following instruction:

{¶26} "It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly. * * * Consider all the evidence, and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the case is decided fairly and impartially. *If, during the course of the trial, I said or did anything that you consider an indication of my view of the facts, you are to disregard it.*" (Emphasis added.) Based on this instruction, the jury was to disregard anything which may have indicated the trial court's views during the trial; and we must presume that the jury followed this instruction. *State v. Granderson*, 177 Ohio App.3d 424, 2008-Ohio-3757, ¶67.

{¶27} Because appellant has been unable to demonstrate that the trial court's questions to Dr. Kenny were made in a biased or partial manner, or that they had any prejudicial effect on the outcome of the proceedings, we find no abuse of discretion. Appellant's first assignment of error is overruled.

{¶28} Assignment of Error No. 2:

{¶29} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT PERMITTED THE STATE TO COMMIT PROSECUTORIAL MISCONDUCT."

{¶30} In his second assignment of error, appellant argues that the state committed prosecutorial misconduct during its closing argument to the jury. We do not agree.

{¶31} "The prosecution is normally entitled to a certain degree of latitude in its

concluding remarks." *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14, citing *State v. Woodards* (1966), 6 Ohio St.2d 14, 26, certiorari denied (1966), 385 U.S. 930, 87 S.Ct. 289, and *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589. "A prosecutor is at liberty to prosecute with earnestness and vigor, striking hard blows, but may not strike foul ones." *Smith* at 14, citing *Berger v. United States* (1935), 295 U.S. 78, 88, 55 S.Ct. 629. However, "[t]he prosecutor is a servant of the law whose interest in a prosecution is not merely to emerge victorious but to see that justice shall be done." *Smith* at 14.

{¶32} "The test for prosecutorial misconduct in [a] closing argument is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. White*, 82 Ohio St.3d 16, 22, 1998-Ohio-363, citing *Smith* at 14. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Smith*, 87 Ohio St.3d 424, 442, 2000-Ohio-450, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

{¶33} Before we begin our analysis, we must point out that appellant's counsel failed to object to the alleged prosecutorial misconduct. As such, any perceived error which was not brought to the attention of the trial court is waived unless it rises to the level of plain error. Crim.R. 52; *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus. Thus, we review this matter under the plain error standard. *White* at 22. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland*, (1990), 50 Ohio St.3d 58, 62. Lastly, "[p]rosecutorial 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." *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 700.

{¶34} During closing arguments, the prosecutor made the following remarks:

{¶35} "Ms. Cook[-Reich] talked to you at the beginning of the case and at the

beginning of her closing argument about the defendant's right to fairness. You should be fair to the defendant. And you should be fair to him by following the law. But justice is a two-way street. [Appellant's daughter] did not have justice in her life.

{¶36} "The State asks you to do justice for her by following the law and weighing the evidence. The State of Ohio asks you to hold the defendant, who admitted to abusing her, guilty of endangering children and guilty of murder. Thank you."

{¶37} Appellant argues that the prosecutor's closing argument to the jury were both "beyond fair comment and beyond the wide latitude normally accorded counsel;" because the state's remarks acted to alter the jury's focus from the evidence to the vindication of the victim. Appellant maintains that the prosecutor's words urged the jury to convict, rather than acquit, by playing on the jurors' sympathy for the victim.

{¶38} While not dispositive, we recognize that the trial court instructed the jury that they were not to use statements made in closing arguments as evidence in their deliberations. As previously noted, we must presume that the jury followed the trial court's instructions. *State v. Woodard* (1993), 68 Ohio St.3d 70, 76; *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶85.

{¶39} Recently, this court found that substantially similar comments made by a prosecutor during closing arguments did not have any impact on the outcome of that case.[3] *Bell* at ¶92. See, also, *State v. Gilbert*, Cuyahoga App. No. 90615, 2009-Ohio-463 (finding a comment made by the state asking for justice for the victim did not amount to plain error or prosecutorial misconduct). In particular, this court found that because there was ample evidence to support Bell's conviction, any misconduct on the part of the prosecutor did

3. The prosecutor's comments in *Bell* were, "It's time for you to decide whether [T.T. and T.W. are] going to get justice. Or whether they're going to be dumped right back into that pile they have lived in their entire life." *Bell* at ¶87.

not amount to plain error. *Bell* at ¶92.

{¶40} In light of the evidence presented at trial – which included appellant's written and signed confession – we do not believe that, in the absence of the prosecutor's remarks, the outcome of this case would have been any different. Therefore, appellant's second assignment of error is overruled.

{¶41} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.

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