

[Cite as *State v. Thornton*, 2002-Ohio-6804.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80136

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
ROBERT D. THORNTON	:	OPINION
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: December 12, 2002

CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas Case No. CR-405460

JUDGMENT: REVERSED AND REMANDED

DATE OF JOURNALIZATION: _____

APPEARANCES:

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COLLEEN CONWAY COONEY, J.:

{¶1} Defendant-appellant Robert Thornton appeals his conviction of domestic violence. For the reasons below, we reverse the trial court's decision.

{¶2} On February 3, 2001, Thornton appeared unannounced at his ex-wife's residence allegedly to pick up the couple's minor son for visitation. His ex-wife, Sharon, was permitted to live in the couple's marital home until June 2001, at which time Thornton would regain control of the home pursuant to a domestic relations court order.

{¶3} Although the facts are in dispute, Thornton maintains that he was speaking to a neighbor when his wife came out of the home and struck him and his truck with a metal stool. Sharon claims that Thornton came up to her front porch and kicked her in the stomach, and that she grabbed the stool and hit him in self-defense.

{¶4} Thornton left the scene, and both he and Sharon contacted the police shortly after the incident. The police received Thornton's call first and went to his home. The responding officer, Paul Baeppler, testified that Thornton was hostile and confrontational with both the police and EMS. Thornton refused medical treatment, and the police report was not completed because Thornton refused to cooperate.

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{¶5} Baeppler testified that he took a statement from Sharon after they left Thornton's home. He determined that Thornton was the primary aggressor because Sharon was shaken and nervous when he saw her. Sharon admitted striking Thornton with a stool.

{¶6} On April 11, 2001, Thornton was indicted on one count of felony domestic violence and one count of felonious assault. A jury acquitted him of the felonious assault charge but convicted him of domestic violence. The trial court sentenced him to eight months imprisonment.

{¶7} Thornton filed a pro se appellate brief which was supplemented by his attorney. In the fifth assignment of error raised by Thornton's counsel and pro se assignment of error four, Thornton argues that he was deprived of his constitutional right to effective assistance of counsel because his trial counsel failed to preserve several issues for appeal. As explained below, we agree.

Prosecutorial Misconduct

{¶8} As argued in Thornton's third assignment of error, the prosecutor made improper comments during closing argument regarding the credibility of witnesses. Due to this error, Thornton was prejudiced by both his counsel's failure to object and by the prosecutor's comments.

{¶9} The test for prejudice regarding prosecutorial misconduct in closing arguments is "whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the

defendant.'" *State v. Thorntonman* (Oct. 3, 2001), 93 Ohio St.3d 274; 754 N.E.2d 1150; *State v. Hessler* (2000), 90 Ohio St.3d 108, 125, 734 N.E.2d 1237, 1254, quoting *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883, 885.

{¶10} Closing arguments must be viewed in their entirety to determine whether the disputed remarks were prejudicial. *State v. Mann* (1993), 93 Ohio App.3d 301, 312, 638 N.E.2d 585. Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. *State v. Carter* (2000), 89 Ohio St.3d 593, 734 N.E.2d 345; citing, *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431, 439. An appellant is entitled to a new trial only when a prosecutor asks improper questions or makes improper remarks and those questions or remarks substantially prejudiced appellant. *State v. Smith*, 14 Ohio St.3d 13, 470 N.E.2d 883.

{¶11} Although the prosecution is normally entitled to a certain degree of latitude in its concluding remarks, *State v. Woodards* (1966), 6 Ohio St.2d 14; *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, an attorney may not express his or her belief or opinion regarding the credibility of a witness. *State v. Jackson*, 92 Ohio St.3d 436, 2001-Ohio-1266, citing, *State v. Smith*, 14 Ohio St.3d at 14.

{¶12} In *Smith*, the prosecutor referred to defense evidence as "lies," "garbage," "garbage lies," "[a] smoke screen," "a well

conceived and well rehearsed lie," and further stated that defense counsel had suborned perjury by manufacturing lies. The Ohio Supreme Court found that "such conduct is well beyond the normal latitude allowed in closing arguments and is clearly improper." Id.

{¶13} Here, during closing argument the prosecutor made several improper statements regarding the credibility of witnesses. First, the prosecutor noted that there were differences in the perspectives of Sharon and her neighbor Willie Brundidge, both of whom testified on behalf of the State, but stated that "those are the kinds of discrepancies you get in a case where witnesses are telling the truth."

{¶14} In comparison, the prosecutor further stated:

{¶15} "[W]hat you don't get too often in a case, and I find it horrifying when you do get it, is instances where people out and out lie, and I hate to use the word 'lie,' but when somebody comes in and says, 'I was there, and I saw what happened and that's what happened,' and that is perjury; it is lying, and it is ugly, offensive, and an ugly thing in the justice system."

{¶16} The prosecutor then referred specifically to the testimony of the defendant and his witness, Denise Clemmons, stating:

{¶17} "Why would [Thornton] bring [Clemmons] in to say that she was there, and 'this is what happened?' That is perjury, and he

says she was there, and she saw what happened too, and that is perjury.

{¶18} "If he is innocent, why is he bringing in his sister to lie and perjure herself? Why is he putting perjured testimony before you; it is offensive." (Tr. 666).

{¶19} The prosecutor then stated, "Lying is where you lie to cover up a bias you have. Look at [defense witness] Mr. Holt. He states 'I have got no bias.' *** I think, during the cross-examination, that was disproved to you ***."

{¶20} The prosecutor then discussed witness credibility, how the jury must decide whether the witnesses' demeanor on the stand was calm or hostile. She reviewed and compared the demeanor of Sharon, Thornton, Clemmons, and Holt. Among other comments, she notes how respectful Sharon was during her testimony and that Thornton was combative during cross-examination while his credibility was being challenged.

{¶21} Finally, in reference to Officer Baeppler's observations about Thornton, the prosecutor asked the jury, "Does Officer Baeppler have any reason to lie to you about that?" (Tr. 673).

{¶22} In summation, the prosecutor again referred to Thornton's testimony stating "Why would he deny that he kicked her at all? Just shows you, again, that he is lying." (Tr. 689).

{¶23} The State argues in the instant case, just as the prosecution argued in *Smith*, that any error was harmless in view of

the sufficiency of the evidence to sustain a conviction. The State also urges that there was no prejudice because the court instructed the jury that closing arguments were not evidence.

{¶24} However, the *Smith* court found that the general instruction that arguments of counsel are not to be considered as evidence was insufficient to correct flagrant prosecutorial misconduct.

{¶25} Here, several pages of transcript¹ serve as evidence of the prosecutor's flagrant misconduct. During her closing argument, the prosecutor repeatedly denounces the credibility of defense witnesses and vouches for the veracity of the State's witnesses. Such action makes it impossible for this court to determine, beyond a reasonable doubt, that the jury would have found Thornton guilty had there been no misconduct on the part of the prosecution.

{¶26} This is especially true given the nature of the underlying incident. This case involves a domestic dispute, where Thornton claims one thing and his ex-wife claims another. Thornton denies that he ever struck Sharon, and in support of this claim Clemmons and Holt testified that they did not see Thornton strike Sharon. On the other hand, Sharon claims that Thornton hit her. Accordingly, the credibility of the State's witnesses -- Sharon,

¹ See Tr. pp. 665-674 and 689.

Brundidge, and Baeppler -- was important to the State because their testimony was essential for conviction.

{¶27} Clearly, the credibility of the witnesses is the very crux of this matter. Thus, we conclude that the improper remarks by the prosecution in closing argument prejudicially affected Thornton's substantial rights.

{¶28} Accordingly, we reverse and remand the matter for a new trial.

{¶29} The remaining assignments of error are rendered moot by our analysis above. See App.R. 12(A)(1)(c).

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This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

TIMOTHY E. McMONAGLE, A.J. CONCURS;

TERRENCE O'DONNELL, J. CONCURS IN

SEPARATE CONCURRING OPINION

JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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JUDGE TERRENCE O'DONNELL, CONCURRING:

{¶30} The singular limited focus of the majority opinion concerns prosecutorial misconduct and the majority does not reach other significant issues. While I agree the judgment of the trial court should be reversed, I base that decision on other claims which have been raised on appeal and which I believe should have been addressed by the majority.

{¶31} In the first assignment of error, Thornton claimed a denial of a fair trial based on the court's practice of allowing jurors to pose questions to witnesses at trial. Relying upon *State v. Gilden* (2001), 144 Ohio App.3d 69, which held juror questioning to be per se reversible error, Thornton urges this error justifies a reversal of his conviction.

{¶32} Contrasted with the reasons set forth in *Gilden* for disallowing juror questioning and the holding that this is per se reversible error, are decisions from the Third Appellate District, in *State v. Cobb* (July 24, 2000), Seneca App. No. 13-2000-07, the Fourth Appellate District, in *State v. Quillen* (Oct. 27, 1995), Hocking App. No. 94CA26, the Fifth Appellate District, in *State v. Mascarella* (June 30, 1994), Tuscarawas App. No. 93-AP-100075, the Sixth Appellate District, in *State v. Ernst* (October 29, 1982), Sandusky App. No. S-82-7, the Seventh Appellate District, in *State v. Noser* (Dec. 7, 2001), Lucas App. No. L-00-1154, and the Tenth

Appellate District, in *State v. Fisher* (Dec. 20, 2001), Franklin App. No. 01AP-614. These courts leave to the trial court's discretion the issue of juror questioning, having concluded that most concerns are alleviated by the practice of submitting questions in writing to the court.²

{¶33} Applying the abuse of discretion standard, the court here, in my view, abused its discretion in permitting juror questions to be posed to witnesses which resulted in improper testimony at trial: when a juror posed a question to Sharon Thornton regarding whether Robert Thornton was an experienced kick-boxer, she responded that he had taken a course in kick-boxing while he had been incarcerated -- obviously improper evidence as it created an inference of his prior criminal record which had not been known to jurors; the court compounded the error in not sustaining the defense objection to this testimony, ordering it stricken from the record, and instructing jurors to disregard the response. In my opinion, this is a ground for reversing Thornton's

² This issue has been certified for review by the Supreme Court of Ohio, in *State v. Fisher* (2002), 94 Ohio St.3d 1484.

conviction, because this testimony should never have been admitted at trial.

{¶34} Furthermore, Thornton argues that Patrolman Baepler, who investigated the allegations of domestic violence and who interviewed both Robert and Sharon Thornton, testified that he believed Robert was the "primary aggressor" and that he found Sharon to be credible in her account of the incident. These statements and opinions are not proper. It is fundamental that the issue of witness credibility and the weight to be given to testimony is left to the province of the jury, not police investigators. And, the ultimate determination of the primary aggressor is for the jury to decide upon proper court instruction. See *State v. Boston* (1989), 46 Ohio St.3d 108. I believe the admission of this improper evidence also warrants reversal.

{¶35} For these reasons, I concur with the judgment of the majority.