[Cite as *State v. Hoerig*, 2020-Ohio-1333.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee, - vs - CLAUDIA C. HOERIG (aka CRISTINA HOERIG; CLAUDIA BOLTE; CRISTINA BOLTE; CLAUDIA CRISTINA SOBRAL; CLAUDIA SOBRAL; CRISTINA SOBRAL), Defendant-Appellant.	: : : : : : : :	**O P I N I O N** **CASE NO. 2019-T-0012**

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2007 CR 00269.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *Ashleigh Musick*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

MATT LYNCH, J.

{¶1} Defendant-appellant, Claudia C. Hoerig nka Sobral ("Claudia"), appeals her conviction for Aggravated Murder following a jury trial in the Trumbull County Court of Common Pleas. For the following reasons, we affirm her conviction.

{¶2} On April 24, 2007, the Trumbull County Grand Jury returned an Indictment

charging Claudia with Aggravated Murder, an unclassified felony in violation of R.C. 2903.01(A) and (F) [now (G)] with a Firearm Specification pursuant to R.C. 2941.145, for the murder of her husband, Karl Hoerig ("Hoerig").

{¶3} Between January 14 and 24, 2019, the case was tried before a jury during which the following testimony was presented (the order of witnesses has been altered for clarity):

{¶4} Krista Bridges, a friend of Hoerig, testified that, in August 2006, she was at a bachelorette party at which Claudia was also present. While talking about Hoerig, she heard Claudia comment that, "if he [Hoerig] ever leaves me, I'd kill him."

{¶5} Donald Schrecengost testified that, in February 2007, he arranged with Hoerig to rent a house on West Broad Street in Newton Falls. Schrecengost received a deposit from Hoerig and gave him the house key.

{¶6} Daniel Henry, a friend of Hoerig, testified that, in February 2007, Hoerig confided that his marriage with Claudia was failing and that they were going to divorce. Hoerig showed Henry the house on Broad Street where he intended to live after they separated.

{¶7} Brian Martin testified that, on March 10 (Saturday), 2007, he was an employee of Slugmasters gun shop in Leavittsburg. On that date, he sold Claudia a Smith & Wesson .357 Magnum Revolver, Crimson Trace Laser Grip (which he installed for her), and .38 and .357 hollow point ammunition. According to Martin, Claudia claimed she wanted a firearm for home protection, asked several questions, and made notes of their conversation in a concealed carry handbook.

{¶8} Richard Sliter, Jr. testified that, on March 10, 2007, he was an employee of

the JCL Shooting Range in Warren. On that date, Claudia used the range to practice firing a .357 Magnum with laser sights.

{¶9} Harry Dodge, a friend of Hoerig, testified that he was aware Hoerig intended to leave Claudia and had invited him to stay at his home. They were members of 910th Airlift Wing based at Youngstown-Warren Air Reserve Station. On the morning of March 15 (Thursday), 2007, Dodge learned that Hoerig had failed to report at the base the previous evening. Dodge contacted the police to request a welfare check on Hoerig.

{¶10} Ron Lane, formerly with the Newton Falls Police Department, testified that, on March 15, 2007, he was dispatched to a residence at 64 West Ninth Street in Newton Falls to perform a welfare check. Lane discovered Hoerig's body at the bottom of a flight of stairs.

{¶11} Pete Pizzulo, formerly a sergeant in the detective bureau of the Trumbull County Sheriff's Department, conducted an investigation of the killing. Pizzulo testified that, based on the odor and other indicators, Hoerig had been dead for a few days. His body was face-down and covered with a comforter and tarp. He had been shot three times. Two other shots had been fired, striking the floor near the body and continuing into the basement. There was a water bottle and a pair of shoes near the body.

{¶12} In an upstairs bedroom, Pizzulo found a bottle of alcohol on the bed. In the bedroom closet, a two by four had been screwed to the wall and a hole drilled in the middle of the board. The muzzle of a .357 Magnum, loaded and cocked, was inserted into the hole and aiming into the bedroom.

{¶13} Pizzulo attempted to contact Claudia by phone without success. A BMW belonging to the couple was found at the Pittsburgh airport and it was learned that Claudia

had flown from Pittsburg to New York and thence to her native Brazil.

{¶14} Andrew Chappell, a forensic scientist in the firearms section of the Ohio Bureau of Criminal Investigation, testified that the bullet fragments and cartridges recovered from the scene were .38 caliber hollow points fired from the .357 Magnum found in the bedroom.

{¶15} Christopher Jester, a Trooper in the Ohio State Highway Patrol's Crash and Crime Scene Reconstruction Unit, testified that, based on the trajectory of the two bullets striking the floor, the shooter would likely have fired from the landing at the top of the steps or from the first and second step at the bottom of the staircase.

{¶16} Joseph Felo, a forensic pathologist and chief deputy medical examiner for Cuyahoga County Medical Examiner's Office, testified regarding the three gunshot wounds. Wound A was a nonfatal, penetrating gunshot wound caused by a bullet entering Hoerig's right upper back and travelling through the body at a steep upwards angle before shattering the right shoulder. Wound B was a fatal, penetrating gunshot wound where the bullet entered Hoerig's back closer to the neck and spine than the bullet that caused wound A. The bullet traveled downward and to the left piercing a lung and his aorta before ending behind the left nipple. Wound C was a fatal, perforating gunshot wound in which the bullet entered the right side of his head, exited the left side, and lodged in the floor underneath the head.

{¶17} Dr. Felo opined that wound A was caused first, possibly while Hoerig was bent over at the bottom of the stairs tying a shoe. Wound B was caused after Hoerig had fallen to the floor which prevented the bullet from exiting the body. Dr. Felo could not estimate the distance at which the bullets were fired causing wounds A and B. The bullet

that caused wound C was fired from a distance of 12 to 24 inches based on the presence of stipple wounds. Dr. Felo noted that there were no signs of bruises or lacerations on the body such as would indicate that Hoerig had fallen down the stairs.

{¶18} Anthony Sano, an agent with the Federal Bureau of Investigation, testified that, on January 17, 2018, he escorted Claudia on a flight from Brazil to the Akron-Canton Airport. During the flight, Claudia admitted killing Hoerig but remarked that "a wife doesn't kill her husband without having a good reason."

{¶19} Mike Yannucci, a sergeant with the Trumbull County Sheriff's Office, interviewed Claudia upon her return to Ohio on January 17, 2018. A video recording of the interview was played for the jury.

{¶20} In the video, Claudia stated she met Hoerig online and they dated for about two months before marrying in June 2005. According to Claudia, the marriage was volatile. She suffered two miscarriages and went into depression and claimed that Hoerig was also depressed. By 2007, she had become suicidal. After a confrontation with Hoerig on the morning of March 12, 2007, she shot and killed him.

{¶21} Claudia testified on her own behalf. She learned that she was pregnant for the third time on March 9 (Friday), 2007. She knew that Hoerig wanted to divorce, but she decided that she would try to save the marriage and, if that failed, she would kill herself. On that day she made arrangements to have $9,900, the balance of her personal savings, wired to her father in Brazil. She did not want Hoerig to have the money if she killed herself.

{¶22} Hoerig was out of town on the weekend of March 10 to 11. Claudia searched the internet for information about killing oneself with a gun.

{¶23} On March 10, Claudia purchased the .357 Magnum, the laser grip, and ammunition and took the gun to a firing range for practice. Claudia explained that, based on what she had learned from the internet, she was concerned about recoil and how that could affect her aim. She did not want to maim herself and survive the suicide attempt. She practiced with a laser sight to see what effect recoil was having on her accuracy. After practicing, she purchased additional ammunition at Gander Mountain.

{¶24} That weekend she built a gun mount in the closet of the upstairs bedroom because she continued to be concerned about recoil. She set the mount at the height her head would be at if she were sitting on a chair in front of the closet. She also drafted a letter pleading with Hoerig not to leave her which she sent to him as well as a few of his friends.

{¶25} Hoerig returned home on the morning of March 12, 2007. Claudia confronted him with the pregnancy and they began to argue. The argument became heated and they began to struggle. Then Hoerig stopped fighting and went to take a shower. Claudia started drinking and continued until she was intoxicated.

{¶26} When Hoerig finished showering (after about an hour), Claudia stood before him with the .357 Magnum pointed at her head. She wanted his attention and to impress upon him that she was both serious about having the baby and desperate to save their relationship. Hoerig stared at her for about ten seconds, then grabbed her and threw her to the floor. He told her "that was a good idea" but she should wait for him to leave the house and do it in the basement so she would not splatter blood on his paintings.

{¶27} Claudia testified she became very angry and described thus what happened next:

> I thought to myself, well, that's it. There's no more talking. I'm gonna kill myself. But you know what? If I'm gonna die, * * * he's gonna get his wish. This child is gonna die. The three of us are gonna die here right now. So I just -- when he started going down the steps, I just got up real fast and positioned myself behind him and I shot the first time, and he died instantly. * * * And he just fell. * * * The position that he fell on the floor, he never moved from that position.

Claudia believed that she "shot three times" and "hit him three times, saving two bullets for herself." She fired the second and third shots "next to him downstairs." She did not realize that she had fired five shots. She then went upstairs to the bedroom with the suicide mount to kill herself but the gun did not fire. She reloaded it.

{¶28} At this point, Claudia hesitated and decided to call her family in Brazil to say goodbye. They urged her not to kill herself but to return to Brazil instead. Claudia decided to flee. She went to the bank where she kept her passport in a safe deposit box and withdrew some money from a checking account and then proceeded to the airport in Pittsburgh.

{¶29} On January 24, 2019, the jury returned a verdict finding Claudia guilty of Aggravated Murder with a Firearm Specification.

{¶30} On February 8, 2019, the sentencing hearing was held. The trial court sentenced Claudia to "serve a prison term of life imprisonment without the eligibility of parole for twenty-five (25) full years, plus three (3) years on the firearm specification which shall be served prior to and consecutive to the underlying charge for a total imprisonment term prior to parole eligibility of twenty-eight full years."

{¶31} On March 6, 2019, Claudia filed a Notice of Appeal. On appeal, she raises the following assignments of error:

{¶32} "[1.] The jury's finding that appellant had committed [the] crime of

Aggravated Murder was not supported by sufficient evidence."

{¶33} "[2.] Appellant's conviction is against the manifest weight of the evidence."

{¶34} "[3.] The trial court erred and abused his discretion by repeatedly permitting the State to make arguments during opening statements."

{¶35} "[4.] The trial court erred and abused its discretion by making a series of evidentiary rulings, over the objection of appellant's trial counsel, which caused appellant to suffer prejudice in the proceedings."

{¶36} "[5.] The cumulative effect of various errors occurring in the trial of the case at bar served to deprive appellant of her right to a fair trial."

{¶37} Under the first assignment of error, Claudia argues there was insufficient evidence of prior calculation and design to sustain her conviction.

{¶38} "A claim challenging the sufficiency of the evidence invokes a due-process concern and raises the question whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 165; Crim.R. 29(A) ("[t]he court * * * shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction").

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "Evaluation of the witnesses' credibility is not relevant to a sufficiency analysis." *State v.*

Beasley, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 207.

{¶39} In order to convict Claudia of Aggravated Murder, the State was required to prove beyond a reasonable doubt that she "purposely, and with prior calculation and design, cause[d] the death" of Hoerig. R.C. 2903.01(A).

{¶40} "[T]he phrase 'prior calculation and design' is a single indivisible term, describing the *mens rea* element of proof necessary to find a violation of R.C. 2903.01(A)." *State v. Taylor*, 78 Ohio St.3d 15, 18, 676 N.E.2d 82 (1997).

> [R.C. 2903.01(A) employs] the phrase, "prior calculation and design," to indicate an act of studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must be sufficient to meet the proposed test of "prior calculation and design." In this context, *momentary deliberation is considered insufficient* to constitute a studied scheme to kill.

(Citation omitted.) *State v. Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶ 17.

{¶41} The Ohio Supreme Court has "traditionally" considered three factors in determining whether a defendant has acted with prior calculation and design: "(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or 'an almost instantaneous eruption of events?'" *Id.* at ¶ 20, quoting *Taylor* at 19. However, "it is not possible to formulate a bright-line test that emphatically distinguishes between the presence or absence of 'prior calculation and design.'" *Taylor* at 20. "Instead, each case turns on the particular facts and evidence presented at trial." *Id.*

{¶42} Claudia argues that the "mere fact that [she] purchased a firearm and then

learned how to use it does not support a conclusion that [she] intended to kill her husband." Appellant's brief at 3. We disagree. The fact that Claudia purchased a firearm with a laser sight, learned how to use it, and then used it to kill her husband at the next opportunity is evidence which, if believed, would convince the average mind, beyond a reasonable doubt, that she acted with prior calculation and design. By her own admission, Claudia and Hoerig's marriage was troubled and she purchased the firearm with the intent to kill - the issue being whom she intended to kill. Given the circumstances, the evidence is sufficient to support the conclusion that Hoerig rather than Claudia was the intended victim.

{¶43} Claudia also argues that her flight to Brazil might indicate consciousness of guilt that "**some** crime had been committed," but it is not evidence of prior calculation and design inasmuch as "[n]one of the travel arrangements had already been made when the homicide occurred and * * * one would expect to find **prior** travel arrangements had been made." Appellant's brief at 4. The fact that Claudia did not make arrangements to travel to Brazil until after Hoerig's murder bears on the weight of the evidence, and not its sufficiency.

{¶44} The first assignment of error is without merit.

{¶45} In the second assignment of error, Claudia claims the conclusion that she acted with prior calculation and design is against the weight of the evidence.

{¶46} "A verdict can be against the manifest weight of the evidence even though legally sufficient evidence supports it." *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 140. The weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue

rather than the other." (Citation omitted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25 ("a reviewing court asks whose evidence is more persuasive–the state's or the defendant's?").

{¶47} When reviewing a claim that a verdict is against the manifest weight of the evidence, the following test applies:

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

(Citation omitted.) *Thompkins* at 387.

{¶48} Claudia characterizes the State's theory of her "grand scheme * * * to go out and buy a gun, wait for [a] fairly lengthy period of time and execute her husband in their home" as an "implausible plan." She maintains, rather, that the evidence quite clearly demonstrates "an almost instantaneous eruption of events." It would be more accurate to say that Claudia's testimony describes "an almost instantaneous eruption of events," but neither the jury nor this court is bound to accept Claudia's version of events. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964) (the jury "may believe or disbelieve any witness or accept part of what a witness says and reject the rest").

{¶49} There are several pieces of evidence that cast legitimate doubt on Claudia's testimony. The fact that she purchased a laser sight is certainly more consistent with the intent to murder Hoerig than to commit suicide. Her purported preoccupation with the effect of recoil is not a convincing explanation. The fact that Hoerig was shot twice in the

back and a third time at close range in the side of the head is certainly consistent with a premeditated plan to murder him. Claudia herself betrays a self-consciousness about how her conduct would be perceived. When withdrawing money from her checking account prior to leaving Ohio, she left $300 in the account because she feared if she took all of the money it would be obvious that she killed her husband. Claudia also makes the dubious claim that her family in Brazil advised her to flee because Ohio still employed the death penalty. We have no disagreement with the jury's resolution of conflicting testimony in the present case. *Thompkins* at 387.

{¶50} The second assignment of error is without merit.

{¶51} In the third assignment of error, Claudia claims the trial court deprived her of a fair trial by permitting the State to make improper arguments during opening statements.

{¶52} "[T]he function of an opening statement by counsel in a jury trial is to inform the jury in a concise and orderly way of the nature of the case and the questions involved, and to outline the facts intended to be proved." *Maggio v. Cleveland*, 151 Ohio St. 136, 84 N.E.2d 912 (1949), paragraph one of the syllabus. "During opening statement, counsel is accorded latitude and allowed fair comment on the facts to be presented at trial." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 157. A prosecutor is not allowed "to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused" or "allude to matters which will not be supported by admissible evidence," and "must avoid insinuations and assertions which are calculated to mislead the jury." *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984).

{¶53} "The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1032, ¶ 110.

{¶54} Claudia contends "that the jury was prejudice[d] against her and inflamed by [the prosecutor]" by the following opening statements:

> Prosecutor: We have a case that happened, a crime that was committed on March 12, 2007. She fled to Brazil. In fact, the evidence will show in her long statement on videotape that's been admitted for review and will be played, * * * [she admitted] that she was guilty, and that she should serve a sentence in Brazil and be close to her family.
>
> Defense counsel: Objection, Your Honor.
>
> The Court: Again, Ladies and Gentlemen of the Jury, I'm going to overrule that. These are statements of counsel. These are not evidence.
>
> * * *
>
> Prosecutor: You will hear this defendant say she was guilty of the aggravated murder of her husband and that she should be tried and serve time for that crime in Brazil and serve 30 years. That's what she said. You will hear it. * * * The venue of this case by law is we have to prove beyond a reasonable doubt that she killed her husband in Trumbull County, Ohio. Individuals who commit crime under the law in this county don't get a trial where they're caught. That's why the law provides extradition, which you will hear from a U.S. Marshal and an FBI agent that they brought her back as a result of legal proceedings --
>
> Defense counsel: Objection. * * * What any of * * * that has to do with this, other than highlight the fact that -- inflame the jury that she -- she has the right to fight extradition. He is not allowed to comment on that right. He's commenting and making it appear that she wanted some sort of special treatment, inflaming the jury * * *.
>
> The Court: All right. Mr. Conley, I understand. You don't want any testimony regarding Brazil. I'm going to ask you to get away from Brazil and her flight and move it along.

* * *

Prosecutor: It's important in proving prior calculation and design that you consider the preparation, buying the guns [sic], where is the man located, the victim? What's the distance between the two? And how many shots were fired? And if you pursue a helpless human being and go down the steps, you've got to straddle him and go on the other side, bang, bang, bang, that's prior calculation and design.

Defense counsel: Objection.

The Court: Now you're arguing, Mr. Watkins. Back to opening statement, please.

* * *

Prosecutor: And then [Claudia] says, from her version that you will hear, that he is walking away -- walking away from the bedroom area. He was in the master bedroom, just took a shower, opened the door. She says, "I'm gonna kill myself." And he grabs the gun, pushes her down and lets her keep the gun. And she gets very angry. And he's walking on the stairs -- to the stairs -- to go down. We submit this did not happen.

Defense counsel: Objection.

Prosecutor: Your Honor, from the evidence, we submit --

Defense counsel: At this point, I'm going to ask for a mistrial, Your Honor.

The Court: You're starting to argue again, Mr. Watkins. Let's get back to opening statement.

Defense counsel: I am going to ask for a mistrial. It's been five or six times.

The Court: Your request for mistrial is denied.

{¶55} The only remark that was arguably improper was the claim that Claudia said "she was guilty of the aggravated murder." Claudia admitted to killing Hoerig and made other statements supporting a conviction for Aggravated Murder, but, as noted in her brief,

she "made no specific admission to that specific crime." Appellant's brief at 8. However, we do not find the remark to have been prejudicial inasmuch as the trial court, upon defense counsel's objection, repeated the admonition to the jury that such remarks were the statements of counsel and not evidence. Likewise, the prosecutor prefaced his remarks by reiterating for the jury: "As the Judge has said, the statement I'm about to give is my opinion, it's my view. It is not evidence." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 145 (the jury is presumed to follow the court's instruction that opening statements are "merely statements of counsel designed to assist you, but they are not evidence").

{¶56} We do not find the remaining statements to have been improper as instances of prosecutorial misconduct. They may have been argumentative, and thus beyond the proper function of the opening statement, but they did not misrepresent the evidence that was presented at trial or otherwise mislead the jury. Contrary to the claim of Claudia's trial counsel, the prosecutor's comments were not inflammatory. To the extent they were argumentative, the court sustained the objections and urged the prosecutor to "move it along."

{¶57} The third assignment of error is without merit.

{¶58} In the fourth assignment of error, Claudia identifies certain evidentiary rulings by the trial court as arbitrary and unreasonable.

{¶59} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991).

{¶60} At trial, defense counsel inquired of Detective Pizzulo: "And while you were in charge of the investigation, you didn't let your team know that you were stealing money from charity, did you?" The State objected. Claudia argued: "I'm offering a specific instance of conduct as to this witness's character and truthfulness under 608(B)."

{¶61} Evidence Rule 608(B) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness * * * concerning the witness's character for truthfulness or untruthfulness * * *.

{¶62} The trial court ruled that it would allow a limited inquiry, "very few questions." The following occurred:

> Defense counsel: I'll ask you the question again. While you were in charge of this investigation, you didn't let your team know that you were stealing money from a charity while you were in charge of this investigation, did you?
>
> Pizzulo: At the time of this investigation, I was not aware that this was being -- what was occurring was in violation of the charitable laws.
>
> Defense counsel: Okay. And you did not tell them about that, correct?
>
> Pizzulo: I did not know that I was doing something wrong.
>
> Defense counsel: And that had been going on for three years, true?
>
> Pizzulo: The charity was established for over three years, yes.
>
> Defense counsel: Okay. And that was, in fact, the reason you were terminated from the Sheriff's Department?
>
> Pizzulo: I was not terminated.

Defense counsel: You weren't?

Pizzulo: No.

Defense counsel: Okay, I'll move on.

{¶63} On appeal, Claudia contends that this evidence "went toward showing the officer[']s propensity for dishonesty" and that the limited inquiry allowed by the trial court "did not actually permit defense counsel to get the answers he actually sought." Appellant's brief at 10. We find no abuse of discretion in the court's ruling on this issue. It is not at all obvious, either from Claudia's appellate brief or the trial transcript, what answers were "actually sought." Pizzulo claimed that he was not aware that he was violating charitable laws at the time of the investigation and his violation of those laws did not affect his employment. Otherwise, it is not evident how this line of inquiry was relevant to Pizzulo's character for truthfulness or untruthfulness.

{¶64} Claudia argues the trial court improperly limited her questioning of Pizzulo with respect to a 911 recording of Hoerig reporting a prior attempted suicide by Claudia that occurred about a month before his murder. Defense counsel queried: "As part of listening to the 911 call, and through your investigation in reviewing the police report, you learned that [Hoerig] was unconcerned about that suicide attempt?" The State objected and the court sustained it. Defense counsel attempted further inquiry into the call without restriction from the court. The State objected that the call was hearsay and that the recording had not been subpoenaed. Nevertheless, defense counsel was allowed to ask Pizzulo if he was "left with an impression from listening to the 911 call or reviewing the police report as to [Hoerig's] state of mind and what he was saying in that call." Pizzulo answered that he was not. Defense counsel then presented Pizzulo with a written police

report of the incident and asked if that refreshed his recollection. Pizzulo answered that it did not. Defense counsel asked if Pizzulo had listened to the 911 call. He answered that he did not remember the call.

{¶65} Claudia maintains this testimony was material inasmuch as "[i]nformation that [Hoerig] had not been at all upset by her prior suicide attempt would have gone a long way to buttress the extremely outrageous and provocative statement that he had made to her immediately prior to his demise." Appellant's brief at 10. We agree that evidence of Hoerig's indifference to her well-being would bolster Claudia's testimony that he was indifferent to her putting the .357 Magnum to her head. The failure to obtain that evidence, however, is not due to any evidentiary ruling by the trial court. Pizzulo was allowed to testify but did not have any impression of Hoerig's state of mind during the call and, in fact, did not remember the 911 call. The police report used to refresh Pizzulo's recollection attested that a 911 call had been made but provided little information as to its content. Without the 911 call being played, there was nothing further that could be done to elicit the testimony desired by defense counsel from this witness.

{¶66} Finally, Claudia contends the trial court, over defense counsel's objection, allowed the State to elicit, "on redirect examination * * * for the first time," the opinion of an expert witness concerning the location of the husband when he had been shot as a result of the position of the body when it was found. She maintains "**[t]his subject had not been addressed in either direct or cross examination**" and for reasons "totally unknown" Dr. Felo "was permitted to address this subject for the first time on redirect." Appellant's brief at 10-11.

{¶67} "As a general rule, the scope of redirect examination is limited to matters

inquired into by the adverse party on cross-examination." *State v. Rucker*, 2018-Ohio-1832, 113 N.E.3d 81, ¶ 59 (8th Dist.). The Ohio Supreme Court has recognized, however, "[t]he control of redirect examination is committed to the discretion of the trial judge and a reversal upon that ground can be predicated upon nothing less than clear abuse thereof." *State v. Wilson*, 30 Ohio St.2d 199, 204, 283 N.E.2d 632 (1972). That new material may be inquired into on redirect is presupposed by the Supreme Court's ruling that "[o]nly where the prosecution inquires into new areas during redirect examination must the trial court allow defense the opportunity to recross-examine." *State v. Faulkner*, 56 Ohio St.2d 42, 46, 381 N.E.2d 934 (1978); *State v. Florencio*, 8th Dist. Cuyahoga No. 107023, 2019-Ohio-104, ¶ 7 ("[e]xceeding the scope of cross-examination in a redirect, however, is not per se error because the redirect is not necessarily limited to the subject areas discussed in cross-examination").

{¶68} In the present case, the subject of the location of Hoerig's body when he was shot was discussed on cross-examination and direct examination. On cross-examination, defense counsel asked Felo: "it's your opinion that Mr. Hoerig was laying on the floor, and it's the fact that he was laying on the floor that stopped the bullet from going through the skin?" Defense counsel continued: "is it possible that he was standing up and because of the number of different items [the bullet] hit going through that its velocity was low enough that it didn't have the ability to break through the skin?" Defense counsel inquired about Hoerig's position when initially shot: "If he fell down the stairs and instead of hitting any of the stairs, he just fell and then landed on the landing where the carpet is, would that change your opinion about whether there would be bruising or not?"

{¶69} Assuming, arguendo, that the trial court did allow the State to exceed the

scope of cross-examination on redirect, the error would not be reversible inasmuch as Claudia was given (and did utilize) the opportunity to recross-examine.

{¶70} The fourth assignment of error is without merit.

{¶71} In the fifth and final assignment of error, Claudia argues that the cumulative effect of the foregoing errors deprived her of a fair trial and require the reversal of her conviction. *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus; *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 257.

{¶72} With the sole possible exception of a non-prejudicial instance of prosecutorial misconduct during opening statements, we have found no errors in the lower court's proceedings and no basis for reversing for cumulative error.

{¶73} The fifth assignment of error is without merit.

{¶74} For the foregoing reasons, Claudia's conviction of Aggravated Murder with a Firearm Specification in the Trumbull County Court of Common Pleas is affirmed. Costs to be taxed against the appellant.

THOMAS R. WRIGHT, J.,

MARY JANE TRAPP, J.,

concur.