[Cite as *State v. Purley*, 2002-Ohio-2689.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-01-1005
Appellee	Trial Court No. CR-00-1588
v.	
James William Purley	**DECISION AND JUDGMENT ENTRY**
Appellant	Decided: May 31, 2002

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Robert L. Clark, Assistant Prosecuting Attorney.

Carol L. Damrauer, for appellant.

* * * * *

PIETRYKOWSKI, P.J.

{¶1} This is an appeal from a judgment of conviction and sentence entered by the Lucas County Court of Common Pleas after a jury found defendant-appellant, James William Purley, guilty of one count of aggravated robbery with a gun specification and guilty of one count of kidnaping with a gun specification. From that judgment, Purley raises the following assignments of error on appeal:

{¶2} "FIRST ASSIGNMENT OF ERROR

{¶3} THE PROSECUTOR'S MISCONDUCT DENIED THE DEFENDANT-APPELLANT DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION.

{¶4} "SECOND ASSIGNMENT OF ERROR

{¶5} DEFENDANT-APPELLANT'S CONVICTION IS SUPPORTED BY INSUFFICIENT EVIDENCE AND IS THEREFORE A DENIAL OF DUE PROCESS.

{¶6} "THIRD ASSIGNMENT OF ERROR

{¶7} DEFENDANT-APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} On April 10, 2000, the Lucas County Grand Jury issued an indictment against James William Purley, Maurice Lee Purley, Darek Lee Lathan and Mary Katherine Kowalik. The first and second counts charged all four defendants with aggravated robbery and kidnaping in connection with the August 15, 1998 robbery of the T.G.I. Friday's ("Friday's") restaurant on Airport Highway in Toledo, Lucas County, Ohio. Attached to both of those charges were gun specifications as to all four defendants. The remaining six counts of the indictment charged James William Purley with aggravated burglary, aggravated robbery and kidnaping on July 4, 1999, and aggravated burglary, aggravated robbery and kidnaping on November 28, 1999. Gun specifications were also attached to each of those six counts.

{¶9} Prior to the trial below, defendants Kowalik, Lathan and Maurice Purley moved to sever Counts One and Two from the remaining six counts of the indictment. At a pretrial conference on August 31, 2000, appellant joined in the motion to sever and the state indicated that it did not oppose severance. The trial court then agreed to proceed to trial only on the first two counts of the

indictment with the other counts against James Purley to be tried at a later date.

{¶10} The state's main witness at the trial below was Lonnie Ebersole. Ebersole appeared in court with counsel and, after being sworn in, was asked if he was involved in the Friday's robbery on August 15, 1998. Ebersole's counsel directed him not to answer the question and asserted Ebersole's Fifth Amendment privilege against self-incrimination. The court then, in the presence of the jury, granted the state's previously filed request for transactional immunity and explained to Ebersole that he could not be prosecuted or subjected to any criminal penalty with regards to his testimony. Ebersole then testified as follows.

{¶11} In the summer of 1997, Ebersole met Darek Lathan while working at Arlington Rack and Packaging. Ebersole and Lathan became friends and, through Lathan, Ebersole was introduced to and became friends with Maurice Purley, Mary Kowalik and James Purley. Sometime prior to the Friday's robbery, Maurice Purley asked Ebersole and the other defendants if they wanted to help him rob Friday's. Maurice then explained his plan. Maurice had worked at Friday's and knew that nobody cleaned the bathrooms after closing at night. He then said that after closing, there were large sums of money in the office while managers were counting the night's receipts. Maurice's plan was that he would drive the others to the restaurant where Kowalik and Lathan would go in to have a drink. Lathan would then go to the bathroom and hide in a stall until closing and Kowalik would leave. After closing, Lathan was to open the side door for Ebersole and James Purley. James Purley and

Lathan would hold the people up and Ebersole would tie them up with duct tape.

{¶12} Ebersole then testified that on August 15, 1998, he and the defendants followed Maurice Purley's plan and robbed Friday's. Ebersole stated that on the evening in question, Maurice Purley drove him and James Purley to Friday's after Kowalik and Lathan had driven to Friday's earlier in Kowalik's mother's car. Ebersole, Maurice and James Purley waited in Maurice's car until Kowalik came out and told them that Lathan was in the bathroom. Kowalik then drove away in Maurice's car, leaving her mother's car in the parking lot as the get-away car. Maurice waited behind the restaurant in that car while Ebersole and James Purley waited by the side door for Lathan to let them in. After waiting for approximately one and one-half hours, Lathan opened the side door for Ebersole and James Purley. Ebersole testified that all three of them had guns and that he was wearing brown pantyhose to cover his face. He also stated that Lathan was wearing a red bandana and a black wig. They then approached the first employee they saw, a black man who was sweeping, and forced him to the ground. Ebersole duct taped his hands behind his back. They then approached a second employee, who was washing dishes, forced him to the ground and Ebersole taped his hands. They next approached a third employee, a white man, and ordered him to take them to the office. After the third employee succeeded in getting the manager to open the door, the employee was passed back to Ebersole, who taped his hands and forced him to the floor. Lathan then went into the office and told the manager to open the safe while Ebersole stood

in the doorway and James Purley watched over the employees. Ebersole testified that after the robbery, they returned to Maurice Purley's house and split the money four ways with Ebersole, James Purley, Maurice Purley and Darek Lathan each getting $1,600. He also stated that he and Darek Lathan took Kowalik's mother's car back to Kowalik later that night.

{¶13} Ebersole was then cross-examined by all four defense attorneys. During cross-examination, Ebersole admitted that by testifying in the present case, he would not be prosecuted for the Friday's robbery and, therefore, would not be subject to a maximum of 23 years in prison. He also stated that in exchange for his testimony, he was only convicted of a misdemeanor offense for a robbery that he had committed in Sylvania, Ohio. In committing that offense, Ebersole admitted that he broke into a home, held the occupants at gunpoint and robbed them. Ebersole was sentenced to serve 120 days in jail on reduced charges in that case. In addition, for a robbery that he committed in Oregon, Ohio, Ebersole stated that he was promised that he would only be convicted of a misdemeanor offense. With regard to that offense, Ebersole admitted that he again broke into a home, held the occupants at gunpoint and robbed them. Nevertheless, he pled guilty to a first degree misdemeanor. Although Ebersole had not yet been sentenced in that case, he stated that the maximum penalty he was facing was six months local jail time.

{¶14} Ebersole admitted that those sentencing deals, as well as the grant of immunity in the present case, all depended on his testimony implicating the four defendants in the present case. He

further stated that the sentencing deals did not motivate him to lie and that a "lifestyle" change had prompted him to testify against the defendants. Ebersole admitted, however, that this "lifestyle" change only came about after he was arrested in January 2000. At that time, Ebersole was pulled over for speeding, but a search of his car revealed four and one-half ounces of marijuana, a handgun, a ledger book, and travelers checks. The travelers checks tied Ebersole to one of the home invasions. Thereafter, Ebersole told a Detective Brannon about the Friday's robbery. Finally, on redirect examination, the prosecutor questioned Ebersole about the Sylvania and Oregon robberies. Prior to that questioning, however, the prosecutor requested permission to inform the jury through Ebersole's testimony that James Purley was the person involved with Ebersole in the Oregon and Sylvania home invasions. The court refused. Ebersole then testified that although he was involved in robberies at Friday's and in Sylvania and Oregon, he was not the leader of those robberies.

{¶15} Other witnesses to testify at the trial below included employees of Friday's who were present during the robbery. Eric Wheatley, a dishwasher, stated that on the evening of the robbery, he was working the 5:00 p.m. to 2:30 a.m. shift and was getting ready to "punch out" when a man wearing a ski mask pulled a gun on him, said "This is a robbery," and told Wheatley to get down on the floor. Wheatley complied. Then, a second assailant taped his hands behind his back with duct tape. Thereafter, Wheatley kept his head on the floor as directed. Wheatley described the first assailant as a dark skinned black man, approximately five feet

eight inches tall, and weighing approximately 235 pounds. The assailants then asked Wheatley where the office was. Wheatley nodded in the direction of the manager's office and stayed on the ground. He was in that position for ten to fifteen minutes after which he heard the assailants leave the restaurant through the back door. On cross- examination, Wheatley testified that he did not know if it was a Friday's policy for the cleaning crew to check the bathrooms for customers when they were closing up. He also testified that he knew Maurice Purley and that Maurice worked as part of the cleaning crew at Friday's, but he did not see Maurice on the night of the robbery.

{¶16} Terry Pasquale, the general manager of Friday's, stated that Friday's closes at 2:00 a.m. and that after closing, he has about an hour and one-half worth of paperwork to do before he leaves, including counting out the receipts for the evening. He stated that when he counts out the evening's receipts, he and David Milear, the assistant manager, keep the door to the office locked. Pasquale further testified that he knows Maurice Purley and that Maurice worked in Friday's cleaning crew for approximately one year until Pasquale fired him shortly before the robbery. On cross-examination, Pasquale stated that the cleaning crew duties include cleaning the bathrooms, but he admitted that he never specifically directed the employees to make sure that the bathrooms were clean and vacant after closing. In testifying about the night of the robbery, Pasquale stated that while he and David Milear were in the office counting the receipts, Robert Spence, a dishwasher, knocked on the door. Seeing that it was Spence, Pasquale unlocked the

door. As he unlocked the door, a black man approximately five feet eight inches tall and wearing a black or blue ski mask came from behind the door holding a gun and forced his way into the office. The robber then told him and Milear to get down on the floor and threatened to shoot them if they did not comply. A second man then entered the office, directed Pasquale to the inner office and told him to open the safe. Pasquale could not describe this second man and did not know if he was carrying a weapon. Pasquale opened the safe and the robber took approximately $6,600. Pasquale was then taken out of the office at gunpoint and told to lay on the floor next to the other employees. He complied and stayed on the floor until the robbers left. Upon further examination, Pasquale testified that the robbers seemed to know where they were going. Pasquale stated he told the police that he was ninety percent sure that the man holding the gun was Maurice Purley; however, the robber did not have gold teeth, which Maurice has. Pasquale also gave the police names of other former employees who could be suspects. With regard to other employees who were present during the robbery, Pasquale testified that in addition to Wheatley, Kim Goebel was bound at the wrists and placed on the ground near the front door and that Robert Spence was on the ground near the office. After the robbers left, Pasquale got up and realized that Goebel was gone. The bartender, Barbara Savery, was also gone.

{¶17} On the night of the robbery, Robert Spence was washing dishes in the kitchen when he saw three masked gunmen enter the kitchen. Spence described the gunmen as two black men, each about five feet seven or eight inches tall, and one white man about

"five-eight [or] six-one." Spence further described the masks as frosted Halloween type masks and believed that the gunmen also had stockings over their heads. The gunmen asked him to take them to the manager's office and Spence complied. On cross-examination, Spence testified that it was clear to him that the gunmen did not know the way to the office. The white gunman then ordered Spence to get the manager's attention which Spence did by knocking on the door. Spence testified that after Pasquale opened the door, the white gunman ordered Spence down on the floor and duct taped his hands together behind his back while the black gunmen went into the office. Spence stayed on the floor until the gunmen left.

{¶18} Dave Milear, the Friday's assistant manager, also testified at the trial below. Milear's testimony was consistent with that of Pasquale.

{¶19} The last witness to testify at the trial below was Detective Martin Shaber of the Toledo Police Department, who was called by counsel for Maurice Purley. Shaber stated that he investigated the Friday's robbery and interviewed the Friday's employees on the night of the robbery. Based on those interviews, Shaber listed four suspects on his report. Suspect number one was listed as an Hispanic male who spoke with an accent, suspect number two was listed as a light-skinned black male, and suspects numbers three and four were listed as white males. After the night of the robbery, Shaber investigated the case and contacted past employees, including Maurice Purley. Maurice came into the police station to talk to Shaber and freely answered his questions but denied any involvement in the robbery. By the end of November 1998, however,

the case was moved into inactive status as the investigation had failed to produce a suspect. Then, in early 2000, Detective Brannon contacted him about the Friday's robbery.

{¶20} At the conclusion of the evidence, the state proceeded to its closing argument, which is the primary focus of this appeal. During the state's initial closing, the prosecutor made a number of statements of personal belief regarding the credibility of witnesses, several of which were objected to by defense counsel. The court overruled the objections and the closing argument continued. Thereafter, in his rebuttal closing argument, the prosecutor again made statements of personal belief regarding the credibility of witnesses. In addition, the prosecutor made the following disparaging remarks about defense counsel's arguments:

{¶21} "Go through briefly some of the things that each defense attorney told you, and some of the things that I'm going to tell you. In order to figure out what they just said, you have to involve yourself in what we call scatological studies. What is that? It's an examination or determination of an animal's health through the examination of his droppings. In this particular case, I think the bull is sick."

{¶22} Finally, the prosecutor twice turned to face the defendants after commenting that Ebersole did not do the home invasions alone. Defense counsel did not object while the statements were being made. Rather, at the conclusion of the rebuttal, Maurice Purley's counsel approached the bench and moved for a mistrial on the grounds of prosecutorial misconduct. Specifically, counsel argued:

{¶23} "MR. WITTENBERG: I didn't interrupt

{¶24} because I didn't want extra attention. I move for a mistrial on the basis when, he, stated that Lonnie was wasn't alone, he turned around, looked at Lathan and Purley and when he said Lonnie wasn't the leader, he turned around and looked at the defendants again. That's totally inappropriate. The case was severed. It's prosecutorial misconduct. It's just - you can't --

{¶25} "MR. CLARK: I was looking at the back row."

{¶26} The court denied the motion and proceeded to charge the jury. Included in the charge was an instruction that closing arguments of counsel are not evidence and are not to be considered as such. There were, however, no curative instructions regarding the prosecutor's improper remarks.

{¶27} After the jury returned guilty verdicts against all of the defendants on both of the charges and specifications, counsel for Maurice Purley renewed the motion for mistrial, to which the other defendants joined. The court asked for written motions and set the matter for a hearing.

{¶28} At the hearing on the motions for mistrial and in the briefs accompanying the motions, the defendants identified a number of improper remarks made by the prosecutor during his closing which, the defendants urged, amounted to prejudicial prosecutorial misconduct. On November 22, 2000, the trial court issued a decision and judgment entry denying the motion for mistrial. In its ruling, the court identified thirteen instances in which the state's attorney made improper expressions of personal belief. The

court found these comments to be "manifestly improper."[i] The court also focused on the impropriety of the prosecutor's gestures toward the defendants when commenting on other home invasions committed by Ebersole and indicated that it did not find the prosecutor's explanation that he was looking at the back row to be credible. In particular, the court held:

{¶29} "The prosecutor's comments here were manifestly improper. His suggestion that one of the defendants was involved in the Oregon and Sylvania home invasions amounted to an expression of personal beliefs and alluded to matters outside the record. His other comments were either expressions of personal belief regarding credibility or personal opinions regarding guilt."

{¶30} Despite this finding, however, the court concluded that the prosecutor's misconduct did not amount to prejudicial error.

{¶31} It is this ruling that appellant challenges in his first assignment of error. Appellant asserts that the improper remarks made by the prosecutor in his closing argument amounted to prejudicial prosecutorial misconduct and deprived appellant of a fair trial.

{¶32} A motion for a mistrial is addressed to the sound discretion of the trial court. *State v. Glover* (1988), 35 Ohio St.3d 18, 19. When, however, the motion alleges prosecutorial misconduct, "a reviewing court must undertake a due process analysis to determine whether the conduct of the prosecutor deprived the defendant of his or her due process right to a fair trial." *State v. Saunders* (1994), 98 Ohio App.3d 355, 358, citing

State v. Johnston (1988), 39 Ohio St.3d 48, 60. Generally, conduct of a prosecuting attorney at trial shall not be grounds for reversal unless the conduct deprived the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24. 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 prejudice appellant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. In analyzing whether an appellant was deprived of a fair trial, an appellate court must determine whether, absent the improper questions or remarks, the jury would have found the appellant guilty beyond a reasonable doubt. *State v. Maurer* (1984), 15 Ohio St.3d 239, 267. Moreover, the prosecutor's conduct must be considered in the context of the entire trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410. The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 291. An accused is guaranteed a fair trial, not a perfect one.

{¶33} Generally, the state may comment freely on "'*** what the evidence has shown and what reasonable inferences may be drawn therefrom.'" *State v. Lott* (1990), 51 Ohio St.3d 160, 165, certiorari denied (1990), 498 U.S. 1017, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 82. Prosecutors, however, may not invade the realm of the jury by rendering their personal beliefs regarding guilt and credibility, or alluding to matters outside of the record. *Smith,* supra at 14. Moreover, they are not to "allude to matters which will not be supported by admissible evidence, DR 7-

106(C)(1), and '*** [a] lawyer should not make unfair or derogatory personal reference to opposing counsel. ***' EC 7-37." *Id.*

{¶34} In our view, the comments and actions of the prosecutor during his closing argument "crossed the line that separates permissible fervor from a denial of a fair trial." *Keenan*, supra at 409. While a number of the comments taken alone do not rise to the level of reversible error, the prosecutor's gestures, the equivalent of a "wink and a nod," were clearly meant to infer that all four defendants were involved in the home robberies in Sylvania and Oregon. Such an impermissible inference drew the jurors' attention toward the commission of other crimes, for which none of these defendants were being tried, and away from the issues at hand. In such a situation, the risk that the jury would convict the defendants of the crimes charged based on a perceived connection to other crimes is too great. As the court in *State v. Hart* (1994), 94 Ohio App.3d 665, 672, citing *Berger v. United States* (1935), 295 U.S. 78, and *Lott*, supra at 166, stated, "The latitude afforded the prosecutor does not *** encompass inviting the jury to reach its decision on matters outside the evidence adduced at trial. For while he may strike hard blows, the prosecutor is not at liberty to strike foul ones." In the present case, the trial court went to great lengths to prevent the jury from connecting these defendants to the Sylvania and Oregon robberies. First, the court severed the first two counts of the indictment from the remaining eight. Then, the court forbade the prosecutor from informing the jury, through Ebersole's testimony, that James Purley was involved in the home invasions. The

prosecutor's gesture during closing argument had the effect of negating the court's prior orders. Moreover, it not only tied James Purley, who *was* indicted for those robberies, to the offenses but also tied to those crimes the other three defendants, who have *never* been indicted for those offenses.

{¶35} The harm caused by the prosecutor's gestures was compounded by his other instances of misconduct and the trial court's failure to recognize them. In particular, we find disturbing the fact that the trial court overruled defense counsel's objections to the prosecutor's expressions of personal belief regarding the credibility of witnesses, thereby giving the jury the impression that such expressions were permissible. In *Keenan*, supra at 410, the Supreme Court of Ohio found a trial court's similar dealings with a prosecutor's closing remarks to exacerbate the prejudice caused by the remarks themselves. In addition, the disparaging remarks that the prosecutor made about defense counsels' arguments, essentially calling them "bulls*!t" were the same types of remarks that the court in *State v. Smith* (1998), 130 Ohio App.3d 360, 367-368, found rose to the level of prejudicial prosecutorial misconduct. (Prosecutor said: "And he's really, really good at making, and maybe you've heard the term before, chicken salad out of chicken -- fill in the blank.")

{¶36} Finally, while the evidence presented at the trial below was compelling, it was not overwhelming. *Keenan*, supra at 410-411. The state's case rested entirely on the credibility of Lonnie Ebersole, an admitted coconspirator to the

{¶37} robbery and kidnapings. Ebersole faced twenty-three years in prison for the Friday's robbery and additional time for the robberies committed in Sylvania and Oregon. In exchange for his testimony he was sentenced to 120 days local jail time for the Sylvania robbery and was to be convicted of a misdemeanor offense for the Oregon robbery. He admitted that his deal was dependent upon his testimony implicating the four defendants. While his story of the robbery itself was corroborated by the employees present, the descriptions of the gunmen given to the police immediately after the robbery did not match the descriptions of the defendants. Accordingly, the only overwhelming evidence presented at the trial below established that Ebersole himself participated in the robbery.

{¶38} Given the numerous improper comments, gestures and suggestions presented by the prosecuting attorney in his closing argument below, and reviewing that closing argument as a whole, we cannot say that absent those remarks, the jury would have found appellant guilty beyond a reasonable doubt. Accordingly, the first assignment of error is well-taken. Given this conclusion, the second and third assignments of error are moot.

{¶39} On consideration whereof, the court finds that appellant was prejudiced and prevented from having a fair trial

{¶40} and the judgment of the Lucas County Court of Common Pleas is reversed. This case is hereby remanded for a new trial. Court costs of this appeal are assessed to appellee.

JUDGMENT REVERSED.

Melvin L. Resnick, J.

JUDGE

Richard W. Knepper, J.

JUDGE

Mark L. Pietrykowski, P.J.
CONCUR.

JUDGE

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[i]{¶a} The specific statements made by the prosecutor which the court below found to be "manifestly improper" were:

{¶b} (1) "He wasn't the kind of guy that would sit up and fabricate something. He's not dishonest. He came across to me as the way Forrest Gump was in that he was brutally honest and very careful when he said each thing."

{¶c} (2) "I think the fact that she was that deeply involved indicates that she knew what was going down."

{¶d} (3) "I think Lonnie said he must have waited out back an hour, hour and a half *** where they encountered Bob Spence and Eric Wheatley, and I think you know what happened from there."

{¶e} (4) "First of all, this particular robbery was done by all four, five, including Lonnie, for money. I think that's obvious."

{¶f} (5) "That actually happened. But how did he know. Did someone tell him? I don't know. I don't think that's possible.""

{¶g} (6) "Those are the things, ladies and gentlemen, that you have to look at and you have to make a judgment yourself as to Lonnie's credibility. Did he answer questions truthfully? I think he did ..."

{¶h} (7) "I was amazed he remembered that

over two years later."

{¶i} (8) "They didn't have him look at reports. I'm surprised he remembered there was a red bandana, and that coincides specifically with what Lonnie Ebersole said."

{¶j} (9) "I don't know why that's so important, because if you go in there almost before closing ***."

{¶k} (10) "And then there are other things he could have done so people would think he was just there. But I don't see any significance to the doors."

{¶l} (11) "He [Mr Feldstein] used several other words. What I'll tell you is don't worry about our case being compromised because it wasn't."

{¶m} (12) "Like I said, I'm not going to defend that first investigation. I don't see really the relevance of it because it doesn't do anything, didn't develop a suspect."

{¶n} (13) "*** because Mr. Feldstein read something to you about mere presence isn't enough to convict someone of complicity, I wanted to say to him, come on now, she drove a car, she left her car as a get-away-car ***."