

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-031021-001 DT

02/20/2015

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
K. Schermerhorn
Deputy

STATE OF ARIZONA

JUAN M MARTINEZ

v.

JODI ANN ARIAS (001)

KIRK NURMI
JENNIFER L WILLMOTT

CAPITAL CASE MANAGER

RULING

The Court has considered the Motion for Mistrial; Prosecutorial Misconduct That Occurred During the Cross-Examination of Dr. Robert Geffner (Supplemental Related to Misconduct that Occurred on January 26, 2015) filed February 7, 2015, the Objection to Defendant's Motion for Mistrial; Prosecutorial Misconduct That Occurred During the Cross-Examination of Dr. Robert Geffner filed February 13, 2015 and the Reporter's Transcript of Proceedings for January 26, 2015. The Court previously denied the defendant's oral motion for a mistrial during a bench conference on January 26, 2015. Defendant filed this written motion to support her renewed request for mistrial. The State requested time to file a written response. Neither party requested oral argument.

During the cross-examination of Dr. Robert Geffner, an expert witness for the defendant, the prosecutor used the name of an individual the Court had previously ordered sealed to protect the privacy of that witness. Within a short span of time, the prosecutor spoke the name of the individual two more times while posing questions to the witness. Each time the defendant objected and moved for a mistrial. The Court found the prosecutor's disclosure was inadvertent and denied the oral motion for mistrial. The Court recognized the prosecutor's actions occurred during a heated cross-examination. It was obvious the prosecutor was focused on phrasing his questions and, in the process, the name of the individual was unintentionally revealed. The Court found the defendant suffered no prejudice from the disclosure of the witness' name. The Court's order had been entered for the sole purpose of protecting the privacy of the individual.

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While the Court agrees that the prosecutor's questions violated that Court's order not to use the individual's name, such violation was clearly inadvertent and not intended to violate the order. The prosecutor's demeanor clearly so indicated. Defendant has failed to establish how the prosecutor's use of the individual's name prejudiced the defendant in any way. The Court finds the prosecutor's use of the individual's name will not reasonably affect the jury's verdict nor will it result in denying the defendant a fair trial.

Defendant alleges other grounds for a mistrial in her written motion. Defendant objected during the trial and the Court ruled on the objections on the record at the bench. The portions of the testimony the defendant cited in support of her motion are addressed below.

1. Defendant argues the prosecutor accused Dr. Geffner of changing the test results after he reviewed them. The transcript of the proceeding reflect that Dr. Geffner testified he changed the test results after he read them. R.T. January 26, 2015, pages 27 through 29. Dr. Geffner explained that changing the wording had nothing to do with the results but occurred after he realized he wrote the wrong thing, approximately one year after the results were in. R.T. page 29, lines 5 through 14. The Court finds the questions posed by the prosecutor were directed at the issue of whether the tests were properly administered, were the proper subject of cross-examination and, thus there was no prosecutorial misconduct.
2. Defendant claims the State accused Dr. Geffner of choosing the answers for the defendant, referencing page 33 of the transcript from January 26, 2015. The prosecutor asked Dr. Geffner: "But what you're doing there is you're not allowing her to pick what the traumatic event is, are you? You are picking it for her?" Dr. Geffner responded that he did not pick the traumatic event for the defendant. He further testified that the defendant filled out the questionnaire and they talked afterward and she provided the responses to him. The Court finds the questions posed by the prosecutor were the proper subject for cross-examination and thus there was no prosecutorial misconduct. The witness fully explained at that point, as well as during other testimony, his expert opinion about how the test should be administered.
3. Defendant claims the prosecutor accused Dr. Geffner of altering the test results to cover up for the defendant's untruthful answers. The prosecutor asked: "Actually isn't it true that you were afraid that because of what the answers had been in Exhibit 540, that she might again be less than truthful, isn't that..." The defendant objected and the objection was sustained as argumentative. See R.T. page 34. The prosecutor reframed his question and testimony proceeded. The Court finds no prosecutorial misconduct.
4. Defendant asserts the prosecutor chose to yell at Dr. Geffner, citing page 75, line 13. The transcript shows the defendant objected and the court overruled the objection.

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The Court did not find the prosecutor's volume to be inappropriate under the circumstances. The Court finds no basis to find prosecutorial misconduct.

5. Defendant alleges the prosecutor purposefully misled the jury by arguing that the defendant's test results showed she was only a little upset about the killing knowing that the actual test language was not used because of copyright concerns, citing to page 81. The prosecutor asked Dr. Geffner: "So in other words, if this now is talking about the choking and killing, she's just a little bit upset, right?" The defendant's objection was overruled. Dr. Geffner testified: "No. For whatever the hypothetical question was now it is not bothering her as much. If upset was the term, it's not bothering her as much now in jail than it did." The Court finds the question posed was an appropriate subject for cross-examination and there was no basis to find prosecutorial misconduct.

With regard to the allegation the prosecutor "yelled" at the witness and flailed his arms, the Court addressed that issue with the prosecutor at a bench conference. The prosecutor responded to the defense objection by stating the witness was not answering his question, was providing an explanation not responsive to his question and thus, he was entitled to direct the witness. The Court told the prosecutor that it would be appropriate to ask the witness to focus on the question but not to state he is putting "a spin on it" and sustained the defendant's objection. The Court further stated to the prosecutor: "I understand that you're frustrated with the witness. But try and refrain from raising your voice." The prosecutor agreed he would do so. See R.T. pages 82 through 85. After the discussion at the bench, the prosecutor was more careful to regulate his voice.

During the remainder of Dr. Geffner's rebuttal testimony on February 18 and 19, 2015, defense counsel asked the court to consider certain actions by the prosecutor as further evidence to support their motion for a mistrial. The Court ruled on each objection on the record at a bench conference. The Court denied all motions for mistrial. There is no transcript of those proceedings currently available to the Court.

Mistrial "is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570 ¶ 43, 74 P.3d 231, 244 (2003) and *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). Prosecutorial misconduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial. *State v. Aguilar*, 217, Ariz. 235, 172 P.3d 423 (App. 2007). To prove prosecutorial misconduct, the proponent must show : (1) the State's action was improper; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial. *State v. Ramos*, 235 Ariz. 230, 330 P.3d 987 (App. 2014) and *State v. Montano*, 204 Ariz. 413, 65 P.3d 61 (203)

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and *State v. Atwood*, 171, Ariz. 576, 832 P.2d 593 (1992). To prevail upon a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. Prosecutorial misconduct sufficient to justify reversal must be so pronounced and persistent that it permeates the entire atmosphere of the trial. *State v. Edmisten*, 220 Ariz. 517, 207 P.3d 770 (2009). There is a distinction between simple prosecutorial error and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial. *State v. Minnett*, 203 Ariz. 431, 438, 55 P.3d 774 (2002) *State v. Pool*, 139 Ariz. 98, 105, 677 P.2d 261, 268 (1984). Conduct is egregious when the material at issue was highly significant to the primary jury issue with the potential to have an important effect on the jury's determination. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). The trial judge is in the best position to determine the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and its possible effect on the jury and trial. *State v. Koch*, 138 Ariz. 99, 673 P.2d 297 (1983).

The scope of cross-examination is a matter left to this Court's discretion. *State v. Robinson*, 165 Ariz. 51, 57–58, 796 P.2d 853, 859–60 (1990). Arizona has "wide open" cross-examination, which means "cross-examination may extend to all matters covered by direct examination, and to any other matter within the knowledge of the witness having relevancy to the issues at the trial." *State v. Mincey*, 130 Ariz. 389, 405, 636 P.2d 637, 653 (1981) (quoting *State v. Gilreath*, 107 Ariz. 318, 320, 487 P.2d 385, 387 (1971)) (internal quotation marks omitted); Ariz. R. Evid. 611(b). The Rule is especially applicable to the cross-examination of expert witnesses. See *Slade v. Schneider*, 212 Ariz. 176, 180, ¶ 22, 129 P.3d 465, 469 (App.2006); *Emergency Dynamics, Ltd. v. Superior Court (Mohave Emergency Physicians, Inc.)*, 182 Ariz. 32, 35, 932 P.2d 297, 300 (App. 1997). The jury has been instructed about the credibility of witnesses and will again be so instructed at the close of evidence.

The Court finds the matters described above do not constitute prosecutorial misconduct and certainly not misconduct that raises a concern about the integrity or fairness of the trial. *State v. Ramos*, 235 Ariz. 230, 330 P.3d 987 (App. 2014) and *State v. Montano*, 204 Ariz. 413, 65 P.3d 61 (203) and *State v. Atwood*, 171, Ariz. 576, 832 P.2d 593 (1992).

The Court finds no basis to grant a mistrial.

IT IS ORDERED denying the Motion for Mistrial; Prosecutorial Misconduct That Occurred During the Cross-Examination of Dr. Robert Geffner (Supplemental Related to Misconduct that Occurred on January 26, 2015) filed February 7, 2015 and the oral motions made during Dr. Geffner's testimony on February 18 and 19, 2015.