Rel: 01/04/2008

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2007-2008

1040163

Ex parte Donald Deardorff

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Donald Deardorff

v.

State of Alabama)

(Baldwin Circuit Court, CC-00-151; Court of Criminal Appeals, CR-01-0794)

PARKER, Justice.

Donald Deardorff petitions for a writ of certiorari to review the decision of the Court of Criminal Appeals affirming

his convictions for capital murder and his sentence of death. We affirm. The facts pertinent to our review are as follows:

On September 22, 1999, Donald Deardorff, armed with a stolen handgun and accompanied by an associate, Millard Peacock, broke into the house of Ted Turner, a local businessman, with whom Deardorff had had some dealings. They awaited Turner's return to the house, at which time they subdued him. They kept Turner in a closet with his hands bound by duct tape. Over the course of the next 24 hours, Deardorff forced Turner to write 5 checks to Peacock for a total of $21,750. Peacock cashed the checks at a bank and gave the money to Deardorff. On September 24, 1999, Deardorff and Peacock drove Turner, whose hands and mouth were taped with duct tape and whose head was covered with a pillowcase that was taped in place, to the end of a logging road, at a point at which the road was blocked by a gate. There, they walked Turner, who had recently had knee surgery, to the end of the road and shot him four times in the head, killing him. Turner's body remained undiscovered until July 2001. Deardorff was convicted on several capital-murder and other charges and was sentenced to death.

Deardorff was charged in a 23-count indictment with capital murder and related offenses surrounding Turner's death. A jury convicted him of three counts of capital murder, seven counts of theft, and one count of receiving stolen property. After a penalty-phase hearing, a jury, by a 10-2 vote, recommended the imposition of the death penalty. After a separate hearing, the trial court followed the jury's recommendation and sentenced Deardorff to death. On June 25, 2004, the Court of Criminal Appeals affirmed the capital-murder convictions and the sentence of death but vacated the seven theft convictions because they violated Deardorff's double-jeopardy rights. Deardorff v. State, [Ms. CR-01-0794, June 25, 2004] __ So. 2d __ (Ala. Crim. App. 2004). The Court of Criminal Appeals remanded the case to the trial court for the limited purpose of vacating the seven theft convictions and the associated sentences. On September 17, 2004, the Court of Criminal Appeals, on return and remand, after the theft convictions had been vacated, affirmed the trial court's convictions and sentences, without an opinion. Deardorff petitioned this Court for a writ of certiorari directed to the Court of Criminal Appeals seeking review of 21

claimed conflicts and/or errors in the Court of Criminal Appeals' opinion. We granted certiorari on four grounds, including three evidentiary issues and Deardorff's claim that the trial court improperly found as an aggravating circumstance that the offense was "especially heinous, atrocious, or cruel" when compared to other capital offenses. Because no objection was made at trial on the evidentiary issues, Deardorff has petitioned this Court for a plain-error review of those issues under Rule 39(a)(2)(A), Ala. R. App. P.

Legal Analysis

I. Was the offense "especially heinous, atrocious, or cruel" when compared to other capital offenses?

Deardorff asserts that the Court of Criminal Appeals' holding that "'[t]he trial court's determination that the evidence established the § 13A-5-49(8) aggravating circumstance, that the murder was especially heinous, atrocious, or cruel, is fully supported by the record'" conflicts with both the record in this case and this Court's decision in Ex parte Clark, 728 So. 2d 1126 (Ala. 1998). Deardorff's petition at 24 (quoting Deardorff, __ So. 2d at __).

The trial court ruled that Deardorff's execution-style murder of Turner fell within the meaning of the "especially heinous, atrocious, or cruel" aggravating circumstance; the Court of Criminal Appeals determined that there was sufficient evidence to support that aggravating circumstance, stating:

> "From the moment Deardorff threatened Turner with 'blowing his brains out' to the moment he was forced to kneel, bound and with his head covered with a pillowcase secured with duct tape, Turner's fear for his life was undoubtedly great. ... The terror he experienced must have escalated tremendously when his mouth was taped and his hands were bound as he was taken away from his home, driven away in his own car. When the pillowcase was taped and he could no longer see where he was being taken, he had to know that his death was imminent."

__ So. 2d at __.

Deardorff disputes whether Turner was aware of his impending death. However, the evidence introduced at trial shows that at one point while Turner was being held captive by Deardorff and Peacock, Deardorff drew his gun, pointed it at Turner and told him to be quiet and say nothing or else Deardorff would blow his brains out. Turner pleaded with Deardorff, telling him that he would give him whatever he wanted so long as Deardorff did not kill him. Two months before his death, Turner had made a notation on his will

reaffirming its validity "just in case Don Deardorff is really crazy." Thus, there is sufficient evidence indicating that Turner was aware of impending death through the threat, the fears, the pleas, the final abduction in the car, and the forced walk down a dirt road.

The Court of Criminal Appeals repeatedly asserted in its opinion that Turner was forced to kneel on the ground before he was shot; however, the only eyewitness to the killing, Peacock, testified that he was not aware that Deardorff was going to shoot Turner, and he testified that "[Deardorff] walked [Turner] a few more feet and he shot him." Deardorff's brief at 83 and 85. The State concedes that evidence in support of those statements in the Court of Criminal Appeals' opinion that Turner was "forced to kneel" is lacking:

> "Deardorff makes much of the statements in the Court of Criminal Appeals' opinion that Turner was 'forced to kneel' before he died. This finding was not made by the trial court, nor did the State argue [that] this was the case. The evidence is silent on this question. But the finding is not necessary to support the [aggravating circumstance that the offense was especially heinous, atrocious, or cruel].... [S]tanding or kneeling, Turner had every reason to fear that his death was imminent and unpreventable. The trial court properly found that the murder of Ted Turner was 'especially heinous, atrocious, or cruel.' No error, much less plain error, occurred."

State's brief at 54-55. The absence of evidence that Turner was forced to kneel, however, does not negate the impact of the evidence previously cited showing Turner's fear and his knowledge of his impending death.

This Court discussed the meaning of the words "especially heinous, atrocious or cruel," as used in § 13A-5-49(8), Ala. Code 1975, in Ex parte Clark as follows:

> "We cannot depart from the established meaning of the words enacted by the Legislature--'especially heinous, atrocious or cruel'-- and apply those words to include murders that do not involve the infliction of torture on the victim. Such a departure would abandon the essential characteristic that made our previous applications of § 13A-5-49(8) compatible with the Eighth Amendment. We are bound to retain the interpretation of 'especially heinous, atrocious or cruel' that has provided a consistent and principled distinction between those murders for which the death penalty sentence is appropriate and those for which it is not. See [Maynard v.] Cartwright, 486 U.S. [356] at 363, 108 S. Ct. 1853 [(1988)]; Godfrey [v. Georgia], 446 U.S. [420] at 433, 100 S. Ct. 1759 [(1980)]."

728 So. 2d at 1140-41. This Court in Ex parte Clark refused to expand the definition of "especially heinous, atrocious or cruel" to include murder not involving torture:

> "The State urges us to hold that the 'execution-style' murder in this case, for which the record does not reflect torture of the victim, is nonetheless 'especially heinous, atrocious or cruel.' Such an expansion of the aggravating circumstance set out in § 13A-5-49(8) to encompass

> a murder not involving torture, merely because the State labels the murder an 'execution-style' slaying would abandon the very interpretation that the Eleventh Circuit held critical to the constitutional application of that aggravating circumstance. Indeed, the Supreme Court of the United States has held that a state supreme court's failure to apply its previously recognized limiting construction of an aggravating circumstance, which required a finding of torture or aggravated battery of the victim, rendered the application of the aggravating circumstance unconstitutional. Godfrey [v. Georgia], 446 U.S. [420,] 429, 432, 100 S.Ct. 1759 [(1980)]."

728 So. 2d at 1140.

When considering whether a particular capital offense is especially heinous, atrocious, or cruel, the Court of Criminal Appeals adheres to the standard set out in Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981), namely, that the particular offense must be one of those "'conscienceless or pitiless homicides which are unnecessarily torturous to the victim.'" Duke v. State, 889 So. 2d 1, 36 (Ala. Crim. App. 2002).

> "One factor this Court has considered particularly indicative that a murder is 'especially heinous, atrocious or cruel' is the infliction of psychological torture. Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent, impending death. Such torture 'must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering.' Norris v. State, 793 So. 2d 847, 861 (Ala. Crim. App. 1999)."

Ex parte Key, 891 So. 2d 384, 390 (Ala. 2004). See also Ex parte Rieber, 663 So. 2d 999, 1003 (Ala. 1995).

Deardorff has not shown any merit in his claim that the aggravating circumstance that the offense was especially heinous, atrocious, or cruel does not exist here. Being threatened with death, being held in captivity and confined to a closet, being transported by car while his head was hooded and his hands taped, being forced to walk down the dirt road while hooded and taped, and the events immediately preceding Turner's killing constitute psychological torture so as to meet the standard for a murder that is "especially heinous, atrocious, or cruel." There was no error here, and Deardorff is not entitled to any relief on this claim.

II. Did the trial court err in admitting evidence of Deardorff's prior bad acts?

Deardorff specifically challenged certain testimony that he asserts constitutes the improper admission of evidence of prior bad acts: testimony that Deardorff had previously killed several other people, that he had illegally possessed the handgun that he used to kill Turner, and that he had been incarcerated in the penitentiary.

Because no objection was made to this testimony at trial, Deardorff petitioned this Court for plain-error review of this issue, under Rule 39(a)(2)(A), Ala. R. App. P.

> "As this Court stated in Hall v. State, 820 So. 2d 113, 121-22 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001), regarding our standard of review when conducting a plain-error analysis:
>
> > "'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), the plain-error doctrine applies only if the error is "particularly egregious" and if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." See Ex parte Price, 725 So. 2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809, 143 L. Ed. 2d 1012 (1999); Burgess v. State, 723 So. 2d 742 (Ala. Cr. App. 1997), aff'd, 723 So. 2d 770 (Ala. 1998), cert. denied, 526 U.S. 1052, 119 S. Ct. 1360, 143 L. Ed. 2d 521 (1999); Johnson v. State, 620 So. 2d 679, 701 (Ala. Cr. App. 1992), rev'd on other grounds, 620 So. 2d 709 (Ala. 1993), on remand, 620 So. 2d 714 (Ala. Cr. App.), cert. denied, 510 U.S. 905, 114 S. Ct. 285, 126 L. Ed. 2d 235 (1993).'"

Irvin v. State, 940 So. 2d 331, 341 (Ala. Crim. App. 2005).

As to the testimony that Deardorff had previously killed several other people, we note that defense counsel, during

cross-examination of Walter Fambro, a convict to whom Deardorff had talked while they were both incarcerated, admitted into evidence a letter from Fambro to federal authorities detailing conversations Fambro alleged he had had with both Peacock and Deardorff about Turner's murder. On redirect examination, the prosecutor questioned Fambro concerning that letter. When asked to read a page of the letter, Fambro stated that Deardorff had mentioned to him that he had committed other murders. The now complained-of testimony by Fambro was based entirely on the letter admitted into evidence as a defense exhibit. State's brief at 30.

Likewise, as to the testimony that Deardorff had previously been incarcerated in a penitentiary, Alabama Bureau of Investigation Agent Andrew Huggins read from a report that had been admitted into evidence by the defense for impeachment purposes, which stated that Deardorff told police when he was arrested for Turner's murder that he was on probation. Deardorff now complains that this testimony was admitted in error, when this information was in fact placed in evidence by defense counsel.

The scope of cross-examination in Alabama is quite broad. Ala. R. Evid. 611(b). This means that any question may be asked on cross-examination that is relevant either to any substantive issue in the case or to the witness's credibility. See Ala. R. Evid. 611(b), Advisory Committee's Notes. The trial court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. Ala R. Evid. 611(a). Deardorff challenges both the testimony that he had previously killed several people and that he had been incarcerated and asserts that it constitutes the improper admission of evidence of prior bad acts under Rule 404(b), Ala. R. Evid. The testimony, however, was not offered to introduce Deardorff's prior bad acts and to show that he acted in conformity therewith, but was elicited on redirect examination regarding documents that had already been offered into evidence by the defense on cross-examination.

> "[O]n redirect examination, the object is to answer any matters brought out on the cross-examination of the witness by his adversary. Whether, on redirect examination, a calling party may elicit from a witness matters which do not rebut that which was brought out on cross-examination is within the discretion of the trial court."

Charles Gamble, McElroy's Alabama Evidence § 439.01(1) (5th ed. 1996) (footnote omitted). See Sistrunk v. State, 596 So. 2d 644, 647 (Ala. Crim. App. 1992).

> "It does not seem consonant with sound principles of judicial administration to allow a party to introduce evidence and assert on appeal that the trial court erred to reversal by admitting that evidence. In 32A C.J.S. Evidence § 1040(1) (1964) the appropriate rule is stated:
>
> > "'[A] party who has introduced certain evidence cannot subsequently object that ... it should not be given such consideration as its natural probative value entitled it to, or that it is insufficient to sustain a judgment based thereon.' (Footnotes omitted.)"

Peterson v. Jefferson County, 372 So. 2d 839, 842 (Ala. 1979).

> "'Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby.' Phillips v. State, 527 So. 2d 154, 156 (Ala. 1988). Although evidence that he had been convicted of a prior crime would not ordinarily have been admissible at trial, the appellant cannot claim that it was error to receive testimony concerning his arrest for a parole violation when he injected the issue into the trial."

Franklin v. State, 644 So. 2d 35, 38 (Ala. Crim App. 1994).

As to the testimony that Deardorff had been in illegal possession of the gun used to kill Turner, testimony was elicited that Deardorff had told Peacock that his

grandmother's house had been broken into and that the gun was reported stolen. However, Deardorff later found the gun but did not tell anyone it had been recovered; instead, he kept it. Deardorff had earlier lied about having a gun, but a gun that proved to be the murder weapon was subsequently found during a search of his car, along with the proceeds from the checks Deardorff had forced Turner to write. In a tape-recorded interview, Deardorff admitted that he had lied about having the gun because he was afraid of going back to the penitentiary. Earlier, Deardorff was arrested on a charge of possessing a firearm without a permit. But the actual offense here is possession of a firearm by a convicted felon.

> "'[T]he State is not permitted to give in evidence other crimes alleged to have been committed by the defendant unless they are so connected by circumstances with the particular crime charged as that proof of one fact with its circumstances has some bearing on the issue on trial other than to show in the defendant a tendency or disposition to commit the crime with which he is charged.'"

Ex parte Casey, 889 So. 2d 615, 618 (Ala. 2004) (quoting Garner v. State, 269 Ala. 531, 533, 114 So. 2d 385, 386 (1959)) (emphasis omitted).

Deardorff challenges the admission of this testimony -- two concerning prior bad acts and one concerning the source of the murder weapon, also involving a prior bad act. The first two were derived from evidence Deardorff had admitted, and under the doctrine of invited error he may not challenge evidence he presented to the court. The testimony regarding his retention of the murder weapon after having reported it stolen was related to the crime charged, in that it was intended to, and did, establish the source of the murder weapon and its traceability to Deardorff. His challenge to the evidence has no merit, and there was no error in admitting the testimony at trial.

III. Did the trial court err in allowing the State's expert witness to testify as to facts not in evidence?

Deardorff contends that the testimony of George Glaser, an agent of the Federal Bureau of Investigation who testified as an expert for the State, was based on hearsay and other collateral sources that were not admitted into evidence.

Rule 703, Ala. R. Evid., requires that the facts or data relied upon by the expert in testifying and procured by the expert other than by firsthand knowledge generally must be admitted into evidence. See Charles Gamble, McElroy's Alabama

Evidence § 127.02(5) (5th. ed. 1996). It is clear that under Alabama law the State must introduce into evidence the information upon which an expert relies. See Ex parte Wesley, 575 So. 2d 127, 129 (Ala. 1999) (holding that reversible error occurred where expert, in giving opinion on defendant's mental condition, based opinion in part on police reports and medical records that were not admitted into evidence).

> "Alabama has followed the traditional rule. Carroll v. State, 370 So. 2d 749 (Ala. Cr. App.), cert. denied, 370 So. 2d 761 (Ala. 1979); Hurst v. State, 356 So. 2d 1224 (Ala. Cr. App. 1978); Cordle v. State, 53 Ala. App. 148, 298 So. 2d 77, cert. denied, 292 Ala. 717, 298 So. 2d 85 (1974), cert. denied, 419 U.S. 1033, 95 S. Ct. 516, 42 L. Ed. 2d 309 (1974). However, in Nash v. Cosby, 574 So. 2d 700 (Ala. 1990), the Alabama Supreme Court modified the traditional rule by allowing a medical expert to give opinion testimony based in part on the opinions of others when those other opinions are found in the medical records admitted into evidence. However, as the Alabama Supreme Court noted in Ex parte Wesley[, 575 So. 2d 127 (Ala. 1999)], Nash did not change 'the traditional rule followed in Alabama that the information upon which the expert relies must be in evidence,' 575 So. 2d at 129 (footnote omitted). In Ex parte Wesley, the expert, in giving his opinion on the mental condition of the defendant in that case, based his opinion in part on police reports and medical records that were not in evidence. Following the traditional rule, as modified, the Wesley court found the expert's testimony inadmissible. More recently, in W.S. v. T.W., 585 So. 2d 26 (Ala. 1991), Justice Houston, the author of the opinion in Ex parte Wesley, in an effort to

clarify the rule in Alabama, stated in a concurring opinion, as follows:

> "'It is my understanding that an expert witness may give opinion testimony based upon facts of which he has personal knowledge; based upon opinions of others, if these are opinions of a type customarily relied upon by the expert in the practice of his profession; or based upon facts that are assumed in a hypothetical question. In any event, the facts known to the expert, the opinions of others of a type customarily relied upon by the expert in the practice of his profession, and the hypothesized facts must all be facts in evidence.'

"585 So. 2d at 29."

Madison v. State, 620 So. 2d 62, 68 (Ala. Crim. App. 1992).

Deardorff asserts that the prosecution relied on the testimony of Agent Glaser, using information obtained from two computers, to place Deardorff in a particular place and time to prove that Deardorff, and not Peacock, the only witness against him, was the killer. Agent Glaser analyzed the computers, searching for information provided by Tom Montgomery, an agent with the Federal Bureau of Investigation. Agent Glaser testified that Agent Montgomery gave him a list of words, all of which he found on the hard drives of the computers he examined. Agent Glaser "'was not sure exactly how

[Agent Montgomery] derived that information during the investigation, but when I got [the words] they were there."

The State contends that all the facts upon which Agent Glaser based his testimony were within his direct knowledge. State's brief at 35. Deardorff states:

> "Agent Glaser testified that his analysis of the computer hard drives was based on information provided to him by a third party, Agent Montgomery. ... In describing his methodology, Agent Glaser testified that [Agent] Montgomery gave him some information, including a list of words or part numbers ... and he was 'not sure exactly' how Agent Montgomery derived that information."

Deardorff's reply brief at 15.

However, before Agent Glaser testified, Agent Montgomery had already testified, and he presented substantial evidence that laid the foundation for Agent Glaser's analysis.

> "The relevance of computer searches performed by Agent Glaser had already been demonstrated by evidence admitted during Agent Montgomery's testimony. For example, documents found in a car Deardorff had used, which Agent Montgomery described as receipts from car parts ordered on the internet in Turner's name, were admitted into evidence. ... Similarly, Agent Montgomery testified that other website names were discovered based on reports from Turner's family that they had discovered websites on Turner's computer that were 'odd, unusual, out of character sites visited on the dates in question when Mr. Turner was missing.' ... Receipt for orders placed on Turner's credit card, provided by the credit card company and the various merchants, were

> also admitted into evidence. ... Agent Montgomery also testified concerning the seizing of the computers and the handing off of the computers to Agent Glaser for analysis."

Deardorff's brief at 35-36 n. 12.

Therefore, the basis for Agent Glaser's testimony regarding information that Agent Glaser sought on the computers had already been admitted into evidence when Agent Glaser testified. We find no plain error.

IV. Did the prosecutor's arguments in the penalty phase amount to improper "testifying"?

Deardorff asserts that the prosecutor improperly "testified" in the penalty phase of his trial. Specifically, Deardorff states:

> "The prosecutor presented as evidence facts, inferences, and opinions going to critical issues at the penalty phase .... The prosecutor offered testimony that the victim suffered 'extensive pain,' 'great fear in his heart,' and 'great torture in his mind' and that he was kept 'gagged and bound' in his house and dragged to his death."

Deardorff's reply brief at 21-22.

Deardorff fails to cite any authority from any court discussing what constitutes proper and improper argument by the prosecutor. Indeed, Deardorff's counsel states: "[T]his extraordinary misconduct apparently is infrequent in Alabama

capital trials, as undersigned counsel's research has occasioned no published decisions dealing with the precise situation presented here." Deardorff's reply brief at 20.

"'In judging a prosecutor's closing argument, the standard is whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process."'" McGowan v. State, [Ms. CR-95-1775, Dec. 12, 2003] __ So. 2d __, __ (Ala. Crim. App. 2003) (quoting Bankhead v. State, 585 So. 2d 97, 107 (Ala. Crim. App. 1989), quoting in turn Darden v. Wainwright, 447 U.S. 168, 181 (1986)).

A prosecutor has the right to present his or her impressions from the evidence and may argue every legitimate inference that can be reasonably drawn from the evidence. Wilson v. State, 874 So. 2d 1155, 1163 (Ala. Crim. App. 2003); Melson v. State, 775 So. 2d 857, 887 (Ala. Crim. App. 1999). The prosecutor's statements cited by Deardorff fall within the prosecutor's right to characterize the strength of the evidence and to suggest reasonable inferences from that evidence. See Liner v. State, 350 So. 2d 760, 763 (Ala. Crim. App. 1977). Nowhere did the prosecutor urge the jury to disregard the evidence or to substitute the prosecutor's

judgment for its own. As to the statement that Turner suffered "extensive pain," the evidence showed that Turner was gagged while in his home; that he had a broken cheekbone that the medical examiner testified was consistent with some sort of blunt-force trauma; and that he was forced to walk with a bad knee (Turner had undergone knee surgery shortly before he disappeared and was still, at that time, required to wear a knee brace, and his mobility was restricted). State's brief at 10. Millard Peacock, who assisted Deardorff in the kidnapping and murder, testified that they "got [Turner] out of the car and walked him down the road all the way to the end." Peacock and Deardorff each held one of Turner's arms so that he had to keep moving. The forced march of the injured Turner between two men down a road is not so far from "dragged" that the prosecutor's characterization of Turner's treatment constitutes plain error.

The prosecutor's comments here did not rise to the level of "testifying," and we find no error.

Conclusion

Based on the foregoing, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

See, Lyons, Woodall, Smith, and Bolin, JJ., concur.

Murdock, J., concurs in the result.

Cobb, C.J., and Stuart, J., recuse themselves.