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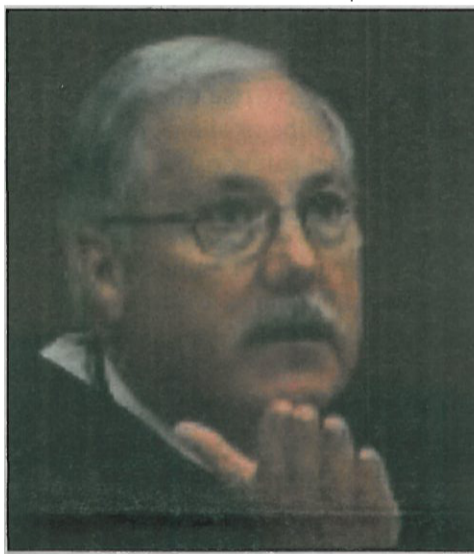


## NO ORDER IN THE COURT

Defendants Mr. & Mrs. Smith were found guilty of felony murder, involuntary manslaughter, cruelty to children, aggravated assault, false imprisonment, and reckless conduct based on the couple's treatment of their eight-year-old son, which led to the child's death. *Smith v. State*, S10A1281.

Mrs. Smith claimed on appeal that the trial judge erred in allowing the prosecutor to make an improper closing argument and that her lawyer was ineffective in failing to object to the improper argument. She argued that the judge erred in allowing the prosecutor to dim the lights in the courtroom, bring out a cake with lit candles, and sing "Happy Birthday" to the deceased victim during her closing argument. However, her lawyer failed to object to the argument by the prosecutor, and therefore waived review of this issue on appeal.

When a defendant believes the State has



Cobb Superior Court Judge James Bodiford received harsh words from Supreme Court Chief Justice Carol Hunstein for failing to maintain order in his courtroom

made an improper closing argument the defendant must object. The failure to object to the State's closing argument waives the right to rely on the alleged improper argument as a basis for obtaining a new trial. *Tidwell v. State*, A10A2183. An appeals court can review an issue even without an objection under the plain error rule. However, the plain error rule only applies to death penalty cases and other criminal cases in which the judge expresses an opinion on the evidence. *Paul v. State*, 272 Ga. 845 (2000). Therefore, the Supreme Court could only review the alleged improper closing argument under a claim of ineffective assistance of counsel. In order to succeed on her claim of ineffective assistance, Mrs. Smith had to prove both that her trial counsel's performance was deficient and that

there is a reasonable probability that the trial result would have been different if not for the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984).

The Supreme Court stated that it frowned upon the prosecutor's antics and found them to be highly inappropriate. The Court stated: "In this regard, we must remind all prosecutors in this State that it is not their job to pursue stunts and antics during their closing arguments that are designed merely to appeal to the prejudices of jurors, but to see that justice is done and nothing more. That duty should not be forgotten in an excess of zeal or the eager quest for victory in any given case." *Carr v. State*, 267 Ga. 701 (1997).

The Supreme Court found that Mrs. Smith's lawyer made a strategic decision not to ob-

ject to the "Happy Birthday" song during the State's closing argument. Specifically, he preferred to remain silent during the argument rather than run the risk of offending anyone on the jury by giving the impression that he was simply trying to disrupt the prosecutor's argument. *Braithwaite v. State*, 275 Ga. 884 (2002) (where attorney "reasonably chooses silence instead of objecting to improper closing argument, . . . we will not use hindsight to second-guess that decision on appeal"). Mr. Smith's lawyer testified at the motion for new trial hearing that he made a strategic decision not to object to the "Happy Birthday" song during closing argument because he thought that the "Happy Birthday" song was so "preposterous," "absurd," and "over the top" that "it would turn the jurors off," and that he should not call any more attention to it by objecting to it.

The Supreme Court held that the decision to remain silent was reasonable, considering the fact that the prosecutor's argument was so "preposterous" and "over the top" that it may have worked to the benefit of the defense even absent an objection. The Supreme Court felt the jury may have been alienated by the prosecutor's theatrical stunt during its closing argument, pointing out that the jury found Mrs. Smith not guilty on several of the charges against her, including two charges of felony murder, one of the first degree cruelty to children charges, and the malice murder charge.

The Court noted that "in order to ensure that the prosecutor did not let her "excessive . . . zeal or the eager quest for victory in this case lead her to forget her duty to see that justice is done and nothing more" the trial court would have been well within its right to control the courtroom by putting an end to the display of the prosecutor, even absent an objection from defense counsel. "Every court has power . . . to con-

Continued on page 7

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## PROSECUTOR'S MISCONDUCT from p. 1

trol, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." OCGA § 15-1-3 (4).

Chief Justice Hunstein wrote a dissent joined by Justice Benham stating that the Supreme Court could review the case because it presented an issue "affecting the fairness, integrity and public reputation of judicial proceedings caused by a trial court's violation of his duty to maintain order and decorum in his courtroom."

Chief Justice Hunstein agreed with the majority of Justices that the judge "would have been well within its *right* to control the courtroom by putting an end to the outrageous display of the prosecutor, *even absent an objection from defense counsel.*" She went further and stated: "what the majority fails to recognize, however, is that trial judges have not only the *right* to control their courtrooms: they have the *duty* to do so." The Chief Justice would find that the actions taken by the prosecutor were so "outrageous" that the fairness, integrity and public reputation of the criminal proceeding was adversely affected. Under these exceptional circumstances the Supreme Court could review the error caused by the trial court's breach of its duty to maintain decorum in the courtroom even in the absence of an objection. The Chief Justice referred to the Court of Appeals opinion in *Almond v. State*, 180 Ga. App. 475 (1986). In *Almond* the Court of Appeals held:

*The United States Supreme Court has stated the general rule many times: "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."*

*Almond* involved neither a death penalty case nor a violation of the judge expressing an opinion on the evidence. Therefore, according to Chief Justice Hunstein, the plain error rule can be applied to cases of the kind addressed in *Almond*.

In evaluating whether the prosecutor's actions seriously affected the fairness, integrity, and public reputation of the judicial proceedings, Chief Justice Hunstein noted the following facts:

*"The prosecutor, in the final moments of her concluding argument on behalf of the State, "clicked" her fingers at which signal one of the deputies in the courtroom turned out the lights and an associate prosecutor "popped out a cake out of a grocery bag" complete with eight candles, which were then lit with a lighter*

*brought into the courtroom; the prosecutor and her associate then proceeded to sing to "dear \_\_\_\_\_," the deceased victim, the celebratory words to "Happy Birthday."*

Chief Justice Hunstein continued:

"There was no legitimate reason for what the prosecutor did. It was neither argument nor rebuttal, because there is nothing at all in the record about birthdays and birthday cakes to raise even the slightest possibility that the prosecutor was drawing a reasonable inference from the evidence presented or the arguments made by defense counsel... The prosecutor's birthday production was not meant to be argument or rebuttal: it was a theatrical stunt spun out of



Cobb County Prosecutor  
Eleanor Dixon

"This prosecutor embarrassed every member of our profession with her behavior."

"Its sole purpose was to prejudice the rights of appellants before the jury."

*Chief Justice Hunstein*

pure fantasy. Its sole purpose was to prejudice the rights of appellants before the jury in an impermissible attempt to invoke the jury's passions and divert the jury from the evidence. It offended the dignity and decorum of the court and violated every precept of professionalism and fair play. Yet the trial court did absolutely nothing. The event played itself out without the trial judge performing his duty to maintain decorum in the courtroom. Moreover, after observing this "preposterous" performance, the trial court took no steps of any kind to minimize the prejudice. There was no rebuke to counsel; there was no direction to the jury to ignore the spectacle they had just witnessed; there was no charge to the jury that sympathy for the victim was to play no role in their verdict... The record is clear that the trial judge violated his duty to maintain order and decorum in his courtroom. ... It is beyond question in this exceptional circumstance that the trial judge's failure to maintain the decorum of his courtroom was an error that seriously affected the fairness, integrity and public reputation of these criminal proceedings, such that the plain error rule should be applied to this case, ... and these convictions reversed."

Chief Justice Hunstein also examined the case under an ineffective assistance of counsel claim. She found that Mrs. Smith's lawyer's failure to object was not based on a reasonable strategy and that there was prejudice shown as a result of the assistant district attorney's "theatrical stunt." The Chief Justice noted that "a reasonable attorney does not stand by silently and allow the prosecutor to figuratively toss the victim into the jury box, with the resulting prejudice to counsel's clients, out of concern that an objection essential to protecting the impartiality of the jury might "give the impression" that he was "disruptive." No reasonable attorney would sacrifice a client's fundamental right to a fair trial for such a ridiculous reason." According to the Chief Justice, the decision of Mr. Smith's attorney to gamble that the prosecutor's

stunt would "backfire" on the prosecution was also not reasonable.

Chief Justice Hunstein would also find prejudice. She noted in describing the behavior of the prosecutor that "it was an assistant district attorney -- an officer of the court and a representative of the State of Georgia -- who debased the dignity and respect of these criminal proceedings. Rather than adhering to the highest standards of professionalism and proper courtroom decorum ... this prosecutor embarrassed every member of our profession with her behavior. The uncontroverted evidence of the events orchestrated by the prosecutor and performed in front of the jury with the tacit permission of the trial court establishes conclusively that the prosecutor did not concern herself with appellants' right to a fair trial. She cared only to win at any cost without regard to how unfair, how undignified, how disrespectful her actions were ... The prosecutor's behavior was an unprofessional tactic undertaken for the purpose of ensuring that the State obtain a conviction. It is difficult if not impossible to imagine that the minds of the jurors would not have been influenced by the spectacle they observed." Chief Justice Hunstein would find that prejudice to appellants was so highly probable as a result of the prosecutor's unprofessional conduct that the Supreme Court cannot assume there was no prejudice.

The Chief Justice added that criminal proceedings must be conducted with dignity and respect. She stated: "We can not lose sight of the fact that the legitimacy of our criminal justice system is undermined when we allow proceedings to be conducted in such a manner that they are rightfully perceived to be unfair. As critically important as the constitutional rights of criminal defendants are, those rights are not the only matters that must concern us. We do a disservice to victims, witnesses, jurors, the bench and bar, and the people of the State of Georgia in general when we do not uphold the dignity and integrity of our criminal justice proceedings. Prosecutorial misconduct of this nature is never harmless because, regardless of the particular verdict rendered, the misconduct damages the perception of fairness of trials that is essential to the effectiveness of the system itself. Our courtrooms are not theaters; the participants in a criminal trial are not actors in reality television programs. It is not enough to "frown on" behavior that undermines the very foundation of the criminal proceedings. We have to *stop* it. And the only effective means of *stopping* it is to punish this behavior in the strongest possible manner."

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