

1. **STATE v. ACKS, 1986 Ohio App. LEXIS 7013 (Ohio Ct. App., Cuyahoga County June 5, 1986)**
 - a. **FACTS:** Defendant convicted of setting fire to house.
 - b. Three claims of misconduct by appellant – Court immediately dismissed the first as unfounded and said the other two were misconduct, but rendered harmless.
 - i. First Claim: McGinty vouched for the veracity of a witness's testimony during his close.
 1. Court determined that McGinty's, "comment that he believed she was telling the truth was impermissible. State v. Thayer (1931), 124 Ohio St. 1. A review of the record demonstrates that on several occasions the trial [*8] court gave a curative instruction. This isolated impermissible comment was rendered harmless by the court's instruction. Chapman v. California (1967), 386 U.S. 18; State v. Bayless (1976), 48 Ohio St. 2d 72.
 - ii. Second Claim: McGinty repeatedly alluded to evidence that was excluded during his close.
 1. The record demonstrates that the prosecutor repeatedly alluded to a report excluded as hearsay. State Fire Marshall, Pete Petronis, testified at trial. The prosecutor tried to have a four-page report, prepared by Petronis, admitted in evidence. The court excluded it. The prosecutor proceeded to repeatedly make reference to the report in his argument... On several other occasions the court instructed the jury that the prosecutor's statements were not evidence, and that they, the jury, were restricted to considering only the evidence. The court's curative instruction rendered this violation harmless.
 - c. The dissenting opinion written by Judge Jackson stated that the above acts of misconduct arose to the level of 'prejudicial.'
 - i. "The majority admits there were at least two incidents of misconduct which constitute error. They decline to find the errors prejudicial. I do not agree. A review of the record reveals that the prosecutor misstated the evidence, asserted his personal belief in the testimony of a pivotal witness, and repeatedly referred to matters outside the record with the implication that if the jury had heard such evidence, they would find the defendant guilty..."
 - ii. "After a thorough review of the record, I cannot conclude that on this evidence the jury would have found appellant guilty beyond a reasonable doubt absent prosecutorial

misconduct. The prosecutor has a duty to scrupulously avoid all efforts to obtain a conviction by going beyond the evidence before the jury or by putting the sanction of his office behind the testimony of witnesses. This duty was clearly violated to the prejudice of the appellant in the case at bar. I am persuaded that when the court recognizes but fails to sanction misconduct by an officer of the court the credibility of our system of justice suffers. Moreover, such inaction encourages disrespect and propagates misconduct in the courtroom.”

2. **State v. Canitia, 1993 Ohio App. LEXIS 3119 (Ohio Ct. App., Cuyahoga County June 17, 1993)**
 - a. **FACTS:** The trial court convicted defendant of aggravated burglary, kidnapping, domestic violence, rape, and intimidation. Three counts included an aggravated felony specification.
 - b. Multiple claims of prosecutorial misconduct. The majority did not find any merit to the claims. In a concurring opinion, however, Judge John Corrigan determined that misconduct did occur.
 - i. During direct examination of a witness, mother of the appellant, one relevant question was asked by appellant's counsel: Q. Mr. McDonnell: Did you ever receive a phone call from Gail Canitia, whereby she said that she was in an automobile being held against her will by your son, Tom? A. Joan Schmidt: No, I have not.
 - ii. "From this basis on direct examination, the prosecutor questioned Mrs. Schmidt concerning alleged mental illness of appellant, acts of violence against appellant's first wife, and appellant's general reputation for violence. The majority finds such cross-examination proper under Evid. R. 616 as it allegedly established the bias of the witness. The judgments of the trial court in this consolidated case were pronounced on June 18, 1990 and August 29, 1990. Evid. R. 616 did not become effective until July 1, 1991, thus this new rule simply cannot be applied to this case."
 - iii. Even assuming the new rule applied, however, Corrigan was still convinced it would have been improper.
 1. Evid. R. 616 provides as follows: "Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence."
 2. The prosecutor's very first question to Mrs. Schmidt was: "Does your son, Thomas J. Canitia, have a problem, emotional, psychological, and other types of problems, that you've discussed with him in the past?"
 3. No foundation was laid by the prosecutor to demonstrate how this information would show bias or prejudice on the part of the witness. Further, no foundation [*66] was ever established for questions concerning specific "other acts" by appellant. The witness was never once asked if she would lie to protect her son or family honor, or had done so in the past. No additional testimony indicated any such bias or prejudicial interest.
 - iv. Although I would find that the prosecutor's questioning of Mrs. Schmidt was improper and constituted misconduct, I believe

that in light of the overwhelming evidence of guilt against appellant, that this instance of misconduct was not prejudicial.

3. **STATE v. CHRISTOPHER, 1985 Ohio App. LEXIS 7260 (Ohio Ct. App., Cuyahoga County Oct. 3, 1985)**

- a. **FACTS:** Defendant, a police officer, was found guilty of stealing a bearskin rug, which had been seized as evidence during a criminal case.
- b. **MISCONDUCT:** Allegation that Mr. McGinty impermissibly referred to defendant's decision not to take the stand during trial.
- c. **ANALYSIS:**
 - i. The transcript of the prosecutor's closing arguments at page 474 reads as follows: By his arguments, he is conceding he walked with it to his trunk and put it there. But he decided to carry the stinky bearskin rug. He wants you to believe, incredible, that this brief period of 30, 40, 50 feet, whatever, it does rain on it and it started stinking, and he had to put it in a plastic bag and wash up. We have no evidence of this. Ladies and gentlemen, there is always a way out. The only way out in this case, though, sometimes people don't have the guts to do their job. Sometimes people don't have it. This guy didn't have the [*6] guts to do his job. Zaller had the guts to do his job when he got on the stand.

MR. D'ANGELO: Objection, your Honor.

THE COURT: Overruled.

MR. MCGINTY: Objection, you honor.

THE COURT: Overruled.

MR. MCGINTY: But this guy didn't have the guts.

MR. D'ANGELO: Objection, your Honor.

THE COURT: Mr. McGinty, hold it a minute.

MR. MCGINTY: I'm not finished with my statement.

THE COURT: Ladies and gentlemen, the prosecutor, hopefully is not intimating that the defendant did not testify. You may not do that, as you know, Mr. McGinty. As I explained to you, the defendant does not have to take the stand and testify. I'm making this brief comment to you so you will understand that. I don't know what Mr. McGinty was about to say, but please, do not make such a comment. Mr. McGinty. Go ahead.

MR. MCGINTY: Yes, your Honor. The defendant didn't have such guts that night to be a policeman and stick to his duty. He took it with selfishness, and let his position of power overwhelm him.

Although it is not clear what Mr. McGinty was going to say in completing his statement, it can be inferred that he was going to comment on the appellant's failure [*7] to testify. But he did not make such a statement. An objection was made before the sentence was completed. The judge gave specific curative instructions to counsel and to the jury concerning the fact that such comments were improper. The final form of the statement was not proper.

- d. **OUTCOME:** assignment of error is found without merit

1. State vs. Hunt, 1982 Ohio App. LEXIS 15415 (Ohio Ct. App., Cuyahoga County Mar. 18, 1982)

- a. Facts:** Defendant hit a child on a bicycle with his car. People came to aid the child and the defendant got into a fight with these people. Defendant left the scene, returned with his gun, shot towards the people providing aid and pointed his gun at them.
- b. Misconduct:** McGinty made several inappropriate statements during his closing argument.
 - i.** McGinty attempted to trump up the efforts of one person who aided the boy stating, "He made a tough decision and I'm glad he made that decision because maybe that boy is on this earth today because of that."
 - ii.** Later McGinty stated that the Defendant wasn't concerned about the boy that was hit stating, "He was the only one that wasn't concerned about the child. In fact, we had testimony that he was trying to get him up off the ground and saying there was nothing wrong with him. He's shaking him.."
- c. Ruling:** "In the case sub judice, the prosecutor's comments were essentially confined to the evidence presented. The fact that the automobile accident occurred as well as the manner in which the appellant reacted to it were relevant facts to this case. Any additional commentary on the part of the prosecutor was not so passionate or improper as to affect the appellant's right to a fair trial. In addition, both the prosecutor and the trial court admonished the jury that the closing statements were not to be considered as evidence. As such, the fourth assignment of error is not well taken."