6-25-2014

State v. Denton Respondent's Brief Dckt. 41512

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 41512
Plaintiff-Respondent,	)	
	)	Twin Falls Co. Case No.
vs.	)	CR-2012-13926
	)	
SHANE ROY DENTON,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature of the Case

Shane Roy Denton appeals his judgment of conviction upon a jury's guilty verdict for attempted strangulation. Although he did not object at trial, Denton argues the prosecutor committed misconduct during closing argument that amounted to fundamental error requiring reversal. However, Denton fails to meet his burden of establishing the requisite elements for fundamental error.

Statement of Facts and Course of Proceedings

The state charged Denton with felony attempted strangulation. (R., pp. 65-66.) The victim is Denton's wife, Helena Denton, with whom he lived at the time of the crime. (R., p. 66; Vol. II Tr., p. 5, L. 22 – p. 6, L. 8; p. 9, L. 25 – p. 10, L. 6.[1]) Helena testified at trial that she and Denton were having marital problems and got into a verbal argument. (Vol. II Tr., p. 11, L. 11; p. 12, L. 22 – p. 15, L. 20.) When Helena took a step away from Denton, he "grabbed [her] by the throat." (Vol. II Tr., p. 16, L. 12 – p. 17, L. 7.) Denton, who is 6'2" and 210 lbs, then picked up Helena, who was 94 lbs, and slammed her to the ground. (Vol. II Tr., p. 19, Ls. 8-25.) At that time, Helena was about six weeks pregnant with Denton's child. (Vol. II Tr., p. 7, Ls. 5-7; p. 88, Ls. 10-11.)

Helena's 16 year old son from a prior relationship arrived shortly after the attempted strangulation. (Vol. II Tr., p. 29, Ls. 1-10.) Helena "was having really

[1] Consistent with Appellant's brief, this Respondent's brief shall cite to the Transcript as follows: Vol. I – Voir Dire, Openings, Jury Instructions, Return of Verdict; Vol. II – Trial, Closings.

bad cramping, and . . . still couldn't catch [her] breath," so her son helped her get to the emergency room. (Vol. II Tr., p. 32, Ls. 10-25.)

At the hospital, Helena told the doctor she had been "assaulted by her estranged spouse while at home." (Vol. II Tr., p. 83, Ls. 22-23.) She told the doctor that Denton "grabbed [her] by the neck and lifted [her] up off the ground" then threw her on her back and continued to strangle her. (Vol. II Tr., p. 83, L. 24 – p. 84, L. 2.) Helena also told the doctor she "was having difficulty swallowing and neck discomfort." (Vol. II Tr., p. 84, Ls. 8-9.) The doctor noted "abrasions and bruising . . . on the left side of [Helena's] neck." (Vol. II Tr., p. 87, Ls. 2-3.) Helena declined a CT scan after the doctor discussed with her "the risks of radiation exposure at that time in her pregnancy." (Vol. II Tr., p. 88, Ls. 5-6.) A police officer who had interviewed Helena also testified at trial, confirming Helena's report of Denton's attempt to strangle her. (Vol. II Tr., p. 135, L. 25 – p. 136, L. 2.)

A jury found Denton guilty. (R., p. 198.) The district court sentenced Denton to a unified term of eight years with three years fixed. (R., pp. 275-80.) Denton timely appealed. (R., pp. 281-83.)

ISSUE

Denton states the issue on appeal as:

> Whether the prosecutor committed misconduct rising to the level of fundamental error by misstating the law, vouching for a witness, and disparaging defense counsel.

(Appellant's brief, p. 4.)

The state rephrases the issue as:

Has Denton failed to establish fundamental error as to his unpreserved claims of prosecutorial misconduct?

ARGUMENT

Denton Has Failed To Establish Fundamental Error As To His Unpreserved Claims Of Prosecutorial Misconduct

A. Introduction

Denton argues the prosecutor committed misconduct that infringed on his right to a fair trial. (Appellant's brief, p. 1.) Although the alleged misconduct was not objected to at trial, Denton asserts it rose to the level of fundamental error thus warranting reversal. (Id.) Applying Idaho case law to the record, Denton fails to satisfy his burden on appeal.

B. Standard Of Review

Where, as here, a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. State v. Perry, 150 Idaho 209, 222-23, 228, 245 P.3d 961, 974-75, 980 (2010). For this, a defendant must show error that (1) violates an unwaived constitutional right, (2) is clear or obvious from the appellate record, (3) and that affected the outcome of defendant's trial. Id. at 226, 245 P.3d at 978. "[P]rosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded." State v. Coffin, 146 Idaho 166, 170-71, 191 P.3d 244, 248-49 (Ct. App. 2008).

C. Denton Has Not Shown The Prosecutor Committed Error, Let Alone Fundamental Error In Closing Argument

The purpose of closing argument is "to sharpen and clarify issues for resolution by the trier of fact in a criminal case." Herring v. New York, 422 U.S. 853, 862 (1975); State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). A prosecutor has considerable latitude in closing argument. State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009); State v. Porter, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997); State v. Priest, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995). But a prosecutor may not "attempt[ ] to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial" and reasonable inferences drawn therefrom, as doing so, "impacts a defendant's Fourteenth Amendment right to a fair trial." Perry, 150 Idaho at 227, 245 P.3d at 979.

Denton argues the prosecutor committed three instances of misconduct during closing argument. (Appellant's brief, pp. 6-11.) As to each, Denton has failed to meet his burden of showing the requisite elements under Perry are satisfied.

1. Denton Has Not Demonstrated Fundamental Error Through A Misstatement Of Law By The Prosecutor During Closing

Denton asserts the prosecutor committed misconduct during rebuttal-closing by misstating the law regarding the use of hearsay. (Appellant's brief, pp. 6-8.) "It is prosecutorial misconduct for a prosecutor to misstate the law in closing arguments." Coffin, 146 Idaho at 170, 191 P.3d at 248 (citation omitted). The prosecutor's disputed comments addressed defense counsel's closing

argument that Helena's statements to the emergency room physician and police officer were inconsistent.

At trial, the emergency room physician and police officer, both of whom spoke with Helena after the attempted strangulation, testified about hearsay statements Helena made to them. (Vol. II Tr., p. 83, L. 4 – p. 84, L. 17; p. 138, L. 14 – 139, L. 19.) The doctor's evaluation notes were admitted in evidence as Defendant's Exhibit C, and the officer's Affidavit of Probable Cause was admitted (as an exception to hearsay per Rule 803(8)(A)) as Defendant's Exhibit D. (Vol. II Tr., p. 94, Ls. 10-16; p. 148, L. 14 – p. 151, L. 16.) Under Idaho Rule of Evidence 806, when a hearsay statement has been admitted in evidence, "the credibility of the declarant may be attacked, . . . [and] [e]vidence of a statement or conduct by the declarant at any time, inconsistent with declarant's hearsay statement, is not subject to any requirement that declarant may have been afforded an opportunity to deny or explain." I.R.E. 806.

In rebuttal-closing, the prosecutor said:

> [Defense Counsel] wants you to believe that there is [sic] inconsistencies in Helena's story . . . [he] had Helena on the stand, didn't he?
>
> But he never challenged Helena on [her story]. . . .
>
> What does he do? He waits and gets Officer Gates on the stand and says, Helena told you this and that's inconsistent, isn't it?

(Vol. II Tr., p. 210, L. 13 – p. 211, L. 2.) The prosecutor then argued:

> You can't use double hearsay to prove somebody is inconsistent. You have to ask the person who made the comment and allow them to respond.

(Vol. II Tr., p. 211, L. 12.) Denton contends these comments misstated the law, contrary to Rule 806. (Appellant's brief, pp. 6-8.) According to Denton, the

comments incorrectly instructed the jury that: (1) because the officer's testimony was double hearsay, it could not be considered; and (2) to use Helena's hearsay statements to demonstrate inconsistency, defense counsel was required to allow Helena to respond. (Appellant's brief, pp. 6-8.) However, this argument mischaracterizes the prosecutor's comments.

The disputed statements here were made as part of the prosecutor's greater rebuttal-closing that argued to the jury what the evidence showed or did not show. (See Vol. II Tr., p. 208-17.) The prosecutor's statements did not *instruct* the jury about the law. Rather, the statements were rebuttal *argument* that the *evidence* failed to demonstrate Helena's accounts of events were inconsistent. "Prosecutors are entitled to ask jurors to draw inferences from the trial evidence, including inferences about a witness's credibility." State v. Frauenberger, 154 Idaho 294, __, 297 P.3d 257, 266 (Ct. App. 2013) (citations omitted).

Even though defense counsel was not required by the rules to ask Helena about the alleged inconsistencies in her statements, it was proper for the prosecutor to point out that this inquiry did not happen. See State v. Dudley, 104 Idaho 849, 852, 664 P.2d 277, 280 (Ct. App. 1983) (proper to argue adverse inference from failure to present particular admissible evidence). Likewise, it was proper to point out that the allegedly inconsistent statement was double hearsay, thus the inconsistency might be attributable to the office rand not Helena. The prosecutor's arguments were proper, and to any extent they might be objectionable, do not rise to constitutional error.

Because Denton failed to object at trial, he must show that prosecutorial misconduct is "plain, clear, or obvious" from the record to satisfy the second prong of the fundamental error doctrine. State v. Jackson, 151 Idaho 376, 381, 256 P.3d 784, 789 (Ct. App. 2011). Taken in context, it is far from plain, clear, or obvious that the prosecutor's comments were intended, let alone interpreted, as statements of law. It is therefore not plain, clear, or obvious that the prosecutor committed misconduct.

Even if Denton could show clear misconduct, he cannot establish fundamental error because he cannot demonstrate the third prong – that the prosecutor's comments affected the outcome of his case. "We presume that the jury followed the district court's instructions." State v. Iverson, 155 Idaho 766, __, 316 P.3d 682, 692 (Ct. App. 2014). Here, the court instructed the jury as to the law, including:

> The evidence you are to consider consists of: sworn testimony of witnesses; exhibits which have been admitted into evidence; and any facts to which the parties have stipulated.
>
> . . .
>
> . . . The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is included to help you interpret the evidence but is not evidence.

(Vol. I, p. 168, L. 22 – p. 169, L. 7.) The court also instructed, "If anyone states a rule of law different from any I tell you, it is my instruction that you must follow." (Vol. I, p. 168, Ls. 15-17.) Because we presume that the jury heeded these instructions, Denton has failed to show the prosecutor's statements – allegedly instructing the jury incorrectly as to the law – impacted the outcome of his case.

2. Denton Has Failed To Show Prosecutorial Misconduct By Vouching

Denton argues the prosecutor committed misconduct by vouching for testimony by the emergency room physician, Dr. Ellsworth. (Appellant's brief, pp. 9-10.) It is improper for a prosecutor to "vouch for a witness by placing the prestige of the state behind the witness." State v. Wheeler, 149 Idaho 364, 368, 233 P.3d 1286, 1290 (Ct. App. 2010) (citation omitted). "Closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness." Id. at 369, 233 P.3d at 1291 (citations omitted). In this case, the prosecutor did not offer a personal opinion or belief about the credibility of Dr. Ellsworth, nor did he otherwise place the prestige of the state behind her.

In closing argument, the prosecutor said Dr. Ellsworth took notes of what the victim (Helena) told her, then stated:

> Why isn't that hearsay under Idaho law? Because it's believed that any statements you make to a doctor are statements that you make to tell them about your injuries.

(Vol. II Tr., p. 182, Ls. 6-8.) This is a correct statement of the law. I.R.E. 803(4). Denton does not argue otherwise. Where a prosecutor makes "a correct statement of law and . . . factual reference . . . grounded in the evidence," there is no misconduct. Felder v. Dickhaut, 968 F.Supp.2d 334, 345 (D. Mass., 2013). As already noted, "[p]rosecutors are entitled to ask jurors to draw inferences from the trial evidence, including inferences about a witness's credibility." Frauenberger, 154 Idaho at __, 297 P.3d at 266. Also, prosecutors may suggest that the jury consider common sense in rendering credibility determinations. Wheeler, 149 Idaho at 370, 233 P.3d at 1292.

Even if Denton could establish the prosecutor committed plain, clear, or obvious misconduct by vouching, to satisfy the second prong of a fundamental error analysis, he cannot show the alleged vouching affected the outcome of his trial. Again, we presume the jury follows the court's instructions regarding the law. Iverson, 155 Idaho at __, 316 P.3d at 692. Here, the prosecutor correctly articulated the exception to hearsay for statements made for purposes of medical treatment. Any danger that the jury could have perceived the statement as an instruction to "find Dr. Ellsworth's testimony credible . . . as a matter of law" (Appellant's brief, p. 10), was balanced by the court's instruction not to consider the attorneys' arguments as evidence, and to follow the court's instructions regarding the law. (See Vol. I, p. 168, L. 15 – p. 169, L. 7.) Accordingly, Denton has failed to establish fundamental error by prosecutorial vouching.

3. Denton Has Failed To Establish Prosecutorial Misconduct Amounting To Fundamental Error By Disparagement Of Defense Counsel

Finally, Denton contends the prosecutor improperly disparaged defense counsel during closing argument. (Appellant's brief, pp. 10-11.) It is "misconduct for the prosecution to make personal attacks on defense counsel in closing argument." State v. Gross, 146 Idaho 15, 19, 189 P.3d 477, 481 (Ct. App. 2008) (citing State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003)). Also, it is improper to disparage defense counsel by unfairly casting defense counsel's role. State v. Baruth, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1984). However, "[a] prosecutor has every legitimate right to point out weaknesses in a

defendant's case," which "can be done in many ways without attacking the defendant's counsel." Id.

Denton challenges the prosecution's statements in closing:

> [Defense counsel] never challenged Helena on any of those [inconsistent statements]. He didn't pick it up and say, didn't you say here in your statement da-da-da-da-da-da. He never asked her because he didn't want her to say, that's not what I said.
>
> What does he do? He waits and gets Officer Gates on the stand and says, Helena told you this and that's inconsistent isn't it?. . .
>
> . . . So if you can't point out discrepancies in somebody's testimony to that person, let's use somebody else.
>
> . . .
>
> . . . You know, if you can't break your witness, if you can't make them say something inconsistent, what do you do? You go after law enforcement. So sure enough, let's go after Officer Gates.

(Vol. II Tr., p. 210, L. 20 – p. 211, L. 14; p. 212, Ls. 19-22; Appellant's brief, pp. 10-11.) Comparing this case to Baruth, Denton contends "the prosecutor's misconduct . . . is clear from the record." (Appellant's brief, p. 11.) It is not.

In Baruth, the prosecutor's disputed statements included casting defense counsel as a "market[er]..., package[r]..., and huckster" of "doubt." 107 Idaho at 657, 691 P.2d at 1272. In contrast, here, the prosecutor did not malign the role of defense counsel. Instead, he pointed out what defense counsel did, what evidence defense counsel elicited, and what evidence counsel did not elicit from Helena. (Vol. II Tr., p. 210, L. 20 – p. 211, L. 9.) The prosecutor's closing focused on the evidence, not on counsel.

In Baruth, defense counsel objected to the prosecutor's statements, and the trial court "immediately issued corrective admonitions" which the appellate court found appropriate. Baruth, 107 Idaho at 658, 691 P.2d at 1273. Here,

because no objection was made, Denton must demonstrate fundamental error. Perry, 150 Idaho at 222-23, 228, 245 P.3d at 974-75, 980. Even if the record supported clear misconduct, which it does not, Denton cannot show the prosecutor's alleged disparagement of counsel affected the outcome of his trial.

According to Denton, the prosecutor's statements "cause[d] the jury to disregard defense counsel's attacks on [Helena's] credibility because . . . they were improperly or inexpertly presented." (Appellant's brief, p. 11.) But again, the prosecutor's comments were not about counsel, they were about the evidence. The prosecutor noted that defense counsel never asked Helena about an inconsistency in her statement "because he didn't want her to say, that's not what I said." (Vol. II Tr., p. 210, Ls. 23-24.) The prosecutor's argument is not that defense counsel acted improperly or even inexpertly, but that the jury could draw inferences from the omission of specific admissible evidence. The role of the jury is to "determine the credibility of the witnesses [and] weigh the evidence," State v. Horejs, 143 Idaho 260, 263, 141 P.3d 1129, 1132 (Ct. App. 2006); the jury's role is not to judge the performances by counsel. As already discussed, the court instructed the jury regarding their role. (See Vol. I, p. 168, L. 15 – p. 169, L. 7.) We must presume the jury followed court's instruction and did not disregard any evidence – whether for or against either party – based on their perceptions of counsel's performance.

Given the record and applicable law, Denton has failed to establish clear error or prejudice as to any of his assertions of prosecutorial misconduct.

Accordingly, Denton has failed to show fundamental error, and his appeal must be denied.

CONCLUSION

The state respectfully requests that this Court affirm Denton's judgment of conviction.

DATED this 25th day of June, 2014.

DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of June, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

DAPHNE J. HUANG
Deputy Attorney General

DJH/pm