4-22-2016

State v. Hoy Appellant's Brief Dckt. 43106

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43106**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR 2013-15210**
v.	)	
	)	
JOHN HARLAN HOY,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JASON D SCOTT
District Judge

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STATEMENT OF THE CASE

Nature of the Case

A jury found John Harlan Hoy, who represented himself at trial, guilty of felony eluding and four misdemeanor offenses related to a hit and run accident. During the closing arguments, the prosecutor asked the jury to find Mr. Hoy guilty, especially of eluding the police, because "what we're really here for is to protect the public." That statement appealed to the jury's passions and prejudices and suggested that the jury convict Mr. Hoy because he could commit a crime in the future, and thus amounts to misconduct. Because there is a reasonable possibility that the misconduct affected the outcome of his trial, Mr. Hoy asks the Court to vacate his convictions and remand this case to the district court for a new trial.

Statement of Facts and Course of Proceedings

At about 8:30 at night on September 30, 2013, a white van rear-ended Robert Garrett's car as he was sitting at a stop light on Curtis Road in Boise.[1] (Tr.,[2] p.251, L.12–p.255, L.9, p.287, L.4–p.288, L.16.) After Mr. Garrett and one of his passengers, Aaron Perez, got out to talk to the van's driver, the van drove away. (Tr., p.255, L.10–p.257, L.4, p.288, Ls.18–21, p.291, Ls.8–12.) Mr. Garret then called 911 and followed the van until Officer Basterrechea caught up to them. (Tr., p.257, L.7–p.59, L.14, p.291, L.18–p.292, L.3.) Officer Basterrechea pulled the van over near Capitol High School. (Tr., p.259, Ls.7–11, p.346, L.1–p.347, L.15.) Just after Officer Basterrechea walked to the passenger-side door and asked the driver to roll the window down, the van sped away. (Tr., p.259, Ls.12–24, p.348, L.3–p.349, L.15.) Officer

[1] This summary of the incident is based on the trial testimony of Mr. Garrett, Mr. Perez, and Officer Basterrechea.

[2] Citations to the transcript refer to the largest volume, which contains the January 21 and 22 jury trial.

Basterrechea followed the van, with his lights and siren running, at speeds up to approximately sixty miles per hour. (Tr., p.352, L.2–p.355, L.25.) When the van got to Glenwood and Marigold, Officer Basterrechea stopped the chase because he thought it was too dangerous. (Tr., p.356, Ls.1–24.) Using the van's license plate number and a driver's license photo, Officer Basterrechea allegedly identified Mr. Hoy as the driver. (Tr., p.357, L.10–p.359, L.13.)

Nearly eight months later, the police arrested Mr. Hoy. (R., p.14.) The State charged him with felony eluding a peace officer, I.C. § 49-1404; misdemeanor leaving the scene of an accident, I.C. § 49-1301; misdemeanor driving without privileges, I.C. § 18-8001(3); misdemeanor resisting or obstructing, I.C. § 18-705; and misdemeanor inattentive driving, I.C. § 49-1401(3). (R., pp.44–45.)

The State called four witnesses at trial: Mr. Garret, Mr. Perez, Officer Basterrechea, and Karen Schoenhut, who prepared a certified court packet containing Mr. Hoy's driving-related information. (*See generally* Tr., p.251, L.1–p.409, L.5.) Mr. Garret, Mr. Perez, and Officer Basterrechea testified that they recognized Mr. Hoy as the driver of the van. (Tr., p.255, L.15–p.262, L.8, p.289, L.8–p.290, L.24, p.348, L.25–p.350, L.9.) Mr. Hoy did not call any witnesses and did not testify. (Tr., p.442, Ls.3–20.) His theory of the case was that the State had the wrong person, and that the many inconsistencies in the State's case showed that it could not meet its burden. (*See, e.g.*, Tr., p.243, L.7–p.249, L.24 (Mr. Hoy's opening statement), p.464, L.10–p.491, L.15 (Mr. Hoy's closing statement).)

The jury found Mr. Hoy guilty of all charges. (R., pp.115–16.) On the felony eluding charge, the court sentenced Mr. Hoy to serve a unified term of five years, with two years fixed, and retained jurisdiction. (R., pp.157–58.) On the misdemeanor charges, the court sentenced Mr. Hoy to serve concurrent sentences ranging between 90 and 288 days, each of which was

satisfied by the time Mr. Hoy had already served. (R., pp.159–60.) Mr. Hoy filed a notice of appeal timely from the court's March 10, 2015 judgment of conviction. (R., pp.164–66.) The court later relinquished jurisdiction, but reduced Mr. Hoy's sentence on the eluding conviction to a total of four years, with two years fixed. (R., pp.186–87.)

ISSUE

Whether the prosecutor committed misconduct when he told the jury to find Mr. Hoy guilty of eluding because "what we're really here for is to protect the public."

ARGUMENT

The Prosecutor Committed Misconduct When He Told The Jury To Find Mr. Hoy Guilty Of Eluding Because "What We're Really Here For Is To Protect The Public"

The U.S. and Idaho Constitutions provide that no person can be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV; ID. CONST. art. I, § 13. Due process requires that criminal trials are fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate a trial that the resulting conviction is a denial of due process. *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005) (citing *Greer v. Miller*, 483 U.S. 756, 765 (1987)). For misconduct to amount to a due process violation, it must be of sufficient consequence that it denies the defendant his right to a fair trial. *Sanchez*, 142 Idaho at 318 (citing *Greer*, 483 U.S. at 765).

"[A]ppeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible" prosecutorial misconduct. *State v. Phillips*, 144 Idaho 82, 86–87 (Ct. App. 2007) (citing *State v. Raudebaugh*, 124 Idaho 758, 769 (1993); *State v. Smith*, 117 Idaho 891, 898 (1990); *State v. LaMere*, 103 Idaho 839, 844 (1982); *State v. Griffiths*, 101 Idaho 163, 168 (1980) (J. Bistline, dissenting). Similarly, "[i]t is undoubtedly improper for a prosecutor to raise the specter of possible future criminality of the defendant as a reason for the jury to return a guilty verdict." *State v. Brown*, 131 Idaho 61, 70 (Ct. App. 1998) (citing *State v. Reynolds*, 120 Idaho 445, 450 (Ct. App. 1991); *State v. Baruth*, 107 Idaho 651, 656 (Ct. App. 1984)). "Such a prediction of future offenses is not a 'fact' proven by the evidence and hence not an appropriate subject for the jury's decision or counsel's argument." *Id.*

When a defendant challenges un-objected to misconduct on appeal, he must persuade the Court that the error

(1) violates one or more of the defendant's unwaived constitutional rights;

> (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

State v. Perry, 150 Idaho 209, 228 (2010). To show the error was not harmless, the defendant has "the burden of proving there is a reasonable possibility that the error affected the outcome of the trial." *Id.* at 226.

During closing argument in this case, the prosecutor asked the jury to "come back with the verdicts of guilty,"

> Especially this one right here, yes, the state did prove beyond a reasonable doubt that this eluding was in a reckless likely—manner likely to endanger other people. *That's what we're really here for is to protect the public*, and that's why he is here because he put the public at risk. So I do ask you to find him guilty. . . .

(1/22/15 Tr., p.463, L.22–p.464, L.6 (emphasis added).) Mr. Hoy did not object.

The prosecutor's statement that "what we're really here for is to protect the public" was fundamental error. (Tr., p.464, Ls.2–3.) First, that statement amounts to misconduct which denied Mr. Hoy his right to due process. The prosecutor impermissibly appealed to the "emotion, passion or prejudice of the jury" by suggesting that it is the jury's job to protect the public, and that a conviction was required to do as much. *Phillips*, 144 Idaho at 86–87. Contrary to the prosecutor's claim, the jury's job is not to "protect the public"—it is to determine the guilt or innocence of the accused based on the evidence presented at trial. *See Baruth*, 107 Idaho at 657. Further, the prosecutor's statement "raise[d] the specter of possible future criminality" of Mr. Hoy as a reason for the jury to return a guilty verdict. *Brown*, 131 Idaho at 70. In other words, the prosecutor implied that the jury had to find Mr. Hoy guilty because otherwise he would keep putting the public at risk. This misconduct was of sufficient consequence to violate Mr. Hoy's rights to a fair trial and due process under the U.S. and Idaho Constitutions. *See* U.S. CONST. amends. V, XIV; ID. CONST. art. I, § 13.

Second, that error plainly exists in the record (*see* 1/22/15 Tr., p.463, L.22–p.464, L.6), and it was surely not a tactical decision by Mr. Hoy, a *pro se* defendant, to sit by silently rather than object, *see Perry*, 150 Idaho at 228.

Finally, there is a reasonable possibility that the misconduct affected the outcome of the trial. *See id.* at 226. A central question in this case was whether Mr. Hoy was the driver of the van. Three witnesses testified as much. Mr. Garret testified that, just after the accident, he saw the driver of the van from two to three feet away when he went back to check on him. (Tr., p.255, Ls.15–25). Mr. Garrett identified Mr. Hoy in the courtroom in January 2015, based on his recollection of the accident in September 2013. (Tr., p.261, Ls.13–25). When asked how certain he was that Mr. Hoy was the driver, Mr. Garrett first said Mr. Hoy "[l]ooks very familiar" (Tr., p.261, Ls.1–15), and later that he was "100 percent sure" (Tr., p.262, L.8). Mr. Perez testified that, at the time of the accident, he looked at the driver for "[m]aybe 20, 30 seconds" from about four or five feet away from the window of the van. (Tr., p.289, Ls.8–21). When asked if he would recognize the driver in the courtroom, he said "I think so" and explained:

> I'm pretty confident. Like I said, I mean, it was 8:30 at night. It was pretty dark, and I was four or five feet away. And honestly after an accident like that, you're just kind of—I've never been in an accident before.
>
> But it was a year—it was quite a while ago, but I'm pretty confident in that.

(Tr., p.290, Ls.1–24). Officer Basterrechea testified that he "got a good look at [the driver's] face," (Tr., p.348, L.25), and identified Mr. Hoy as the driver (Tr., p.350, Ls.4–9). Given that a central question in this case was whether Mr. Hoy was the driver and that the evidence presented at trial casts doubt on that question, there is a reasonable possibility that the misconduct affected the outcome of the trial. The misconduct requires remand.

CONCLUSION

Mr. Hoy respectfully asks that the Court vacate his judgment of conviction and remand to the district court for a new trial.

DATED this 22nd day of April, 2016.

_____/s/_____
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of April, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
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MPW/eas