

NOT DESIGNATED FOR PUBLICATION

No. 124,615

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

KEVIN DAVID CAMYN,
Appellant.

MEMORANDUM OPINION

Appeal from Barton District Court; CAREY L. HIPPI, judge. Opinion filed March 10, 2023.

Affirmed.

Michelle A. Davis, of Kansas Appellate Defender Office, for appellant.

Michael R. Serra, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., BRUNS and ISHERWOOD, JJ.

PER CURIAM: A jury convicted Kevin David Camyn of robbery and battery. Camyn pursued a direct appeal to this court and argues he is entitled to a new trial because the State committed reversible prosecutorial error during closing argument. We agree that the challenged remarks fall outside the latitude the prosecutor was allowed in summarizing his case to the jury but decline to find it denied Camyn his right to a fair trial and requires reversal of his convictions. Thus, those convictions are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 2018, Camyn was arrested for a single count each of robbery, criminal restraint, and battery. The district court granted a motion to evaluate Camyn's competency to stand trial. That evaluation revealed that Camyn was not competent to stand trial and the court ordered that he undergo treatment at Larned State Security Hospital. Camyn's stay at Larned was extended twice as he continued to work toward the level of competency required for trial.

Seven months after his initial intake, a new evaluation confirmed that Camyn was competent to stand trial and the case could go forward. During voir dire the State asked whether the potential jurors could remain neutral in their judgment if someone exhibited mental health issues. Camyn's counsel likewise inquired whether any of them would struggle to be impartial toward a person who suffered from substance abuse or mental illness. Only the State revisited the issue of mental health during its opening statement, and specifically as it related to Camyn's state at the time of the alleged crime.

Once the evidentiary portion of the trial got underway, Matt Huslig testified that he encountered Camyn along a bike trail when debris blocking the trail forced him to stop. Huslig stated that he saw Camyn yelling, screaming, and talking gibberish before he approached Huslig. According to Huslig, Camyn asked him for money but when told Huslig did not have any, Camyn called him a liar, patted him down, and took Huslig's cell phone from his pocket. Huslig managed to retrieve the phone immediately without resistance. He also informed the jury that Camyn shook his hand, then mentioned he touched poison ivy merely moments before. Huslig left a short time later, ending an encounter that totaled roughly 20 minutes.

The State also called Officer Jacob Graham as a witness. Graham testified that he interviewed Camyn after Huslig and his mother filed a complaint, and he then read the

report that he created at the time of the interview. According to that report, Camyn told Officer Graham that he was staying under the bridge and shared a conversation with Huslig. It also stated that during the officer's encounter with Camyn, Camyn talked to animals that were not present, yelled randomly, and had trouble walking without stumbling. The State admitted video footage of the interview from Graham's body camera into evidence and published it for the jury.

Camyn testified that the described incident did not happen, and he did not recall either the location or meeting Huslig. He claimed that the bridge in the video and photograph was not the same one he stayed under while passing through Kansas, and that the person in those exhibits simply looked like him but was not actually him. Rather, it might be his brother, who is like a twin. Camyn also stated that he remembered meeting two police officers under the bridge, but they did not arrest him, they merely asked which way he was headed. Camyn claimed he was taken into custody in Nebraska for these charges sometime after he left Kansas.

During cross-examination, Camyn maintained that the person in the video and photograph was not him and he did not remember any encounter with Huslig. He remarked that he was in jail for three years but acknowledged that time was actually spent in Larned State Security Hospital. The State questioned Camyn about his competency evaluation and asked whether he was taking medication currently and at the time of the incident under the bridge. Camyn testified that he was presently on medication but was not when these offenses occurred.

During closing arguments, the State compared the current state of Camyn's mental health with what it was at the time of the alleged crime. By contrast, Camyn's counsel made no direct references to the issue. Rather, he simply stated that the jury should not overlook testimony from the State's witnesses that during the incident Camyn was talking to animals that were not there and uttering gibberish.

The State dismissed the charge for criminal restraint leaving the jury to deliberate only the charges for robbery and battery. It ultimately returned a guilty verdict for both offenses, and the court sentenced Camyn to serve a prison term of 32 months.

Camyn timely brings the matter to us to determine whether reversible error occurred during his trial.

LEGAL ANALYSIS

The challenged remarks from the prosecutor's closing argument, while erroneous, do not rise to the level of reversible error.

Camyn claims that the State committed reversible prosecutorial error during closing argument when it made comments about Camyn's mental capacity that lacked an evidentiary foundation and misstated the law with respect to the required mental state.

Standard of Review

Appellate courts employ a two-step process to evaluate claims of prosecutorial error. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

"To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmless inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.' We continue to

acknowledge that the statutory harmless test also applies to prosecutorial error, but when 'analyzing both constitutional and nonconstitutional error, appellate courts need only address the higher standard of constitutional error.' [Citations omitted.]" *Sherman*, 305 Kan. at 109.

The State committed prosecutorial error in its closing argument.

Camyn makes two claims of error. First, that certain statements made by the prosecutor during closing arguments constituted improper remarks that were not supported by evidence, and next, that the prosecutor uttered misstatements of law.

Addressing his first claim of error, Camyn's challenge arises out of the following portion of the State's closing argument:

"He was not so far off his meds that day or in such a state of poor mental health—which is maybe the way to say it. He was not in a such a state that day that he doesn't have the ability to—he didn't have the ability to form the mental state of knowing. . . .

. . . .

"He stands before you having a poor memory, having poor mental health, but not being to the degree that he can't stand trial. He stands in front of you not to the point that in July of 2018 he was incapable of understanding what he was doing."

The State contends it simply and fairly argued that Camyn was not taking any stabilizing medication at the time of the crime, but was at the time of trial, which enabled him to be more coherent.

A prosecutor errs when arguing a fact or factual inference that lacks an evidentiary foundation. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 887 (2021). Even so, again, prosecutors are generally afforded a fair amount of freedom in crafting closing arguments. 313 Kan. at 176. While that latitude enables the State to make reasonable

inferences based on the evidence, it does not extend so far as to allow it to utter remarks which distract the jury from its obligation to make decisions based on the evidence and the controlling law. *State v. Killings*, 301 Kan. 214, 228, 340 P.3d 1186 (2015).

When determining whether a challenged statement exceeds the bounds of fair argument, we must consider it in the context in which it was made rather than analyze it in isolation. *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019). Doing so here, we cannot conclude that the challenged remark was merely an effort by the prosecutor to highlight the difference between Camyn's mental capacity at the time of the crime and during trial, as the State suggests on appeal. The prosecutor argued that Camyn might have been in a poor mental state when he encountered Huslig but not to such a degree that it impeded his ability to knowingly commit the charged offenses. The problem is that the State never presented any evidence during the trial that supports such a claim. To the contrary, the testimonies offered by Huslig and the police officer who interviewed Camyn, as well as the video footage from that interview, arguably suggest it is possible that Camyn suffered from a mental illness at that time. Thus, given that the prosecutor's comments lacked any support in the evidence, they fell outside the scope the State is allowed in making a closing argument. See *State v. Ly*, 277 Kan. 386, 393, 85 P.3d 1200 (2004).

Camyn next asserts that the prosecutor misstated the law when he remarked, "Not taking your medicine is not a defense. Not being fully there is not a defense," because it diluted the State's burden to show that Camyn knowingly committed the crimes.

The State counters that while Camyn did not formally advance a compromised mental state defense, his trial counsel referred to his mental health issues throughout the trial as a scheme to undermine the "knowingly" element of the crime. The record does not support this claim. Rather, it reflects that the statements made by Camyn's trial counsel did not mention mental illness, but amounted to comments which explained that

situations are not always clearly black or white since everyone comes from different circumstances.

The State contends it interpreted defense counsel's statement about things in the "gray area" as a comment upon Camyn's mental state generally and that Camyn's different life experiences may be hard to comprehend. But from our review of the record defense counsel's comment simply refers to the circumstances of the encounter. It is a questionable leap to infer that such remarks amounted to a strategic attempt by counsel to propose that Camyn suffered from mental health issues which provided him with a defense.

The record also bears out that it was the State that opened the door to Camyn's mental health by asking him on cross-examination about his extensive commitment period at Larned State Security Hospital. And it was only during that exchange when Camyn acknowledged episodes of feeling confused or dazed and mentioned taking medication.

We find that the prosecutor's challenged remarks constituted a misstatement of the law which encouraged the jury to conclude that any mental health struggles Camyn experienced did not excuse him from knowingly committing the alleged crime. The State had the duty to prove beyond a reasonable doubt that the "knowingly" element of the crime was satisfied, as prescribed by law under K.S.A. 2022 Supp. 21-5202. That burden is fulfilled when the State successfully establishes that Camyn "is aware of the nature of [his] conduct" or when he "is aware that [his] conduct is reasonably certain to cause the result." K.S.A. 2022 Supp. 21-5202(i). The prosecutor's remarks arguably circumvented the mental state the State needed to prove and therefore amounted to a misstatement of the law. *State v. Thomas*, 307 Kan. 733, 743, 415 P.3d 430 (2018). With this finding, the first prong of the prosecutorial error analysis is satisfied because the comments fall

outside the wide latitude afforded to prosecutors. *State v. Wilson*, 309 Kan. 67, 78, 431 P.3d 841 (2018).

Camyn was not prejudiced by the State's closing argument.

Finding two instances of prosecutorial error occurred, this court must next consider whether Camyn was prejudiced by the errors such that he was denied his right to a fair trial. See *Sherman*, 305 Kan. at 109. Under this step of the analysis, the identified error is harmless if the State can establish "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict." 305 Kan. at 109. The State asserts that even if the prosecutor's comments amounted to error, it did not affect the outcome of the trial or contribute to the verdict because the physical evidence, alongside testimony from the State's witnesses and Camyn, was sufficient to enable the jury to conclude Camyn committed the charged offenses.

We find the State's argument persuasive. Not only did both Huslig and Officer Graham unequivocally identify Camyn as the individual they encountered that day, but the jury also had the chance to view at least a portion of those encounters through footage from Graham's bodycam. This provided it with the unique opportunity to thoroughly scrutinize the credibility of Camyn's assertions that he was not the person who robbed Huslig and that, while the person on the video looked like him, it could have been his twin. No evidence was ever introduced by Camyn that he has a twin.

The district court's instructions also buttress a harmlessness finding. Here, the jury was instructed as follows:

"Instruction 1:

" . . . Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law. But they are not evidence. If any statements made that are not supported by evidence, they should be disregarded. . . .

....

"Instruction 2: The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty. The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty."

Appellate courts presume juries follow the instructions provided by the trial courts. *State v. Hillard*, 313 Kan. 830, 845, 491 P.3d 1223 (2021). Moreover, the Kansas Supreme Court has held that although proper jury instructions do not grant prosecutors an excuse for any errors, they are an appropriate consideration in determining whether the prosecutor's error had any effect on the verdict. *State v. Huddleston*, 298 Kan. 941, 956, 318 P.3d 140 (2014). Thus, even if the challenged remarks resulted in confusion for the jurors over the tools required to fairly deliberate the case, the trial court's instructions offered the necessary guideposts.

Given the totality of the evidence and the results of this issue after thoroughly filtering it through the *Sherman* test, we conclude that while the prosecutor's statements fell wide of the permissible mark, they were harmless and do not require reversal of Camyn's otherwise valid convictions. Camyn's convictions for robbery and simple battery are affirmed.

Affirmed.