

2014 IL App (1st) 123093-U

No. 1-12-3093

March 19, 2014

THIRD DIVISION

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 07 CR 7073
)	
ALLEN BLANCH,)	
)	
Defendant-Appellant.)	The Honorable
)	Kevin M. Sheehan,
)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Prosecutorial remarks that the defendant must "justify" his actions to receive a verdict of second degree murder misstate the law. The trial court compounds the error when it overrules timely objections to the misstatement of the law. Here, the defendant showed that the improper remarks and rulings had prejudicial effect requiring reversal of the conviction and remand for retrial.

¶ 2 Prosecutors charged Allen Blanch with first-degree murder. Blanch admitted that he murdered the victim, but he argued that mitigating circumstances reduced his crime to second-degree murder. A jury returned a verdict of guilty on the first-degree murder charge. In this appeal, we hold that the prosecutor and the trial judge misled the jury by telling the jury that they should not find Blanch guilty of second-degree murder unless they found the circumstances justified the killing. We reverse the judgment and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 Allen Blanch moved in with Tanisha Thurmond in 2006. On February 26, 2007, Allen had some drinks with a friend, less than a block from the apartment Allen shared with Tanisha. Tanisha called Allen as she drove home from school that night. They argued. Tanisha told Allen to pick up his things from her apartment and move out. When he arrived at the apartment, he found Tanisha waiting. They fought. Allen strangled Tanisha.

¶ 5 As Allen drove away from the apartment, he called his sister, Devona Blanch, and told her he killed Tanisha. Devona called the police. Police did not go to Tanisha's apartment because Devona did not know the address. Allen parked the car in an alley before passing out.

¶ 6 Police went to Tanisha's apartment on February 27, 2007, and found her dead on the floor. The next day, police found the car Tanisha shared with Allen in a motel parking lot. They arrested Allen in his motel room. He made no effort to resist arrest or escape. At the police station, in a recorded interview, Allen admitted that he strangled Tanisha. A grand jury indicted Allen for first-degree murder.

¶ 7 Psychiatrists who examined Allen before his trial found him fit to stand trial, sane at the time of the offense, and able to understand the *Miranda* warnings police used at the time of Allen's arrest. Intelligence tests showed that Allen had an IQ of about 72.

¶ 8 At the jury trial, defense counsel conceded that Allen killed Tanisha. He argued only that Allen acted under a sudden and intense passion that mitigated the offense to second-degree murder.

¶ 9 A police officer testified that she found Tanisha's apartment in some disarray, with signs of a struggle. The medical examiner also saw signs of a struggle on Tanisha's corpse. The medical examiner testified that strangulation victims usually lose consciousness after about 15 seconds of pressure in excess of 4 pounds applied to the neck. To cause death, the strangler must apply 11 pounds of pressure for some minutes.

¶ 10 The jury watched the recording of Allen's confession. Allen then testified in accord with his confession, but he added some further details. Gunshot wounds Allen sustained in 2000 left him unable to work. When he went to the apartment on February 26, 2007, he tried to talk with her about their problems. She hit him in the face. He showed the jurors pictures of scratch marks where she drew blood. She pushed him to the door as he tried to restrain her. He then started choking her. Allen testified, "I remember her saying that she couldn't breathe, but at that time I didn't have no control over myself." After she died, he called 911, but because he did not know the address no one came. He called Devona from the car as he drove away.

¶ 11 Defense counsel, in closing argument, stressed evidence that Allen acted under the influence of an intense passion when he strangled Tanisha.

¶ 12 In rebuttal, the prosecutor, Mary Jo Murtaugh, said:

"There is an enormous difference between first degree murder and second degree murder because second degree murder, there's some type of justification. There is no justification here. It's an excuse. Let me hide behind the shield of second degree murder. It is an excuse. There is no justification here."

The trial court overruled defense counsel's objection. Murtaugh continued:

"The only possible mitigating factor he could say was she threw me out. She broke up with me. I was upset about it and I guess at this time today she tried to push me out of her own house so that means I can kill her, that I'm justified and that's second degree murder."

The trial court overruled defense counsel's specific objection to the use of the word, "justified."

¶ 13 Murtaugh further pursued the theme:

"There is no justification for what he did. There is no second degree murder. *** [H]e strangled her to death and he left her there and he could care less. He was on the run. Do you think if he was justified –

[Defense counsel]: Again, objection to that word, Judge

I think it's misleading, Judge, and I would object.

THE COURT: The word without lawful justification is contained in the murder instruction, justification. Overruled.

MS. MURTAUGH: Don't you think he would have stuck around? ***

*** You can't just kill someone because they want you out of their life and that's basically what he's suggesting to you. ***

[Defense counsel]: Objection, Judge.

THE COURT: It's argument. Overruled."

¶ 14 The trial court sent to the jury, over the objection of defense counsel, pictures of Tanisha's corpse, including pictures of Tanisha's injured brain, exposed during the autopsy. Defense counsel did not object to numerous other pictures showing the external injuries Tanisha suffered. Defense counsel also did not object to the State's proposed instructions. The instructions to the jury, apart from the trial court's comment during rebuttal argument, did not include the words "justify," "justified" or "justification."

¶ 15 The jury returned a verdict of guilty on the charge of first-degree murder. In his motion for a new trial, Allen specified the comments listed above as ground for his contention that Murtaugh's closing argument misled the jury about the applicable law. The trial court denied the motion and sentenced Allen to 50 years in prison. Allen now appeals.

¶ 16 ANALYSIS

¶ 17 Allen argues that the closing argument and the photographs sent to the jury room deprived him of a fair trial, and the court imposed an excessive sentence. We address only the closing argument, because we find that the improper argument and erroneous rulings require reversal.

¶ 18 Standard of Review

¶ 19 Allen first points out, correctly, that our supreme court decisions appear to conflict with one another on the applicable standard of review. The court in *People v. Land*, 2011 IL App (1st) 101048, succinctly stated the difficulty:

" In [*People v.*] *Wheeler*, [226 Ill. 2d 92 (2007)] our supreme court held: 'Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*.' *Wheeler*, 226 Ill. 2d at 121. However, the supreme court in *Wheeler* cited with approval [*People v.*] *Blue*, [189 Ill. 2d 99 (2000)] in which the supreme court had previously applied an abuse-of-discretion standard. *Wheeler*, 226 Ill. 2d at 121. In *Blue* and numerous other cases, our supreme court had held that the substance and style of closing argument is within the trial court's discretion, and that the trial court's decision will not be reversed absent an abuse of discretion. *Blue*, 189 Ill. 2d at 128, 132 ." *Land*, 2011 IL App (1st) 101048, ¶ 149.

¶ 20 Like the *Land* court, we find that we do not need to resolve the conflict in this case, because under either standard, we reach the same result. See *Land*, 2011 IL App (1st) 101048, ¶ 151. The State asks us to use the abuse of discretion standard, so we will treat the case as though the abuse of discretion standard applies.

¶ 21 Review of Closing Argument

¶ 22 The parties agree on the principles applicable to review of closing argument, as the court restated those principles in *People v. Buckley*, 282 Ill. App. 3d 81 (1996):

"In reviewing allegations of improper closing argument, the People's argument must be examined in its entirety, and the complained of comments must be placed in proper context. [Citation.]

During closing argument, the People are barred from misstating the law or facts of the case, from making remarks that diminish their burden

of proof, or from commenting on factual matters not based on evidence.
[Citation.] While a prosecutor has wide latitude in closing argument, he
must not make comments which misstate the law in the case. ***

* * *

*** [I]mproper arguments that result in substantial prejudice to the
defendant can constitute reversible error." *Buckley*, 282 Ill. App. 3d at
89-90.

¶ 23 As we apply these principles, we bear in mind the guidance our supreme court provided
in *People v. Johnson*, 208 Ill. 2d 53, 65-67 (2003):

"[P]rosecutorial misconduct [is] a problem that courts across the country
have, for the most part, been unable or unwilling to control. *** Over 50
years ago, Judge Jerome Frank of the Second Circuit Court of Appeals
weighed in on the same exasperating issue:

"This court has several times used vigorous language in denouncing
government counsel for such conduct as that of the United States
Attorney here. But, each time, it has said that, nevertheless, it would not
reverse. Such an attitude of helpless piety is, I think, undesirable. It
means actual condonation of counsel's alleged offense, coupled with
verbal disapprobation. If we continue to do nothing practical to prevent
such conduct, we should cease to disapprove it. For otherwise it will be
as if we declared in effect, "Government attorneys, without fear of
reversal, may say just about what they please in addressing juries, for our
rules on the subject are pretend-rules. If prosecutors win verdicts as a

result of 'disapproved' remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial." Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters— breeds a deplorably cynical attitude towards the judiciary.' *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946); [Citations].

Members of *this* court have recently expressed concern over the frequency with which this court is seeing instances of prosecutorial misconduct:

'Unfortunately, the kind of courtroom tactics which occurred in this case does not appear to be an isolated occurrence. This court recently cited the conduct of two assistant State's Attorneys as lacking in maturity and professionalism, once again in a Cook County courtroom during a capital trial. [Citation.] The frequency with which this court is seeing such behavior is not only alarming, but causes legitimate public concerns regarding the fairness and integrity of these proceedings.' [*People v.*] *Moss*, 205 Ill.2d [139] at 191 (Freeman, J., concurring in part and dissenting in part, joined by Kilbride, J.).

The *Moss* dissent also conveys a sense of exasperation with the 'helpless piety' that afflicts our judiciary. In *Moss*, our distinguished

colleagues in dissent observed that threats of reversal, and words of condemnation and disapproval, have been less than effective in curbing prosecutorial misconduct and are unlikely to achieve any greater success in the future:

'It is obvious to me that our admonishments—that such behavior risks reversal—have not been heeded. ***

* * *

*** This court cannot expect the trial judges to vigorously guard against improper conduct if we ourselves fail to address the problem with any consistency. *** [N]otions of reform ring hollow when this court, faced with conduct which requires reversal, fails to acknowledge it." *Moss*, 205 Ill.2d at 191, 195-96 (Freeman, J., concurring in part and dissenting in part, joined by Kilbride, J.)."

¶ 24 Misstatement of the Law

¶ 25 Allen conceded that his conduct in killing Tanisha met all the criteria for first-degree murder. He asked the jury only to find his guilt mitigated because he acted "under a sudden and intense passion resulting from serious provocation by the individual killed." 720 ILCS 5/9-2(a)(1) (West 2006).

¶ 26 Murtaugh told the jurors repeatedly that they should not find Allen guilty of second degree murder because Tanisha's acts did not justify the killing. But Allen did not seek to justify the killing – he only asked the jurors to find his guilt mitigated. He admitted that his conduct warranted a substantial sentence, as the court must impose a sentence between 4 and 20 years for second-degree murder. See 730 ILCS 5/5-8-1(a)(1.5) (West 2006). The statute

imposed on Allen the burden of proving mitigation. Murtaugh told the jurors instead that Allen had the burden of proving a justification for the killing.

¶ 27 The State argues that Murtaugh did not misinform the jurors about the applicable law, because the court never defined "justification." According to the State, the jurors had to use only their laymen's understanding of justification. But the legal definition of "justification" closely matches its everyday use. To legally justify the use of force against another person, one must show that he reasonably believed he needed to use that force to defend himself against the other's imminent use of force. 720 ILCS 5/7-1(a) (West 2006). According to Webster's Third New International Dictionary, to justify an act one must "prove or show [it] to be just, desirable, warranted, or useful." Black's Law Dictionary sharply distinguishes justification from mitigation, as it defines "mitigating circumstances" as circumstances which "do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." Black's Law Dictionary 1002 (6th ed. 1990). Murtaugh's argument shows that she used justification in its legal sense, in accord with common usage, and in a way not compatible with the meaning of mitigation, as she argued that if the circumstances justified the killing, Allen would have stayed in the apartment with Tanisha's corpse. A person guilty of murder may well have a consciousness of guilt that impels him to leave the scene of the crime, even if mitigating circumstances warrant reducing the crime to second-degree murder.

¶ 28 Allen faced the burden of showing that Tanisha's acts of throwing him out of the apartment they shared and pushing and hitting him seriously provoked him and caused in him a sudden and intense passion, and that he acted under the influence of that intense passion when he killed her. 720 ILCS 5/9-2(a)(1) (West 2006). Murtaugh's argument radically

increased the burden on Allen, requiring him to show, instead, that Tanisha's acts justified the killing. Jurors who understood the common meaning of "justification" would understand that they should find Allen guilty of first-degree murder unless they found the killing "just, desirable, warranted, or useful."

¶ 29 We find this case similar to *People v. Gutierrez*, 205 Ill. App. 3d 231 (1990), in which the jurors needed to decide whether Alvarez committed murder or involuntary manslaughter. The prosecutor impermissibly told the jurors that they should convict Alvarez of murder unless they found the death resulted from an accident. The *Gutierrez* court held that the substitution of accident for the applicable legal standard of recklessness misstated the law and had great potential for severe prejudice. *Gutierrez*, 205 Ill. App. 3d at 264. Moreover, by referring to involuntary manslaughter as the lowest class of felony, the prosecutor improperly drew the jurors' attention to the severity of the sentences the court could impose. See *People v. Crossno*, 93 Ill. App. 3d 808, 823 (1981). Here, the prosecutor's comments misstated the law by impermissibly substituting "justification" for "mitigation." The comments that a finding of second-degree murder had the effect of a finding of innocence, like the comments in *Gutierrez* on the class of felony, impermissibly drew the jurors' attention to the severity of the possible sentences.

¶ 30 The *Gutierrez* court affirmed Alvarez's conviction, largely because the trial court in *Gutierrez* correctly sustained defense counsel's objections to the improper arguments and instructed the jurors to disregard the remarks. Here, the trial court exacerbated the effect of the improper argument by overruling defense counsel's well-founded objections. See *People v. Kidd*, 147 Ill. 2d 510, 544 (1992). These errors alone would warrant a reversal. The trial court went further, telling the jurors, incorrectly, that "the word *** justification is contained

in the murder instruction." By overruling defense counsel's objections, the trial court reinforced Murtaugh's misstatement of the law. The trial court's rulings imposed on Allen the unlawful burden of proving justification for the killing. The prosecutor's error, misinforming the jury about the applicable law, was compounded when the trial court overruled defense counsel's objections to Murtaugh's rebuttal argument.

¶ 31 The State next suggests that defense counsel's closing argument invited the comments on justification. The State does not cite any specific remark that provoked any of its argument about justification. Moreover, we do not see how any comment can ever invite or warrant a misstatement of the applicable law. See *United States ex rel. Kurena v. Thieret*, 659 F. Supp. 1165, 1175 n. 17 (N.D. Ill. 1987).

¶ 32 Prejudice

¶ 33 Murtaugh's misleading comments and misstatement of the law does not require reversal unless the comments prejudiced Allen. *Buckley*, 282 Ill. App. 3d at 89-90. The *Wheeler* court established the standards for finding prejudice:

"If *** the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123.

¶ 34 The record in this case shows only that the jurors found that Tanisha's acts did not justify the killing. We cannot tell whether the jurors would have found that Tanisha's acts - pushing and hitting Allen and throwing him out of his home - provoked Allen into a sudden and intense passion, and that he acted under the influence of that intense passion when he killed Tanisha. See 720 ILCS 5/9-2(a)(1) (West 2006). Because we find the misstatement of the law prejudicial, we reverse the conviction and remand for a new trial.

¶ 35

CONCLUSION

¶ 36

The trial court abused its discretion when it overruled appropriate objections to Murtaugh's misstatements of the law which improperly imposed on Allen the burden of proving a justification for killing Tanisha. Because we cannot tell what jurors would have done without the judicial seal of approval on the prosecutor's misconduct, we reverse the judgment and remand for a new trial.

¶ 37

Reversed and remanded.