

Third District Court of Appeal

State of Florida, July Term, A.D. 2008

Opinion filed July 9, 2008.

Not final until disposition of timely filed motion for rehearing.

No. 3D06-894

Lower Tribunal No. 05-32789

Mark Wilson,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jacqueline Hogan Scola, Judge.

Rene A. Sotorrio, for appellant.

Bill McCollum, Attorney General, and Magaly Rodriguez, Assistant Attorney General, for appellee.

Before RAMIREZ, SUAREZ, and ROTHENBERG, JJ.

RAMIREZ, J.

Mark Wilson appeals the trial court's final judgment of conviction and sentence of attempted purchase of cocaine. We reverse because the prosecution

impermissibly commented on Wilson's right to remain silent at the end of its closing argument.

On October 14, 2005, the City of Miami Crime Suppression Unit conducted an operation using teams of undercover narcotics detectives who would pose as drug buyers or sellers. Detective Odney Belfort participated in the operation. He was trained in working in an undercover capacity involving narcotics identification and tactical narcotics training.

Early on October 14, 2005, Detective Belfort and other detectives arrested a drug seller from an abandoned house in Miami. Following the arrest, Detective Belfort posed as a drug seller at the same location. Later that day, Wilson, while removing money from his pocket, approached Detective Belfort. When he got close to Detective Belfort, Wilson asked for "four hards," street slang for four rocks of cocaine. Detective Belfort showed Wilson a plastic bag containing narcotics seized earlier that day. After flashing the bag, Detective Belfort opened the bag. Once Wilson had seen what was in the bag, he tendered a twenty dollar bill. Detective Belfort took the twenty dollar bill and reached into the bag to retrieve the narcotics. A back-up team of officers then came in, grabbed Wilson, and arrested him.

At trial, Detective Belfort explained that he knew what Wilson meant when he asked for "four hards" because of his experience as an officer working in the

subject area, he had posed as a seller prior to the subject sale, and he knew the street slang. He stated that buyers never asked for rock cocaine itself, but used the terms “hards” or “soft,” or they would ask for a “boy” (heroin) or a “girl” (powder cocaine). Detective Belfort stated that the bag he flashed to Wilson was a smaller tinted green zip plastic bag, which was the characteristic baggie used in the area. Different areas had different color baggies. Detective Belfort stated the tinted green bag was used because it was recovered from the actual seller at the location.

Detective McGahee, the take-down officer at the scene when Wilson was arrested, testified that Detective Belfort had the twenty dollar bill that Wilson had handed to him. Detective Belfort handed Detective McGahee the money, which he then placed inside of an envelope with a metal tab on the back of it. Detective McGahee sealed the envelope, wrote Wilson’s name on it and wrote the case number on it. Detective McGahee also filled out a money sheet indicating the denomination of the money received. The envelope was then taken with Wilson to the command post. Detective Allen received the envelope containing the twenty dollar bill from Detective McGahee and turned it in to the property unit. The twenty dollar bill was not admitted into evidence because the State failed to lay the proper legal foundation.

The defense moved for a judgment of acquittal, contending that the State failed to show that Wilson knew he was buying any kind of drugs because there

was no showing that he knew what “hard” meant. The State argued that the issue of whether or not “four hard” meant crack cocaine was an issue of fact for the jury to decide. The trial court denied the motion.

During the State’s closing, the prosecutor stated:

Members of the Jury, this isn’t a murder case. It is an attempted purchase of cocaine. A stubborn fact. A crime. A crime, nonetheless.

The defendant has had the opportunity to be able to have a jury trial and he has that right. He had the right to remain silent –

Defense counsel objected to the reference to Wilson’s right to remain silent. The trial court sustained the objection and reserved ruling. The prosecution continued its argument by stating that Wilson had the right to see every witness presented against him, but that he did not have the right to commit a crime. He then concluded by asking the jury to find Wilson guilty of attempted possession of cocaine.

After the parties concluded their closing arguments and the jury retired for deliberation, the parties discussed with the court the defense’s objection to the reference to Wilson’s silence. Wilson’s attorney moved for a mistrial. The court found that, in the context in which it was said, it was not an improper statement by the prosecutor. The trial court denied Wilson’s motion for mistrial.

In defending the prosecutor’s comment, the State argues that the statement did no more than state the obvious, that a defendant has the right to remain silent, which every juror knows. This argument has been rejected consistently by the courts of our state for many years. In Carter v. State, 199 So. 2d 324 (Fla. 2d DCA 1967) (reversed on other grounds by Falcon v. State, 226 So. 2d 399 (Fla. 1969)), the court found a similar comment to be reversible error.¹ The court reasoned that “[i]n the light of numerous decisions of the Florida courts in the fairly recent past, we must hold the comment of the prosecutor to have been prejudicial.” Carter, 199 So. 2d at 335. It explained that in the argument objected to here, the attention of the jury was directly drawn to the fact that defendant had a constitutional right not to testify. This in turn unfailingly focused attention of the jury upon the fact that defendant had not testified in his own behalf. Id. at 335-36.

In Miller v. State, 847 So. 2d 1093, 1094-95 (Fla. 4th DCA 2003), during closing arguments, the prosecutor commented to the jury that the judge “also

¹ The prosecutor’s comment in closing was:

“I want to point this out to you, however, that the defendant in every criminal case has a constitutional right not to testify and this is a right that he has and it cannot be held against him because of this constitutional right, and I want to state if the defendant does object to not having this evidence, they have the same subpoena power as does the State. They can come in here too--”

Id. at 335.

instructed you that the defendant has the right to remain silent. And he does. He did not take the stand in this case. But there were two witnesses.” Defense counsel immediately moved for a mistrial arguing that the prosecutor’s argument was an impermissible comment on the defendant’s right to remain silent. The court denied the motion. Id. at 1095. The Fourth District reversed and remanded for a new trial, citing to Varona v. State, 674 So. 2d 823 (Fla. 4th DCA 1996), which concluded that it was reversible error for a prosecutor to comment on the defendant’s right to remain silent during voir dire. The court explicated that the comment made by the prosecutor called undue attention to Miller’s decision whether or not to testify. “Furthermore, pointing out during closing argument that the defendant did not take the stand is certainly fairly susceptible of being interpreted by the jury as a comment on the defendant’s failure to testify.” Miller, 847 So. 2d at 1095. The court then found the error harmful.

The State has not cited to a single case where a Florida court has held that such a comment was nothing more than stating the obvious, that a defendant has the right to remain silent, which every juror knows. Neither can the State cite a single case in which a similar comment by a prosecutor has been found to be harmless. Instead, the State cites to cases where witnesses have made the improper remark. See Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005); Jones v. State, 748 So. 2d 1012 (Fla. 1999).

We cannot find that the error here was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) (“The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.”). The defense argued that there was nothing to corroborate the testimony of Detective Belfort: no drugs, no twenty dollar bill, no police report. Given that the officer had made thirty other arrests that day, his credibility was questionable. Clearly, in the jury’s mind, there was another eyewitness to the transaction besides the detective - Wilson. But Wilson did not testify. For the prosecutor to call attention to this fact at the very end of his closing argument and then urge the jury to find Wilson guilty, cannot be viewed as harmless beyond a reasonable doubt.

Reversed and remanded for a new trial.

SUAREZ, J., concurs.

ROTHENBERG, J. (dissenting).

While I agree with the majority and the defendant that the State's comment in its closing argument was an impermissible comment on the defendant's right to remain silent, I respectfully disagree with the majority's conclusion that reversal is required.

In State v. DiGuilio, 491 So. 2d 1129, 1137-38 (Fla. 1986), the Florida Supreme Court held that improper comments regarding a defendant's invocation of his right to remain silent are subject to a harmless error analysis and need not require reversal if the court is convinced beyond a reasonable doubt that the error did not contribute to the verdict. Thus, a motion for mistrial "should be granted only when it is necessary to ensure that the defendant receives a fair trial." Goodwin v. State, 751 So. 2d 537, 547 (Fla. 1999) (quoting Cole v. State, 701 So. 2d 845, 853 (Fla. 1997)). A trial court's ruling on a motion for mistrial, which the trial court denied in the instant case, is subject to an abuse of discretion standard of review. See Goodwin, 751 So. 2d at 546.

In applying a harmless error analysis, the court must examine both the permissible evidence on which the jury could have relied and the impermissible

evidence, with the focus being on the effect of the error on the trier-of-fact. Fitzpatrick v. State, 900 So. 2d 495, 517 (Fla. 2005).

In Fitzpatrick, the detective who interviewed the defendant testified that during his initial interview with the defendant, the defendant mentioned that he thought he needed an attorney. Fitzpatrick argued on appeal that his motion for mistrial should have been granted to ensure that he received a fair trial. Id. at 516. While the Florida Supreme Court found that the comment was “fairly susceptible of being interpreted by the jury as a comment on silence,” id., it concluded, that based upon the overwhelming permissible evidence of Fitzpatrick’s guilt and the fact that “the impermissible remark was neither repeated nor emphasized,” the “isolated and singular comment [did] not constitute harmful error.” Id. at 517.

Similarly, in Jones v. State, 748 So. 2d 1012, 1021-22 (Fla. 1999), the Florida Supreme Court concluded that although the detective impermissibly commented on the defendant’s right to remain silent where he testified that he terminated his interrogation of Jones when Jones invoked his right to remain silent, the error was harmless beyond a reasonable doubt. In applying the harmless error analysis, the Florida Supreme Court noted the permissible evidence introduced at trial, and that the remark was neither repeated nor emphasized. Id. at 1022.

I submit that based upon the majority’s very thorough recitation of the permissible evidence introduced at trial, the evidence overwhelmingly establishes

the defendant's guilt. Because the impermissible comment was neither highlighted nor repeated and the context in which it was made did not suggest any negative inference regarding the defendant's right to remain silent, I would conclude, as did the Florida Supreme Court, in Di Giulio, Fitzpatrick, and Jones, that the error was harmless beyond a reasonable doubt. The context in which the statement was made was that although the defendant had many important rights: the right to a jury trial, the right to remain silent, and the right to confront the witnesses against him, he did not have the right to commit a crime.

While the majority recognizes the Florida Supreme Court's holdings in Fitzpatrick and Jones, it attempts to distinguish those cases on the basis that the improper comments were made by witnesses rather than the prosecutor, as is the situation in the instant case. The manner in which the comment was made, is however, simply a factor to consider when weighing the possible effect the impermissible statement might have had upon the trier of fact. I submit it is not a distinction that simply ends the analysis.

Because an examination of the permissible evidence establishes the defendant's guilt, and the impermissible evidence, which in this case was an isolated comment that did not suggest an improper inference and was not highlighted nor repeated, the error was harmless beyond a reasonable doubt. Thus, I respectfully disagree that reversal is required and with the majority's conclusion

that the trial court abused its discretion in denying the defendant's motion for mistrial.