

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37705

STATE OF IDAHO,)	2011 Unpublished Opinion No. 676
)	
Plaintiff-Respondent,)	Filed: October 26, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
PAUL JAMES CAVANAUGH,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Steven C. Verby, District Judge.

Judgment of conviction for vehicular manslaughter and leaving the scene of an injury accident and unified sentence of fifteen years, with a minimum period of confinement of eight years, for vehicular manslaughter, affirmed.

Molly J. Huskey, State Appellate Public Defender; Spencer J. Hahn, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Paul James Cavanaugh appeals from his judgment of conviction for vehicular manslaughter and leaving the scene of an injury accident and his unified sentence of fifteen years, with a minimum period of confinement of eight years, for vehicular manslaughter. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

On March 10, 2005, a pedestrian was struck by a pickup while she walking along a dirt road at approximately 6:30 in the evening. The pedestrian later died from her injuries. Cavanaugh, the registered owner of the pickup, emerged from the wooded area that the vehicle had swerved into after striking the pedestrian. Cavanaugh was thereafter charged with vehicular manslaughter, I.C. § 18-4006, and leaving the scene of an injury accident, I.C. § 18-8007. A jury

found Cavanaugh guilty of both charges on December 16, 2005. Cavanaugh was sentenced to a unified term of fifteen years, with a minimum period of confinement of eight years, for vehicular manslaughter and a concurrent minimum period of confinement of five years for leaving the scene of an injury accident.

On June 12, 2006, Cavanaugh filed a pro se motion for a new trial under Idaho Criminal Rule 34. The district court denied this motion on October 25, 2006, and Cavanaugh appealed. In an unpublished opinion, this Court affirmed the district court's denial of Cavanaugh's motion for a new trial. *State v. Cavanaugh*, Docket No. 33657 (Ct. App. Feb. 10, 2009).¹ On July 29, 2009, Cavanaugh filed a pro se application for post-conviction relief and asserted numerous instances of ineffective assistance of counsel, including the failure to file a notice of appeal upon his timely request. On April 26, 2010, the district court entered an order finding ineffective assistance of trial counsel and permitting the filing of an appeal from Cavanaugh's judgment of conviction. Cavanaugh now appeals.

II.

ANALYSIS

Cavanaugh contends that his convictions should be vacated because the prosecutor committed prosecutorial misconduct during closing argument that violated his constitutional due process right to a fair trial. Cavanaugh further contends that his sentence with respect to his conviction for vehicular manslaughter is excessive.²

A. Prosecutorial Misconduct

While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.*

Cavanaugh made no contemporaneous objection to the prosecutor's alleged misconduct during closing argument at trial. In *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the

¹ Cavanaugh filed another motion for a new trial on September 6, 2007. The district court entered an order denying this motion on July 10, 2009.

² Cavanaugh does not raise an excessive sentence claim with respect to leaving the scene of an injury accident because he has already served the full term of the sentence imposed.

Idaho Supreme Court clarified the fundamental error doctrine as it applies to allegations of prosecutorial misconduct. If the alleged misconduct was not followed by a contemporaneous objection, an appellate court should reverse when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings. *Id.* at 226, 245 P.3d at 978.

Accordingly, we first address Cavanaugh's claim that the prosecutor committed prosecutorial misconduct during closing argument. Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587. Appeals to emotion, passion, or prejudice of the jury through the use of inflammatory tactics are impermissible. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. *See also State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *State v. Pecor*, 132 Idaho 359, 367, 972 P.2d 737, 745 (Ct. App. 1998). The prosecutor's closing argument should not include disparaging comments about opposing counsel. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *State v. Brown*, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998); *State v. Baruth*, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1984). Similarly, the prosecutor's closing argument should not include disparaging comments concerning the role of defense attorneys in general. *State v. Timmons*, 145 Idaho 279, 290, 178 P.3d 644, 655 (Ct. App. 2008).

Cavanaugh asserts that the prosecutor committed prosecutorial misconduct in two instances during closing argument. In the first instance, the prosecutor asserted:

There is only one person whose conduct initiated this chain of events that led to the tragic result that we're having to deal with here today. And if this process has been difficult for the family of [the victim], for the prosecution, and if it becomes difficult for you, then I want to remind you why that has been difficult and that has been difficult because Paul Cavanaugh, after driving into [the victim]

did not fulfill his responsibility to remain at that scene, to provide the information that the law imposes upon him the obligation to provide.

. . . . You've got an obligation to render assistance to the person who has been injured.

In this case, that was not done by the Defendant Paul Cavanaugh. So if you have to struggle with those issues, remember how much easier it would have been for the family, for the law enforcement officers, and for the judicial system to deal with this case had Paul Cavanaugh fulfilled his responsibility to remain at the scene until he had met the requirements of providing the information that the Judge just outlined for you in the instructions. But he didn't do that. So this became a more complicated issue.

Cavanaugh relies on *Phillips* to support his contention that these comments constituted prosecutorial misconduct. In *Phillips*, this Court determined that prosecutorial misconduct was committed when the prosecutor suggested during closing argument that the jury might feel irritated and upset by the defense witnesses' testimony and should respond to the testimony with irritation and resentment. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. We concluded that such inflammatory language seemingly calculated to arouse negative emotions during closing argument was plainly improper. *Id.*

Here, the prosecutor suggested that the jury should remember that, if the case became difficult for the jurors to deal with and if the process was difficult for the victim's family, law enforcement officers and the judicial system, it was the fault of Cavanaugh. This suggestion, similar to that made by the prosecutor in *Phillips*, was seemingly calculated to arouse negative emotions during closing argument and invited the jury to respond accordingly. As such, the prosecutor committed prosecutorial misconduct.

The second alleged instance of prosecutorial misconduct occurred during the middle of closing argument after a juror asked to speak to the bailiff for a moment. After the exchange between the juror and bailiff, the prosecutor remarked:

I was standing over here concentrating because one of the common techniques that defense attorneys use on me is they try to interrupt me during my closing because I forget where I am. So fortunately this interruption was long enough I didn't have to concentrate on the issues involved in an argument and I was able to remember where I need to pick up.

Cavanaugh cites to *State v. Gross*, 146 Idaho 15, 189 P.3d 477 (Ct. App. 2008) to support his contention that the prosecutor committed prosecutorial misconduct in making this comment because it disparaged defense attorneys and their role in the adversarial process. In *Gross*, this

Court determined that prosecutorial misconduct occurred when the prosecutor disparaged defense counsel by accusing defense counsel of lying or facilitating his client's lying. *Gross*, 146 Idaho at 19, 189 P.3d at 481. Similarly, in *Timmons*, 145 Idaho at 290, 178 P.3d at 655, this Court determined that prosecutorial misconduct occurred when the prosecutor disparaged defense counsel and the role of criminal defense attorneys in general by making the following comments:

[Defense counsel] also made reference to the fact, you know, the bruises were slight. If the bruise had been darker do you think that [defense counsel] would have come in and said, okay, that means he's guilty. No. He's simply going to point to everything he can and argue that his client's not guilty because that's his job. It wouldn't have mattered if we had a video tape of the entire incident. He would have found something to complain about. Do you suppose any defense lawyer ever walks in and says, "I give. There's enough"?

Here, the prosecutor's comment that defense attorneys commonly interrupt him to cause him to forget where he is in closing argument implied that defense attorneys commonly use such tactics to harm a prosecutor's ability to obtain a conviction. As in *Timmons*, such comment disparaged defense attorneys and their role in the adversarial process in general and constituted prosecutorial misconduct.

Even though we conclude that the prosecutor committed prosecutorial misconduct in both instances alleged by Cavanaugh, such error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* Thus, we examine whether the alleged error complained of in the present case was harmless. *See State v. Lopez*, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005). Where a defendant meets his or her initial burden of showing that a constitutional violation has occurred, the state has the burden of demonstrating to the appellate court beyond a reasonable doubt that the violation did not contribute to the jury's verdict. *Perry*, 150 Idaho at 227-28, 245 P.3d at 979-80.

Cavanaugh first asserts that the prosecutor's misconduct did not constitute harmless error as evidenced by the length of jury deliberations. Cavanaugh relies upon *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980) to support his contention that, even though the issues in this case were relatively simple--whether Cavanaugh was driving the vehicle that killed the victim and, if so, whether he was either intoxicated or grossly negligent--long jury deliberations weigh against a finding of harmless error. In *Gibson*, the jury impermissibly relied upon evidence not produced

in court and deliberated for nine hours over several days. *Id.* at 852, 855 n.8. The court concluded that there was a reasonable possibility that the extrinsic evidence affected the verdict because the state's case was strong and, without such evidence, it seemed unlikely that they would have deliberated for so long to reach a verdict. *Id.* at 855. Cavanaugh also cites to *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (jury deliberated for twenty-six hours) and *Dallago v. United States*, 427 F.2d 546, 559 (D.C. Cir. 1969) (jury deliberated for five days) to support his argument that long jury deliberations weigh against finding harmless error. Cavanaugh further contends that the prosecutor's comments did not constitute harmless error as evidenced by the lack of eyewitnesses, fingerprints, or other forensic evidence that could place Cavanaugh in the driver's seat at the time of the collision with the pedestrian.

Before addressing Cavanaugh's claim that the prosecutor's misconduct did not constitute harmless error, we first note our description of the state's case as set forth in our unpublished opinion denying Cavanaugh's motion for a new trial:

One witness who testified at Cavanaugh's trial saw the accident (though he could not see the driver inside the pickup) and was at the victim's side within seconds. Several other witnesses were on the scene within minutes, if not less than a minute. Testimony indicated that Cavanaugh's crashed truck came to a stop about twenty to twenty-five feet from the victim. Although it was dark, so that the surroundings could not be seen, one witness heard Cavanaugh emerge from the pickup and saw him come over to the location of the victim. Several other witnesses saw him later at the scene. None of these witnesses reported seeing anyone other than Cavanaugh come from the direction of the crashed truck or anyone fleeing from the scene. One witness said that, as she was tending to the victim, Cavanaugh came to her side and said, "I'm sorry, I didn't mean to. I didn't mean to. I didn't mean to."

This evidence that Cavanaugh was the driver who struck [the victim] comports with his own statements. Cavanaugh called 911 the day after the accident to report his accident from the night before. In that recorded conversation, Cavanaugh clearly indicated he had been driving the truck. During that conversation, Cavanaugh said, "I was going down the road and, and I thought I seen some people in the road and it's like they jumped out in front of me or something and I swerved to miss them and I ended up in the trees." Similarly, Cavanaugh told the operator later in the conversation, "My brakes are kind of bad and I just swerved out of the way and next thing you know I found myself--I looked back and my truck was in the trees and I was trying to talk to these people to help them." When asked by the operator if he had been driving down the road towards Highway 41, Cavanaugh responded, "Yeah." The rest of the taped conversation is replete with additional statements by Cavanaugh indicating he was driving the truck that hit [the victim], but contains not one statement, explicit or implicit, indicating that anyone else was in the truck either as a driver or

passenger. That same day, in an interview by an officer, Cavanaugh specifically said that no one else was in the truck with him.

Although Cavanaugh now claims that he has no recollection of the accident or who was driving due to the effects of alcohol and the trauma of the event, it is clear that on the day following the accident he had no such memory loss and reported the event in detail to both the 911 operator and the interviewing officer. It is highly improbable that Cavanaugh's purported new evidence, a woman claiming to have seen someone else driving Cavanaugh's pickup sometime that day or evening, with him in the passenger seat, would lead to a different jury verdict. Such new evidence simply would not be able to overcome the effects of his taped voluntary confession and other evidence of his guilt, and therefore would not probably produce an acquittal if a new trial were granted.

Cavanaugh, Docket No. 33657 at 4-5.

Given the strength of the state's case against Cavanaugh, while the jury deliberated for over three hours before finding Cavanaugh guilty, such a time period is not long enough, as it was in *Gibson*, *Parker* and *Dallago*, to indicate that there was a reasonable possibility that the error affected the verdict. Further, even without eyewitnesses, fingerprints, or other forensic evidence that could place Cavanaugh in the driver's seat at the time of the collision, the prosecutor's misconduct was not so prejudicial so as to overwhelm all the admissible evidence that Cavanaugh was guilty of vehicular manslaughter and leaving the scene of an injury accident such that the prosecutor's comments can be said to have contributed to the verdict in any meaningful way. As such, we conclude beyond a reasonable doubt that the prosecutor's misconduct constituted harmless error because Cavanaugh has not shown that the error affected the outcome of the trial proceedings. Accordingly, Cavanaugh fails under the third prong of *Perry* and we will not vacate his convictions.

B. Reasonableness of Sentence

Cavanaugh asserts that his unified term of fifteen years, with a minimum period of confinement of eight years, for vehicular manslaughter is excessive. Specifically, Cavanaugh argues that, considering his chaotic childhood, mental health issues, remorse and acceptance of responsibility and willingness to participate in alcohol treatment, the district court abused its discretion when it imposed Cavanaugh's sentence.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion.

State v. Brown, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary “to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case.” *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant’s entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

At the sentencing hearing, the district court heard Cavanaugh describe his troubled upbringing, mental health issues, remorse, and acceptance of responsibility. The district court then considered the criteria established in I.C. § 19-2521 for imposing imprisonment; the information contained in the presentence investigation report; the comments made by Cavanaugh, counsel, and others who presented information; and the aggravating and mitigating factors including the nature of the offense, the character of Cavanaugh as a multiple criminal offender, his remorse, and his habits including alcohol usage. In imposing Cavanaugh’s sentence, the district court considered the goals of sentencing--protection of society, rehabilitation, and retribution--and concluded that a lesser sentence would depreciate the seriousness of the offense. Having conducted an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest, we conclude that the sentence imposed by the district court was reasonable and was not an abuse of discretion.

III. CONCLUSION

Although the prosecutor committed prosecutorial misconduct as Cavanaugh alleged, we conclude beyond a reasonable doubt that such misconduct constituted harmless error because Cavanaugh has not shown that the error affected the outcome of the trial proceedings. Further, the sentence imposed by the district court was reasonable and not an abuse of discretion.

Accordingly, Cavanaugh's judgment of conviction for vehicular manslaughter and leaving the scene of an injury accident and unified sentence of fifteen years, with a minimum period of confinement of eight years, for vehicular manslaughter are affirmed.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**