

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37654

STATE OF IDAHO,)	2011 Unpublished Opinion No. 527
)	
Plaintiff-Respondent,)	Filed: June 17, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
MICHAEL LEE SOUTHERN,)	THIS IS AN UNPUBLISHED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, Kootenai County. Hon. John T. Mitchell, District Judge. Hon. James D. Stow, Magistrate.

Order of the district court affirming the magistrate’s judgment of conviction, affirmed.

John Adams, Kootenai County Chief Public Defender; Mayli A. Walsh, Deputy Public Defender, Coeur d’Alene, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent.

GRATTON, Chief Judge

Michael Lee Southern appeals from the district court’s order affirming the magistrate’s judgment of conviction for two counts of misdemeanor battery. Southern claims prosecutorial misconduct. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Southern was charged with two counts of misdemeanor battery, Idaho Code § 18-903, against two minor brothers. Southern allegedly exited his house and yelled at the boys for being on his lawn. Southern, by using his forearms, picked up each of the boys around the neck lifting them off the ground. The boys were able to return to their home. Both of the victims testified at trial. The jury convicted Southern on both counts of misdemeanor battery.

Southern appealed to the district court alleging prosecutorial misconduct for statements the prosecutor made in voir dire and in closing arguments. The district court affirmed the magistrate's judgment of conviction. Southern appeals.

II.

DISCUSSION

Southern asserts that the prosecutor made inflammatory statements during voir dire and in closing that personalized the issues to the jury and made it impossible for the jury to effectively assess the credibility of the victims. On review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008); *State v. DeWitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Id.* If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Id.*

Although our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, the prosecutor 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.* When there has been a contemporaneous objection we determine factually if there was prosecutorial misconduct, then we determine whether the error was harmless. *Id.*; *State v. Hodges*, 105 Idaho 588, 592, 671 P.2d 1051, 1055 (1983); *State v. Phillips*, 144 Idaho 82, 88, 156 P.3d 583, 589 (Ct. App. 2007). A conviction will not be set aside for small errors or defects that have little, if any, likelihood of having changed the results of the trial. *State v. Pecor*, 132 Idaho 359, 367-68, 972 P.2d 737, 745-46 (Ct. App. 1998). Where prosecutorial misconduct is shown, the test for harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *Id.* at 368, 972 P.2d at 746.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. 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.

Closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also State v. Garcia*, 100 Idaho 108, 110-11, 594 P.2d 146, 148-49 (1979); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial. *Phillips*, 144 Idaho at 86 n.1, 156 P.3d at 587 n.1. The safer course is for a prosecutor to avoid the statement of opinion, as well as the disfavored phrases "I think" and "I believe" altogether. *Id.* 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).

Trial error ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v. Adams*, 147 Idaho 857, 861, 216 P.3d 146, 150 (Ct. App. 2009). This limitation "serves to induce the timely raising of claims and objections, which gives the [trial] court the opportunity to consider and resolve them." *Puckett v. United States*, ___ U.S. ___, ___, 129 S.Ct. 1423, 1428 (2009). Because Southern argues one of the prosecutor's statements was error for the first time on appeal, to obtain our review of this issue, he must establish that it is reviewable as "fundamental error."

In its recent opinion in *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court re-examined the fundamental error doctrine and adopted a new definition of the types of error for which review will be provided on appeal in the absence of a timely objection in the trial court. The Supreme Court stated that to obtain relief on appeal for fundamental error:

(1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, 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) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id. at 226, 245 P.3d at 978 (footnote omitted). Thus, on a claim of fundamental error a defendant must first show that the alleged error "violates one or more of the defendant's unwaived constitutional rights" and that the error "plainly exists" in that the error was plain, clear, or obvious. *Id.* at 228, 245 P.3d at 980. If the appellate record is insufficient to show clear error, "the matter would be better handled in post-conviction proceedings." *Id.* at 226, 245 P.3d at 978. If the alleged error satisfies the first two elements of the *Perry* test, the error is reviewable. *Id.* To obtain appellate relief, however, the defendant must further persuade the reviewing court that the error was not harmless; i.e., that there is a reasonable possibility that the error affected the outcome of the trial. *Id.* at 226, 228, 245 P.3d at 978, 980.

Southern argues four of the prosecutor's statements constituted misconduct. The first alleged error was during voir dire. The prosecutor began by asking the prospective jurors if they held any bias for or against police officers. Then the prosecutor questioned the jury on whether they had children, they believed children the age of the victims normally told the truth, and they would report an allegation from a child to the police if it was serious. Southern requested a sidebar and objected on the ground that the prosecutor was personalizing the case by asking the jurors if they personally would take action and call the police. Southern argued it was an inappropriate line of questioning that inflamed the jury and he requested a mistrial. The trial court did not believe the questioning impeded Southern's right to a fair trial and denied the motion for a mistrial. Southern maintains on appeal that this line of questioning was misconduct because it personalized the case for the jury. Voir dire is a party's opportunity "to propound questions to prospective jurors concerning their qualifications to sit as jurors in the action." I.C.R. 24(b). Parties are given wide latitude to examine jurors for the purpose of obtaining information for the intelligent exercise of both for cause and peremptory challenges. *State v. Camarillo*, 106 Idaho 310, 312, 678 P.2d 102, 104 (Ct. App. 1984). Restricting voir dire rests with the discretion of the trial court. *Id.* The prosecutor's line of questioning was principally aimed at discerning the jurors' perceptions regarding the believability of children and their

reporting of matters to authorities. The prosecutor did ask how many jurors would report something that the police needed to be involved in, but did not thereby unduly personalize the issues to the jury. While the questions likely conveyed that the children's credibility was important, they were not inflammatory. The voir dire questions do not constitute prosecutorial misconduct.

Southern's remaining claims of misconduct come from the prosecutor's closing and rebuttal arguments. In Southern's second claim of misconduct, the prosecutor stated:

Now, keep in mind in our society that we tell children if something happens tell an adult. Tell your teacher. Tell the police. That's what these boys did. That's what they're supposed to do.

Southern objected on the grounds the statement was inflaming and prejudicial. The trial court overruled the objection and told the prosecutor he could proceed. Southern argues on appeal that the prosecutor was impermissibly telling the jury they had a duty to believe the children because children are raised to report this type of allegation. The prosecutor, however, was merely arguing to the jury that the children acted as they should be expected to act in reporting their confrontation with Southern. The prosecutor's argument was simply an assertion that since the children acted in accordance with expectations, by reporting the event, which underscores their credibility. The prosecutor's argument that the victims' actions and testimony were reasonable was not misconduct.

Third, Southern argues the prosecutor committed misconduct when he again argued that the children did what they were supposed to do by reporting the incident and that children are taught to bring their problems to the attention of an adult so that the issue can be resolved. The prosecutor stated:

This is what children are supposed to do. Tell an adult who takes it to the authorities. And in the end you are that ultimate authority. You have to validate what these children did. You have to validate what they have said. You have to invalidate the violence that was done to them. That's why you're here. And that's why I'm asking you to find him guilty of two counts of battery. Thank you.

As recognized by the district court, Southern did not raise a contemporary objection to this statement by the prosecutor and, therefore, must establish fundamental error. The district court determined that the prosecutor's request for the jury to "validate" the testimony of the victims was asking the jury to make a decision based on evidence that was not before them, focusing the

jury on their passions rather than the evidence. While the district court held that the statement was improper, it further determined that it was harmless. We agree.

The jury was instructed that they must base their decision on the evidence and that neither opening statements nor closing arguments are evidence. As the district court noted, the evidence before the jury was overwhelming. Both victims testified that Southern yelled at them and grabbed each of them around their necks with his forearms and choked them for a few seconds before letting them go. Southern surprised the older brother from behind and when the younger brother came to help, Southern grabbed the younger brother with his other arm. Southern did not succeed in impeaching their testimony on cross-examination. The older brother saw Southern drive away from his home shortly after the incident. The victims' mother testified to the victims' reaction as they returned home. The investigating officer testified that Southern appeared intoxicated shortly after the event and gave inconsistent stories as to his whereabouts shortly after the incident. Southern has not pointed to any evidence that casts doubt on this evidence. It is Southern's burden to demonstrate the error was not harmless. This Court concludes that Southern failed to demonstrate that the error affected the outcome of the trial.

Southern's fourth claim of misconduct is from the prosecutor's rebuttal, where he stated:

We're not talking about the Salem Witch trials here.¹ The defendant is not being persecuted.

What we're talking about here is the safety of the children in a neighborhood. This issue's been brought to you by two children. And it's very important to them they know the system works for them. That they know that they will be listened to when something happens. This is what children are told in our culture. And that's how we respond to it.

Southern objected that the prosecutor's argument was inflaming the jury, and the trial court sustained this objection. Even if the statement was improper, Southern obtained the relief he requested when he objected and the trial court sustained the objection. Southern did not request to have the statement stricken or ask to have the jury instructed to disregard the statement. Southern has demonstrated no further basis for relief.

¹ In Southern's closing arguments he asserted this case began because the children thought they would get in trouble for being in Southern's yard and shifted the blame by falsely accusing him of grabbing them. Southern asserted there was a lot of emotion here and compared it to the Salem Witch trials.

III.
CONCLUSION

Southern has failed to demonstrate that the prosecutor committed reversible misconduct. The district court's order affirming the magistrate's judgment of conviction is affirmed.

Judge LANSING and Judge MELANSON **CONCUR.**