STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0772

State of Minnesota,
Respondent,

vs.

James Evans Johnson,
Appellant.

Filed August 12, 2008
Affirmed
Minge, Judge

Hennepin County District Court
File No. 03033507

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sara L. Martin, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges his conviction of murder in the second degree, arguing that the prosecutor committed misconduct by shifting the burden of proof during closing argument. Because we find that the prosecutor did not commit misconduct, we affirm.

FACTS

This appeal arises out of the retrial of appellant James Johnson after a reversal of his initial conviction. *See State v. Johnson*, 719 N.W.2d 619 (Minn. 2006). The underlying facts are set forth in that reported decision of the supreme court.

At retrial Johnson testified that Julie Bottema, the victim, was incredibly angry when she arrived at his home and did not calm down the entire time she was there. He claimed that he grabbed a derringer pistol because he did not know R.H., the man who accompanied Bottema, and that he put the pistol in the front pocket of his sweatshirt. He stated that while he and the victim were in the master bedroom, she was angry and throwing items, and that she kicked him in the knee. He said this was very painful because he suffers from gout and that he fell. Johnson testified that after he got back to his feet, he started walking out of the room threatening to call the cops, that he turned to look back and saw Bottema pointing the pistol at him, and that she shot him. He claims that the next thing he remembers is waking up next to her on the floor and hearing sirens outside of his home. Johnson states he does not know if he shot Bottema.

After nearly two days of deliberation, the jury again found Johnson guilty of second-degree intentional murder. The district court sentenced him to 306 months in prison. This appeal from the conviction on retrial follows.

D E C I S I O N

The issue on this appeal is whether the prosecutor's closing argument shifted the burden of proof to Johnson and, if so, whether this constituted reversible misconduct. A prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). The supreme court has recently clarified that objected-to prosecutorial misconduct is no longer viewed under the "two-tiered" system used in earlier Minnesota appellate decisions. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). The new standard is summarized as follows:

> [A conviction must be reversed] if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial. If the state has engaged in misconduct, the defendant will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt. We will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error.

Id. (quoting *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006)) (emphasis omitted).

The state has the burden to prove all elements of the crime beyond a reasonable doubt; the burden of proving innocence cannot be shifted to an accused. *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986). "The prosecutor may not shift the burden of proof to the accused by commenting about his failure to call witnesses or to present evidence."

Id. To do such is prosecutorial misconduct. *See, e.g.*, *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985) (stating that "misstatements of the burden of proof are highly improper and constitute prosecutorial misconduct"); *State v. Thomas*, 307 Minn. 229, 230-31, 239 N.W.2d 455, 456-57 (1976) (condemning the prosecutor's suggestion that the burden of proof is meant to protect the innocent, not shield the guilty); *State v. Trimble*, 371 N.W.2d 921, 926 (Minn. App. 1985) (holding that a prosecutor's comment that the presumption of innocence disappears as more and more evidence of guilt is found to be credible is improper), *review denied* (Minn. Oct. 11, 1985).

When a prosecutor does make a statement during closing argument that shifts the burden of proof, courts will also consider any mitigating statements that correctly lay the burden of proving guilt on the prosecution. *See, e.g.*, *State v. Tate*, 682 N.W.2d 169, 178-79 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). For instance, where the district court properly instructs the jury after the prosecution misstates the burden, the misconduct will not typically require reversal. *See id*.; *see also State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001); *Race*, 383 N.W.2d at 664; *Coleman*, 373 N.W.2d at 782-83. Similarly, a district court may avoid reversing a conviction by instructing the jury to disregard statements of counsel on the applicable law where they conflict with those of the court. *See Race*, 383 N.W.2d at 664.

Here, the prosecution pointed out that in his various interviews and his testimony at trial, Johnson provided inconsistent details regarding what happened the day of Bottema's death. For instance, he told both an officer and an ambulance driver that after Bottema shot him he pushed her or attempted to recover the gun from her, at which point

it went off. This contrasted with his testimony that he could not remember anything after she fired the pistol at him. In a subsequent interview with a different officer, Johnson claimed that the pistol must have fallen out of its holster when Bottema kicked him in the knee. This contrasted with his testimony that the pistol was in the pocket of his sweatshirt and the holster was in his pants pocket.

The prosecution made the following statements during closing argument regarding Johnson's various accounts:

> There is an example that is frequently used by prosecutors of a puzzle. As you all know, puzzles have a number of pieces, and you need every single piece to fit together just right to get the picture. And in this case [defense counsel] and the defense throw out a lot of possibilities. It could have been this; it could have been this. The blood on her face could have been this; the blood on her face could have been this. Those might look okay by themselves. They might be reasonable possibilities in and of themselves if they were in a vacuum just as one piece, but if you take all of the other evidence, and you take [defense counsel's theories] and the defense's reasonable possibility and try to jam that in with all those other pieces, it doesn't fit.

At that point defense counsel objected to the statement, and the district court overruled the objection. The prosecutor continued:

> You have to have the entire picture based on the testimony, physical evidence, the exhibits that you have seen and can see again. It all needs to fit together. [The prosecution's evidence], it all fits together. It all fits together and shows you what happened here.
>
> Mr. Johnson's story, one of the five that you have heard from him, keeps changing. It keeps changing because he knows that the first few stories, they don't make sense. They don't fit with the other evidence, so they can't fit into that puzzle, so you got to change it. You've got to try to come up with something that might fit in there, squeeze it in

> there, and make it look like it's a real puzzle, but he can't do it. Instead he just says he can't remember. He knows if he told you what really happened, you would convict him of murder, so he comes up with a different story each time. One time he's got the gun with the holster together. The next time they are in different pockets, because he learned subsequent[ly] . . . that he had the holster in his pocket. He had to change the story to try to fit that puzzle. It doesn't work, ladies and gentlemen. It's not about a reasonable possibility.

Johnson's counsel again objected, and the district court again overruled the objection. But the district court informed the jury that it would be giving them instructions concerning the law at the end of the case and stated that the jury should follow the district court's instructions if they conflicted with what the lawyers stated. The prosecutor continued on, arguing that he had made a case that appropriately "fits together."

Johnson argues that the prosecutor's closing argument suggested that the defense had an obligation to provide a completed puzzle in order for the jury to acquit. The district court considered this objection and commented that the prosecutor was saying that "the evidence paints a picture – or puzzles depict a picture – and the possibility that [Johnson] w[as] arguing just didn't fit into that puzzle . . . ." The prosecution argued that its presentation was a complete account of what happened, that the puzzle characterization was used to show that all the pieces fit together to support a conviction, but that Johnson's varying stories were an "ill-fated attempt" to make an acquittal fit with the established evidence.

The United States Supreme Court has held that a prosecutor's closing argument that a defendant tailored his testimony to be compatible with that of other trial witnesses

does not violate a defendant's rights under the federal constitution. *Portuondo v. Agard*, 529 U.S. 61, 63-73, 120 S. Ct. 1119, 1122-27 (2000). In *State v. Swanson*, the Minnesota Supreme Court considered whether, under state law, the state may impeach a defendant's testimony by suggesting that a defendant tailored his testimony by testifying after hearing the statements of other witnesses. 707 N.W.2d 645, 657 (2006). The court held that "the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case." *Id.* at 657-58. Because no evidence of tailoring was present in *Swanson*, our supreme court found the prosecutor's comments improper. *Id.* at 658. But the court endorsed the approach taken by *Commonwealth v. Gaudette*, 808 N.E.2d 798 (Mass. 2004). *Id.* at n.2. Under the *Gaudette* approach, where evidence of tailoring is present at trial, comments upon it do not constitute misconduct; where no evidence of tailoring exists, comments suggesting tailoring took place are misconduct. 808 N.E.2d at 803.

Here, Johnson's changing account is an indication that he tailored his testimony. We do not view the prosecution's closing argument as an attempt to shift the burden of proof to Johnson. Rather, the argument was a fair comment upon Johnson's trial testimony. Based on this record, we conclude that the prosecution did not commit misconduct.

Even if the prosecutor's statements were improper, the evidence of Johnson's guilt is overwhelming. The record shows that during the night, morning, and day after decedent Bottema called Johnson to tell him that she was not coming to his home for the

dinner he had prepared, he called her 73 times. Most of those calls were made in the early morning and were just minutes apart. The calls indicate that Johnson was agitated and slept little that night.

R.H. testified that after the first gunshot he saw Johnson exiting the bedroom with the pistol and that Johnson was not injured. Shortly after R.H. left the home, he heard a second shot. This testimony indicated that Johnson was injured by the second shot. A number of expert witnesses commented upon the unusual quality of the physical evidence presented in this case. Several expert or law enforcement witnesses testified that the pistol, which was found in Bottema's hand, was held in an odd manner that seemed staged. Johnson later admitted that he placed the pistol in Bottema's hand. The lead investigator and the medical examiner testified that "stippling"[1] on Bottema's arms and injuries to her hands, including the loss of a finger, were consistent with someone firing a shot at her from close range, and inconsistent with her shooting herself. The medical examiner was able to determine from the physical evidence present on Bottema's body that Bottema was shot in the head while crouching slightly with her head tilted forward and with her hands above her head in a protective manner.

In addition, as previously noted, when the defense objected to the prosecution's closing argument, the district court ordered the jury to follow its instructions regarding the law, not the arguments of the attorneys. After those closing arguments, the district

[1] Stippling is the term given to injuries or marks caused by items exiting a gun's barrel upon firing, such as still-burning or unspent gunpowder.

court properly instructed the jury regarding the burden of proof. The district court then added:

> Yesterday, during closing arguments, reference was made to a puzzle analogy. If you were to apply the principles of presumption of innocence and proof beyond a reasonable doubt to a puzzle it would be the State's burden to put the pieces of the puzzle together to show a picture of guilt beyond a reasonable doubt. If the State has done that, then the State has met its burden of proof. If the State has not done that, then the State has not met its burden of proof.

If the jury had any doubts about which party carried the burden of fitting puzzle pieces together, this instruction would have alleviated those doubts, not confused them, as Johnson claims.

In sum, we conclude that the prosecution did not shift the burden of proof or otherwise engage in misconduct. Even if the prosecutor's argument was in error, given the strong evidence supporting the conviction, as well as the district court's efforts to ensure that the jury knew the prosecution had to carry the burden of proving its case beyond a reasonable doubt, the jury's verdict "was surely unattributable to the error," and Johnson received a fair trial.

Affirmed.

Dated: