

21CA0092 Peo v Rogers 04-06-2023

COLORADO COURT OF APPEALS

Court of Appeals No. 21CA0092
City and County of Denver District Court No. 20CR2136
Honorable Shelley I. Gilman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Cristina Jene Rogers,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division D
Opinion by CHIEF JUDGE ROMÁN
Freyre and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 6, 2023

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¶ 1 Defendant, Cristina Jene Rogers, appeals the judgment of conviction entered after a jury found her guilty of second degree assault and rejected her affirmative defense of self-defense.

Because we conclude the prosecution impermissibly commented on Rogers' constitutional right not to testify at trial, and the comments were prejudicial, we reverse and remand the case for a new trial.

I. Background

¶ 2 Rogers contacted J.M. to ask if she could do laundry at his house because she was unhoused at the time. But according to J.M., when Rogers arrived at J.M.'s house, she went directly into his bedroom and fell asleep. J.M., on the other hand, stayed up all night using cocaine, smoking marijuana, and drinking.

¶ 3 According to J.M., the next morning, an argument broke out about whether Rogers did her laundry.¹ This led to a physical fight between Rogers and another resident of the house named Jordan,

¹ The investigating detective testified that when he observed J.M.'s car during his investigation, the clothing in the back seats "appeared to have just been laundered."

during which, according to J.M., Rogers hit Jordan in the back with a baseball bat and Jordan hit Rogers in the face.²

¶ 4 J.M. testified that he then told Rogers to leave, packed her belongings in his car, and drove her to her storage unit. While driving on the interstate, J.M. and Rogers argued. According to J.M., Rogers held up a knife and stated, “I’m going to stab you.” J.M. then put his hand up and Rogers stabbed him in the wrist.

¶ 5 J.M. took the nearest highway exit and waved down a police officer who followed his vehicle for a couple blocks until they arrived at a fire station. Both J.M. and Rogers were transported to the hospital and received medical treatment for their injuries. J.M.’s injuries included a punctured artery, causing him to bleed profusely. Rogers’ injuries included an abrasion on her face below her eye.

¶ 6 The People charged Rogers with first degree assault. Her theory of the case at trial was that she acted in self-defense when stabbing J.M. In other words, the issue at trial was not whether

² While there was evidence substantiating the marks on Rogers’ face, there was no corroborating evidence of a bruise or marks on Jordan’s back. Moreover, J.M. did not tell police about this altercation.

Rogers stabbed J.M. but whether it was justified. The jury acquitted Rogers of first degree assault but found her guilty of the lesser offense of second degree assault, rejecting her theory of self-defense. The district court sentenced her to a term of nine years in the custody of the Department of Corrections.

II. Analysis

¶ 7 Rogers contends the prosecutor committed misconduct in closing argument by (1) impermissibly commenting on her right not to testify at trial; (2) misstating the law by arguing the jury could not speculate; and (3) misstating the law of self-defense. We agree with Rogers that the prosecutor committed misconduct in closing argument by impermissibly commenting on her right not to testify at trial and that the misconduct constituted reversible error. Based on this disposition, we do not reach Rogers' remaining contentions.

A. Standard of Review

¶ 8 In reviewing prosecutorial misconduct claims, we first consider whether the prosecutor's arguments were improper and then whether any improper statements require reversal under the applicable standard. *People v. Carter*, 2015 COA 24M-2, ¶ 63 (describing the two-step analytical framework set forth in *Wend v.*

People, 235 P.3d 1089, 1096 (Colo. 2010)). Whether a prosecutor’s statements constitute misconduct is generally a matter left to the trial court’s discretion. *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). Therefore, we consider “the context of the argument as a whole and in light of the evidence before the jury.” *People v. Samson*, 2012 COA 167, ¶ 30.

¶ 9 As in this case, where prosecutorial misconduct was preserved and of constitutional dimension, “any error will require reversal unless we are convinced that the error was harmless beyond a reasonable doubt.” *People v. Dunlap*, 975 P.2d 723, 760 (Colo. 1999). Under the constitutional harmless error standard, “we reverse if ‘there is a reasonable *possibility* that the [error] might have contributed to the conviction.’” *Hagos v. People*, 2012 CO 63, ¶ 11 (alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

B. Applicable Law

¶ 10 “[T]he prosecution may not refer to a defendant’s exercise of [her] Fifth Amendment right to remain silent” *People v. Burnell*, 2019 COA 142, ¶45 (quoting *People v. Key*, 185 Colo. 72, 75, 522 P.2d 719, 720 (1974)). A prosecutor engages in misconduct

in closing argument when their comments are “calculated or intended to direct the attention of the jury to the defendant’s neglect or failure to exercise [her] right to testify [on her] own behalf.” *Martinez v. People*, 162 Colo. 195, 200, 425 P.2d 299, 302 (1967).

¶ 11 Because we are particularly attuned to errors that directly prejudice a defendant’s constitutional rights, “any direct, or even indirect, statement concerning a defendant’s failure to testify in a criminal proceeding” is constitutionally impermissible. *Id.* However, not every reference to a defendant’s exercise of her right to remain silent requires reversal. *Burnell*, ¶ 45 (citing *Key*, 185 Colo. at 75, 522 P.2d at 720). Reversal is only required where the prosecutor’s comment creates an inference of guilt or where the prosecutor argues that the defendant’s silence constituted an implied admission of guilt. *See People v. Ortega*, 198 Colo. 179, 182, 597 P.2d 1034, 1036 (1979) (“Prosecutorial comment which has the effect of creating an inference of guilt by reference to the defendant’s silence . . . effectively penalizes the defendant for exercising a constitutional privilege.”).

¶ 12 Factors we consider in determining whether the prosecutor’s argument was an unconstitutional reference to a defendant’s failure to testify include whether:

(1) the comment referred specifically to the defendant’s failure to testify or to rebut the evidence against [her]; (2) the trial court, after an objection was made, gave a cautionary instruction to the jury to disregard the remarks relating to the failure of the defendant to testify; (3) the prosecutor’s comments were aggravated or repetitive; and (4) the defendant was the only person who could refute the evidence.

People v. Gomez, 211 P.3d 53, 58 (Colo. App. 2008) (citing *People v. Todd*, 189 Colo. 117, 122, 538 P.2d 433, 436 (1975)), *abrogated on other grounds by Moore v. People*, 2014 CO 8.

¶ 13 Our determination is guided by the context in which these statements were made, which includes the evidence in the case and the nature of the alleged offenses. *Domingo-Gomez*, 125 P.3d at 1050.

C. Discussion

¶ 14 Here, the prosecutor’s comments that the jury could not “fill in the gaps” for Rogers or “speculate what she would have said had she taken that stand because [the prosecution] never ha[d] the

opportunity to cross-examine [her]” were unmistakable references to Rogers’ invocation of her right not to testify. Similarly, the prosecutor referenced Rogers’ silence when she stated, “let’s talk about [J.M.] because he’s the only one who testified and provided evidence of what happened in that car.” We perceive no legitimate reason for the prosecutor to have mentioned Rogers’ invocation of her right not to testify at trial.

¶ 15 Indeed, “[i]t is the duty of the prosecutor, in [her] role as an officer of the court, scrupulously to avoid making or inducing comments at trial that will prejudice the defendant for exercising [her] Fifth Amendment rights.” *People v. Reynolds*, 194 Colo. 543, 550, 575 P.2d 1286, 1292 (1978). We therefore reject the People’s contention that the prosecutor’s observation that only two people could have known what happened in the car did nothing more than highlight the absence of evidence supporting self-defense. Rather, the prosecutor’s comments impermissibly directed the attention of the jury to Rogers’ exercise of her constitutional right by expressly and specifically referring to Rogers’ failure to take the stand.

¶ 16 This does not end our analysis, however. The issue is not simply whether the prosecutor engaged in misconduct, which we

conclude happened. We must now consider, in the context of the entire record, whether there is a reasonable possibility that the prosecutor's misconduct contributed to Rogers' conviction.

¶ 17 Rogers did not testify on her own behalf nor was any evidence presented by the defense. Moreover, because J.M. and Rogers were alone when the stabbing occurred, aside from the medical evidence of the parties' injuries, J.M.'s testimony at trial was the only firsthand account of what happened in the car offered by the People.

¶ 18 But this does not mean that Rogers did not have a theory of the case. She did — self-defense. Nor does it mean that she could not persuade the jury by presenting her case through cross-examination. *See People v. Elmarr*, 2015 CO 53, ¶ 26 (“[A] criminal defendant is entitled to all reasonable opportunities to present evidence that might tend to create doubt as to the defendant's guilt.”).

¶ 19 Here is some of the contradictory evidence that Rogers was able to extract through cross-examination — evidence which, if considered and believed by the jury, could have supported her self-defense theory.

- The investigating detective testified that the clothing found in J.M.'s car after the stabbing appeared to have been recently laundered, although J.M. testified that Rogers had not done her laundry.
- J.M. testified that Rogers and Jordan, another resident, got into a physical fight and that Rogers struck Jordan in the back with a baseball bat and that Jordan hit Rogers in the face. However, J.M. never told officers or investigators about the alleged physical altercation, and no witnesses corroborated J.M.'s description of a physical fight between Rogers and Jordan.
- J.M. testified that he pushed Rogers at his house before giving her a ride but did not put his hands on her while she was in the car. However, the investigating detective testified that J.M. reported that, in the car, "he pushed [Rogers] away because she scratched him and almost made him wreck into a diesel."
- Rogers was treated at the hospital for injuries that included an abrasion on her face below her eye.

¶ 20 Although Rogers conceded she stabbed J.M., as discussed, the issue at trial was her state of mind at the time of the incident — that is, was it self-defense in response to first being struck by J.M.? The inconsistencies in J.M.’s testimony should have teed up the issue for the jury to consider Rogers’ affirmative defense of self-defense. But instead, the jury was told by the prosecutor to disregard this evidence, and the comments, despite an objection, were not corrected by the court through a curative measure. *Cf. Burnell*, ¶¶ 48-49.

¶ 21 Thus, in overruling the defense objection without explanation, the court essentially condoned the prosecutor’s argument, and, in doing so, abused its discretion. *Cf. People v. Rivera*, 968 P.2d 1061, 1067 (Colo. App. 1997) (declining to reverse where the trial court sustained the defendant’s objection to the prosecutor’s comment during closing and instructed the jury to disregard the comment).

¶ 22 The necessary implication of the prosecutor’s argument was that Rogers should be faulted because she was the only one who could refute J.M.’s testimony, so by not testifying, an inference of guilt should apply — even though she exercised her constitutional right not to testify. *See Howard-Walker v. People*, 2019 CO 69, ¶ 38

(holding where defendant (accused of burglary) did not testify and the prosecutor told the jury, “[T]here is only one person in this room that could tell you where all of those items are now and he won’t,” clearly implied the defendant’s guilt because he exercised his right not to testify).

¶ 23 Finally, we reject the People’s contention that the prosecutor’s statement of the law preceding the challenged comments mitigates the impermissible references to Rogers’ right to remain silent.³

Under the circumstances of this case, especially where there was no curative instruction given, it’s just as likely that this statement shone a spotlight on that which was impermissible — her silence.

See Wilson v. People, 743 P.2d 415, 420 (Colo. 1987) (where issue of credibility is of critical significance, prosecutor’s characterization of witnesses’ testimony has added significance). “Although jurors are obviously aware that the arguments of counsel are not evidence, we cannot ignore the fact that jurors do pay heed to the arguments of counsel in arriving at a result.” *Id.* at 421.

³ In closing argument, the prosecutor said, “Now, we talked a lot in jury selection about whether or not [Rogers] — whether, if [Rogers] doesn’t testify, can you not hold that against her. And you shouldn’t. You should consider that for no purpose whatsoever.”

¶ 24 Finally, contrary to what the prosecutor suggested with her improper commentary, the evidence in this case was not overwhelming. *See People v. Rodriguez*, 914 P.2d 230, 279 (Colo. 1996) (considering the “massive and overwhelming evidence against” the defendant); *People v. Ortega*, 40 Colo. App. 449, 453, 580 P.2d 813, 817 (1978) (considering “wholly circumstantial evidence . . . subject to conflicting inferences”). Considering the clear implication of guilt created by the prosecutor’s express comments on Rogers’ constitutional right and the inconclusive nature of the evidence in this case, there is a “reasonable *possibility* that the [error] might have contributed to the conviction.” *Hagos*, ¶11 (quoting *Chapman*, 386 U.S. at 24). Therefore, the court’s error in allowing the misconduct cannot be considered harmless beyond a reasonable doubt.

D. Remaining Contentions

¶ 25 Rogers also contends that the prosecutor engaged in misconduct when she (1) misstated the law by arguing the jury could not speculate, and (2) misstated the law of self-defense. Because we remand for a new trial, we need not address these contentions. *See People v. Harris*, 2015 COA 53, ¶ 37.

III. Disposition

¶ 26 The judgment of conviction is reversed, and the case is remanded for a new trial.

JUDGE FREYRE and JUDGE TOW concur.