No. 25893 -- State of West Virginia v. James Robert Stephens

Maynard, Justice, dissenting:

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I dissent because I believe the circuit court's second cautionary instruction to the jury effectively cured the prejudice which resulted from the prosecuting attorney's improper remarks.

This Court has now reversed a murder conviction and a conviction for sexual abuse of a four-year old child within the space of two weeks based on the arguments of prosecutors. *See State v. Swafford* (No. 25844, November 19, 1999). It appears from these decisions that this Court does not believe that prosecutors should be allowed to make any effective closing arguments to a jury. It must be remembered that criminal trials are adversarial proceedings in which prosecutors represent the people as well as the victims of crime. Accordingly, prosecutors have not only the right but the duty to make persuasive and compelling arguments. Further, prosecutors have wide latitude within the rules in making their arguments. This Court, however, has tied the hands of prosecutors with a perplexing collection of arbitrary, complex and unfair prohibitions, scattered among several cases, which no one can follow. These prohibitions have granted too much power to defendants and left prosecutors hamstrung and weakened.

In the case at bar, the State concedes that certain remarks made by the prosecuting attorney during his closing argument were improper and that the circuit court's first attempt to cure the prejudice only made matters worse. However, I agree with the State that the circuit court's second cautionary instruction was sufficient to cure the prejudice.

This Court has stated, and furthermore, it is abundantly clear that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syllabus Point 5, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). To determine whether the remarks prejudice the accused or result in manifest injustice, *Sugg* sets forth a four-part test. The majority quotes the four-part test, but then omits any discussion applying the *Sugg* test to the facts at hand and simply concludes that "[a]pplying these factors in the instant case, the prosecutor's remarks had a substantial tendency to mislead the jury and to prejudice the accused." That may be true, but when that factor is balanced with the other factors suggested by *Sugg*, I believe that one must conclude a new trial is not warranted. This remark made by the prosecutor was an isolated remark which was not meant to divert the jury's attention to extraneous matters. In fact, the prosecutor's remarks directly related to the matter at hand. Furthermore, the evidence of guilt was overwhelming.

This case is not synonomous with *State v. Moss*, 180 W.Va. 363, 368, 376 S.E.2d 569, 574 (1988), wherein no corrective instruction was given by the court. The prosecutor's improper closing remarks were summarized by this Court as follows:

> The prosecutor expressed his personal opinion as to the credibility of the State's witnesses. Code of Professional Responsibility DR 7-106(C)(4). He characterized the appellant as a "psychopath" with a "diseased mind." Syl. Pt. 3, *State v. Brown*, 104 W.Va. 93, 138 S.E. 664 (1927). He appealed to the passions and prejudices of the jury by imploring that they return verdicts of first degree murder without recommendation of mercy so that the appellant would "never be released to slaughter women and children of Kanawha County." *Critzer*, 167 W.Va. at 661, 280 S.E.2d at 292. He misstated crucial evidentiary matters. And he referred the jury to the fact that the deceased woman's husband took a polygraph, arguing to the jury "that is one reason we know he didn't do it." (Footnote omitted).

The prosecutor in *Moss* also stated on a radio talk show, "No doubt in my mind that he in fact is the murderer of Vanessa Reggettz and her two children." *Id.*, 180 W.Va. at 366, 376 S.E.2d at 572. The talk show aired during a recess in the trial. Unlike the case at bar, the circuit court made no attempt to cure these egregious comments.

The prosecuting attorney's comments obviously violated Rule 3.4(e) of the West Virginia Rules of Professional Conduct. But the court's curative instruction given just prior to releasing the jury to begin deliberating effectively cured any prejudice the prosecutor's remarks caused. The remarks made during the trial must be viewed in light of the curative instruction and the balancing test set forth in *Sugg*. Moreover, one must consider the four-year old victim. It is appalling that this Court would put this child through

the traumatic experience of testifying all over again. He has already been embarrassed and humiliated by being put in front of a courtroom full of adults to tell his story. Now once again the eyes of all present will be on him as he recites the events that occurred on that awful day. To put him on the stand again in a public courtroom will do immense psychological and emotional damage to the child, and this Court is responsible for that harm.

As I cannot say the trial judge erred in failing to grant a mistrial, I would affirm. Accordingly, I respectfully dissent.