THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0701, State of New Hampshire v. James Martin, the court on October 30, 2009, issued the following order:

The defendant, James Martin, appeals his convictions for misdemeanor sexual assault and simple assault. He argues that the trial court erred in overruling his objection to remarks made by the State in closing argument. We reverse and remand.

Because the trial court is in the best position to gauge any prejudicial effect that a prosecutor's remarks may have had on a jury and the remedy that will adequately correct the prejudice, we review the trial court's decision on these issues under our unsustainable exercise of discretion standard. State v. Mussey, 153 N.H. 272, 277 (2006); State v. Ellsworth, 151 N.H. 152, 154 (2004).

In this case, the defendant challenges two remarks made in the State's closing argument: (1) "There was [sic] only two people in that car that night. And there is [sic] only two people who absolutely, positively know exactly what happened. And one of those people came up there and told you about it"; and (2) "It has been said that the defendant didn't do this. Detective Flanagan did not testify to that. [The victim] did not testify to that." Defense counsel objected to both statements.

On appeal, the defendant argues that the statements were improper and violated his right against self-incrimination and his due process right against burden-shifting. He concedes that any argument that the New Hampshire Constitution affords him greater protection than the Federal Constitution has not been preserved.

It is well-settled that a defendant' s decision not to testify or present evidence in his own defense can provide no basis for adverse comment by the prosecutor. Ellsworth, 151 N.H. at 155. Comment by a prosecutor that may be construed as an unfavorable reference to the failure of a defendant to testify is a violation of the defendant's constitutional right against self-incrimination. Id. When a defendant argues on appeal that a prosecutor's remarks constituted an unfavorable reference to the defendant's decision not to testify at trial, we examine first whether the remarks were impermissible and then whether they require reversal of the verdict. Id.

Citing United States v. Robinson, 485 U.S. 25 (1988), the State argues that its challenged remarks were permissible in light of the defendant's attack in his closing statement upon the victim's credibility. We disagree. In Robinson, defense counsel argued that "the Government had not allowed [Robinson] to explain his side of the story." Id. at 26. The Supreme Court held that where the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by the defendant or his counsel, there is no violation of the defendant's privilege against compulsory incrimination. Id.

The State would have us broadly expand this limited exception. In this case, however, the prosecutor's arguments were not made in fair response to a claim of misconduct by the State. Rather, as conceded by the State, the prosecutor's remarks were made in response to defense counsel's attacks on the victim's credibility. To the extent that the defendant argued that the victim fabricated her testimony, the State could have addressed the veracity of those statements, including her specific description of the assault. Defense counsel's argument, however, did not open the door to comment about the defendant's failure to testify.

Having determined that the State's remarks were impermissible, we turn to whether they require reversal of the verdict. In making this determination, we balance the following factors: (1) whether the prosecutor's misconduct was isolated and/or deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; and (3) whether any prejudice surviving the court's instruction likely could have affected the outcome of this case. State v. Ellsworth, 151 N.H. at 155.

We conclude that the impermissible remarks were not isolated and were deliberate. The trial court gave no immediate curative instruction. Although the court addressed both burden shifting and the defendant's right not to testify in its later charge, the length of time between the remarks and that portion of the charge addressing those issues rendered the charge insufficient to outweigh the danger that was created by the court's failure to instruct the jury immediately following the prosecutor's improper comments. See id. at 157.

In analyzing whether any prejudice surviving the court's instruction likely could have affected the outcome of a case, we have focused in previous cases upon the strength of the evidence against the defendant. In this case, we cannot conclude that the evidence was overwhelming. While the victim provided consistent, specific testimony about the assault, her testimony was uncorroborated. The defendant's strongest defense was to attack her credibility. The State countered by highlighting the defendant's failure to testify.

Because all three factors weigh in favor of the defendant, we conclude that the impermissible remarks require reversal of the verdict.

Reversed and remanded.

DALIANIS, DUGGAN and CONBOY, JJ., concurred.

Eileen Fox,
Clerk