ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-452

NOVEMBER TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin District
Kyle Reynolds	}	DOCKET NO. 493-4-07 FrCr
		Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals his convictions of assault and robbery, 13 V.S.A. § 608(b), and obstruction of justice, 13 V.S.A. § 3015. On appeal, defendant argues that the trial court misstated the law in instructing the jury, and the prosecutor made prejudicial statements during closing, including accusing a defense witness of perjury and alleging a conspiracy without foundation. We reverse and remand for a new trial.

The two complainants, Tiffany and Ben, testified that they were watching television at Tiffany's house at 11:00 p.m., when an intruder carrying a gun entered the home. The intruder wore a baseball cap and had a scarf tied around his face. Tiffany was acquainted with defendant prior to the incident and testified that she immediately recognized defendant by his appearance and his voice. The intruder demanded money and anything of value. When Tiffany and Ben explained they had no money, the intruder then ordered complainants to give him their cell phones. Ben's phone was on the table, and he handed it over. Tiffany hid her phone under a blanket. Her child, who was sleeping in an adjacent bedroom, began to cry, and she asked if she could go and comfort him. The intruder allowed her to go. Tiffany hid her phone in her pants and took it with her. From the bedroom, Tiffany called her child's father, who is a police officer, for help. During the call, Tiffany identified the intruder as defendant. The intruder soon left the house and was gone before police arrived at the scene. After the intruder left, Tiffany and Ben looked out the window, but did not see anyone or any cars.

A couple of days after the incident, defendant called Tiffany's cell phone and Ben answered. According to Ben, defendant identified himself and told Ben that if the charges were not dropped Ben and Tiffany would be in a lot of trouble. Defendant admitted making the call, but claimed that he just asked Ben to have Tiffany call him.

The case proceeded to trial. Defendant's defense was mistaken identity. Defendant's friend Jon testified on defendant's behalf and claimed that he was also at Tiffany's house on the night of the alleged robbery. He claimed he went there to buy drugs. He explained that he had known defendant for twenty years and that the intruder was not defendant. He claimed that he

was able to slip out of the house when the robber was not looking. Both Tiffany and Ben testified that Jon was not present on the night of the assault and robbery. Although they initially denied drug use in their depositions, both Tiffany and Ben admitted at trial that they used drugs and were involved in drug dealing. Tiffany admitted that Jon had been at her house in the past to purchase drugs.

Defendant's sister, Caitlin, also testified and provided an alibi for defendant. She stated that on the night in question, she and defendant when to the house of another friend, Chelsea, to hang out. Then around 8:30 or 9:00 p.m., they went to the office of their lawn-care business to work on paperwork. According to Caitlin, they fell asleep on couches in the office. Chelsea testified that defendant and Caitlin came to her house on the evening of the incident looking for drugs, but that she did not have any to sell to them. Chelsea was not certain whether Jon was with them.

In closing argument, the prosecutor made several comments to which defendant objected. The prosecutor commented on the reliability of defendants' witnesses and also alleged a conspiracy between defendant, Jon, and Caitlin to perpetrate the assault and robbery.

At the charge conference, defendant requested that the court include in the elements of assault the requirement that defendant's actions caused the victims to fear "imminent serious bodily injury." The court concluded that this was not required and went on to charge the jury that one of the elements of the charge was that the defendant "purposely placed [Ben and Tiffany] in fear of bodily injury." The court defined bodily injury as "any physical pain illness or any impairment of physical condition." After the charge was read and before the jury retired, defendant objected to the definition of assault because it lacked the "imminent" and "serious" elements.

The jury found defendant guilty of both charges. Defendant filed a motion for a new trial, raising several arguments including that the prosecutor had impermissibly argued that defendant's sister and his friend Jon were both involved in the robbery. According to defendant, this allegation was not supported by any facts in the record. The trial court denied the motion, concluding that "the only theory that plausibly explains all of the credible evidence is that both [defendant's sister] and [Jon] participated in the offense." Defendant appeals.

On appeal, defendant first argues that the trial court's instructions omitted a vital element of the charge. Defendant was charged with assault and robbery, defined as someone who "being armed with a dangerous weapon, assaults another and robs, steals or takes from his person or in his presence money or other property which may be the subject of larceny." 13 V.S.A. § 608(b). We have previously held that "the assault component of § 608 is properly understood to incorporate the elements of assault as defined in §§ 1023 and 1021." State v. Francis, 151 Vt. 296, 306 (1989). Under 13 V.S.A. § 1023(a), assault may be proven three different ways. Because there was no allegation of actual harm in this case, the method of assault was "attempt[ing] by physical menace to put another in fear of imminent serious bodily injury." Id. § 1023(a)(3). Defendant claims that the court's instruction was erroneous because it eliminated the requirement that defendant's behavior caused the victims to fear imminent serious bodily injury, and instead allowed the jury to convict if it found that defendant caused the victims to fear bodily injury.

In evaluating jury instructions, "[w]e look at the charge as a whole rather than piecemeal." State v. Valley, 153 Vt. 380, 398 (1989). "If as a whole the charge breathes the true spirit and doctrine of the law and there is no fair ground to say the jury has been misled, there is no error." Id. (quotation omitted).

We agree with defendant that the trial court's instruction in this case was erroneous because it employed an overly broad definition of assault and allowed the jury to convict defendant without finding the critical elements of imminence and serious injury. See State v. Goyette, 166 Vt. 299, 304 (1997) (concluding that court's instruction resulted in reversible error where the court's definition of harassment was overly broad and "[a]lthough the alleged acts, taken together, could have supported the jury's verdict, the court's instruction required far less to convict defendant"). Under the court's instruction, the jury could convict defendant if it found that his actions caused the complainants to fear "any physical pain, illness or impairment of physical condition." This is much broader than the requirement that complainants imminently feared serious bodily injury, which the assault statute defines as bodily injury which creates any of the following: "(i) a substantial risk of death; (ii) a substantial loss or impairment of the function of any bodily member or organ; (iii) a substantial impairment of health; or (iv) substantial disfigurement." 13 V.S.A. § 1021(2)(A).

We reject the State's argument that these elements were not required because defendant was charged with assault and robbery with a dangerous weapon under § 608(b), not regular assault under § 608(a). The State contends that because § 608(b) involves the use of a deadly weapon, this use alone suffices to demonstrate that the victims were placed in fear of serious bodily injury. Under the State's interpretation of the statute, § 608(b) instead incorporates the elements of § 1024(a)(5)—aggravated assault by use of a deadly weapon. We find no support for the State's construction of the statute in our case law. In Francis, after examining the legislative history of the assault and robbery statute, we held that § 608 should "be construed according to the definitions of the assault statutes." 151 Vt. at 306. Thus, we concluded that it was appropriate "to incorporate the elements of assault as defined in §§ 1023 and 1021." Id. We made no distinction between the different subsections of § 608. Our cases have consistently held that § 608 "consists of the combined elements of assault and larceny." State v. Powell, 158 Vt. 280, 281 (1992).

We also disagree with the State that the court's error was harmless in this case because the main issue at trial was the perpetrator's identity. "Under the harmless error standard, we may find a constitutional or nonconstitutional error harmless only if we can state a belief that the error was harmless beyond a reasonable doubt." State v. Jackowski, 2006 VT 119, ¶ 8, 181 Vt. 73. In this case, we cannot conclude that the error was harmless beyond a reasonable doubt. Although the State is correct that defendant's theory of the case rested primarily on a mistaken identity defense, the issue of whether the victims were placed in imminent fear of serious bodily injury was an element of the crime that the State was required to prove, see State v. Boutin, 134 Vt. 151, 152 (1976) (State bound to prove all elements of offense), and the evidence on the issue of the victims' fear was mixed. Cf. Francis, 151 Vt. at 308 (concluding that error in instructing jury on intent was not plain error where the issue of intent was not a "close or difficult" one). Tiffany testified that at first she thought the intrusion was a joke. She explained that when she realized the intruder was serious, she then was "very scared" and "very threatened." Her actions following the intrusion could be construed as indicating that she was not very afraid of the intruder. She lied about having a cell phone and hid her cell phone from the intruder. She then concealed the phone when she left the room to comfort her child. When she called for help, she

did not call 911; instead, she phoned her daughter's father who is a police officer. The other complainant, Ben, did not claim to be afraid at all. He explained that after Tiffany went into the bedroom, the intruder simply left. Given the evidence, it is impossible to say that the victims were placed in imminent fear of serious bodily injury as a matter of law. Because the court's instruction allowed the jury to convict defendant without making a finding on an element of the offense, this error was not harmless and the case should be remanded for a new trial.

Defendant next argues that the prosecutor made impermissible statements during closing arguments that were overwhelmingly prejudicial. Defendant claims that the prosecutor committed misconduct by insinuating that defense witnesses were not reliable and had committed perjury, and by alleging a conspiracy between defendant and defendant's witnesses to perpetrate the assault and robbery. The prosecutor explained that Jon had motive to lie for defendant because they were close friends, and then told the jury that Jon should be sitting in the defendant's chair. Defendant construes this as an allegation that Jon committed perjury. Defendant objected to the statement and the court overruled the objection. The prosecutor also made several statements implying that Jon and Caitlin were involved with defendant in committing the crime, suggesting that "it was really something that [defendant] and Jon and his sister accomplished together." Even though we reverse on other grounds, we address this claim of error briefly to prevent further error on retrial. See State v. Hazelton, 2006 VT 121, ¶ 22, 181 Vt. 118 (addressing legal argument likely to arise in new trial).

"The longstanding rule in Vermont is that counsel should confine argument to the evidence of the case and inferences properly drawn from it, and must avoid appealing to the prejudice of the jury." State v. Lapham, 135 Vt. 393, 406 (1977). While prosecutors are granted wide latitude in closing argument, "[c]omments of counsel shall not be inflammatory, nor depart from the evidence, nor represent an injection into the case of the prosecutor's personal belief as to the guilt of the accused." Id. at 407. Whether an improper argument requires reversal depends on the facts of the case. Id. To warrant reversal, defendant "must establish that the prosecutor's closing argument was not only improper, but also that it impaired the defendant's right to a fair trial." State v. Gates, 141 Vt. 562, 566-67 (1982).

We first consider the statements regarding the credibility of defendant's key witness, Jon. Although the prosecutor was free to "challenge the consistency of the witness's story," id. at 567, "[w]e have long condemned prosecutors' statements conveying their beliefs or opinions about a case." State v. Rehkop, 2006 VT 72, ¶ 34, 180 Vt. 228. We conclude that the statements about the credibility of the witnesses were improper, but insufficient on their own to warrant reversal. Although the prosecutor improperly injected his own belief that Jon was lying by insinuating that Jon should be sitting in the defendant's chair, this comment was isolated and not sufficient on its own to warrant reversal.

Next, we consider the prosecutor's statements implying that defendant, his sister, and Jon were all involved in a plan to commit this assault and robbery. The prosecutor stated that defendant, Caitlin and Jon had a "plan and their plan is to go rip off the drug dealer. . . . Kyle needed a ride there that night because his truck was impounded and he got the ride there from his sister and [Jon] is waiting outside." In rebuttal argument, the prosecutor again alleged that "the evidence suggests that it was really something that [defendant] and Jon and his sister accomplished together."

We conclude that the prosecutor's argument was improper in that it "strayed from the evidence and inferences properly drawn from it." Gates, 141 Vt. at 567 (quotation omitted). We disagree with the trial court that "the only theory that plausibly explains all of the credible evidence is that both [Caitlin] and [Jon] participated in the offense." The trial court infers this from the following evidence: defendant, Caitlin and Jon were all drug abusers; the three had obtained drugs from complainant's home in the past; Caitlin and defendant tried to get drugs from Chelsea on the night of the robbery, but were unsuccessful; and defendant's truck was impounded on the night of the robbery. Although it may be plausible from the evidence that Caitlin and Jon were involved in the crime, it is not a reasonable inference since it requires several steps in logic, and no evidence directly implicated a conspiracy. No evidence was submitted demonstrating that Caitlin or her car was at the scene of the robbery, or even in the town where the robbery took place. There was also no evidence to indicate that the three were even together on the night in question. Both witnesses denied that Jon was with defendant and Caitlin that night, and Chelsea testified that she did not remember if Jon was present that night. Furthermore, when asked, Jon emphatically denied taking a part in planning the robbery. Evidence that the three often spent time together and did drugs together is not enough to infer that the three had a plan to commit the robbery. Thus, the prosecutor's statement was error.

We further hold the erroneous statement was not harmless. It is impossible to say that the prosecutor's comments did not have an impact on the fairness of the trial. The case turned on whether the jury believed complainants or defendants' witnesses, and the prosecutor's statements damaged defendants' witnesses' credibility without a proper basis in evidence. Moreover, not only did the prosecutor's statement allege that two key defense witnesses were guilty of conspiring to commit the robbery, but the argument injected an allegation of an additional uncharged offense of conspiracy against defendant. Allegations of uncharged misconduct are particularly prejudicial to a defendant because it gives the jury "a collateral ground for convicting [the defendant]." Id. at 569. Under these circumstances, we cannot say that the statements were harmless beyond a reasonable doubt.

Reversed and remanded for a new trial.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice