20080125

ORIGINAL
(e-filed)

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUG 20 2008
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/ Appellee,	) Supreme Court No. 20080125
-vs-	) District Court No. 18-07-K-01424
Cornell Xavier Scutchings, Defendant/ Appellant.	)

BRIEF OF APPELLANT

APPEAL FROM CRIMINAL JUDGMENT

DATED MAY 22, 2008,

OF NORTHEAST CENTRAL JUDICIAL DISTRICT

THE HONORABLE JOEL D. MEDD PRESIDING

HANDY LAW OFFICE
By: Gretchen Handy
Attorney at Law
ND Bar ID# 05077
1407 24th Ave. South
P.O. Box 6306
Grand Forks, ND 58203
Telephone: (701) 780 1286
Fax: (701) 780 1287

Table of Contents

Table of Authorities

Statement of Issues Presented for Review

I. Whether the Assistant State's attorney engaged in Prosecutorial Misconduct by improperly commenting on the Defendant's failure to testify, resulting in a denial of Due Process under the 5th Amendment.

II. Whether allowing the state to present a "booking" photograph to a jury that was not entered as evidence, was unduly prejudicial and a denial of Mr. Scutchings' right to a fair trial.

III. Whether there was prosecutorial misconduct in the state's vouching for the testimony of the complaining witness and whether this resulted in a Denial of a Fair Trial?

Statement of the Case

Nature of the Case and Procedural History

¶1 This appeal is taken from a Criminal Judgment entered by the Honorable Joel D. Medd, Judge of the District Court for the Northeast Central Judicial District on May 22, 2008, convicting the Defendant and Appellant Cornell Scutchings of Corruption and Solicitation of a Minor. (Docket 76; App. at 15). Notice of Appeal was filed on May 21, 2008. (Docket 72; App. at 22).

Statement of Facts

¶2 In the late evening hours of March 31st, and the early Morning hours of April 1st, 2007, C.M. was staying at the home of her uncle, Tyree Crayton and his wife Kaylie Crayton. (App at 35). The Defendant, Cornell Xavier Scutchings is the brother of Tyree, and uncle to the complaining witness. (App. 36, 37). During the time in question. Mr. Scutchings was temporarily living with his brother after having moved from South Carolina. (App. 52).

¶3 Tyree, his friends Raul and Osie and Mr. Scutchings watched a basketball game that evening and had a few drinks along with others at the house during the game. (App.51, 53). After the game. Tyree's friends Raul and Osie went home at approximately 11:00 p.m. (App. 39, 50). C.M. and her cousin, J.C., age 9, were watching Harry Potter on T.V. and eating snacks. (App. at 38). There is some discrepancy as to exactly how long the two were in the basement watching T.V. (compare App. 51 to App. 38). C.M. testified that they watched a "marathon" of Harry Potter that night, though J.C. said they only watched one movie. (App. 38, 51). She testified that she was supposed to be doing a science project. (App.35).

¶4 C.M. alleges that while she was visiting, she and her Uncle Cornell began talking about music, and her project, but then he began "talking about sex" with her in a way that made her feel "weird." (App 36-37). She alleges Mr. Scutchings came downstairs periodically and allegedly made inappropriate comments. C.M. also alleges there were two instances during which she was alone with Mr. Scutchings, wherein Mr. Scutchings made inappropriate advances towards her. (App. 37-49).

¶5 Detective Mike Iwan with the Grand Forks Police Department testified as to his interviews with C.M and Tyree. (App. 33). Ms. Larson, the Assistant State's Attorney for Grand Forks County, questioned the Detective about his qualifications and experience as a juvenile investigator, though he was not disclosed or offered as an expert witness. (App. 34). Detective Iwan testified extensively regarding his training and abilities in "assessing the credibility" of child witnesses. (App. 31, 32 and 34). Over objection of defense counsel, Ms. Larson asked the Detective if he had "any concerns regarding the credibility of her statement?" (App. 34). Counsel for the defense objected, stating that credibility was an issue for the jury, and that Detective Iwan was not disclosed as an expert witness. (App. 34). The Court sustained the objection. Ms Larson re-phrased her question, asking if he had "any concerns that C.M. was dreaming or imagining that this took place?" (App. 34).

¶6 Despite the earlier objection, Ms. Larson argued in her closing that Detective Iwan testified that he had "no concerns that C. was lying . . . taking into consideration all of his training." (App. 54).

Also during the State's closing, Ms. Larson argued that:

> "The witnesses that you heard from yesterday are the State's witnesses. The Defendant has no constitutional burden to testify. The only thing you can consider

are the State's witnesses and any cross-examination by the defense counsel. What do you have to refute C.M.'s testimony? Nothing. There's no reasonable doubt in this case. The ages have been proven to you."

(App. 55).

¶7 At the end of the closing arguments, Counsel for the defense made a motion for a mistrial based upon the State's characterization of Detective Iwan's testimony regarding C.M.'s credibility and the State's reference to Mr. Scutchings not taking the stand. (App. 56). The Court denied the motion for a mistrial. (App. 57).

¶8 The jury found Mr. Scutchings guilty. (App.58) Notice of Appeal was filed by Mr. Scutchings through his counsel, Attorney Daniel Borgen, on May 21, 2008. Docket 72, App. 22-25). In this manner, Mr. Scutchings brings this appeal before this Court.

Law and Argument

Jurisdiction

¶9 Appeals from decisions of the lower court to the Supreme Court shall be allowed as provided by law. The pertinent law provides:

> "An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D. Cent. Code § 29-28-03. An appeal may be taken by the defendant from:
>
> 1. A verdict of guilty;
> 2. A final judgment of conviction;
> 3. An order refusing a motion in arrest of judgment;
> 4. An order denying a motion for a new trial; or
> 5. An order made after judgment affecting any substantial right of the party."
> 6.

N.D. Cent. Code § 29-28-06.

¶10 This case is an appeal from a judgment of conviction resulting from a verdict of guilty and an Order denying a motion for a mistrial. (App. 56). Therefore, this Court has jurisdiction to hear this appeal.

I. Whether the Assistant State's attorney engaged in Prosecutorial Misconduct by improperly commenting on the Defendant's failure to testify, resulting in a denial of Due Process under the 5th Amendment.

¶11 Courts of appeal may notice a claimed error that is plain and affects substantial rights. N.D. R. Ev. 103. This authority to notice is cautiously exercised only where serious injustice is suffered. *Id.* (*quoting Hawes v. N.D. Dept of Transp.* 2007 N.D. 177, ¶ 10, 741 N.W. 2d 202). Trial courts have great discretion over the conduct of attorneys during closing argument to make sure they only refer to evidence on the record and inferences reasonably drawn from that evidence. Ordinarily. Appellate courts must not disturb decisions made by the district court unless there is a violation of a fundamental constitutional right. *Id.* North Dakota has found that with limiting

instructions, the potential harm caused by improper inferences can be minimized to the point of harmless error. *State v. Clark*, 2004 ND 85, ¶ 9. 678 N.W. 2d at 765.

¶12 The Fifth Amendment of the U.S. Constitution states that "No person . . . shall be compelled, in any criminal case, to be a witness against himself. . . ." U.S. Const. Amend. 5. If the State mentions the defendant's exercise of his Fifth Amendment privilege against self incrimination, it impermissibly shifts the burden of proof to the defendant to prove his innocence, and the trial court that allows this commits reversible error. *See Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that the 5th Amendment forbids improper comment on the silence of the accused by a prosecutor). When a prosecuting attorney uses his closing argument to draw attention to a defendant's lack of testimony, he casts such a shadow over this right such that it becomes an artificial piece of evidence in the State's case. *See Griffin*, 380 U.S. at 615. Prosecutors may not comment, either directly or indirectly, on the defendant's choice to remain silent through the proceedings. *Id.* To allow otherwise would be to whittle down this constitutional protection against overzealous prosecution, and effectively remove the presumption of innocence from criminal proceedings. Patrick McDermott, *United States v. Dickerson: Has Miranda been Overruled?* 52 Baylor L. Rev. 191, 192 (2000) (discussing the impact of legislation on the right to remain silent under the 5th Amendment).

¶13 In *Rivet v. State*, 2008 ND 145 ¶ 10, 752 N.W. 2d, 610. 610. the North Dakota Supreme Court explained this principle with reference to the United States Supreme Court case of *Chapman v. California*, 386 U.S. 18. 22 (1967) and the North Dakota Case of *State v. Schneider*, 270 N.W. 2d 787, 792 (N.D. 1978). "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it

was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 22. There the court also explained that the "beneficiary of a constitutional error has the heavy burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Rivet*, at ¶ 10, 752 N.W. 2d at 610.

¶14 Harmless error analysis is appropriate where a prosecutor improperly mentions a defendant's post-arrest silence. *State v. Janda*, 397 N.W. 2d 59, 66 (N.D.1986) (quoted in *Rivet, supra).* If an error is harmless, that is, "a defect, irregularity or variance that does not affect substantial rights," the court may disregard it. *Rivet*, 2008 ND 145, at ¶ 10. In order to find that an error is harmless, the court must "consider the entire record and the probable effect of the actions alleged to be error in light of all the evidence." *Id.*

¶15 In this case, the prosecutor said "the Defendant has no constitutional burden to testify. The only thing you have to consider are the State's witnesses and any cross-examination by defense counsel." Mr. Scutchings submits that this statement should be considered reversible error because it draws attention to the defendant's exercise of his right to remain silent. There is little difference between commenting on a defendant's post-arrest silence and lack of testimony at trial. Both indirectly point negatively to the exercise of constitutional rights, and attempt to shift the state's burden to the defendant. This burden shifting essentially turns the adversary, accusatory system into an "inquisitorial" one practiced in Europe. *Griffin*, 380 U.S. at 614: *See also,* Franklin Strier. *Making Jury Trials More Truthful*, 30 U.C. Davis. L. Rev. 95, 142 (1996) discussing the evolution of the right to remain silent). The inquisitorial system practiced in England at the time of the Revolutionary War compelled the defendant to take an oath to answer all

questions the state asked, even those that might incriminate him in other unknown crimes. *Griffin,* 380 U.S. at 614.

¶16 The Supreme Court in *Griffin* recognized that a person who might be innocent of the crime charged may incriminate himself on the stand by appearing and subjecting himself to the humiliation of cross-examination. *Griffin*, 380 U.S. at 614. A defendant's past criminal convictions may be brought in to impeach his testimony if he takes the stand, no matter how innocent he may be of the crime at hand. *Id.* When a prosecutor mentions that a defendant has "no constitutional burden" to testify, as here, she draws attention to this decision and challenges the defendant to testify even though it may be harmful for him to do so. *Id.* at 615. There is no point in having a privilege against self-incrimination if one's choice to exercise that right can be indirectly criticized in court before a jury.

¶17 The trial court committed reversible error in allowing the prosecution to draw attention to Mr. Scutchings' exercise of his privilege not to testify. The Fifth Amendment of the U.S. Constitution and Article 1, § 12 of the ND Constitution provide that one "shall not be compelled to be a witness against himself" in a criminal proceeding, and here the prosecution eroded this protection by drawing negative inferences from it for the jury. The constitutional protection against self-incrimination is a "substantial right" and thus the beneficiary of an error against it must bear the burden of showing why the error is not prejudicial. *State v. Schneider*, 270 N.W. 2d 787, 792 (N.D. 1978). There is little difference between being able to comment on a defendant's post-arrest silence and unwillingness to testify at trial. In both cases, such as in Rivet and the instant case, the defendant invokes the privilege, and in both cases the prosecutor is

trying to undermine the defendant's credibility by reminding the jury of this invocation. To allow prosecutors to comment on a defendant's silence is to allow them to compel defendants to testify, in violation of the 5th Amendment and precedent.

II. Whether allowing the state to present a "booking" photograph to a jury that was not entered as evidence was unduly prejudicial and a denial of Mr. Scutchings' right to a fair trial.

¶18 The standard of review for federal constitutional errors in North Dakota is harmless error. *State v. Schneider*, 270 N.W. 2d 787, 792 (N.D. 1978). Unless constitutional errors are found to be harmless beyond a reasonable doubt, they require reversal. *Id.* (citing *Chapman v. California*, 386 U.S. 18, 87 (1967)).

¶19 The booking photograph of the defendant, used as part of the state's PowerPoint presentation, was unnecessary and prejudicial. Its admission denied Mr. Scutchings a fair trial under the 6th Amendment which reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . .". U.S. Const. Amend. 6. Due to the nature of this case, where C.M. accused her uncle and there was little doubt as to the identity of the suspect, who was present at all hearings, including trial, this photograph was not needed to sort out the elements of the state's case. In order to prove Corruption or Solicitation of a Minor under sections 12.1-20-05(2) and 12.1-32-01(4) of the North Dakota Century Code, the state must show the defendant was "an adult at least 22 years of age or over and soliciting with the intent to engage in a sexual act with a minor under the age of 15." (App. 29). In this case, the defendant was present in the court room, and his age of 37 years was readily identifiable by this

presence in court, witness testimony, and his relationship to the family members accusing him.

¶20 The trial court has wide discretion to control the introduction of evidence. N.D. R. Evid. 403 (Explanatory Note). Here despite the purported non-evidentiary nature (App. 28) of the photograph as part of the State's visual PowerPoint aid, the District Court Judge allowed it to be shown to the jury. Rule 403 of the Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* Because Mr. Scutchings' identity was not in serious doubt due to his relationship as an uncle to C.M., we submit that the presentation of this photograph was a "needless presentation of cumulative evidence" already on the record. *Id.* In addition, this photograph ought to have been judged unduly prejudicial because of its "mug shot" like nature, which painted the defendant in an unfavorable light without any offer of proof attached to it. Counsel objected to its introduction prior to the start of trial, but it was allowed anyway. (*See* App. 28); *see also* N.D. R. Evid. 103 (a) (1) ("In case the ruling is one admitting evidence, timely objection or motion to strike appears on the record, stating the specific ground for objection if the specific ground is not apparent from the context).

¶21 The state was the beneficiary of the error and thus bears the burden of showing that it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24; *Rivet*, at ¶ 15, 752 N.W. 2d at 617. We submit that this photograph helped contribute to the guilty verdict by destroying Mr. Scutchings' credibility before any evidence was

presented in much the same way shackles and an orange jumpsuit might. *Estelle v. Williams*, 425 U.S. 501. 512 (1976) (commenting that as long as an objection is timely made, criminal defendants cannot be compelled to wear prison garb). The reasoning behind allowing defendants the option of dressing in plain clothes when attending court is the same, the bias against the defendant based solely on appearance. *Id.* The appearance of the defendant affects a jury's ability to carry out its fact finding function with the necessary impartiality of a fair trial. *Id.* at 515 (Marshall, J., dissenting). Although an unfair trial is not guaranteed when the jury sees the defendant in shackles and prison wear, the court must allow the defendant to change if a timely objection is made. *Id.* at 512. In the same way a prison jumpsuit can negatively bias a jury against the defendant, so too can an unflattering booking photograph, and its admission was not harmless error beyond a reasonable doubt. Mr. Scutchings' conviction should be reversed and remanded for a new trial declared.

III. Whether there was prosecutorial misconduct in the state's vouching for the testimony of the complaining witness and whether this resulted in a Denial of a Fair Trial?

¶22 The standard of review for prosecutorial misconduct is harmless error. *State v. Marks*, 452 N.W. 2d 298, 301 (1990). Harmless error is determined based on the severity of the misconduct alleged, the more severe the misconduct alleged, the higher the burden on the state to show that is was harmless. *Id.* In severe cases of misconduct, the state must prove beyond a reasonable doubt that the error was not harmful. *Id.*

¶23 During direct examination, and again during closing argument, the state attempted to vouch for the credibility of C.M. by calling Detective Mike Iwans of the Grand Forks Police Department to the stand. Although not called as an expert witness,

the prosecutor made significant mention of the Detective's specialized training in dealing with child victims. (App. at 34). Apparently, the Detective has "gone to a number of schools dealing with interviewing juveniles" and "part of that training involves assessing the credibility of a person that you're interviewing." (App. at 32). Later, the prosecutor asked Detective Iwan: "when you were interviewing C.M., she's the juvenile victim in this case, did you have any concerns regarding the credibility of her statement?" Defense counsel objected to this as credibility is for the jury, and in the alternative, that the Detective was not disclosed as an expert witness, and the court sustained the objection. In her closing statement, however, the State referred to Iwan's training again: "His job is to interview juveniles. He told you that he had no concerns that C was lying to him and he was willing to tell you that under oath today, taking into consideration all of his training." (App. at 54).

¶24 Misconduct occurs when a prosecutor uses her position as counsel for the state to vouch for the credibility of its witnesses. *Rivet*, at ¶ 15, 751 N.W. 2d at 617. The allowance of this misconduct is reversible error. When the State's attorney referred to Detective Iwan's testimony regarding his having "no concerns C. was lying to him," she impermissibly vouched for the credibility of the state's witness. The burden is on the state, the beneficiary of the error, to prove that these comments were harmless, and if they do not meet this burden, the conviction must be reversed. *Rivet*, at ¶ 15, 751 N.W. 2d at 617. The Court may consider the record in its entirety and assess the probable effect of the actions alleged to be error in light of all the evidence. *Chapman*, 386 U.S. at 22.

¶25 Rule 701 of the North Dakota Rules of Evidence deals with opinion testimony of lay persons. It reads: "If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences that are (i) rationally based on the perception of the witness and (ii) helpful to a clear understanding of the witness' testimony or the determination of a fact at issue." N.D. R. Evid. 701. Since Detective Iwan was not disclosed or qualified by the Court as an expert witness. his opinions testimony, and counsel's conclusions drawn from it. must fit within this rule. The jury is the ultimate arbiter of the credibility of witnesses, and they had an opportunity to hear from C.M. on the stand during direct, cross and re-direct examination. The detective's opinion, when offered in support of the state was not necessary to help the jury clarify the witness's testimony or determine a fact at issue, because it was their role to determine credibility. Having someone with over 20 years as a police officer take the stand and vouch for the credibility of a witness improperly gives that person's testimony greater weight with the jury, due to the moral authority of the badge behind it. *Montgomery v. Aetna Cas. Sur. Co.*, 898 F.2d 1537 (1993). (discussing the greater weight placed on expert witnesses by juries.) The Detective was not disclosed or qualified by the Court as an expert, so counsel improperly used his testimony to vouch for the credibility of C.M. in its closing argument.

¶26 Had the Detective been disclosed or qualified by the Court as an expert witness, which he essentially was, he could have gone through the analysis that allows him to have greater insight into the mind of a 12 year old girl than most jurors. Rule 702 of the Rules of Evidence says: "If scientific. technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a

witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." N.D.R. Evid. 702. Detective Iwan did not offer a scientific explanation for why the jury ought to believe C.M.'s testimony, but merely asserted his personal opinion. Under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579. (1993), an expert witness must employ some form of scientific method that can be reliably reproduced. *Id.* The trial court may use several factors in assessing the reliability of scientific expert testimony. These factors may include whether the expert's technique or theory can be tested, whether the expert's theory can be challenged objectively, or whether it is a subjective, conclusory approach that cannot reasonably be assessed for reliability. *Id.*, Fed. R. Evid. 702 (2000 advisory notes). No explanation or methodology was offered in this case, so Detective Iwan's testimony should not have included personal assertions regarding the credibility of C.M.

¶27 Given that Detective Iwan's testimony in this case repeatedly mentioned his specialized knowledge of juvenile victims and his ability to assess deception, and that prosecutor brought it up again in closing, this is not to be a harmless slip, but a calculated campaign to inflate the credibility of the complaining witness. A prosecuting attorney's argument may induce the jury to trust the government's view rather than its own judgment when deliberating. *City of Williston v. Hegstad*, 1997 ND 56 ¶ 8, 562 N.W. 2d 91. Knowing this, the State improperly vouched for C.M.'s testimony. Because of this misconduct, the conviction of Mr. Scutchings should be reversed.

Conclusion

¶28 Based on the foregoing, given the circumstances and number of errors in this trial, Mr. Scutchings' conviction should be reversed. The burden is on the state to prove

beyond a reasonable doubt that its improper mention of Mr. Scutchings exercise of his rights against self incrimination, the inflammatory "mug shot" and the State's vouching for the credibility of the complaining witness was harmless and did not contribute to the verdict obtained. In order to assess whether the errors were harmless, this court must take into account all the facts and circumstances in the record. Mr. Scuthings was denied his rights to Due Process and a Fair and Impartial Trial. One defect on its own may not support a reversal, but the perfect storm of others combined ought to in this case. Mr. Scutchings respectfully requests a reversal of the judgment and that the matter be remanded for a new trial.

Dated this 19th day of August, 2008.

Gretchen Handy
NDID 05077
Attorney at Law
Handy Law Office
(701) 780 1286
P.O. Box 6306
Grand Forks, ND 58206