No. 07-3487

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BETHANY V. BOWEN,

Plaintiff-Appellant,

v.

HON. JEFFRE CHEUVRONT, IN HIS OFFICIAL CAPACITY,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Nebraska

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BRIEF *AMICUS CURIAE* OF THE NORTH DAKOTA STATE'S ATTORNEYS ASSOCIATION, IN SUPPORT OF PLAINTIFF-APPELLANT FOR REVERSAL AND REMAND

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December 21, 2007

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INTEREST OF *AMICUS*

Amicus North Dakota State's Attorneys Association ("the Association") is a voluntary association of district attorneys located in North Dakota. District attorneys are bound to serve the public interest and to ensure that justice is done. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935); AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-1.2 (3d ed. 1993). In this case, the state trial court ordered witnesses, on pain of contempt, not to use certain terms in telling their stories to the jury. The plaintiff in this case seeks to protect her right to tell the jury about the crime against her using her own words without fear of punishment for contempt—an interest that coincides with the Association members' interest in bringing criminals to justice. The danger that such a constraint on victims' testimony will adversely affect their credibility and thus result in criminals going free is particularly acute in prosecutions of sexual assault and rape crimes, where the credibility and testimony of victims play a key role in the fact-finder's assessment of evidence. The Association's members therefore believe that their perspective as line prosecutors informs the Court with a unique and important perspective that argues in favor of reversing the district court's dismissal of this case so that these compelling issues can be weighed on their merits.

STATEMENT OF FACTS

In November 2004, prosecutors in Lincoln, Nebraska, filed a one count complaint and information (the "Information") against Pamir Safi (the "Defendant"). The Information specified one count of First Degree Sexual Assault, pursuant to Nebraska Code § 28-319(1)(a),[1] in connection with the alleged sexual assault of Bethany V. Bowen ("Ms. Bowen") on October 31, 2004. *See* App. at 59.

At trial, and over the opposition of the prosecuting attorney, the court granted the Defendant's pretrial motion to prevent all testifying witnesses from using certain specific words in open court, including "victim," "assailant," and "rape." App. at 37, 70. The prosecution did not appeal the ruling, presumably because Nebraska law does not allow interlocutory review of a prohibition on witness speech. NEB. REV. STAT. § 29-2315.01 (2007).

Strict compliance by witnesses with the court's language order proved difficult during the trial. *See* App. at 18. Each witness had to abide by the judicially imposed speech restrictions, while at the same time recounting events and testifying truthfully and accurately. Reconciling the need to self-censor with the duty to relay their experiences fully and candidly, witnesses fumbled in

[1] The Nebraska criminal code does not specify a crime for rape. *See* NEB. REV. STAT. Ch. 28 (2007).

rendering testimony and used words prohibited by the language order. *Id*. The jury deadlocked in deliberations, and the court consequently declared a mistrial. App. at 60.

When a second trial was scheduled, the Defendant again sought and obtained an order disallowing the use of certain words by testifying witnesses.[2] *Id*. This time, the court prohibited the use of the terms "victim," "assailant," "attack," "rape," and the technical terms "sexual assault kit," and "sexual assault nurse examiner."[3] The court also required witnesses to certify in writing that they would comply, on pain of contempt, with the language order. App. at 17-20, 48-50. In part due to the media attention surrounding public opposition to the second language order, the court declared a mistrial before a jury could be empanelled. App. at 56.

Invoking 42 U.S.C. § 1983, Ms. Bowen filed an action in the United States District Court for the District of Nebraska against the presiding judge at trial, Hon. Jeffre Cheuvront, in his official capacity. Confronted with a language order judicially restricting her ability to testify completely and candidly, Ms. Bowen sought a declaratory judgment specifying that the language restrictions violated her

[2] Presumably because it could not appeal interlocutorily, the prosecution sought a language order prior to the second trial that might to some extent help neutralize the effects of the judge's order. That motion was denied. App. at 51-54.

[3] Witnesses were required to refer to the sexual assault kit as a "sexual examination kit" and to the Sexual Assault Nurse Examiner as one "having special training in 'sexual examinations.'" App. at 48.

First, Fifth, and Fourteenth Amendment rights. *See* App. at 58-66. The district court *sua sponte* invoked FED. R. CIV. P. 11, and dismissed the action as a sanction. Mem. and Order, Sept. 25, 2007; Judgment, Sept. 25, 2007; Mem. and Order, Oct. 16, 2007. Ms. Bowen appealed to this Court.

ARGUMENT

Language orders like those involved in this case are problematic for prosecutors and the court system on the whole. Judicial language restrictions distort the ability of witnesses to recount important events naturally, particularly when those witnesses fear being held in contempt. As a result, juror perceptions of key prosecution witnesses are systematically biased when word restrictions are in place, to the detriment of the administration of justice. This case presents an opportunity to ensure that witnesses are permitted to testify in language that is intuitive and accurate. The concerns to which language restrictions are directed are better addressed by less harmful measures, such as jury instructions.

The Association submits that reversal in this case provides the opportunity to preserve the ability of fact witnesses to speak the truth in their own words in criminal cases. The Association members believe that the dangers presented by language orders to the just prosecution of criminal cases should be taken into account in considering the merits of plaintiff's claims.

I. THREATENED CONTEMPT FOR USE OF NATURAL AND ACCURATE LANGUAGE INHIBITS ASSESSMENT OF WITNESS CREDIBILITY

Language restrictions such as those involved in this case are likely to distort the outcome of cases, notwithstanding the underlying facts or merits of the parties' positions. In the adversarial system, "uninhibited testimony is vital to the success of our courts' truth seeking function" and "the foundations of federal justice will be undermined if witnesses are not able to testify freely." *Catletti v. Rampe*, 334 F.3d 225, 230 (2d Cir. 2003) (citation omitted). Yet such language restrictions pose a dangerous risk by seeking to inhibit the natural testimony of witnesses, especially when witnesses testify on pain of contempt for violating the orders.

An order inhibiting free and candid testimony is likely to damage the credibility of witnesses in the eyes of the fact-finder. This effect may manifest itself in numerous ways. For instance, witnesses are likely to stumble over their language or speak less fluidly when recounting events, due to the need to self-censor their testimony to abide by the court's language order. Even if no mistakes occur, witnesses have an increased likelihood of speaking more slowly, shifting in their seats, breaking eye contact, or (in extreme cases) sweating due to the need to comply with a judicial order regarding their use of language. Such effects on the speaker—though not intended to alter the perception of the substance being conveyed—inherently affect the fact-finder's perception of the testimony and

undermine the credibility assessed to the speaker. Since juries typically do not learn of the language restrictions,[4] they are particularly likely to compromise jurors' ability to assess credibility accurately.

II. SUCH LANGUAGE RESTRICTIONS ESPECIALLY COMPROMISE PROSECUTIONS OF SEXUAL ASSAULT CASES

Language restrictions have a disparate impact on prosecutions of sexual assaults and rapes because the burden on witness credibility is especially pronounced for victims. Unlike crimes in which documents or disclosures play a central role, there is a "heavy dependence on oral testimony in a rape trial[;] language shapes and determines how jurors visualize and interpret the alleged rape event." Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 Colum. J. Gender & L. 437, 462 (2006). In addition, the burden of proof in many sexual assault prosecutions is borne largely or wholly by victims whose testimony is the only critical evidence. *See, e.g.*, *United States v. Kenyon*, 397 F.3d 1071, 1076 (8th Cir. 2005) (in child sexual abuse case, court noted that "a victim's testimony alone can be sufficient to support a guilty verdict") (citation omitted).

In addition, victims in sexual assault and rape cases are under tremendous emotional pressure even before they testify. In these cases, victims start with a

[4] In the *Safi* case, for instance, the jury was never apprised of the language restrictions. App. at 60.

handicap because "the predictable after-effects of their traumatic attacks often make [them] appear less credible[.]" Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client / Attorney Relationships*, 48 S. Tex. L. Rev. 695, 700-01 (2007). At the same time, sexual assault and rape victims face more challenges than other complainants because they must confront their assailants and typically spend several hours[5] to "detail publicly all the elements of an event likely to be particularly embarrassing to" them. Carol Bohmer & Audrey Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 Judicature 391, 393 (1975). Notwithstanding these barriers to victim testimony, however, courts in this Circuit have repeatedly embraced a policy of encouraging sex crime victims to testify. *See United States v. Grassrope*, 342 F.3d 866, 869 (8th Cir. 2003) (permitting leading questions to develop sexual assault victims' testimony); *Phea v. Benson*, 95 F.3d 660, 662 (8th Cir. 1996) (curative measures are appropriate response to rape victim's emotional outburst, including screaming and crying, on stand).

Assuming that victims can overcome emotional hurdles and are willing to testify at trial, a language order exposing the witness to a contempt citation can be expected to undermine the court's truth-seeking function. Such orders prevent

[5] At trial in the criminal case, Ms. Bowen herself testified for thirteen hours while subject to the court's first order. App. at 15 (victim felt "immense pressure of testifying for nearly 13 hours").

victims from using words that they incline to naturally and that best convey their actual experiences.[6] When the terms most natural and intuitive to a lay witness—including "rape," "sexual assault," and "victim"—are barred, victims must scramble for judicially sanctioned substitutes while rendering testimony. The judicial language bar thus results in an additional hurdle for complaining witnesses, compounding the emotional challenges. This effect can be expected to undermine systematically the credibility assessed to the victim's testimony in particular.

In the Safi case, the court instructed the jury to consider the conduct and demeanor of the witness while testifying and whether the witness communicated accurately—two things that require witnesses to be able to testify naturally and at ease. *Cf.* Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 Just. Q. 651 (2001) (conviction often "depends primarily on the victim's ability to articulate what happened and to

[6] In addition to barring lay terms such as "rape," and "victim," the court in the Safi case barred the technical terms "sexual assault kit" and "sexual assault nurse examiner." App. at 48. Instead, witnesses—presumably including the Sexual Assault Nurse Examiner herself—were ordered to refer to a "sexual examination kit" and one "having special training in 'sexual examinations.'" *Id*. Such restrictions are particularly dangerous because they are both inaccurate and misleading. Sexual Assault Nurse Examiners are licensed professionals, and they specialize in the examination of sexual assault, not sex. Rebecca Campbell, *The Effectiveness of Sexual Assault Nurse Examiner (SANE) Programs*, http://new.vawnet.org/category/ Main_Doc.php? (last visited Dec. 20, 2007).

convince a judge or jury that a sexual assault occurred"). However, the victim's testimony in the case was encumbered by the "extreme emotional pressure" she faced while testifying "with what I perceive as the person who raped me [sitting] five feet away." App. at 14. As the victim told the court, she did not wish to testify if not allowed to testify freely. App. at 17. The fact that she could be held in contempt for violating the language order could not help but compound these difficulties. Because victim testimony often represents the most important evidence that the prosecution presents, language restrictions like that in the Safi case can thus be expected to bias the outcome of trials against the prosecution, particularly when the core issue is whether to believe the victim or the defendant.

In addition, language restrictions threaten to discourage witness participation in the criminal justice system in the first instance. If witnesses and victims must testify under threat of contempt for testifying truthfully in their own language, they will be less inclined to come forward and cooperate with the prosecution. To the extent that such language restrictions undermine public confidence in the conduct and outcome of criminal trials, the work of prosecutors will be impeded. Victims of sexual violence, who already confront substantial obstacles, are especially likely to be deterred. In a system that relies on the voluntary reports of citizen-witnesses to detect and punish criminal activity, this consequence of language orders impairs the ability of prosecutors to represent the public interest.

III. SUBSTANTIVE REVIEW IS NECESSARY TO ENSURE WITNESSES' ABILITY TO TESTIFY CANDIDLY AND ACCURATELY

Because of the lack of adequate appellate review to date, there are no clear standards for the imposition of restrictions on fact witness testimony. Moreover, defense motions for witness language orders are increasingly prevalent.[7] *See*, *e.g.*, *State v. Kelley*, 896 A.2d 129, 132 (Conn. App. Ct. 2006); *State v. Fernandez*, 876 A.2d 221, 240-41 (N.H. 2005); *Jones v. State*, 625 S.E.2d 4, 9 (Ga. Ct. App. 2005). Language restrictions like that in the instant case undermine consistency and predictability in the law.

One key factor contributing to this problem is the general lack of opportunity to present the issue to reviewing courts. In criminal cases, prosecutors are often unable to appeal unfavorable orders, in part because: (i) in the event of an acquittal, double jeopardy effectively precludes post-trial appeals regarding language orders; and (ii) interlocutory appeals of orders on motions *in limine* are typically not available. Of the states in the Eighth Circuit, prosecutors in

[7] In recent years, motions for language restrictions have expanded beyond sex crime trials. In courts around the country, criminal defendants have sought to have words such as "murder," "robbery," and "carjacking" replaced by unnatural substitutes, notwithstanding that those words accurately describe witnesses' factual perceptions. *See*, *e.g.*, *Appling v. State*, 642 S.E.2d 37, 41 n.2 (Ga. 2007) (motion to prevent "murder" during trial for malice murder); *Jones v. State*, 128 P.3d 521, 539 (Okla. Crim. App. 2006) (motion to bar "carjacking" at trial in which murder was allegedly committed during armed robbery of automobile); *State v. Shaeffer*, No. E2005-00085-CCA-R3-CD, 2005 WL 3533304, at *6 (Tenn. Crim. App. Dec. 17, 2005) (unpublished opinion; attached) (defense counsel objection to detective's characterization of offense as a "robbery" in trial for aggravated robbery).

Arkansas, Iowa, Missouri, Nebraska, and North Dakota cannot pursue an interlocutory appeal of a language order like that at issue here. ARK. R. APP. P. - CRIM. 3 (2007); IOWA CODE § 814.5 (2007); MO. REV. STAT. § 547.200 (2007); NEB. REV. STAT. §§ 29-2315.01, 29-316.01 (2007); N.D. CENT. CODE § 29-28-07 (2007). Prosecutors in Minnesota and South Dakota have only limited ability to appeal such interlocutory orders. MINN. R. CRIM. P. 28.04.1(1), 28.04.2(8) (2007); S.D. CODIFIED LAWS § 23A-32-12 (2007). At the same time, although defendants may seek appellate review of language orders, those appeals principally address whether reversal of a conviction is warranted. As a result, reviewing courts do not typically focus on the propriety of language orders directly, but instead address the issue in collateral contexts. *See, e.g.*, *People v. Gray*, 118 P.3d 496, 527-28 (Cal. 2005) (denying defendant's claim that counsel was ineffective for failing to object to "sexual assault kit"); *United States v. O'Sullivan*, No. 98-C-0235, 1999 WL 755918, at *1 (N.D. Ill. Sept. 3, 1999) (unpublished opinion; attached)[8] (denying, as procedurally defaulted, defendant's claim that witness's use of "rape" in testimony, in violation of an order banning the word, violated due process). Thus, procedural constraints ensure that the legal status of language restrictions on

[8] Pursuant to 8TH CIR. R. 32.1A, the unpublished opinions cited in this brief are not cited as precedent, but only referenced as examples of language restrictions sought in various jurisdictions.

victims and other fact witnesses, and in particular their constitutional status, is typically not addressed by reviewing courts.

As this case illustrates, unless there is effective judicial review, trial courts will have virtually unfettered discretion to determine what language is barred for witnesses at trial, even when such determinations have the potential to obfuscate admissible evidence. The extent to which evidence indicates a likelihood of conviction plays a key role in the prosecutor's decision whether to prosecute a case. *See, e.g.,* NEB. REV. STAT. § 29-404 (2007); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9.27-220 *et seq*., http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (last visited Dec. 20, 2007). Inasmuch as a lack of standards undermines predictability, the ability of prosecutors to exercise proper charging discretion is inhibited.[9]

Lack of review not only results in unpredictability, but also is likely to produce judicial rulings at odds with legislative determinations. For instance, in the criminal case underlying this matter, the court's language order contradicted

[9] Beyond the additional burdens imposed on prosecutors, the judicial system itself is increasingly being forced to bear the additional strain of motions for language orders and associated appeals. *See, e.g., People v. Williams*, No. 263892, 2006 WL 3682750, at *2-3 (Mich. Ct. App. Dec. 14, 2006) (unpublished opinion; attached) (defendant sought to overturn conviction when prosecutor said "murder" once during a five-day trial); *People v. Gray*, 118 P.2d at 527-28 (defendant claimed ineffective assistance because counsel referred to a "sexual assault kit" in a case with extensive physical evidence that 87-year-old victim was beaten, raped, sodomized, and strangled by the defendant).

Nebraska's statutory definition of "victim" in this context as "the person alleging to have been sexually assaulted." NEB. REV. STAT. § 28-318(7) (2007). Under the law, Ms. Bowen was indisputably the victim, yet was prevented from saying the word at trial. In addition, the court prohibited the use of the word "rape" on the stated ground that the assault in the Safi case involved an unconscious victim instead of one who was assaulted with physical force—despite the fact that, under Nebraska law, the two scenarios are legally indistinguishable. *See* NEB. REV. STAT. §§ 28-318(8), 28-319(1)(a) (2007). Thus, the lack of a clear standard for the imposition of language restrictions on precipient fact witnesses can result in significant, but effectively unreviewable, legal errors.

IV. DEFENSE INTERESTS CAN BE PROTECTED THROUGH OTHER, LESS HARMFUL MEASURES

Courts can and should turn to measures other than language restrictions on fact witnesses to avoid the numerous injuries to the prosecution and the truth-seeking function of trials. For example, courts routinely provide instruction to juries regarding the significance of witness testimony during trial and/or prior to deliberations, and this practice is a favored means to combat undue prejudice. This Circuit, in particular, has "been reluctant to find that the evidence was unfairly prejudicial when the district court gave an appropriate limiting instruction." *United States v. Loveless*, 139 F.3d 587, 593 (8th Cir. 1998); *see also*, *e.g.*, *United States v. Medicine Horn*, 447 F.3d 620, 623 (8th Cir. 2006) (lower court properly

instructed jury prior to the testimony of witnesses who claimed the defendant sexually assaulted them); *State v. Sanchez-Lahora*, 616 N.W.2d 810, 821-22 (Neb. Ct. App. 2000) (limiting instruction given because defense counsel was concerned his client would be convicted "of being a bad person as opposed to whether or not he raped the alleged victim"); *cf.* FED. R. EVID. 403 advisory committee's notes (courts should consider "effectiveness of a limiting instruction" when deciding "whether to exclude on grounds of unfair prejudice").

Amicus is not aware of any instances in which a reviewing court has held that the lack of a witness language restriction is grounds for reversal of conviction. *See, e.g.*, *State v. Kelley*, 896 A.2d at 132, 135 (holding that trial court did not err in denying defendant's motion to bar use of terms "tests," "results," "pass," "fail," and "points" by witnesses describing defendant's performance on field sobriety test); *State v. Fernandez*, 876 A.2d at 240 (holding that trial court could reasonably have determined that the use of the word "murder" by witnesses was not more prejudicial than probative); *Jones v. State*, 625 S.E.2d at 9 (holding that trial court did not err in denying defendant's motion in limine to prevent witnesses from testifying that machines seized were "gambling devices"). Given the availability of jury instructions—a widely used and constitutionally sound alternative—courts should refrain from restricting the word choice of testifying fact witnesses, particularly in cases involving emotional trauma for complaining witnesses.

CONCLUSION

For the reasons stated herein, language restrictions like those in the Safi case present an obstacle to the just prosecution of criminal matters. *Amicus* supports reversal and remand so that these compelling issues can be weighed on their merits.

Respectfully Submitted:

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Dated: December 21, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2007, two paper copies of, and one computer disk (per party) containing this Brief *Amicus Curiae* of the North Dakota State's Attorneys Association were sent via Federal Express, postage prepaid, to each of the following:

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Amicus has been informed by the office of the Clerk of the Eighth Circuit that no further service is required.

_____
Katherine A. Ross

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief *Amicus Curiae* of the North Dakota State's Attorneys Association (the "brief") complies with the type-volume limitations stated in Fed. R. App. P. 29(d) and 32(a)(7) and in 8th Cir. R. 28A(c). The brief is proportionally spaced, with Times New Roman font size 14, and contains 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief was prepared using the Microsoft® Office Word 2003 word processing software.

Pursuant to 8th Cir. R. 28A(d)(2), I further certify that the file copied to the CD-ROM has been scanned for viruses and is virus-free.

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ATTACHMENTS

HState v. Schaeffer
Tenn.Crim.App.,2005.
Only the Westlaw citation is currently available.
SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.
Court of Criminal Appeals of Tennessee,at Knoxville.
STATE of Tennessee
v.
Joshua SCHAEFFER.
No. E2005-00085-CCA-R3-CD.

Nov. 29, 2005 Session.
Dec. 27, 2005.
Application for Permission to AppealDenied by Supreme CourtMay 1, 2006.

Direct Appeal from the Criminal Court for Hamblen County, No. 04-CR-273;James Edward Beckner, Judge.

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Paul G. Summers, Attorney General & Reporter; Blind Akrawi, Assistant Attorney General; and Victor Vaughn and Paige Collins, Assistant District Attorneys General for the appellee, State of Tennessee.

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and THOMAS T. WOODALL, JJ., joined.

OPINION

GARY R. WADE, P.J.

***1** The defendant, Joshua Schaeffer, was convicted of aggravated robbery. The trial court imposed a Range I sentence of eight years in the Department of Correction. In this appeal as of right, the defendant alleges (1) that the evidence is insufficient; (2) that the trial court provided an incorrect definition of the term "deadly weapon" in its instructions to the jury; (3) that the trial court committed plain error by giving the "result-of-conduct" definition of "knowingly" in its instructions to the jury; (4) that the trial court improperly allowed into evidence a newspaper headline related to the offense; (5) that a detective impermissibly referred to the crime as "robbery" during his testimony; (6) that the prosecutor's closing argument was improper; and (7) that the cumulative effect of the errors deprived him of the right to a fair trial. The judgment of the trial court is affirmed.

At approximately 3:00 a.m. on June 16, 2004, the defendant walked into the Fast Stop Number Seven in Hamblen County, sought assistance from the clerk, Eva Darlene Pearson, threatened her with a knife, and then demanded money from the register. According to Ms. Pearson, the defendant said, "I'm not going to hurt you, I just want the money."He then directed her to empty the money from the cash register and then walk outside along the road. When the defendant left, Ms. Pearson returned to the market to telephone 911 and reported the robbery. She described the knife used by the defendant as having a seven inch blade and a black handle.

Later that day, Ms. Pearson was in a vehicle with her family when she noticed that a car similar to that driven by her assailant had been stopped by police near a Baskin-Robbins. When she recognized the defendant, she told her husband, who stopped the car and informed the officer of this information.

Detective Todd Davidson of the Morristown Police Department, who responded to the robbery call, interviewed Ms. Pearson, who described the defendant's vehicle as a "champagne-colored vehicle that ... [was] beat up all over."He also recovered a videotape from the store's security camera. Later that day, Detective Davidson drove to the Baskin-Robbins to arrest the defendant. The defendant had in his possession a newspaper with the headline "Bandit Robs Market at Knifepoint," and approximately $200 in cash.

After being taken to the police station, the defendant waived his rights and admitted having committed the robbery. In a statement to Detective Davidson, the defendant acknowledged that he drank some beer to "build [his] nerve up," placed the kitchen knife in his pants pocket, and then drove to the Fast Stop Number Seven. The defendant admitted asking the victim for help finding some medication before displaying his knife and demanding money. The defendant told the detective that he took the money from the register,

ordered the victim to walk along the roadway, and then left in his car. He also informed the detective that he threw the knife into the median as he drove away.

***2** Patrol Officer Brian Rinehart testified that he stopped the defendant near a Baskin-Robbins for making an improper lane change. He recalled that he was checking the defendant's identification and proof of insurance when he was approached by the victim's husband, who identified the defendant as having committed the robbery. At that point, Officer Rinehart contacted Detective Davidson.

The twenty-year-old defendant, who testified on his own behalf, apologized to the victim, explaining that he never intended to hurt her and did not realize that she would be so frightened by the incident. The defendant claimed that he never threatened the victim and, in fact, had emphasized that he would not hurt her. He acknowledged using a knife in the robbery, stating, "It is robbery.... I did go down there to steal money."He also admitted spending a small amount of the robbery money on a can of smokeless tobacco and a newspaper.

I

The defendant first asserts that the evidence is insufficient to support the conviction. He asserts that because the indictment named two victims, the Fast Stop Number Seven Market and its clerk, Eva Darlene Pearson, he should have been found guilty of the theft of the market and the assault of Ms. Pearson. The state submits that the evidence is sufficient to support the single conviction for aggravated robbery.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom.*State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn.1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact.*Byrge v. State*, 575 S.W.2d 292, 295 (Tenn.Crim.App.1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R.App. P. 13(e); *State v. Williams*, 657 S.W.2d 405, 410 (Tenn.1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *Liakas v. State*, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn.1992).

Aggravated robbery, as charged in the indictment, is "robbery ... [a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon."Tenn.Code Ann. § 39-13-402(a)(1) (2003). Robbery is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear ."Tenn.Code Ann. § 39-13-401(a) (2003).

***3** The evidence adduced at trial established that the defendant entered the Fast Stop Number Seven at approximately 3:00 a.m., displayed a knife to the clerk, and took some $200 from the cash register. The defendant admitted to Detective Davidson that he committed the robbery. In his testimony he acknowledged that "[i]t was robbery." While the defendant claimed that he never intended to hurt the victim, he conceded that he used the knife to gain power over the victim. She acceded to his directions. The jury was properly instructed on both theft and assault as lesser included offenses of aggravated robbery. As was its prerogative, the jury accredited the witnesses for the state, concluding that the defendant committed the charged offense. That the indictment listed the name of the market and the clerk on duty as victims of the crime does not mean that the defendant is entitled to two convictions on the lesser included offenses.

II

The defendant next contends that the trial court erred by giving an improper definition of the term "deadly weapon" in its instructions to the jury. He claims that the trial court should have utilized the definition in Tennessee Code Annotated section 39-11-106(5)(B) rather than Tennessee Code Annotated section 39-11-106(5)(A). The state submits that the instruction given by the trial court was proper.

Under the United States and Tennessee Constitutions, a defendant has a constitutional right to trial by jury, which dictates that all issues of fact be tried by a jury. U.S. Const. amend VI; Tenn. Const. art. 1, § 6; *see State v. Bobo*, 814 S.W.2d 353, 356 (Tenn.1991); *Willard v. State*, 174 Tenn. 642, 130 S.W.2d 99, 100 (Tenn.1939). This right encompasses the defendant's right to a correct and complete charge of the law. *State v. Teel*, 793 S.W.2d 236, 249 (Tenn.1990). In consequence, the trial court has a duty "to give a complete charge of the law applicable to the facts of a case."*State v. Harbison*, 704 S.W.2d 314, 319 (Tenn.1986); *see State v. Forbes*, 793 S.W.2d 236, 249 (Tenn.1990); *see also*Tenn. R.Crim. P. 30.

Our law requires that all of the elements of each offense be described and defined in connection with that offense. *See State v. Cravens*, 764 S.W.2d 754, 756 (Tenn.1989). Jury instructions must, however, be reviewed "in the context of the overall charge" rather than in isolation. *See Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *see also State v. Phipps*, 883 S.W.2d 138, 142 (Tenn.Crim.App.1994). A charge is prejudicial error "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law."*State v. Hodges*, 944 S.W.2d 346, 352 (Tenn.1997).

In this case, the trial court provided the following definition of "deadly weapon" in its instructions to the jury:
Deadly weapon means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

***4** This language tracks Tennessee Code Annotated section 39-11-106(5), which provides as follows:(5) "Deadly weapon" means:
(A) A firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or
(B) Anything that in the manner of its use or intended use is capable of causing death or serious bodily injury[.]

*See*Tenn.Code Ann. § 39-11-106(5) (2003). Thus, it is a full and correct statement of the law and fairly submits the issue to the jury. *See Hodges*, 944 S.W.2d at 352. While the defendant may have preferred that the trial court instruct only on subsection (B) rather than providing the language in both subsections, the trial court has the obligation to provide a complete definition of the term.

III

The defendant also contends that the trial court erred by giving the "result-of-conduct" definition of the term "knowingly" in its instructions to the jury. The state submits that the defendant waived this issue by failing to object to the instructions at trial and by failing to raise the issue in a motion for new trial. In the alternative, the state asserts that the defendant is not entitled to relief because the instruction given was proper.

The record establishes that the trial court instructed the jury as follows:
Intentionally means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.
Knowingly means that a person acts knowingly with respect to the conduct or the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

In *State v. Page*, 81 S.W.3d 781 (Tenn.Crim.App.2002), this court held that because second degree murder is a result-of-conduct offense, the trial court erred by including the nature-of-conduct and nature-of-circumstances definitions of "knowingly." Our court concluded that a "jury instruction that allows a jury to convict on second degree murder based only upon awareness of the nature of the conduct or circumstances surrounding the conduct improperly lessens the state's burden of proof."*Id.* at 788.Further, this court ruled that the error could not be classified as harmless beyond a reasonable doubt because Page's mental state was a contested issue at trial. *Id.* at 789-90.In other cases addressing the same issue, however, this court has determined that an error of this nature might qualify as harmless beyond a reasonable doubt when mens rea is not a disputed issue at trial. *See, e.g.*, *State v. Theron Davis*, No. W2002-00446-CCA-R3-CD (Tenn.Crim.App., at Jackson, May 28, 2003).

Recently, in *State v. Faulkner*, 154 S.W.3d 48, 59 (Tenn.2005), our supreme court limited the holding in *Page*, concluding that "[t]he superfluous language in the 'knowingly' definition did not lessen the burden of proof because it did not relieve the State of proving beyond a reasonable doubt that the defendant acted knowingly."Our high court concluded that the error did not qualify as a misstatement of an element and was, therefore, not an error of constitutional magnitude, as suggested in *Page* and its progeny. *Id.* at 60.While our supreme court concluded that it was error for the trial court to give the inapplicable definitions of "knowingly" and "intentionally," the error was deemed harmless. *Id.; see*Tenn. R.App. P. 36(b) ("A final judgement ... shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.").

***5** This court has held that robbery is not strictly a result-of-conduct crime. *See State v. Marcus Webb*, No. W2002-00614-CCA-R3-CD (Tenn.Crim.App., at Jackson, Jan. 29, 2003). In *Marcus Webb*, the panel reasoned that "[t]he knowing mens rea of robbery refers to the 'knowing theft.' The knowing mens rea of theft refers to 'knowingly obtain[ing] or exercis[ing] control over the property.'The focus of the proscribed conduct is not upon its result."*Id.*, slip op. at 5 (citations omitted). Further examination of the robbery statute establishes that not only must the defendant knowingly obtain or exercise control over property to be guilty of theft, and thus robbery, he must also intend to deprive the owner of the property. *See*Tenn.Code Ann. § 39-14-103 (2003). Intent to deprive the owner of property would require knowledge that the defendant is not the owner of the property. In consequence, to be guilty of robbery, an accused must intend to engage in certain conduct, obtaining or exercising control over property; he must intend a certain result, the deprivation of the property; and he must be aware that certain circumstances exist, that he is not the owner of the property. *Cf. State v. Hershel David Standridge*, No. M2002-01699-CCA-R3-CD (Tenn.Crim.App., at Nashville, Sept. 30, 2003) (holding that theft is not a result-of-conduct offense because the conduct is criminal due to the circumstances surrounding the taking of the property of another). In our view, each definition would be relevant for the jury's consideration of the offense of aggravated robbery. *See State v. Guy*, 165 S.W.3d 651, 661-62 (Tenn.Crim.App.2004) (holding that all three definitions of "knowing" are applicable to robbery). In consequence, the trial court did not err by providing the result-of-conduct and nature-of-conduct definitions of "intentional" and did not err by providing the result-of-conduct, nature-of-conduct, and nature-of-circumstances definitions of "knowing."

IV

The defendant next asserts that the admission into evidence of two photographs of the newspaper found in the defendant's car at the time of his arrest displaying the headline "Bandit Robs Market at Knifepoint" deprived him of the right to a fair trial. The state submits that the trial court did not err by permitting the photographs to be introduced into evidence. In the alternative, the state contends that any error was harmless beyond a reasonable doubt.

The admissibility of photographs is governed by Tennessee Rule of Evidence 403. *See State v. Banks*, 564 S.W.2d 947, 951 (Tenn.1978). In order to be admissible, photographs must be relevant and their probative value must not substantially outweigh any danger of unfair prejudice. Tenn. R. Evid. 403; *Banks*, 564 S.W.2d at 950-51. The term "unfair prejudice" has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."*Banks*, 564 S.W.2d at 951. Whether to admit the photographs rests within the sound discretion of the trial court and will not be reversed absent a clear showing of an abuse of that discretion. *State v. Dickerson*, 885 S.W.2d 90, 92 (Tenn.Crim.App.1993); *State v. Allen*, 692 S.W.2d 651, 654 (Tenn.Crim.App.1985).

***6** Here, the state introduced three photographs of the defendant's vehicle taken at the time of his arrest. One is a photograph of the outside of the defendant's vehicle. The second is a photograph of the inside of the passenger's side of the vehicle and shows the newspaper on the passenger's seat. The third is a close-up of the newspaper that is focused on the headline. The defendant objected to the introduction of the two photographs which showed the headline based upon the use of the word "bandit." The trial court admitted the photographs over the defendant's objection, ruling that they were relevant and that their probative value was not outweighed by the danger of unfair prejudice. *See*Tenn. R. Evid. 401, 403. The trial court also provided the following curative

instruction immediately following the introduction of the photographs:
[O]ne of these pictures has the newspaper article about the charge here, and as newspaper headlines usually are on the front page, it says, Bandit Robs,.... That word bandit is not a word that we would use in court. Don't consider what someone in the newspaper called the defendant. He's charged with aggravated robbery.... It will be for you to decide whether he did it or did not do it, but don't be prejudiced because of the terminology of a newspaper article, but it is relevant that he had that with him.

The defendant indicated his satisfaction with the instruction as an appropriate means of resolving the objection. Under these circumstances, it is our view that the trial court did not err by admitting the photographs.

V

The defendant contends that Detective Davidson's characterization of the offense as "robbery" during his testimony invaded the province of the jury and denied him the right to a fair trial. The state submits that the defendant has waived our consideration of this issue by failing to cite authority in support of his argument. In the alternative, the state asserts that the defendant received a fair trial.

The record establishes that during his direct-examination, Detective Davidson stated, "I took this statement from the defendant the evening of the robbery."Defense counsel objected to the detective's use of the word "robbery" and the trial court sustained the objection, ruling, "The cases say you're not supposed to make that conclusion. That's for the jury to make."No other similar reference was made during the remainder of the trial. In our view, the trial court properly sustained the defendant's objection and offered an admonishment. The defendant did not request additional curative instructions from the trial court and does not suggest what more could have been done. Under these circumstances, it is our view that the defendant is not entitled to relief on this issue.

VI

The defendant next contends that the prosecutor improperly encouraged the jury to engage in jury nullification during her closing argument as it related to the jury's consideration of the lesser included offenses. The state submits that the argument was not improper.

***7** Trial courts have substantial discretionary authority in determining the propriety of final argument. Although counsel is generally given wide latitude, courts must restrict any improper argument. *Sparks v. State*, 563 S.W.2d 564, 569-70 (Tenn.Crim.App.1978). Generally speaking, closing argument "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried."*State v. Sutton*, 562 S.W.2d 820, 823 (Tenn.1978). To merit a new trial, however, the argument must be so inflammatory or improper as to affect the verdict. *Harrington v. State*, 215 Tenn. 338, 385 S.W.2d 758, 759 (1965). In *Judge v. State*, 539 S.W.2d 340 (Tenn.Crim.App.1976), this court articulated the factors to be considered in making that determination:
(1) The conduct complained of viewed in the context and in light of the facts and circumstances of the case[;]
(2) [t]he curative measures undertaken by the court and the prosecution[;]
(3) [t]he intent of the prosecutor in making the improper statements[;]
(4) [t]he cumulative effect of the improper conduct and any other errors in the record[; and]
(5) [t]he relative strength or weakness of the case.

Id. at 344.

In this case, the defendant complains that the prosecutor's comment on the consideration of the lesser included offenses was improper. He contends that the prosecutor's argument that it would not be necessary for the jury to consider the lesser included offenses had the effect of encouraging the jury to disregard the law.

During closing argument, the prosecutor made the following statement regarding the jury's consideration of the lesser included offenses:
[T]he trial is over and the judge is going to be reading your instructions on what you are to consider after you've heard everything today. And the first thing he's going to ask that you consider is the charge of aggravated robbery, and I submit to you that that's the only charge you're going to have to consider because that's exactly what this defendant did. He submitted it. You've heard his confession.

At that point, defense counsel objected but the trial court overruled the objection, observing that the prosecutor was "within her rights of argument."

It is well established that "the courts are the proper source from which [the jury is] to get the law."*Dale v. State*, 18 Tenn. 551, 555 (1837). The trial court has the duty to charge the law relative to the case. *See Cordell v. State*, 207 Tenn. 231, 338 S.W.2d 615, 618 (1960); *see also*Tenn. Const. art. I, § 19. "It is the function of the trial court, and not that of counsel, to instruct or advise the jury as to matters of law."*State v. David Ivy*, No. W2003-00786-CCA-R3-DD (Tenn.Crim.App., at Jackson, Dec. 30, 2004).

Counsel should refrain from attempting to instruct the jury on the law. *See Smith v. State*, 626 S.W.2d 283, 285 (Tenn.Crim.App.1981) ("It is the province of the trial judge to state to the jury the law of the case, and it is not always advisable to counsel to do so in final argument because of the possibility of error in their summation."). In this case, however, the prosecutor's comment does not rise to the level of an attempt to instruct the jury on the law. Moreover, the statement did not, in our view, encourage the jury to disregard the law but was, instead, the prosecutor's assessment of the evidence, suggesting that the jury would not have to consider the lesser included offenses because of the overwhelming proof of the charged offense. This court has specifically approved of a jury instruction requiring sequential consideration of the offenses contained within the indictment. *See State v. Rutherford*, 876 S.W.2d 118, 120 (Tenn.Crim.App.1993). Further, the trial court provided the correct instruction regarding the consideration of the lesser included offenses. *See State v. Smith*, 893 S.W.2d 908, 914 (Tenn.1994) (the jury is presumed to follow the instructions of the trial court). Finally, it is our view that the comment was not so inflammatory as to have affected the verdict. *See Harrington*, 385 S.W.2d at 759. In consequence, the defendant is not entitled to relief on this issue.

VII

***8** As his final issue, the defendant asserts that the cumulative effect of the errors at trial denied him the right to a fair trial. Because there was no error in the conduct of the trial, the defendant is not entitled to relief on the basis of cumulative error.

Accordingly, the judgment of the trial court is affirmed.

Tenn.Crim.App.,2005.
State v. Schaeffer
Not Reported in S.W.3d, 2005 WL 3533304 (Tenn.Crim.App.)

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U.S. ex rel. Hollinshead v. O'Sullivan
N.D.Ill.,1999.
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
UNITED STATES OF AMERICA, ex rel. Ryan Hollinshead, Petitioner,
v.
William O'SULLIVAN, Respondent.
No. 98 C 0235.

Sept. 3, 1999.

MEMORANDUM OPINION AND ORDER
LEINENWEBER, J.
***1** Ryan Hollinshead, a prisoner in state custody acting *pro se*, petitions this court for a writ of habeas corpus. As all of Hollinshead's claims are procedurally defaulted, the court denies his petition.

BACKGROUND

Hollinshead was convicted of criminal sexual assault following a jury trial in the circuit court of Sangamon County, Illinois. According to the testimony presented at trial, the victim was a 13-year-old girl enrolled in the sixth grade. The defendant was 23 years old at the time of the offense. Both the victim and Hollinshead were overnight guests at the home of one Joseph Bray. The victim testified that after she went to bed Hollinshead forced her to have sex with him. Hollinshead testified that he believed that the victim, whom he had not met before, to be 17 years old and that the victim willingly engaged in intercourse with him. At trial, the state introduced evidence of Hollinshead's five previous felony convictions for impeachment purposes. The jury was not informed of the substantive offenses that gave rise to the convictions.

Hollinshead was sentenced to ten years in prison. Meanwhile, he appealed his conviction. On appeal, he raised three issues: (1) that the trial court erred in failing to perform a balancing test to determine whether the state should have been permitted to use the felony convictions for impeachment; (2) that he was denied effective assistance of counsel; and (3) that he suffered from "prejudice." Hollinshead did not file a petition for leave to appeal in the Illinois Supreme Court. He was represented by different lawyers at trial and on appeal.

HOLLINSHEAD'S HABEAS CLAIMS

In his habeas petition, Hollinshead raises two grounds for relief: due process and cruel and unusual punishment. He raises the following due process violations: (1) various untruths were admitted into evidence at trial; (2) publicity relating to the exclusion of Illinois Governor Jim Edgar from the jury may have prejudiced the remaining members of the jury; (3) Hollinshead's testimony was unlawfully limited; (4) Hollinshead was denied effective assistance of counsel; (5) the trial judge ordered the jury to hurry up and as a result the jury deliberated for only four or five hours before returning a verdict; (6) one of the state's witnesses used the word "rape" in his testimony although the use of that word had been banned pursuant to a motion in liming; and (7) testimony relating to force confused the jury. Hollinshead raises the following cruel and unusual punishment violations: (1) he was forced to send his legal papers home because the nature of his case would make him a target of abuse from other inmates; (2) he is unable to seek assistance from prison legal clerks for the same reason; (3) the nature of his case is hazardous to his health; and (4) he "[c]an't lie about his conviction," although doing so would protect him from violence by other inmates, because it is not in his nature to lie.

The Exhaustion Doctrine And Procedural Default

***2** The court will first consider the application of the exhaustion doctrine to this case. "Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."*O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1731 (June 7, 1999). In *O'Sullivan*, which involved a habeas petitioner convicted under Illinois state law, the Supreme Court held that in order to satisfy the exhaustion doctrine, a state prisoner convicted under Illinois law must not only appeal to the Illinois appellate court but also petition for leave to appeal to the Illinois Supreme Court. *O'Sullivan* at 119 S.Ct.

1733.

As Hollinshead did not petition the Illinois Supreme Court for leave to appeal, he has not satisfied the exhaustion doctrine as required by *O'Sullivan.*Therefore, all of Hollinshead's claims raised on direct appeal are procedurally defaulted. The issues not raised on direct appeal are, *a fortiori*, also procedurally defaulted.

The court will now consider if any of the procedurally defaulted claims fit into any of the exceptions to the procedural default rule. Hollinshead has alleged ineffective assistance of counsel. Ineffective assistance of counsel claims may be excepted from the procedural default rule if the defendant was represented by the same lawyer at trial and on appeal or if the defendant seeks to rely on evidence outside the trial record. *Guinan v. U.S.*, 6 F.3d 468, 471-472 (7th Cir.1993). Hollinshead was represented by different counsel at trial and on appeal, so the "same lawyer" exception cannot apply. Hollinshead does not seek to rely on evidence outside the trial record to show that his trial counsel was ineffective, and therefore that exception is also inapplicable.

In addition to the exceptions applying to ineffective assistance of counsel claims, the Seventh Circuit has identified two exceptions applicable to all claims. The first exception is where the petitioner can show cause and prejudice for his failure to exhaust his claims. *Howard v. O'Sullivan*, No. 98-2589, 1999 WL 49986 (7th Cir. July 15, 1999). The second exception is where a failure to review the procedurally defaulted claims would result in a fundamental miscarriage of justice. *Id.* Hollinshead asserts that he wanted to raise the procedurally defaulted issues on direct appeal but that his attorney refused to allow him to do so. The court is unaware of any Seventh Circuit case law establishing that an attorney's unwillingness to raise an issue on direct appeal constitutes "cause" for failure to exhaust a claim. The court therefore declines to establish such an exception in the absence of controlling authority. The court also finds that on the facts of this case Hollinshead has failed to show that a failure to review his procedurally defaulted claims would result in a fundamental miscarriage of justice.

***3** As all of Hollinshead's claims are procedurally defaulted, this court may deny Hollinshead's petition without reaching the merits of his claims. *SeeHoward v. O'Sullivan*, No. 98-2589, 1999 WL 49986 (7th Cir. July 15, 1999). The court does note, however, that this habeas petition is not the proper means of presenting Hollinshead's 8th Amendment cruel and unusual punishment claims. If Hollinshead wishes to litigate the merits of his cruel and unusual punishment claims he should file a Section 1983 action against the prison warden. *See,e.g.*,*Steidl v. Gramley*, 151 F.3d 739 (7th Cir.1998), *Soto v. Johansen*, 137 F.3d 980 (7th Cir.1998).

CONCLUSION

Therefore, for the foregoing reasons, Hollinshead's petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

N.D.Ill.,1999.
U.S. ex rel. Hollinshead v. O'Sullivan
Not Reported in F.Supp.2d, 1999 WL 755918 (N.D.Ill.)

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People v. Williams
Mich.App.,2006.
Only the Westlaw citation is currently available.
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Court of Appeals of Michigan.
PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Antonio Martez WILLIAMS, Defendant-Appellant.
No. 263892.

Dec. 14, 2006.

Washtenaw Circuit Court; LC No. 04-001359-FC.

Before: MARKEY, P.J., and SAAD and WILDER, JJ.
PER CURIAM.
***1** Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227(b). The trial court sentenced defendant to 20 to 50 years' imprisonment for second-degree murder and two years' imprisonment for the felony-firearm conviction. Defendant appeals by right. We affirm.

On the night of July 30, 2004, an altercation arose at an outdoor party. One of the aggravators brandished a gun and fired shots into the air and toward the crowd. Defendant, who was not involved in the initial altercation, subsequently pulled out his own gun, approached the original shooter, and shot him from behind at close range. Defendant then proceeded to shoot the victim three more times as he lay dying on the ground. Defendant admitted to shooting the victim, but he claimed he did not harbor the intent to kill and that he was adequately provoked.

I

On appeal, defendant argues that the trial court erred in admitting certain evidence at trial. We review a trial court's ruling regarding the admission of evidence for an abuse of discretion. *People v. Washington*, 468 Mich. 667, 670;664 NW2d 203 (2003).

First, defendant contends that certain rap lyrics, which were found in defendant's duffle bag in the room where he was staying, were inadmissible. Defendant mistakenly argues that rap lyrics are MRE 404(b) "other acts" evidence that should not have been admitted because of their extreme prejudice. MRE 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts in order to prove the character of someone to show action in conformity therewith. The rap lyrics, however, are not MRE 404(b) evidence. They are not a crime, wrong, or an act under MRE 404(b). Rather, the lyrics are a written statement; consequently, we find that the rules of hearsay apply. MRE 801(d)(2) provides that when a "statement is offered against a party" and is "the party's own statement" or is "a statement of which the party has manifested an adoption or belief in its truth," it is not hearsay. Written statements are included in this definition. MRE 801(a); *People v. Cetlinski*, 435 Mich. 742, 747-748;460 NW2d 534 (1990). Therefore, the lyrics were admissible if their probative value outweighed the danger of unfair prejudice to defendant. MRE 403.

Here, the lyrics were offered as evidence of defendant's motive and intent. The lyrics refer to many of the circumstances surrounding this crime. The lyric "I got ragged hollow tips that's gone spit at yo dome" is poignant because defendant initially shot Pfeiffer in his head ("dome".) Further, the lyrics mention "fake niggas," which is reminiscent of witness accounts that defendant loudly proclaimed the original shooter to be a "fake-ass Eminem ass nigger." Also, the lyrics state, "when I come through you hood, you ain't no good," and defendant himself testified that he was not at a location familiar to him when the shooting occurred. The evidence revealed that the location was where the victim was often found. The probative value of the lyrics, which helped to illuminate defendant's motive and intent, were not outweighed by the danger of unfair prejudice to defendant.

***2** Defendant also argues that evidence of three firearms, which were seized at the home of defendant's grandfather, should not have been admitted into trial. There is no dispute that the guns seized at defendant's grandfather's house had no connection to the crime. The jury was informed several times that the three firearms had no relation to the shooting in question. The prosecution argued that

photos of the weapons were relevant to the case because they showed the "thoroughness of the police investigation." But, the thoroughness of the police investigation was never at issue in this case. At issue was defendant's motive and intent, not whether he was the one who actually pulled the trigger. Therefore, we conclude that the challenged evidence pertaining to the guns was irrelevant to any issues of consequence at trial. MRE 401. Accordingly, admitting the photographs of the three guns into trial was an abuse of discretion. Nevertheless, in *People v. Lukity*, 460 Mich. 484, 495-496;596 NW2d 607 (1999), the Court ruled that a preserved, nonconstitutional error justifies reversal of a conviction only if it is "more probable than not" that the evidence was outcome determinative. Here, considering the overwhelming evidence of defendant's guilt, including two eyewitness accounts, damaging ballistics evidence, and defendant's own admissions, the error was harmless.

II

Defendant next argues that the prosecutor committed prosecutorial misconduct. We review unpreserved claims of error for plain error affecting defendant's substantial rights. *People v. Carines*, 460 Mich. 750, 763;597 NW2d 130 (1999). This requires a showing of prejudice, which can be established by demonstrating that a clear error affected the outcome of the trial court proceedings. *People v. Jones*, 468 Mich. 345, 356;662 NW2d 376 (2003).

This Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v. Watson*, 245 Mich.App 572, 586;629 NW2d 411 (2001). Each claim is decided on a case-by-case basis, and the prosecutor's remarks must be reviewed in context. *Id.* The alleged misconduct is considered in light of all of the facts of the case and in the context of all of the prosecutor's remarks. *Id.* The prosecutor's comments are also examined in light of the defendant's arguments and the evidence presented at trial. *People v. Callon*, 256 Mich.App 312, 330;662 NW2d 501 (2003). Improper remarks may not require reversal if they are raised in reply to issues introduced by the defense. *Id.*, citing *People v. Duncan*, 402 Mich. 1, 16;260 NW2d 58 (1977).

Defendant argues that the prosecutor improperly referred to the "murder" of the victim and stated, "I would love for this jury to know everything that we possibly have heard from various people in this case, your Honor, but it's not proper."Defendant also contends that it was misconduct for the prosecution to state that defense counsel was about to "open a door I'll walk through."Defendant believes the combination of these improper remarks deprived him of a fair trial.

***3** Prosecutors may use "hard language" when it is supported by evidence; they are not required to phrase arguments in the blandest of all possible terms. *People v. Ullah*, 216 Mich.App 669, 678;550 NW2d 568 (1996). A single reference to "murder" during a trial that lasted for five days likely caused no prejudice in a case where the charge defendant faced was murder. Accordingly, we find that the prosecutor's single use of the word murder did not deny defendant a fair trial.

The other two disputed prosecutor remarks, when viewed in context, were not prejudicial to defendant. The comment, "he's about to open a door that I will walk through," was made after the prosecutor objected to defense counsel questioning. The trial court determined that if defense counsel continued asking certain questions, it would have opened the door for the prosecutor to raise defendant's history of violence. If the jury were to learn of defendant's history of violent conduct, his case would have been prejudiced. Therefore, the prosecution's objection and subsequent explanation did not prejudice defendant. In fact, they assisted him.

We also find that the prosecutor's following statements do not require reversal.
Ms. Taylor: It's hearsay as to what might have been suggested to him. *I would love for this jury to know everything that we possibly have heard from various people in this case, your Honor,* but it's not proper. It's not proper to admit it and I'll ask the Court-
Mr. Strouss:-now, if she wants to talk about that, I'd love for them to learn about Mr. Pfeiffer too, Judge, if we're going to get into trading information.
Ms. Taylor:-but, that's my point, your Honor. That's why we have rules.

A prosecutor may not intentionally inject into trial inflammatory arguments with no apparent justification except to arouse prejudice. *People v. Bahoda*, 448 Mich. 261, 271;531 NW2d 659 (1995). However, here it was not the prosecutor who first mentioned inadmissible character evidence. It was defendant who first suggested the existence of

negative information. The prosecutor responded by explaining her hearsay objection. While she editorialized during her explanation, she did not imply that the information would be harmful to defendant. The jury did not learn anything from the prosecutor's comment except that both sides had information that the rules precluded. Thus, even if the comment were improper, it does not necessitate reversal. Moreover, we note that the challenged comments were brief in the context of the trial and were not so inflammatory as to cause unfair prejudice. See *Watson, supra* at 591.

III

Defendant asserts that he was denied the effective assistance of counsel. Defendant failed to move the trial court for an evidentiary hearing or a new trial based on ineffective assistance of counsel, and therefore, our review is limited to mistakes apparent on the record. *People v. Rodriguez*, 251 Mich.App 10, 38;650 NW2d 96 (2002). Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *People v. LeBlanc*, 465 Mich. 575, 579;640 NW2d 246 (2002). Effective assistance of counsel is presumed, and the defendant has a heavy burden of proving otherwise. *People v. Rodgers*, 248 Mich.App 702, 714;645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors a different outcome reasonably would have resulted."*People v. Harmon*, 248 Mich.App 522, 531;640 NW2d 314 (2001).

***4** Defendant claims that failing to object to the word "murder" constitutes ineffective assistance of counsel. On the record before us, we cannot conclude that defense counsel's conduct was "objectively unreasonable." The court in *People v. Reed*, 449 Mich. 375, 400;535 NW2d 496 (1995), maintained:

[t]rial strategy supports counsel's decision not to object. Objecting would have invited an overruling by the trial judge and risked jury disapproval. At best, trial counsel might have obtained a direction to the prosecutor to rephrase his summary, or a charge that the lawyer's arguments were not evidence. Trial counsel had to balance this meager benefit against the potential that the jury would believe defense counsel did not want them to hear the prosecutor's analysis of the evidence. Trial counsel's failure to object was a quintessential example of trial strategy.

The holding in *Reed* is applicable to the current situation. At worst, the judge would have overruled the objection because the prosecutor was not prohibited from referring to crimes by their common name. At best, the objection would have been sustained, and the prosecutor would have rephrased and reemphasized her point without using the term "murder." Therefore, defendant cannot overcome the presumption that counsel made a sound strategic decision by not drawing attention to the term "murder."

In addition, defendant believes his counsel's own use of the terms "murder" and "crime" at trial constituted ineffective assistance. Defense counsel used the word "murder" once, and the term "crime" four times. Yet looking at the context of all five of the challenged references, they do not appear to be prejudicial. In each context, the focus was not on the word "crime" or "murder," but rather on the ballistics' and weapons' evidence that was being discussed. Further, defendant has not shown how the use of these terms affected the outcome of his trial. Throughout the course of a five-day trial, the use of the word "murder" once and word "crime" four times was not so substantial as to alter the outcome. A trial has to be fair, not perfect. *People v. Mosko*, 441 Mich. 496, 503;495 NW2d 534 (1992). Statements are not held prejudicial if they are made in good faith, and, when fairly construed, they did not deny the accused a fair and impartial trial. *People v. Lawton*, 196 Mich.App 341, 353-355; 492 NWW2d 810 (1992).

IV

Defendant finally argues on appeal that the prosecution presented insufficient evidence to support his convictions. We review a challenge to the sufficiency of the evidence in a jury trial by viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v. Hoffman*, 225 Mich.App 103, 111;570 NW2d 146 (1997). We are required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v. Nowack*, 462 Mich. 392, 400;614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime. *People v. Nelson*, 234 Mich.App 454, 459;594 NW2d 114 (1999).

***5** To sustain a conviction for second-degree murder, the prosecution must prove four elements beyond a reasonable doubt: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v. Goecke*, 457 Mich. 442, 463-464;579 NW2d 868 (1998).“Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.”*Id.* at 464.When viewed in a light most favorable to the prosecution, the evidence supported defendant's conviction of second-degree murder.

The evidence establishes that upon witnessing the victim pull out a gun, defendant became scared. But, instead of running away from the man with the gun, defendant snuck around some cars and approached him from behind. Standing behind him, defendant fired a shot from approximately eight inches away, into the victim's head. As the victim lay on the ground, defendant shot him three more times. The evidence supported beyond a reasonable doubt that defendant acted with malice and caused a death.

Neither was there any evidence to justify or excuse the shooting. Defendant argues that the victim provoked the crime, so he did not act out of malice. The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason.*People v. Pouncey*, 437 Mich. 382, 389;471 NW2d 346 (1991).
“The law does not excuse actors whose behavior is caused by just any ... emotional disturbance ... Rather, the law asks whether the victim's provoking act aroused the defendant's emotions to such a degree that the choice to refrain from crime became difficult for the defendant. The legal doctrine reflects the philosophical distinction between emotions that only cause choice and emotions so intense that they distort the very process of choosing.”*[Id.*, quoting Moore, *Causation and the excuses*, 73 Cal L R 1091, 1132 (1985).]

Here, defendant's actions are not the behavior of one who has lost the ability to choose. In fact, the evidence shows that defendant made a calculated decision to sneak up behind and kill the victim. He then decided to make sure the victim was dead by firing three additional shots. All of this evidence was sufficient to convict defendant of second-degree murder.

We affirm.

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