

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROGER BOATSWAIN,)
) No. 408, 2004
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for New Castle County
)
 STATE OF DELAWARE,) Cr. A. ID No. 0304003074
)
 Plaintiff Below,)
 Appellee.)

Submitted: March 30, 2005
Decided: April 27, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, and **JACOBS**, Justices.

ORDER

This 27th day of April, on consideration of the parties' briefs, it appears to the Court that:

1. Roger Boatswain appeals his first-degree robbery and weapons possession convictions in the Superior Court, claiming that the trial judge erred by overruling his objection to a comment by the prosecutor during closing argument. Boatswain asserts that the remark, which claimed that the State's burden of proof has been improperly heightened by televised depictions of criminal prosecutions, denigrated the "reasonable doubt" standard of criminal culpability and, as a result, denied him a fair trial. Because the prosecutor alluded to his perception of

television based standards, he created confusion about the threshold of evidence required for a finding of guilt beyond a reasonable doubt. Therefore, we find that the trial judge abused her discretion by failing both to sustain Boatswain's objection and to take any corrective action. But because the trial record reflects overwhelming untainted evidence of guilt, we find that the trial judge's rejection of Boatswain's application constituted harmless error. Accordingly, we affirm.

2. In April 2003, Boatswain entered a Commerce Bank branch in Wilmington and handed the teller a note demanding money. When the teller failed to respond, Boatswain grabbed the teller, brandished a knife, and grabbed a pack of bills from the drawer. After a brief struggle with a bank security guard, Boatswain fled the scene, eventually leaving the state. Several months later, local authorities apprehended Boatswain in Florida. Delaware officials extradited Boatswain and charged him with two counts of first-degree robbery and a variety of firearms offenses.

3. At trial, several State witnesses recounted the events of the robbery. Two identified Boatswain as the robber. The State also introduced a videotape recorded by the bank's surveillance cameras and still photographs produced from the videotape. Both Boatswain's wife and daughter identified Boatswain as the individual in the still photographs.

4. Another witness, Wilmington Police Detective Scott Chaffin, testified that officers were unable to obtain reliable fingerprint evidence that connected Boatswain to the crime scene. Boatswain focused on this concession and cross-examined Detective Chaffin extensively on that point. During the State's closing argument, the prosecutor made the following statement:

The one issue left in this case is: Was it him? The defense would say, well – and you know they will – there's [sic] no fingerprints of him. They didn't print the money. They didn't find his prints on the note. In today's day and age, unfortunately, the police and the State isn't [sic] put to the same test that they wrote 200 years ago in the Constitution [in] which they said the proof must be beyond a reasonable doubt. Unfortunately, the test, of course, of criminal defendants now is, can they meet the TV expectation that they hope folks like you want. Can they meet CSI?

[Objection overruled]

[I]f they don't have fingerprints, he can't be guilty. On TV, they would have found fingerprints. But this isn't TV, this is real life.¹

5. Boatswain objected following the prosecutor's confusing reference to the "television test" for reasonable doubt. The trial judge, however, overruled the objection and allowed the prosecutor to finish his argument about television viewers' expectations of the quantity or nature of the evidence necessary to convict. The jury then convicted Boatswain of two counts of first-degree robbery, two counts of possession of a deadly weapon during the commission of a felony,

¹ *State v. Boatswain*, Del. Super., ID No. 0304003074 (July 7, 2004), Trial Tr. at 47 (punctuation altered). "CSI" refers to the television drama *Crime Scene Investigation*.

and one count of possession of a deadly weapon by a person prohibited. Boatswain appeals, claiming the trial judge abused her discretion when she denied his objection following the prosecutor's comments. As a result, Boatswain contends that the trial judge's failure to sustain his objection and to take corrective action denied him a fair trial.

6. To obtain a conviction, the State is constitutionally required to prove every element of the offense charged beyond a reasonable doubt.² A prosecutor may not mislead the jury about the State's burden of proof, nor can the State knowingly "disparage the 'reasonable doubt' standard that governs the jury's determination of guilt."³ We review a trial judge's decision to overrule an objection during closing arguments based on an improper prosecutorial remark for abuse of discretion.⁴

7. Assertions that discredit standards of proof as perceived on television, without more, do not alter the State's actual evidentiary burden. The procedures employed in fictionalized prosecutions, after all, are irrelevant to those utilized in a real court case. But statements that trivialize the actual constitutional standard by

² See *Mills v. State*, 732 A.2d 845, 849-53 (Del. 1999) (recounting application of reasonable doubt standard nationally and in Delaware).

³ *Hunter v. State*, 815 A.2d 730, 732 (Del. 2002).

⁴ *Harris v. State*, 695 A.2d 34, 39 (Del. 1997), citing *Grayson v. State*, 524 A.2d 1, 2-3 (Del. 1987).

comparing it to a purportedly unnecessarily burdensome “television” standard may leave jurors with the impression that the State’s burden of proof is pinned to either an abundance or dearth of a specific type of evidence. The prosecutor’s comments here suggest that fingerprint evidence may be required to meet the burden of proof during fictionalized television programs but that same requirement has no bearing on the jury’s determination of reasonable doubt at trial.

8. While correct, that comment tends to trivialize the State’s burden, a tactic that implicates the well-worn admonition against disparaging the reasonable doubt standard.⁵ The prosecutor told the jury that the State is not “put to the same test” established by the Constitution. By doing so, he disparaged the reasonable doubt standard by claiming that the State is held to an indeterminate, but implicitly lower, burden of proof. That created the risk that the jury might take him at his word. Although the prosecutor probably did not intend to confuse matters by his muddled and inartful comments, that makes little difference. Because of the prosecutor’s confusing and disjointed attempt to compare fictional television standards of proof, as he chose to perceive them, with actual Constitutional

⁵ See *Hunter v. State*, 815 A.2d 730, 732 (Del. 2002) (“The prosecutor in this case forces us to add another admonition to the list: do not disparage the “reasonable doubt” standard that governs the jury’s determination of guilt.”). See also *Taylor v. State*, 827 A.2d 24, 27 (Del. 2003) (reaffirming that disparaging reasonable doubt standard violates prosecutor’s “dual obligation to present the State’s case with earnestness and vigor while discharging his duty to see that justice be done by giving defendant a fair and impartial trial”) (quotation marks omitted).

standards, his comment – “the police and the State isn’t [*sic*] put to the same test they wrote 200 years ago in the Constitution” – denigrated the reasonable doubt standard and incorrectly stated the law,⁶ thereby requiring immediate correction.⁷ Therefore, we find that the trial judge abused her discretion by overruling the objection and by failing to instruct the jury accordingly or to take other corrective action.

9. Error deemed to be harmless, however, does not warrant reversal. In determining whether an error is harmless, the Court must weigh the “significance of the error against the strength of the untainted evidence of guilt to determine whether the error may have affected the judgment” in issue.⁸ Errors implicating the reasonable doubt standard that occur “during the presentation of the case to the jury . . . may be quantitatively assessed in the context of other evidence presented,” and thus may be deemed harmless.⁹

⁶ See *Mills*, 732 A.2d at 851 (quoting 11 *Del. C.* § 302(a): “[T]he defendant is entitled to a jury instruction that the jury must acquit if they fail to find each element of the offense proved beyond a reasonable doubt.”).

⁷ Compare *Hooks v. State*, 416 A.2d 189, 204-208 (Del. 1980) (holding that prosecutor's inflammatory comments cured by trial court's lengthy admonishment to jury) with *Hunter*, 815 A.2d at 738 (reversing conviction, despite absence of objection by defense counsel to all but one statement, because integrity of trial process compromised by “persistent pattern of prosecutorial misconduct”). Cf. *Taylor*, 827 A.2d at 27 (holding that prosecutorial misconduct implicates defendant’s entitlement to fair trial under Fourteenth Amendment).

⁸ *Van Arsdall v. State*, 524 A.2d 3, 11 (Del. 1987) (“[R]eversal is required whenever the reviewing court cannot say that the error was harmless beyond a reasonable doubt.”), quoting *Chapman v. California*, 386 U.S. 18, 24 (1967).

⁹ *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

10. Here, the evidence introduced at trial produced overwhelming proof of guilt.¹⁰ Two eyewitnesses positively identified Boatswain as the perpetrator. Surveillance cameras captured the entire robbery on video and Boatswain's own wife and daughter identified him as the individual in the photographs produced from the bank's surveillance videotape. Although the trial judge committed error, we find that the untainted and overwhelming evidence of Boatswain's guilt outweighs the significance of the error. Accordingly, we find no reversible error.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

/s/ Myron T. Steele
Chief Justice

¹⁰ See *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981) (holding that determining prejudicial effect of improper prosecutorial argument requires assessment of three aspects of trial: (1) closeness of the case; (2) centrality of the issue affected by the alleged error; and (3) steps taken to mitigate any subsequent effects of the alleged error.).