

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH PIERCE,	§	
	§	No. 554, 2004
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	No. 0310017917
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 15, 2005  
Decided: August 10, 2005

Before **STEELE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

**ORDER**

This 10<sup>th</sup> day of August 2005, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Kenneth Pierce (“Pierce”), appeals from his convictions following a jury trial in the Superior Court on the charges of robbery in the first degree and conspiracy in the second degree. The Superior Court sentenced Pierce as a habitual offender to 25 years at Level V followed by 6 months at Level IV in the CREST Program for his robbery conviction and 1 year at Level V suspended immediately for 1 year at Level III supervision for his conspiracy conviction. Pierce raises two arguments in support of his direct appeal. He first argues that he was

denied his right to a fair trial because the prosecution characterized his defense as a “fantasy” and described certain testimony as “the only credible evidence” during rebuttal argument. He also contends that the Superior Court abused its discretion in permitting the prosecution to introduce into evidence certain photographs of the alleged victim. We find no reversible error and affirm.

(2) On September 29, 2003 two hooded men kicked open the office door of the Motel 6 near the Delaware Memorial Bridge. The first, later identified as Rico, hit the general manager in the face several times and threw him to the floor. The second intruder then reached into the general manager’s pocket and removed the Sunday deposit bag. During the process, the second intruder removed his hood and the general manager saw the second intruder’s face.

(3) The Delaware State Police investigated the incident. The Detective presented the general manager with a photo lineup. The general manager then identified Pierce as the second intruder. Subsequently, Pierce gave the Detective three increasingly self-incriminatory versions of his involvement. He initially denied any knowledge of the event, then later acknowledged his presence at the motel but still denied any part in the event. Finally, after being advised of surveillance footage, he admitted to being approached by Rico about a potential robbery for lots of money and that he responded to Rico with “Count me in.”

(4) At trial, Pierce elected not to testify and he presented no witnesses. His defense strategy was that the prosecution's evidence only supported the lesser charge of theft and not the robbery in the first degree charge. The jury ultimately found Pierce guilty of robbery in the first degree and conspiracy in the second degree. Pierce then brought this instant appeal.

(5) Pierce argues that the Superior Court deprived him of a fair trial by permitting the prosecution to improperly denigrate the role of his defense counsel as well as improperly vouch for the credibility of the prosecution's witnesses during the prosecution's rebuttal argument. Specifically, Pierce points to two separate comments made by the prosecutor during the rebuttal argument. Because Pierce's counsel objected only to the first comment at trial, two separate standards of review apply. We will review *de novo* the ruling on the first comment,<sup>1</sup> and apply a plain error analysis to the second.<sup>2</sup>

(6) Defense counsel argued to the jury during his closing statement that Pierce's actions were nothing more than a "snatch and grab theft."<sup>3</sup> The general manager had already testified, however, that he was severely beaten during the

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<sup>1</sup> See *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004) (applying a *de novo* standard of review to a prosecutor's remarks during closing arguments).

<sup>2</sup> See *Swan v. State*, 820 A.2d 342, 354 (Del. 2003) (applying a plain error standard of review to a prosecutor's remarks during closing arguments which were not objected to at trial).

<sup>3</sup> Transcript of Trial Proceedings on September 10, 2004 at 160.

robbery, and the Detective had provided corroborating evidence of the condition of the general manager after the incident. The prosecutor replied to defense counsel's argument directly by stating in his rebuttal that it "belies reason and common sense and the facts in this case. This is a court of law. Your decision must be based on facts, not fantasy."<sup>4</sup>

(7) Pierce claims that this comment sarcastically mocked his case and presented Pierce's guilt to the jury as a foregone conclusion. We have recognized that as long as the prosecutor refrains from "impugning the integrity ... of defense counsel," the prosecutor is given wide latitude in his presentation to the jury.<sup>5</sup> The prosecutor's challenged statement simply reminded the jury that its decision must be based upon the facts of the case. We are satisfied that his argument did not impugn the integrity of the defense counsel in this case and that his argument was appropriate under the circumstances.

(8) Pierce also challenges the prosecutor's rebuttal statement that "[t]he only credible evidence presented in this case which is corroborated by the video is that on September 29, 2003, two men that we now know to be Rico and the defendant, Kenneth Pierce, walked in the Motel 6 office, Rico knocked down the door, and that,

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<sup>4</sup> *Id.* at 172-73.

<sup>5</sup> *Walker v. State*, 790 A.2d 1214, 1219-20 (Del. 2002).

two or three seconds later, the defendant, Kenneth Pierce, came walking in.”<sup>6</sup> Pierce claims that, in making this comment, the prosecutor vouched for the credibility of the victim’s testimony. We review this comment for plain error.

(9) The law is clear that a prosecutor may not vouch for the credibility of any witness.<sup>7</sup> Pierce has the burden of showing that the comment was so clearly improper as to undermine confidence in the jury’s verdict.<sup>8</sup> Given the record in this case, including Pierce’s admission to the Detective that he told Rico to “count me in” we are not persuaded that the comment was so clearly improper as to undermine any confidence in the jury’s verdict.

(10) Finally, Pierce argues that the trial court abused its discretion in admitting photographs of the general manager’s injuries without proper authentication. During the testimony of the Detective, the prosecution presented three photographs taken by the Detective of the injuries approximately three weeks after the robbery. Pierce’s counsel objected to these photograph’s, claiming that the Detective was in no position to authenticate them as the injuries sustained by the general manager as a result of the robbery. Both sides agree that the standard by which this claim is reviewed is abuse of discretion.<sup>9</sup>

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<sup>6</sup> Transcript of Trial Proceedings on September 10, 2004 at 197.

<sup>7</sup> *Caldwell v. State*, 770 A.2d 522, 529-30 (Del. 2001).

<sup>8</sup> *Stevenson v. State*, 709 A.2d 619, 633 (Del. 1998).

<sup>9</sup> *Floudiotis v. State*, 726 A.2d 1196, 1202, 1208 (Del. 1999).

