DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2009

MARLON MIGUEL BROWN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D08-437

[September 23, 2009]

PER CURIAM.

Appellant Marlon Miguel Brown ("Brown") timely appeals the trial court's final judgment and sentence for first degree murder, false imprisonment, and carrying a concealed weapon. This court has jurisdiction. Fla. R. App. P. 9.140(b)(1)(A) (2008). For the reasons set forth below, we reverse.

Brown was charged by information with one count of second degree murder of Shanique Harris ("Harris") with a firearm, which was later superseded by an indictment for first degree murder with a firearm, false imprisonment with a firearm, and carrying a concealed firearm. A jury trial was held, and Brown was found guilty on all counts. The trial court sentenced him to life imprisonment for the first degree murder, fifteen years for false imprisonment, and five years for carrying a concealed weapon. Brown moved for a new trial, arguing the impropriety of the State's rebuttal in its closing statement. After hearing arguments from both sides, the court denied Brown's motion.

On appeal, Brown raises several claims, but we find only his argument as to the State's closing statement persuasive. Thus, we affirm as to the other claims without further discussion.

The alleged errors in the State's closing argument were on rebuttal. After giving a brief initial closing statement, the State presented to the jury a much more extensive, thirty-four-slide PowerPoint presentation on rebuttal. That presentation also included a photograph, which was never introduced into evidence, and the name of a witness, who never testified

at trial.

First, "[a] prosecutor must confine his or her closing argument to evidence in the record and must not make comments which could not be reasonably inferred from the evidence." *Hazelwood v. State*, 658 So. 2d 1241, 1244 (Fla. 4th DCA 1995). This Court in *Hazelwood* found that a new trial was necessary where "the prosecutor suggested that [witnesses who did not testify] would corroborate the [S]tate's case." *Id.* Here, the photograph and the mention of a witness who never testified had the same prejudicial effect.

Further, we find problematic the general structure of the State's closing argument. *See Heddendorf v. Joyce*, 178 So. 2d 126 (Fla. 2d DCA 1965). In *Heddendorf*—a negligence action involving an automobile accident—plaintiff's counsel "did not assess or suggest any specific sum for the damages claimed other than out-of-pocket expenses" during his initial closing statement. *Id.* at 128. After the defendant's reply, however, plaintiff's counsel, "for the first time in the trial, produced a chart outlining to the last cent his mathematical computation of each element of damage, totaling the sum of $61,035.96." *Id.* The trial court denied the defendant's request to reply to that rebuttal, and the Second District reversed the trial court. That decision was "founded upon the nature, function and purpose of closing argument," which the Second District characterized as the following:

> It thus appears that the concluding argument sustains an analogy to evidence in rebuttal. Its proper limit is a reply to what has been brought out in the defendant's argument. As the plaintiff (or, in a criminal case, the State) is not allowed to establish its case in chief by evidence introduced for the first time in rebuttal, so the plaintiff's counsel (or the State's counsel) ought not to be allowed, in the concluding argument, to take new ground, to state new points of law, or to read new authorities in support of the positions which he has assumed.

Id. at 129-30.

In the case at hand, the State's initial closing went only as far as to assert how the evidence did not support convictions for lesser included charges. On rebuttal, however, the State summarized, in a detailed PowerPoint presentation, the testimony of each witness, what was shown in the surveillance tape, and the elements of each crime for which Brown was charged. The proper limit of a rebuttal is "a reply to what has been

brought out in the defendant's [closing] argument." 178 So. 2d at 130. The State's rebuttal not only contained references to evidence that was never admitted at trial, but went beyond its function as a reply to Brown's closing argument. This was improper.

Thus, we reverse the trial court's denial of Brown's motion and remand this case for a new trial.

POLEN and FARMER, JJ., concur.
GROSS, C.J., dissents with opinion.

GROSS, J., dissenting.

The majority has stretched case law to reverse in a situation where reversal is not justified.

The defendant shot his girlfriend with a handgun from close range. The strongest theory of the defense was that the defendant was guilty of manslaughter and not premeditated murder.

During the first part of his closing statement, the prosecutor argued for a verdict of first degree murder and discussed how the evidence did not support a finding of excusable homicide, manslaughter, or second degree murder. He argued that the evidence proved the three crimes charged—first degree murder, false imprisonment, and carrying a concealed weapon.

The defense closing focused on the evidence and strenuously argued that the defendant did not consciously reflect upon the shooting.

The state's rebuttal focused on the many details in the evidence that pointed to premeditation.

This is a proper thematic structure for a closing argument. The prosecutor said the defendant was guilty, the defendant argued that he was guilty of a lesser charge, and the prosecutor rebutted by contending that the evidence supported the conclusion that the defendant was guilty of the most serious crime charged in the information.

This case is unlike *Heddendorf v. Joyce*, 178 So. 2d 126 (Fla. 2d DCA 1965), where the plaintiff did not discuss damages in his opening argument, leaving the precise mathematical computation of damages for rebuttal. In this circumstance, the defense was left without the ability to respond to the damages issue. Here, both sides had the chance to

address the main issue in the case—whether there was sufficient premeditation to support the charge of first degree murder, or whether a lesser included offense was the more appropriate verdict. Although the prosecutor extensively went into the facts on rebuttal with his Power Point presentation, his argument did not "take new ground . . . state new points of law, or . . . read new authorities in support" of his case. *Id.* at 130 (quoting Thompson, *Trials* (2d ed. 1912)). As the trial judge recognized, the defense had the opportunity to "attack [ ] every angle" of the state's case during its argument. The defense attorney had the "opportunity not only to advance the theories and reasoning which favor his client, but also to rebut the argument of plaintiff's counsel." *Heddendorf*, 178 So. at 129.

The majority bootstraps its misapplication of *Heddendorf* by stating that the prosecutor argued that witnesses who did not testify would corroborate the state's case. This characterization overstates what happened. A witness who did not testify at trial was listed along with two testifying witnesses on a Power Point slide. After the defense objected, the trial judge instructed the jurors to rely upon the testimony presented in court. The other two witnesses listed on the slide gave detailed accounts of the shooting. The prosecutor did not argue that the non-testifying witness would have corroborated the state's case.

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Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Okeechobee County; Sherwood Bauer, Jr., Judge; L.T. Case No. 472006CF000584.

R. Lee Dorough of Dorough, Calzada & Hamner, P.L., Orlando, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Laura Fisher Zibura, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.