IN THE COURT OF APPEALS OF IOWA

No. 3-176 / 12-0717
Filed April 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT RAY EVERETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Steven J. Andreasen, Judge.

Robert Everett appeals his conviction for child endangerment resulting in bodily injury, in violation of Iowa Code sections 726.6(1)(a), 726.6(1)(b), and 726.6(6) (2011). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Patrick Jennings, County Attorney, and Drew Bockenstedt, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

The question in this appeal is whether the prosecutor improperly drew attention to Robert Everett's decision not to testify at his child endangerment trial and, if so, whether the badly chosen remarks deprived Everett of a fair trial. In closing argument, the prosecutor urged the jury to believe the accuser's testimony because the child "was sworn to tell the truth . . . in contrast to the defendant when he is talking to the investigators."

We find the comments were improper because jurors would "naturally and necessarily" interpret the prosecutor's juxtaposition of the child's experience on the witness stand with Everett's unsworn statements as an allusion to Everett's failure to testify. Nevertheless, the impropriety does not require a new trial. The State corroborated the child's version of the events with physical evidence and admissions by Everett. The prosecutor's isolated comment did not prejudice Everett's substantial rights in the context of the whole trial. Accordingly, we affirm his conviction for child endangerment resulting in bodily injury.

I. Background Facts and Proceedings

A jury could have found the following facts from the evidence offered at trial. Ten-year-old D.E. lived with his mother in Sioux City, but spent several weeks during the summer of 2011 staying with his father Robert Everett in Correctionville. D.E. remembers his father spanking him almost every day of the visit.

The last day was particularly punishing. On August 15, 2011, Everett took his son along to work at a bin site on a farm outside of Anthon. On the bin site,

Everett cut up pieces of metal, and D.E. helped haul the scraps. Everett was unhappy with D.E.'s performance and yelled at him "really loud like—like screaming at the top of his voice." D.E. started to cry. His father did not like it when he cried. When the ten-year-old cried, Everett forced him to stand on his "tippy toes" with his heels raised from the ground. D.E. recalled his father yelling: "Water works don't work with me. I'm going to check on you every ten minutes until you are done crying. Every time you are not done crying, I'm going to spank you five times—no ten times really hard." When D.E. did not stop crying, his father told him, "Grab your ankles." When D.E. bent over, Everett "would swat [him] ten times really hard on the butt." D.E. recalled his father repeating the ten-minute intervals of tip-toe balancing followed by the ten blows to his buttocks six or seven times. The spankings hurt worse each time, as Everett used ever increasing force.

Everett paused the spankings for lunch time, eating a sandwich with his son in the truck. During lunch, Everett asked D.E. a question. Because D.E. did not know the answer and his father had previously told him "'I don't know' isn't an answer," D.E. stayed silent. Everett responded by poking D.E. in the head with a finger, then grabbing him by the arm, and pulling him out of the truck. Everett continued to ask D.E. the question and swatted the boy's buttocks with his hand when he would not answer. Eventually, D.E. started screaming: "I want to go home." Everett then took off his studded belt and spanked his son with it. D.E. testified: "He folded it in half so the studs were hitting me." D.E. squirmed, and one of the belt strikes grazed his lower back. Everett told D.E. that hitting his

back was an accident. D.E. was crying so hard he started to vomit. Everett reacted by stripping off his son's shirt and shoving it into the boy's mouth. At the end of the day, Everett showed his son the studded belt had split in half, saying, "See what you did? Now I have to get a new belt."

That night, Everett returned D.E. to his home in Sioux City. D.E. did not immediately tell his mother what happened. But two days later his little brother noticed the bruising when they were showering together, saying: "Wow [D.E.] your butt is dirty." D.E. then showed his mother the large purple bruise. D.E.'s mother photographed her son's injury and immediately called Everett to confront him. She also reported the abuse to law enforcement. Woodbury County Sheriff's Deputy Ryan Peterson spoke with D.E. and viewed the six- to eight-inch circular bruise on the boy's buttock.

D.E. received a referral to the Mercy Child Advocacy Center in Sioux City. The Mercy nurse who examined D.E. described "a very large patch of bruising that covers about 40 percent of the butt cheek. It's very, very different colors. There is greens and yellows and black, red, purple." The nurse explained it was "more difficult to cause injury to a buttock just because there is a lot of adipose or fat tissue that has more cushion compared to an area like, say over a boney area of the cheek or your arm." She said it was uncommon to see bruising that extensive and expressed her opinion that it was caused by the use of "unreasonable" and "excessive force."

Everett agreed to an interview at the sheriff's office on August 25, 2011. He spoke with Detective Peterson and Chantel Rol, a social worker from the

Department of Human Services. Everett admitted spanking his son during the summer visitation but estimated no more than four or five times. Everett also admitted using a belt on the boy once or twice but denied ever owning a studded belt. Everett acknowledged recently purchasing a new belt, but only because his old one had worn out.

When asked about August 15, Everett said he spanked D.E. at the bin site. In fact, Everett's version of that day largely paralleled D.E.'s recollection, though Everett was hesitant to take responsibility for causing his son's injury. Early in the interview, Everett told the investigators he had "no idea" how D.E. suffered the severe bruising and he was "pretty sure he didn't leave that there." He suggested his son bruised easily and may have injured himself by "flopping on the ground" or maybe it happened while they were "wrestling around." But Everett did confirm he was frustrated with his son for "not doing things correctly" at the bin site and spanked him just once, using ten swats. Everett also said he forced D.E. to stand on his "tippy toes" for ten minutes at a time until he stopped crying, because "you can't talk to no one when they're crying." Everett said he had to interrupt his work and check on D.E. every ten minutes for an hour and a half because he would not stop crying. Everett said D.E. was hyperventilating so Everett "stuck his shirt in his mouth to keep the drool from getting all over him." Everett said D.E. "wasn't liking the treatment" and asked to go home. When the investigator asked if he used a belt to spank D.E., Everett responded: "if it was a belt wouldn't there be welts?"

About an hour into the interview, Everett started hedging a bit, saying, "If I did it, I'm so sorry that I did it, but I don't know where the bruises came from." He also said: "If I did lose my temper when I did spank him then that's probably where it came from." Everett eventually confessed that he "probably swatted him a little bit too hard" and concluded: "it was probably my frustration that got the better of me."[1]

Social worker Rol said she commonly sees marks on children while investigating abuse cases, but the severity of D.E.'s bruising stood out as unusual. She opined that the force used to inflict those injuries would have been unreasonable.

The State charged Everett with child endangerment resulting in bodily injury, in violation of Iowa Code sections 726.6(1)(a), 726.6(1)(b), and 726.6(6) (2011), a class "D" felony. His jury trial started on March 20, 2012. The State offered a video-recording of Everett's interview with law enforcement, but Everett did not testify. Following the State's closing argument, defense counsel moved for a mistrial, alleging the prosecutor engaged in misconduct. The court denied the mistrial motion. On March 22, 2012, the jury returned a guilty verdict. The defense moved for a new trial, again claiming prosecutorial misconduct. The court denied the motion for new trial and sentenced Everett to an indeterminate five-year prison sentence. Everett now appeals.

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[1] The defendant also admitted spanking his son on other occasions, for example, when D.E. did not complete his chores within the time given; when he cried because he was not able to master "hospital corners" when making his bed (Everett admitted telling him: "if you want to cry, I'll give you a reason to cry"); and when he could not properly use a pitchfork to help clean out a barn.

II. Scope and Standards of Review

Everett appeals the district court's denial of his motion for mistrial and motion for a new trial challenging comments by the prosecutor which Everett alleges drew an adverse inference from his failure to testify. Because his challenge involves the constitutional protection against self-incrimination, our review is de novo. *State v. Jones*, 511 N.W.2d 400, 408 (Iowa Ct. App. 1993). We review Everett's related challenge to the district court's denial of the mistrial and new trial motions for an abuse of discretion. *See State v. Piper*, 663 N.W.2d 894, 911 (Iowa 2003), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010).

III. Analysis

The Fifth Amendment to the U.S. Constitution prohibits comment on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 614 (1965). Both direct and indirect comments violate the prohibition. *State v. Taylor*, 336 N.W.2d 721, 727 (Iowa 1983). Here, Everett claims the prosecutor's remarks indirectly focused the jury's attention on his failure to testify. The test is whether "the language used by the prosecutor, in context, would 'naturally and necessarily' be understood by a jury to be a comment on the failure of the accused to testify." *Id*.

At issue is the following passage from the State's closing argument:

> So what did the State produce in this case?
> Well you heard from [D.E.], and really, I guess, if you boil it down, to some degree you can come down to [D.E.'s] statements that it was 60 to 70 strikes plus what happened over lunch, or you can go with what the defendant told the investigator, which was that it was ten strikes. He got a around to saying it was ten strikes.

> Well, why should you believe [D.E.]? And this comes down into the factors that you are given in the instructions on credibility. . . .
>
> Well, for one, [D.E.] came into court. He sat in this chair. He looked at all of you, and he testified, and he testified under oath, and he demonstrated to you that he understood what the oath meant. He was sworn to tell the truth.
>
> That's in contrast to the defendant when he is talking to the investigators. Ask yourself when the defendant is talking to the investigators what motive he might have when he is discussing things with the investigators. What might he be concerned about? Maybe himself, what's going to happen to him.
>
> Now look at [D.E.]. What incentive does [D.E.] have to come into court and tell you he got hit 60 to 70 times by his dad? Do any of you think that this coming into court was fun for [D.E.]?

After the State concluded its argument, defense counsel asked for a sidebar and moved for a mistrial based on prosecutorial misconduct. Counsel asserted the prosecutor's comparison of D.E.'s credibility for having testified under oath with his father's motive to lie to investigators gave "the clear negative connotation to the jury that Mr. Everett should be negatively looked at or his statements to the officer should not be believed because he didn't come here and testify in court."

The prosecutor denied harboring "an intent to reflect on the defendant's failure to testify" and insisted his comments were proper: "Certainly I can comment on witnesses who took the stand and that they testified under oath. The defendant's statements . . . to the investigators were not under oath. I don't believe there is anything inappropriate about pointing that information out . . . ."

The court said the prosecutor's comments did "raise some concern." The court accepted that the reference was not intentional but found "there at least arguably is some implication from what was said by counsel the fact that Mr.

Everett did not testify in this trial should somehow be taken into consideration." The court nevertheless denied the defense request for a mistrial, concluding the prosecutor's statements were not so prejudicial as to deny Everett a fair trial.

Everett renewed his request for relief in a motion for new trial. The court again denied it, explaining:

> [T]his case, in the Court's view, is more than simply a he said, he said type case. Certainly, the credibility of [D.E.] as a witness was an important part of the state's case. However, the state's case was also bolstered by physical evidence in regard to the physical injuries to the child and the opinions that were offered as to the cause of those injuries and those opinions being based [on] more than just the statements of the child but also [on] the injuries themselves.

To obtain a new trial, Everett must show not only that the prosecutor's comments were improper, but that they prejudiced his substantial rights causing him to be deprived of a fair trial. *See State v. Bishop*, 387 N.W.2d 554, 562–63 (Iowa 1986); *see also United States v. Sandstrom*, 594 F.3d 634, 662 (8th Cir. 2010). We review the prosecutor's comments in the context of the entire closing argument and evidence introduced at trial. *Sandstrom*, 594 F.3d at 662. The record supports Everett's claim of impropriety but not of prejudice.

It is true the prosecutor did not explicitly tell the jury to disbelieve Everett based on his failure to testify. But the State's closing argument drew an obvious distinction between the version of events described by D.E.—whose credibility was bolstered by coming into court, looking the jurors in the eye, and testifying under oath—and the statements by Everett who had a motive to avoid getting himself into trouble when talking to investigators. In resisting the mistrial motion, the prosecutor said he believed it was appropriate to point out that Everett's

interview statements were not under oath. In this context, we disagree. We find the prosecutor impliedly invited the jury to consider Everett's failure to testify as proof of his guilt.

The State draws our attention to *State v. Johnson*, 944 A.2d 416, 425 (Conn. App. Ct. 2008), where the court determined the prosecutor's reference to the victim testifying under oath could not be fairly interpreted as an attempt to draw attention to the fact that the defendant did not testify. But we note it was significant to the Connecticut court that the prosecutor did not offer any comparison regarding the presence or absence of witnesses at trial or between those who took the oath and those who did not. *See Johnson*, 944 A.2d at 425.

The State also cites our decision in *Jones* where the prosecutor told the jury in closing argument that a co-defendant "told the truth, he got up and took the oath and subjected himself to all questions" and later remarked that another suspect "testified under oath and presented an alibi for himself and that of his girlfriend." 511 N.W.2d at 408. Our court said the prosecutor's statements "could have been better phrased, but did not demonstrate an intention to comment on defendant's failure to testify." *Id*. at 409. Notably, the *Jones* decision did not address whether the jury would have "naturally and necessarily" construed the references to other suspects' testimony as a critique of the defendant's absence from the witness stand.

The comparison of a testifying witness with the non-testifying defendant was much more blatant in Everett's case than in *Jones* or *Johnson*. In one breath, the prosecutor told the jurors they should believe D.E. because "[h]e

swore to tell the truth," and in the next breath, the prosecutor said: "That's in contrast to the defendant when he is talking to the investigators." The jurors would have naturally and necessarily interpreted the comments as highlighting Everett's failure to testify. *See People v. Guzman*, 96 Cal. Rptr. 2d 87, 90 (Cal. Ct. App. 2000) (holding "by virtue of his comparative paradigm, the prosecutor rather clumsily alerted the jury to the fact that, unlike Hall, Guzman was not willing to explain his side of the story in court").

Having decided the comments were improper, we turn to the question whether they were harmless beyond a reasonable doubt. *See United States v. Hasting*, 461 U.S. 499, 510–11 (1983) (framing the "question a reviewing court must ask" as "absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victim, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?"). Everett contends the prosecutor's insinuations harmed his chances for acquittal because the trial's outcome hinged on a credibility battle between D.E. and Everett. The State contends the strength of its case against Everett outweighed the isolated comment implicating his failure to testify. We agree with the State's assessment.

The fighting issue before the jury was whether Everett's act of spanking his son was reasonable. In Iowa, parents have the right to use corporal punishment as a means of correcting their children's misbehavior. *State v. Arnold*, 543 N.W.2d 600, 603 (Iowa 1996). But the right is circumscribed by the requirements of moderation and reasonableness. *Id*. "Corrective" measures

must be aimed at modifying the behavior of the child rather than satisfying the passions of an enraged parent. *Id*.

In this case, it is clear the jury would have found Everett's actions to be immoderate and unreasonable even without the prosecutor's comments alluding to his failure to testify. To convict, the jury did not have to believe D.E.'s testimony that his father struck him as many as seventy times, including blows with a studded belt. Everett admitted to the investigators that he spanked D.E., and probably did so "a little bit too hard," and did so out of frustration and because he lost his temper. Everett's own statements show the punishment was abusive and not corrective.

Moreover, the photographs of D.E.'s severe bruising and the testimony of the nurse examiner and social worker corroborated D.E.'s testimony. Both women had expertise in child abuse investigation and believed excessive force was used to inflict the bruising documented in the photographs of D.E.'s buttocks. Whether by his hand or a belt and regardless of the number of blows, the evidence overwhelmingly demonstrated that Everett's punishment of his son amounted to child endangerment resulting in bodily injury.

Everett's prejudice argument is also deflated by the instructions provided the jury. The court instructed the jurors that counsels' arguments were not evidence, and that because Everett was not required to testify, they were not to infer guilt from his decision not to take the stand. These instructions helped counteract any improper implications from the prosecutor's remarks.

Finally, we reiterate the value of deferring to the trial judge in this circumstance; the "trial court is in the better position to determine if prejudice resulted from the prosecutor's conduct because that court observed the alleged misconduct and the jury's reaction." *Bishop*, 387 N.W.2d at 561. The district court decided the prosecutor's remarks during closing argument did not deny Everett a fair trial. From our vantage point, we are not inclined to second-guess that decision.

AFFIRMED.