

DA 17-0548

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 258N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ALFRED JOHN ABELLA,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 15-707
Honorable Gregory R. Todd, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Deborah S. Smith, Assistant Appellate
Defender, Helena, Montana

For Appellee:

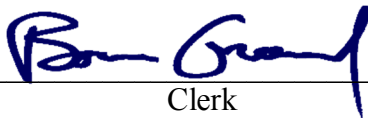
Timothy C. Fox, Montana Attorney General, Roy Brown, Assistant
Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Christopher A. Morris,
Deputy County Attorney, Billings, Montana

Submitted on Briefs: October 2, 2019

Decided: October 29, 2019

Filed:


Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Alfred John Abella ("Abella") appeals from an order of the Thirteenth Judicial District Court, Yellowstone County. He contends that his right to due process was violated when the prosecutor cross-examined him about his pretrial silence requiring reversal of his conviction. Alternatively, he argues, and the State concedes, the judgment should be amended to credit him with time served of an additional 181 days. We affirm the District Court's conviction and sentence of Abella and remand with instructions to grant Abella his requested credit for time served.

¶3 On July 4, 2015, Abella, in a jealous rage, confronted Anthony Lowe ("Lowe"), whom he thought was sleeping with his girlfriend, Tomi Gray ("Gray"). The confrontation, which was precipitated by an altercation a week earlier, occurred in the early morning hours at Gray's house, where Lowe, Gray and others were about to smoke methamphetamine. Abella then arrived at the home and began knocking loudly on the front door and eventually forced the locked door open. Abella appeared wielding a machete in his hand and proceeded towards Lowe while yelling at him. Lowe then backed away towards the kitchen to retrieve a sledgehammer in an effort to defend himself. However, a sledge hammer is no match for a machete and Lowe's efforts

proved futile. Abella swung his machete at Lowe slicing through Lowe's arm. Abella's strike cut through Lowe's ulna bone and tendons causing him to bleed profusely. Abella, seemingly coming to his senses, then dropped his machete and proceeded to help Lowe stop the bleeding. Abella then left the home prior to Billings Police Department officers arriving. On July 21, 2015, Abella was arrested for assault with a weapon.

¶4 Abella was formally charged with assault with a weapon, and on March 22, 2017, a jury found him guilty. The District Court issued a judgment and sentencing order on July 21, 2017.

¶5 During the trial, Abella, the lone witness for the defense, proffered a separate version of the story than the State's six witnesses had testified about. In his version, he claimed he was only defending himself with his machete from Lowe's sledgehammer attack. During the State's cross-examination and closing argument, the prosecutor questioned the veracity of his story and made comments indicating that Abella's story appeared to be a recent fabrication. During trial, the prosecutor asked the defendant, "And today is the first time that we have heard your story?" Abella appeals his conviction on the basis that the State violated his right to due process by commenting on his silence and requests, alternatively, that the judgment should be amended to credit him with time served.

¶6 We exercise plenary review of constitutional questions. *State v. Covington*, 2012 MT 31, ¶ 13, 364 Mont. 118, 272 P.3d 43. We review a criminal sentence that imposes a year or more of actual incarceration for legality. *State v. Herman*, 2008 MT 187, ¶ 11, 343 Mont. 494, 188 P.3d 978.

¶7 Abella maintains that the prosecutor committed misconduct during trial when she commented on his story that he asserted during trial. The essence of the defense argument is that by questioning Abella on his story during cross-examination and commenting on it during her closing argument, Abella's fundamental right to remain silent was infringed and he was thereby denied due process of law.

¶8 It is well established that impeachment use of a defendant's silence after arrest and after receiving *Miranda* warnings is a violation of due process. *State v. Morsette*, 2013 MT 270, ¶ 35, 372 Mont. 38, 309 P.3d 978 (citing *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976)). However, a prosecutor does not infringe on a defendant's Fifth Amendment right to remain silent by attacking the veracity of a defendant's story told at trial. *State v. Godfrey*, 2004 MT 197, ¶ 37, 322 Mont. 254, 95 P.3d 166; *Morsette*, ¶ 38. A prosecutor is allowed to "attempt to convince a jury that a defendant's story is a recent fabrication," *Morsette*, ¶ 38, and we will not reverse a conviction unless there is a "clear comment on or infringement of" the defendant's fundamental right to remain silent, *Godfrey*, ¶ 40. A prosecutor's questions cross the line, however, when they are "designed to create an inference that, by declining to give his version of events after invoking his *Miranda* rights, [the defendant] must be guilty." *State v. Wagner*, 2009 MT 256, ¶ 20, 352 Mont. 1, 215 P.3d 20; *State v. Sullivan*, 280 Mont. 25, 36, 927 P.2d 1033, 1040 (1996).

¶9 Indeed, it is a fine line that a prosecutor chooses to walk, which is why such questions and statements are "inadvisable." *Godfrey*, ¶ 37. Clearly, under these facts it was unnecessary.

¶10 Here, given the overwhelming evidence against Abella, the prosecutor ultimately fell within the bounds of acceptable questioning. The prosecutor focused on highlighting Abella’s story as being recently fabricated after hearing all the witness testimony, not on his silence. She made no explicit comment or infringement on Abella’s fundamental right to remain silent. In *Godfrey*, we held that comments focused upon the veracity of a defendant’s story, rather than on his silence, were allowed. There, like here, the prosecutor had asked the defendant about the amount of time he had to “think up an explanation” and that his explanation was “the first time that anyone has really heard this explanation.” *Godfrey*, ¶ 18.

¶11 The Prosecutor’s focus on Abella’s story being a possible fabrication is further evident in her closing argument. In closing, the prosecutor requested the jury to consider whether “the story that we’ve heard some almost two years later is *reasonable*” and that “it’s *convenient* that he now remembers all of these things after he’s read all the statements, he’s looked at all the evidence, he’s sat through the entire trial, he gets to hear everything and *formulate* his story which is . . . *not logical* in any way.” Again, this is similar to the facts in *Godfrey*, where the prosecutor stated in his closing argument that the defendant “knew it was always going to be his word or my word type of thing. He always knew that. He’s not a dummy. You saw him testify. He articulates well. He’s got an explanation. He’s had plenty of time to think about it.” *Godfrey*, ¶ 19.

¶12 Moreover, in *Morsette*, the prosecutor asked the defendant several times why he didn’t tell the police nor mention he had an alibi witness until trial. We affirmed, noting

that the prosecutor did not mention Morsette's exercise of his *Miranda* rights nor had he suggested that any inference be drawn from Morsette's silence. *Morsette*, ¶¶ 31-33, 39.

¶13 In *Sullivan* and *Wagner*, the prosecutors' comments were found to be error. They had repeatedly mentioned that the defendant refused to make a statement during his arrest (after he received *Miranda* warnings) and failed to volunteer his version of events to the police earlier on. These cases can be distinguished on the facts. The prosecutor here did not explicitly comment on the defendant's refusal to make a statement after being given *Miranda* warnings. Rather, the prosecutor focused on the fact that Abella's story differed from any other witness, that it was the first time anyone had heard that version of the events, and that it has been a long time since the event occurred indicating his story could be muddled due to lack of memory.

¶14 Therefore, we conclude the comments were not an infringement of Abella's fundamental right to remain silent. The prosecutor's comments were focused on the veracity of Abella's uncorroborated story rather than inferring any guilt by his remaining silent.¹

¶15 Regarding the second issue, credit for time served, the State concedes that Abella's judgment should be amended to include an additional 181 days of time served.

¹ Regardless, we could determine that any error would have been harmless, as the State has demonstrated beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Sullivan*, 280 Mont. at 35, 927 P.2d at 1039 (citations omitted). Based on the evidence presented, there is no question that Abella used a machete to slice through Lowe's left arm and that the prosecution had six witnesses testify that Abella was the attacker. Defendant's testimony of justifiable use of force is illogical. He would have us believe that he was just sitting around with his machete minding his own business. As the prosecutor aptly questioned, rhetorically: "Who brings a hammer to a sword fight?"

We agree and remand to the District Court to apply the credits for time served consistent with this Opinion.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional questions, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶17 Affirmed in part and remanded.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ DIRK M. SANDEFUR

/S/ JIM RICE

/S/ INGRID GUSTAFSON