NOT DESIGNATED FOR PUBLICATION

No. 125,187

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MARQUIS BRANDON HOLMES,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Opinion filed April 28, 2023. Reversed and remanded.

Peter Maharry, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris Kobach*, attorney general, for appellee.

Before BRUNS, P.J., GREEN and WARNER, JJ.

PER CURIAM: Marquis Brandon Holmes appeals after a jury convicted him of aggravated battery for the stabbing of Shawn Hiatt. On appeal, Holmes contends that the State committed prosecutorial error. Although the State concedes that the prosecutor committed error, it contends that the error was harmless and did not deny Holmes of his right to a fair trial. However, based on our review of the record on appeal, we conclude that the State has failed to meet its burden to show that the prosecutor's error did not impact the outcome of the trial. Thus, we reverse Holmes' aggravated battery conviction and remand this case to the district court for a new trial.

FACTS

On August 18, 2018, Hiatt went to Carl Dearinger's house. Not long after he arrived, a man entered the residence and stabbed Hiatt several times. Hiatt—who was bleeding from his injuries—left Dearinger's house after the man who stabbed him had fled. Although the exact version of events is disputed, the record reflects that Hiatt obtained a gun from the silver SUV he was driving and shot Holmes five times. Both Holmes and Hiatt received treatment for their respective injuries at hospitals in Missouri.

On the same day, a detective from the Leavenworth Police Department went to the hospital to speak with Hiatt. When he arrived at the hospital, the detective saw the silver SUV in the parking lot that witnesses had indicated was involved in the shooting. The detective called Hiatt's grandfather—who owned the SUV—and obtained consent to search the vehicle. During the search, the detective seized—among other things—the gun that was used to shoot Holmes.

Two days later, the detective traveled to a different hospital in Missouri to interview Holmes. Although he denied stabbing Hiatt, he admitted that he was at a residence on the same street as Dearinger's house. He also told the detective that as he left the residence that he was visiting, a man in an SUV drove toward him and began shooting.

The State charged Holmes with one count of aggravated battery and one count of aggravated burglary arising out of the stabbing of Hiatt. Additionally, the State charged Hiatt with attempted first-degree murder and criminal possession of a firearm arising out of the shooting of Holmes. Before Holmes' case came to trial, Hiatt was convicted by a jury of the lesser included offense of attempted voluntary manslaughter for shooting Holmes and of possession of a firearm. Subsequently, Hiatt's convictions were affirmed

on appeal. *State v. Hiatt*, No. 122,430, 2021 WL 762073, at *4 (Kan. App.) (unpublished opinion), *rev. denied* 314 Kan. 857 (2021).

On February 28, 2022, the district court commenced a 1-day jury trial in this case. During voir dire, the assistant county attorney representing the State told the prospective jurors that "if the State does prove to you beyond a reasonable doubt that Mr. Holmes committed these crimes, then it will be your job as jurors to find him guilty." He also told the prospective jurors that if the State did not prove that Holmes committed one or both crimes beyond a reasonable doubt, then the jurors "should find him not guilty." Later during voir dire, the assistant county attorney reiterated that it would be their "job as a juror to find [Holmes] guilty" if the State proved its case beyond a reasonable doubt. Then, near the end of the State's voir dire, the assistant county attorney had each potential juror orally commit that he or she would "do [their] job as a juror and find him guilty" if the State proved its case.

During the trial, the State called three witnesses: the detective, Dearinger, and Hiatt. In addition, the State presented 26 photos taken by the police during their investigation that were admitted into evidence. After the State rested, Holmes exercised his right not to call any witnesses or present any evidence. At the conclusion of the trial, the district court instructed the jury and the attorneys presented their closing arguments.

In his closing argument, the assistant county attorney told the jurors, "Now, a jury has already found Mr. Hiatt guilty of the shooting. It's now time for you to do your job as jurors and find Marquis Holmes guilty of the stabbing that precipitated the shooting." Finally, the assistant county attorney concluded his argument by stating:

> "Ladies and gentlemen, I've almost finished my job here, so has Mr. Floyd, and then it's going to be time for you to do your jobs. The State's proven beyond a reasonable doubt that the defendant committed the crimes with which he is charged. And as each of

> you agreed to do, it will be your job to find him guilty of aggravated battery causing great bodily harm and aggravated burglary."

After deliberation, the jury convicted Holmes of aggravated battery for the stabbing of Hiatt but acquitted him of aggravated burglary. The district court ultimately sentenced Holmes to 162 months in prison, to be followed by 36 months of postrelease supervision. Thereafter, Holmes timely filed a notice of appeal.

ANALYSIS

On appeal, Holmes contends that the assistant county attorney committed prosecutorial error on multiple occasions and that these errors denied him of his right to a fair trial. Specifically, Holmes argues that it was error when the assistant county attorney told the jurors—both during voir dire and during closing arguments—that it was their "job" to convict Holmes if the State proved its case. In response, the State—which is represented by the Attorney General's Office on appeal—candidly concedes that the assistant county attorney made erroneous statements to the jury. Instead, the State contends that these errors were harmless.

We apply a two-step process to evaluate claims of prosecutorial error. First, we determine whether the prosecutor committed error. Second, if the prosecutor did commit error, we determine whether the error prejudiced the defendant's right to a fair trial. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). Here, because it is undisputed that the assistant county attorney committed error, we will focus our attention on whether the erroneous statements made by the assistant county attorney were prejudicial under the constitutional harmlessness inquiry originally set forth in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Prosecutorial error is deemed to be harmless if the State can establish "'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the

trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" *Sherman*, 305 Kan. at 109. Although the statutory harmlessness test also applies to prosecutorial error, it is only necessary that we address the higher standard of constitutional error. 305 Kan. at 109; see *State v. Fraire*, 312 Kan. 786, 791-92, 481 P.3d 129 (2021). Even if a prosecutor's actions are egregious, reversal of a criminal conviction is not appropriate if the actions are determined to satisfy the constitutional harmless error test. *Sherman*, 305 Kan. at 114.

As indicated above, the parties agree that the assistant county attorney's statements to the jury—during both voir dire and closing arguments—constitute error. As the United States Supreme Court has held, statements by prosecutors telling a jury to "'do its job'" have "no place in the administration of justice." *United States v. Young*, 470 U.S. 1, 17-18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) ("That kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice."); see also *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986) ("There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality."). Similarly, the Kansas Supreme Court—citing *Young* and *Mandelbaum*—has held that it is improper for a prosecutor to tell jurors to honor their oath and return a guilty verdict because doing so is akin to statements urging the jury to "do its job." *State v. Scott*, 286 Kan. 54, 79-80, 183 P.3d 801 (2008), *overruled on other grounds* by *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016).

We recognize that "[j]uries possess the power to decide a case in a manner which is contrary to the applicable facts and law, i.e., the power of jury nullification." *State v. Naputi*, 293 Kan. 55, Syl. ¶ 4, 260 P.3d 86 (2011). Yet the argument that a jury should be explicitly instructed on its power of nullification has been rejected by our Supreme Court. See *State v. Smith-Parker*, 301 Kan. 132, Syl. ¶ 6, 340 P.3d 485 (2014). Consequently, a prosecutor's statement during closing argument that it "must" convict if the jury was

convinced that the State met its burden of proof has been found not to rise to the level of prosecutorial error. *State v. Pruitt*, 310 Kan. 952, 967, 453 P.3d 313 (2019). Thus, we recognize that it is sometimes difficult for prosecutors to discern between an argument that is proper and one that is improper.

Here, although we do not find the assistant county attorney's statements and arguments to be egregious, we agree with the parties that they did rise to the level of prosecutorial error. Not only did the assistant county attorney repeat his erroneous statements multiple times—both prior to and after the presentation of evidence—he also asked each potential juror to make a commitment to do their jobs and then reminded of them of that commitment at the conclusion of his closing argument. Perhaps if the assistant county attorney had only made a brief and isolated exhortation asking the jurors to do their job if they found the State had met its burden of proving Holmes' guilt beyond a reasonable doubt, we may have found the error to be harmless. But that is not what occurred in this case.

While the assistant county attorney usually added language about the State meeting its burden of proof when making his statements about the jurors doing their job and usually asked that the jury find Holmes guilty of both counts, he did not always do so. Significantly, the assistant county attorney made the following statement to the jury during closing arguments without including language about the State's burden to prove Holmes' guilt beyond a reasonable doubt or asking the jury to convict on both counts:

> "Now, a jury has already found Mr. Hiatt guilty of the shooting [of Holmes]. It's now time for you to do your job as jurors and find Marquis Holmes guilty of the stabbing [of Hiatt] that precipitated the shooting."

This argument not only exhorts each member of the jury "to do your job" but also directly links the aggravated battery charge in this case—arising out of the stabbing of Hiatt—to Hiatt's conviction for shooting Holmes. Specifically, this argument could be

rationally construed to be suggesting to the jurors that because Hiatt has been convicted of shooting Holmes, they have a reciprocal obligation to convict Holmes of stabbing Hiatt. Although it is impossible for us to know with certainty what impact this statement—as well as the others erroneously made by the assistant county attorney — actually had on the jury's verdict, we find it to be within the realm of "reasonable possibility" that such statements contributed to the verdict based on our review of the record on appeal.

The State valiantly argues that even though the assistant county attorney repeated his erroneous statement and argument multiple times over the course of the trial, his errors should be deemed to be harmless. In support of its contention that the error did not deny Holmes a fair trial, the State argues that the evidence of Holmes' guilt is overwhelming. Although the evidence of Holmes' guilt in the record would likely be sufficient to uphold a conviction if we were reviewing the evidence in the light most favorable to the State, we do not find it to be overwhelming.

A review of the record on appeal reveals that neither the State's eyewitness—Dearinger—nor the victim of the stabbing—Hiatt—were particularly strong witnesses. At trial, Dearinger could not identify Holmes in the courtroom as the individual who came into his house and stabbed Hiatt. Likewise, although Hiatt identified Holmes as the person who stabbed him at the start of his testimony, he later indicated that he could not state with certainty that Holmes was the man who stabbed him.

Interestingly, both parties point to the fact that the jury acquitted Holmes on the charge of aggravated burglary as support for their respective arguments. On the one hand, the State argues that the partial acquittal establishes that the jury was not swayed by the assistant county attorney's admittedly erroneous statements and argument. On the other hand, Holmes argues that the assistant county attorney's erroneous statements and arguments "pushed the jury" to convict on the aggravated battery count. Once again, it is

impossible for us to know with certainty why the jury found Holmes to be guilty of one count but not the other one.

The difficulty in trying to determine why a jury may find a defendant guilty on one charge but not another is highlighted by the United States Supreme Court's decision in *Young*. The majority found that the jury's acquittal of the defendant on one charge reinforced their conclusion that the prosecutor's erroneous statements "did not undermine the jury's ability to review the evidence independently and fairly." 470 U.S. at 18 n.15. However, the concurring justices pointed out that a partial acquittal could also be viewed as demonstrating that the evidence was not overwhelming. 470 U.S. at 32. The concurring justices suggested that a partial acquittal could "just as naturally be interpreted to suggest that the evidence was close and the verdict a compromise, thus supporting a belief that the prosecutor's . . . exhortation to 'do your job' did in fact have prejudicial impact." 470 U.S. at 32.

Regardless, we must determine whether the State has met its burden to prove beyond a reasonable doubt that the prosecutorial error did not affect a jury's verdict on a case-by-case basis. Here, based on our review of the record on appeal as a whole, we find that the State has failed to establish beyond a reasonable doubt that the repeated erroneous statements and arguments made by the assistant county attorney did not affect the outcome of the trial. As a result, we reverse Holmes' aggravated battery conviction and remand this case to the district court for a new trial. Finally, in light of this decision, we find that it is unnecessary for us to address the other issues presented by the parties on appeal.

Reversed and remanded.