

SUPREME COURT OF NEBRASKA

State v. McSwine

292 Neb. 565 (2016) · No. No. S-13-887 · Decided January 29, 2016

SUMMARY

The Nebraska Supreme Court reviewed the State's petition for further review after the Court of Appeals reversed Frederick E. McSwine's convictions based on alleged prosecutorial misconduct during closing argument. The court held that the prosecutor's references to the lack of corroborating evidence were not misleading or unduly influential because the jury had been instructed to consider only evidence admitted at trial. The court reversed the Court of Appeals' judgment and remanded the cause for further proceedings.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Stacy, J., not participating; majority opinion by Heavican, C.J.; Heavican, C.J.; Wright, J.; Connolly, J.; McCormack, J.; Miller-Lerman, J.; Cassel, J.
JURISDICTION	Nebraska
DECIDED	January 29, 2016
DOCKET	No. S-13-887
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The State petitioned for further review of a Nebraska Court of Appeals decision that reversed McSwine's convictions and remanded for a new trial based on plain prosecutorial misconduct in closing argument.
STANDARD OF REVIEW	The denial of a motion for new trial based on prosecutorial misconduct is reviewed for abuse of discretion. Plain error may be found when an unasserted error is plainly evident from the record, prejudicially affects a substantial right, and, if uncorrected, would damage the integrity, reputation, and fairness of the judicial process. Ineffective assistance claims are governed by Strickland's deficient-performance and prejudice requirements.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Frederick E. McSwine, also known as Frederick E. Johnson v. State of Nebraska

TOPICS

prosecutorial misconduct

jury instructions

preservation of error

appellate procedure

ineffective assistance

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

QUESTIONS PRESENTED

1. Whether the prosecutor's statements during closing argument that no evidence supported McSwine's account of the unrelated trespassing incident constituted prosecutorial misconduct.
2. Whether the prosecutor's statements, even if improper, were prejudicial or constituted plain error requiring reversal.
3. Whether trial counsel was ineffective for failing to object to the prosecutor's statements.
4. Whether the district court abused its discretion by denying McSwine's motion for new trial.

HOLDINGS

1. The prosecutor's statements that McSwine's trespassing account was unsupported by evidence were not misleading or unduly influential in the context of the trial because no evidence concerning the trespass had been admitted and the jury was repeatedly instructed to consider only admitted trial evidence.
2. Even assuming the statements were prosecutorial misconduct, they were not sufficiently prejudicial to violate due process and did not constitute plain error.
3. Trial counsel was not ineffective for failing to object because the prosecutor's statements were not misconduct and McSwine was not prejudiced.
4. The Nebraska Court of Appeals erred in reversing McSwine's convictions and remanding for a new trial.

KEY QUOTATIONS

“Prosecutorial misconduct prejudices a defendant’s right to a fair trial when the misconduct so infects the trial that the resulting conviction violates due process.” (575)

“Plain error should be resorted to only in those rare instances where it is warranted; to conclude otherwise would swallow the general rule.” (583)

“It is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” (584)

FACTUAL BACKGROUND

McSwine was accused of abducting C.S. at knifepoint, driving her around rural Lancaster County, and sexually assaulting her. C.S. testified that McSwine forced her from her apartment and later allowed her to leave his vehicle; a friend testified that McSwine admitted abducting and sexually assaulting C.S., and medical evidence showed a vaginal laceration. McSwine admitted sexual contact but claimed it was consensual and testified that incriminating text messages referred instead to an unrelated trespassing incident earlier that day. During closing

argument, the prosecutor stated that McSwine's account of the trespass was unsupported by any evidence beyond his own word, although police reports concerning the incident had been provided to the defense but were not admitted at trial.

PROCEDURAL HISTORY

McSwine was convicted in the Lancaster County District Court of terroristic threats, kidnapping, first degree sexual assault, and use of a deadly weapon to commit a felony, and received an aggregate sentence of 57 to 85 years' imprisonment. The Court of Appeals reversed and remanded for a new trial, concluding that the prosecutor's closing argument constituted plain error and that trial counsel was ineffective for failing to object. The Nebraska Supreme Court granted further review, reversed the Court of Appeals, and remanded for consideration of McSwine's remaining assignments of error.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The cause was remanded to the Nebraska Court of Appeals for consideration of McSwine's remaining assignments of error.

CASES CITED

- State v. McSwine, 22 Neb. App. 791, 860 N.W.2d 776 (2015)
- State v. Williams, 282 Neb. 182, 802 N.W.2d 421 (2011)
- State v. Alarcon-Chavez, 284 Neb. 322, 821 N.W.2d 359 (2012)
- State v. Scott, 284 Neb. 703, 824 N.W.2d 668 (2012)
- State v. Keup, 265 Neb. 96, 655 N.W.2d 25 (2003)
- State v. Dubray, 289 Neb. 208, 854 N.W.2d 584 (2014)
- State v. Pierce, 231 Neb. 966, 439 N.W.2d 435 (1989)
- Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965)
- State v. Smith, 286 Neb. 856, 839 N.W.2d 333 (2013)
- State v. Collins, 281 Neb. 927, 799 N.W.2d 693 (2011)
- State v. Barfield, 272 Neb. 502, 723 N.W.2d 303 (2006)
- State v. McCulloch, 274 Neb. 636, 742 N.W.2d 727 (2007)
- Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)
- Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- State v. Ortega, 290 Neb. 172, 859 N.W.2d 305 (2015)
- State v. Kays, 289 Neb. 260, 854 N.W.2d 783 (2014)
- State v. Qualls, 284 Neb. 929, 824 N.W.2d 362 (2012)
- McCready v. Al Eighmy Dodge, 197 Neb. 684, 250 N.W.2d 640 (1977)

- *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015)
- *United States v. McBride*, 862 F.2d 1316 (8th Cir. 1988)
- *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)
- *United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009)
- *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993)
- *United States v. Toney*, 599 F.2d 787 (6th Cir. 1979)
- *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)
- *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993)
- *State v. Bvocik*, 324 Wis. 2d 352, 781 N.W.2d 719 (Wis. App. 2010)
- *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014)