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STATE OF CONNECTICUT *v.* LUISA BERMUDEZ
(AC 25546)

DiPentima, Gruendel and Foti, Js.

Argued December 6, 2005—officially released March 7, 2006

(Appeal from Superior Court, judicial district of Fairfield, Owens, J.)

Aaron J. Romano, special public defender, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Joseph J. Harry*, senior assistant state's attorney, for the appellee (state).

Opinion

FOTI, J. The defendant, Luisa Bermudez, appeals from the judgment of conviction, rendered after a jury trial, of two counts of robbery in the first degree in

violation of General Statutes § 53a-134 (a) (2), and one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2). On appeal, the defendant claims that prosecutorial misconduct deprived her of a fair trial. We affirm the judgment of the trial court.

The relevant background facts are set forth in *State* v. *Bermudez*, 93 Conn. App. 814, A.2d (2006), in which we affirmed the judgment revoking the defendant's probation on the basis of her involvement in an armed robbery in Bridgeport. In this appeal, the defendant challenges her conviction on the charges stemming from the robbery. She specifically claims that the prosecutor improperly (1) failed to disclose a statement of her codefendant, (2) cross-examined her as to other witnesses' veracity, (3) bolstered the credibility of the state's witnesses and (4) misstated evidence in closing argument. Before addressing those claims, we review several principles concerning prosecutorial misconduct.

We conduct a two step inquiry in analyzing claims of prosecutorial misconduct. ''The two steps are separate and distinct: (1) whether misconduct occurred in the first instance; and (2) whether that misconduct deprived a defendant of his due process right to a fair trial.'' (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 572, 849 A.2d 626 (2004). ''The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . [The court] must view the prosecutor's comments in the context of the entire trial.'' (Internal quotation marks omitted.) Id., 571. ''[T]he fairness of the trial and not the culpability of the prosecutor is the standard for analyzing the constitutional due process claims of criminal defendants alleging prosecutorial misconduct. . . . It is in that context that the burden [falls] on the defendant to demonstrate that the remarks were so prejudicial that he was deprived of a fair trial and the entire proceedings were tainted.'' (Internal quotation marks omitted.) *State* v. *Antonio A.*, 90 Conn. App. 286, 301, 878 A.2d 358, cert. denied, 275 Conn. 926, 883 A.2d 1246 (2005). The factors to be considered in assessing the prosecutor's actions include ''the extent to which the misconduct was invited by defense conduct or argument . . . the severity of the misconduct . . . the frequency of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case.'' (Citations omitted.) *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987).

I

The defendant first directs us to the prosecutor's actions concerning a statement made by her codefendant, Orema Taft. Taft pleaded guilty to charges that

he had participated in the robbery and was sentenced to eight and one-half years incarceration. Taft then served as a defense witness in the defendant's trial and testified that the defendant had not been involved in the robbery. After the defendant rested her case, the prosecutor proffered a rebuttal witness, state police Trooper Mario Rosa, who had interviewed Taft after he pleaded guilty. According to Rosa, Taft had stated that he and the defendant would not have been arrested in connection with the robbery if the defendant had not spoken to one of the robbery victims, Robert Gagstetter. During the robbery, the defendant ordered Gagstetter to remove his jewelry. Gagstetter, who was acquainted with the defendant, recognized her voice and informed the police of her identity. The defendant objected to Rosa's testimony regarding Taft's statement because the state had not disclosed it to her pursuant to Practice Book § 40-11 (a) (6).[1] The defendant argued that if she had known about Taft's statement to Rosa, she might not have called Taft as a witness. The court overruled the objection and offered defense counsel additional time to prepare cross-examination.

The state concedes that it did not comply with Practice Book § 40-11 (a) (6), and we agree. Failure to comply with our rules of practice, however, does not provide a proper basis for a claim of prosecutorial misconduct on appeal. Instead, a party seeking a remedy for the opposing party's failure to comply with required disclosures may move the trial court for an appropriate order pursuant to Practice Book § 40-5.[2] We therefore interpret the defendant's claim regarding Taft's statement not as a prosecutorial misconduct claim, but as a claim that the court should have sanctioned the prosecution by prohibiting the introduction of Taft's statement through Rosa's testimony.

''Practice Book § 40-5 gives broad discretion to the trial judge to fashion an appropriate remedy for noncompliance with discovery. . . . Generally, [t]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the state for its allegedly improper conduct. As we have indicated, the formulation of an appropriate sanction is a matter within the sound discretion of the trial court. . . . In determining what sanction is appropriate for failure to comply with court ordered discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. . . . Suppression of relevant, material and otherwise admissible evidence is a severe sanction which should not be invoked lightly.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Respass*, 256 Conn. 164, 186, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

We find it significant that the defendant learned of Taft's statement by way of the state's proffer of Rosa's testimony outside the presence of the jury. Although the court refused to impose the severe sanction of prohibiting Rosa's testimony as to Taft's statement, it offered defense counsel additional time to prepare cross-examination pursuant to Practice Book § 40-5 (2). The court reasonably could have concluded that the defendant did not suffer prejudice as a result of the state's failure to disclose Taft's statement because the jury was not present when the defendant learned of the statement. The defendant's mere suggestion that she might not have called Taft as a witness is unavailing because the state could have called him instead. In view of the relevance, materiality and admissibility of Taft's statement, we conclude that the court did not abuse its discretion in permitting Rosa to testify as to Taft's statement.

II

The defendant next claims that the prosecutor improperly cross-examined her as to the testimony of other witnesses. The defendant specifically directs us to four of the prosecutor's questions. In the first question, the prosecutor asked her: "So, what the [judicial] marshals testified to did not occur?" A short time later, the prosecutor asked her: "So, you are saying [that] you never did what [the police officers] said you did?" Thereafter, the defendant testified that she had not slept in the same bedroom with Taft on the night of the robbery, and the prosecutor then asked her: "You heard that [Taft had testified that] he was with you in bed . . . when he came back from the robbery . . . ?" In the final question on which the defendant bases her claim, the prosecutor asked her: "So, when [Taft] testified that he [told you about the robbery], that was inaccurate?" The defendant did not object to any of those questions during cross-examination,[3] but now claims that they were improper because they concerned other witnesses' veracity.

"[A] witness may not be asked to characterize another witness' testimony as a lie, mistaken or wrong." *State* v. *Singh*, 259 Conn. 693, 712, 793 A.2d 226 (2002). "[D]eterminations of credibility are for the jury, and not for witnesses. . . . Consequently, questions that ask a defendant to comment on another witness' veracity invade the province of the jury." (Citations omitted; internal quotation marks omitted.) Id., 707. "[Q]uestions of this sort also create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied." Id., 708.

We agree with the defendant that the prosecutor should not have asked her whether her testimony contradicted the testimony of the other witnesses. Viewed in the context of the entire trial, however, the prosecu-

tor's four improper questions were too few in number, and the misconduct was not severe enough to deprive the defendant of a fair trial.

III

The defendant next claims that the prosecutor improperly bolstered the credibility of the state's witnesses. We disagree.

During closing argument, the prosecutor told the jury: "[T]he judge will tell you that you can take people's interest in a case, their bias and you can use that . . . to judge someone's demeanor and . . . credibility. . . . [N]ot one of the state's witnesses had an interest in this case. The cops, what do they care? They went and investigated a robbery." Referring to the two robbery victims, Gagstetter and Esau Roque, the prosecutor continued: "Did Mr. Gagstetter have an interest in this case? . . . [H]e lost all [of his] money. So, what is his interest in this case? What is Esau Roque's interest in this case? Nothing. To come in here and get cross-examined . . . subject to what? For what purpose? This is what happened to me. Take it or leave it."

We conclude that the prosecutor's comments did not constitute improper bolstering. "[I]t is not improper for a prosecutor to remark on the motives that a witness may have to lie, or not to lie, as the case may be." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 585. In arguing to the jury that the state's witnesses were credible, the prosecutor merely commented on the witnesses' motives. We therefore reject the defendant's claim.

IV

The defendant's last claim is that the prosecutor misstated evidence in closing argument. The prosecutor told the jury that only Gagstetter's identification of the defendant's voice had led police to the defendant. In fact, Gagstetter testified that he also had recognized one of the other assailants as "O. T." Gagstetter did not know that "O. T." was Orema Taft and did not know that Taft lived with the defendant. In contrast, Gagstetter knew the defendant's address and gave it to the police. Because Gagstetter's reference to "O. T." was not relevant in leading police to the defendant, we conclude that the prosecutor correctly stated the evidence in closing argument.

The judgment is affirmed.

In this opinion GRUENDEL, J., concurred.

[1] Practice Book § 40-11 (a) provides in relevant part: "Upon written request by a defendant . . . and without requiring any order of the judicial authority the prosecuting authority . . . shall promptly, but no later than [forty-five] days from the filing of the request . . . disclose in writing the existence of and allow the defendant . . . to inspect . . . any of the following items: . . .

"(6) (i) Any written, recorded or oral statements made by the defendant or a codefendant, before or after arrest to any law enforcement officer . . . concerning the offense charged; or

"(ii) Any relevant statements of coconspirators which the prosecuting authority intends to offer in evidence at any trial or hearing. . . ."

[2] Practice Book § 40-5 provides: "If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a motion may enter such orders and time limitations as it deems appropriate, including, without limitation, one or more of the following:

"(1) Requiring the noncomplying party to comply;

"(2) Granting the moving party additional time or a continuance;

"(3) Relieving the moving party from making a disclosure required by these rules;

"(4) Prohibiting the noncomplying party from introducing specified evidence;

"(5) Declaring a mistrial;

"(6) Dismissing the charges;

"(7) Imposing appropriate sanctions on the counsel or party, or both, responsible for the noncompliance; or

"(8) Entering such other order as it deems proper."

[3] The defendant's failure to object does not affect our review because the prosecutor's conduct must be considered in the context of the entire trial. We note, however, that "the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was unfair in light of the record of the case at the time. . . . [C]ounsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 576.