

51 Misc.3d 653

County Court, Monroe County, New York.

PEOPLE of the State of New York, Respondent,

v.

Michelle JURs, Defendant–Appellant.

Sept. 8, 2015.

### Synopsis

**Background:** Defendant was convicted, in a jury trial in the Greece Town Court, Monroe County, [Campbell, J.](#), of second-degree reckless endangerment and endangering the welfare of a child. She appealed.

**Holdings:** The County Court, Monroe County, [John L. DeMarco, J.](#), held that:

[1] prosecutor's misconduct during summation substantially prejudiced defendant's fundamental right to a fair trial, and

[2] County Court could not say that without prosecutor's misconduct jury would undoubtedly have rendered same verdict.

New trial ordered.

West Headnotes (5)

#### [1] Criminal Law

##### 🔑 Arguments and conduct in general

Although defendant's prosecutorial misconduct claim was not properly preserved, County Court would review that contention as a matter of discretion in the interest of justice. [McKinney's CPL §§ 470.05\(2\), 470.15\(6\)\(a\)](#).

[Cases that cite this headnote](#)

#### [2] Criminal Law

#### 🔑 Particular statements, arguments, and comments

Prosecutor's unobjected-to summation in prosecution for second-degree reckless endangerment and endangering the welfare of a child substantially prejudiced defendant's fundamental right to a fair trial; prosecutor drew irrelevant and inflammatory conclusions which had a decided tendency to prejudice jury against defendant. and made various other improper comments and mischaracterizations of critical evidence. [U.S.C.A. Const.Amend. 14](#); [McKinney's Penal Law §§ 120.20, 260.10\(1\)](#).

[Cases that cite this headnote](#)

#### [3] Criminal Law

##### 🔑 Conduct of counsel in general

While reversal is an ill-suited remedy for prosecutorial misconduct, it is mandated when prosecutor's conduct has caused such substantial prejudice to defendant that he or she has been denied due process of law. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

#### [4] Criminal Law

##### 🔑 Conduct of counsel in general

#### Criminal Law

##### 🔑 Action of Court in Response to Comments or Conduct

In measuring whether substantial prejudice has occurred as result of alleged prosecutorial misconduct, one must look at severity and frequency of the conduct, whether the Court took appropriate action to dilute effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached.

[Cases that cite this headnote](#)

#### [5] Criminal Law

##### 🔑 Particular statements, arguments, and comments

In light of fact that evidence in prosecution for second-degree reckless endangerment and endangering the welfare of a child was not overwhelming, and given the inflammatory nature of the charges, County Court could not say that without prosecutor's unobjected-to misconduct during summation the jury would undoubtedly have rendered same verdict, requiring grant of new trial. [McKinney's Penal Law §§ 120.20, 260.10\(1\)](#).

[Cases that cite this headnote](#)

### Attorneys and Law Firms

**\*\*89** Sandra Doorley, Monroe County District Attorney by Scott Miles, ESQ., Assistant District Attorney, Rochester, NY, for respondent.

[Timothy P. Donaher](#), Esq. Monroe County Public Defender by Janet C. Somes, Esq. Assistant Public Defender Rochester, NY, for appellant.

### Opinion

[JOHN L. DeMARCO](#), J.

**\*654** Appeal from a judgment of the Greece Town Court (Campbell, J.), Monroe County, rendered May 7, 2014. The judgment convicted defendant, following a jury trial, of reckless endangerment in the second degree (Penal Law [PL] § 120.20) and endangering the welfare of a child (PL § 260.10[1]).

On appeal, defendant argues three principal points: (1) that the prosecutor's pervasive and prejudicial misconduct during the trial violated her due process right to a fair trial; (2) that the trial court committed reversible error by allowing a prosecution witness to give expert testimony, inasmuch as the prosecutor gave no expert notice, and expressly stated that she was not calling her witness as an expert witness and would not be qualifying the witness as an expert; and (3) that she was denied her constitutional and statutory right to be present during a material stage of the trial, namely, at sidebar discussions with potential jurors discussing their ability to fairly and impartially decide the case.

**[1]** **[2]** **[3]** **[4]** Although defendant's prosecutorial misconduct claim was not properly preserved (*see Criminal Procedure Law [CPL] 470.05[2]* *see also People v. Smith*, 129 A.D.3d 1549, 1549–50, 10 N.Y.S.3d 374 [4th Dept.2015]), under the circumstances presented, the Court has nevertheless chosen to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6][a]*) and concludes, upon that review, that defendant is entitled to a new trial. While “[r]eversal is an ill-suited remedy for prosecutorial misconduct” (*People v. Galloway*, 54 N.Y.2d 396, 401, 446 N.Y.S.2d 9, 430 N.E.2d 885 [1981]), it “is ... **\*655** mandated when the conduct of the prosecutor has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law” (*People v. Griffin*, 125 A.D.3d 1509, 1511, 4 N.Y.S.3d 434 [2015] [internal quotation marks omitted]). “In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the conduct, whether the Court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached” (*id.* [citation and internal quotation marks omitted]).

The lion's share of defendant's brief is dedicated to her contention that the prosecutor's misconduct during summation substantially prejudiced her fundamental right to a fair trial. The Court agrees. The **\*\*90** record reveals that the prosecutor's misconduct during summation—the various instances of which are exhaustively detailed in defendant's brief—was pervasive and severe. Nor was the misconduct ever diluted by the trial judge<sup>1</sup> (*see People v. Casanova*, 119 A.D.3d 976, 979, 988 N.Y.S.2d 713 [3rd Dept.2014]). In addition, contrary to the People's contention, the **\*656** prosecutor's comments in summation cannot, on the whole, be considered a fair response to defense counsel's summation. The brunt of the prosecutor's summation “led the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant” (*People v. Ashwal*, 39 N.Y.2d 105, 110, 383 N.Y.S.2d 204, 347 N.E.2d 564 [1976]). Even assuming, arguendo, that the prosecutor's use of the phrase “smoke and mirrors”<sup>2</sup> and her additional comments to the effect that her witness had no reason to lie, when viewed in their proper context, **\*\*91** may have been fair responses to defense counsel's summation, the prosecutor's summation included various other improper comments and mischaracterizations of

critical evidence (*see id.* at 109–10, 383 N.Y.S.2d 204, 347 N.E.2d 564) which, when taken together, “substantially prejudiced defendant's rights” (*People v. Calabria*, 94 N.Y.2d 519, 523, 706 N.Y.S.2d 691, 727 N.E.2d 1245 [2000]).

[5] Inasmuch as the record reveals that the evidence in this case was not overwhelming, the Court cannot say that without the prosecutor's misconduct the jury would have undoubtedly \*657 rendered the same verdict (*see Griffin*, 125 A.D.3d at 1512, 4 N.Y.S.3d 434 [citations omitted]; *see also People v. Mott*, 94 A.D.2d 415, 419, 465 N.Y.S.2d 307 [4th Dept.1983]), especially given the inflammatory nature of the charges (*see People v. Riback*, 13 N.Y.3d 416, 423, 892 N.Y.S.2d 832, 920 N.E.2d 939 [2009]), and

thus, a new trial is required (*see People v. Crimmins*, 36 N.Y.2d 230, 237, 367 N.Y.S.2d 213, 326 N.E.2d 787 [1975]). In light of this determination, the Court need not reach defendant's additional contentions.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and as a matter of discretion in the interest of justice, the defendant's convictions are vacated, and the matter is remitted to Greece Town Court for a new trial of the accusatory instruments, pursuant to CPL 470.20(1).

#### All Citations

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#### Footnotes

1 But, to be clear, the trial judge had virtually no recourse. The Court notes that defendant essentially all but concedes that her trial counsel, also from the Public Defender's Office, was ineffective for “[t]he lack of objection” to the prosecutor's misconduct in summation (see defendant's brief at 25), as well as for failing to advise her “of her right to be present at sidebar conferences with prospective jurors who did not wish to discuss certain matters publicly” (defendant's brief at 36).

In light of the first of these claims, the Court observes that the facts here are generally akin to those presented in *People v. Wright*, 25 N.Y.3d 769, 16 N.Y.S.3d 485, 37 N.E.3d 1127 (decided 2015), where the Court of Appeals reversed the Fourth Department and found that defendant was denied meaningful representation for failing to object during summation where the prosecutor's arguments exceeded the four corners of the evidence, consisted of a pattern of misstatements and affirmative misrepresentations regarding the most critical portions of the evidence, and included requests of the jury to draw conclusions not fairly inferable from the evidence (*see Wright, supra*).

The trial prosecutor's misconduct here, according to the arguments in point one of defendant's brief, is commensurate with the misconduct eschewed in *Wright* and related authorities cited by defendant. In reviewing the relevant trial evidence and the prosecutor's summation, this Court describes no reasonable strategy for leaving the prosecutor's improper statements, but for one objection, unchallenged (*see People v. Fisher*, 18 N.Y.3d 964, 967, 944 N.Y.S.2d 453, 967 N.E.2d 676 [2012]; *Wright, supra*). On the whole, “[t]he prosecutor's summation directed the jury's attention elsewhere—a circumstance that competent defense counsel should have sought to prevent” (*Fisher*, 18 N.Y.3d at 966, 944 N.Y.S.2d 453, 967 N.E.2d 676). Juxtaposing *Wright* and *Fisher* with defendant's trial counsel's inactions here would appear to equal ineffective assistance of counsel (*see also People v. Washington*, 122 A.D.3d 1406, 1407, 997 N.Y.S.2d 194 [4th Dept.2014], *lv. denied* 25 N.Y.3d 1173, 15 N.Y.S.3d 304, 36 N.E.3d 107 [2014] [implying that defense counsel's failure to object to a pattern of improper comments in summation constitutes ineffective assistance of counsel]; *People v. Gottsche*, 118 A.D.3d 1303, 1306–07, 987 N.Y.S.2d 736 [4th Dept.2014], *lv. denied* 24 N.Y.3d 1084, 1 N.Y.S.3d 11, 25 N.E.3d 348 [2014] [same]). Indeed, defendant's distinct awareness of her trial counsel's inactions in the face of virtually every instance of alleged prosecutorial misconduct in summation resounds between the lines of her brief.

Be that as it may, as defendant, for whatever reason, strategic or otherwise, has never raised the issue, and the People have not sought to disqualify the Public Defender as appellate counsel on the ground that defendant's arguments on appeal entail a concomitant claim of ineffective assistance of counsel, that issue is not now before the Court.

2 The Court is somewhat disquieted by defendant's denouncement of the trial prosecutor's use of the phrase “smoke and mirrors” when, indeed, it was defendant's trial counsel who, in the first instance during defendant's opening statement, characterized the People's case as “a lot of smoke and mirrors and ... distractions” (tr. at 211), and then, again, during defendant's summation, expressly denigrated the introduction of medical records into the People's case as having been done “[f]or smoke and mirror effect, to distract [the jury] from the reality[ ] ... [that the People's] witness ... can't keep her story straight[ ]” (tr. at 365). The Court fails to see how defendant's condemnations regarding the trial prosecutor's responsive use of the phrase “smoke and mirrors” in summation are not equally applicable to her (defendant's) trial

counsel. And while the Court appreciates that defendant's trial counsel's use of the phrase "smoke and mirrors" during her opening statement is, strictly speaking, beside the point at issue, that the phrase appears to have been strategically woven into defendant's general theme makes her failure to acknowledge that she, too, used it—and on the offensive, at that—all the more curious.

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