

No. 87921

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

JEREMY L. BANKS,

Appellant.

**Appeal from the Circuit Court of Jackson County, Missouri
The Honorable K. Preston Dean, Judge**

SUBSTITUTE RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

JURISDICTIONAL STATEMENT..... 4

STATEMENT OF FACTS 5

ARGUMENT

Point I - The trial court did not abuse its broad discretion in overruling
defense counsel’s objection and request for mistrial during the State’s
rebuttal closing argument because the prosecutor’s comment was not
improper or unwarranted and did not prejudice appellant 7

CONCLUSION 18

CERTIFICATE OF COMPLIANCE AND SERVICE..... 19

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

State v. Banks, WD 63647 (Mo.App., W.D. June 27, 2006)..... 14

State v. Barrington, 95 S.W. 235 (Mo. banc 1906)..... 15

State v. Bell, 603 S.E.2d 93 (N.C. 2004)..... 18

State v. Clayton, 995 S.W.2d 468 (Mo. banc 1999) *cert. denied*, 528 U.S. 1027 (1999) 12

State v. Goodwin, 217 S.W. 264 (Mo. banc 1919)..... 16

State v. Jeremy Banks, WD63647 (Mo.App., W.D. June 27, 2006) 7

State v. Johnson, 968 S.W.2d 123 (Mo. banc 1998) 9

State v. Johnston, 957 S.W.2d 734 (Mo. banc 1997) *cert. denied*, 522 U.S. 1150 (1998) 16

State v. Manhurin, 799 S.W.2d 840 (Mo. banc 1990) 8

State v. Ringo, 30 S.W.3d 811 (Mo. banc 2000) *cert. denied*, 532 U.S. 932 (2001) 12

State v. Sidebottom, 753 S.W.2d 915 (Mo. banc 1988) 8

State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997) 8

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995) 12

State v. Williams, 97 S.W.3d 462 (Mo. banc 2004) 8

State v. Willis, 420 S.E.2d 158 (N.C. 1992)..... 18

State v. Young, 12 S.W. 879 (Mo.banc 1890) 15

Other Authorities

§565.020, RSMo 2000..... 4
§571.015, RSMo 2000..... 4
Article V, § 10, Missouri Constitution (as amended 1982)..... 4
Supreme Court Rule 83.04 4

Jurisdictional Statement

This appeal is from convictions for first degree murder, §565.020, RSMo 2000, and armed criminal action, §571.015, RSMo 2000, obtained in the Circuit Court of Jackson County, the Honorable K. Preston Dean presiding. Appellant was sentenced, as a prior and persistent offender, to a term of life imprisonment without the possibility of probation or parole for murder in the first degree and a concurrent life term on the armed criminal action count. The Court of Appeals, Western District, affirmed appellant's conviction and sentence. Pursuant to Supreme Court Rule 83.04, this Court granted respondent's application for transfer. This Court has jurisdiction. Article V, § 10, Missouri Constitution (as amended 1982).

Statement of Facts

Appellant, Jeremy L. Banks, was charged via information in lieu of indictment with one count of the class A felony of murder in the first degree and one count of the unclassified felony of armed criminal action (L.F. 3). On September 16-17, 2003, this case went to trial before a jury in the Circuit Court of Jackson County, the Honorable K. Preston Dean presiding (Tr. 1). Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

Three days before the murder of Alvon Turner, Galenda Cooper was sitting on the steps of her apartment building with Crystal Stanford and Andrea Dulang when the appellant arrived, with a friend by the name of Dewayne, in a white two-door Chevy Caprice (Tr. 225, 228). The group went inside the apartment and appellant sat next to Cooper while she had a telephone conversation with her ex-boyfriend, Turner (Tr. 227). Turner and Cooper were having an argument and Turner repeatedly hung up on Cooper (Tr. 228). The telephone conversation prompted appellant to tell Cooper that he had discovered that Turner was going to snitch on him to the police regarding a drug case he and Turner had previously been arrested on (Tr. 228). Appellant further stated that he was “going to get Al” (Tr. 228).

The next day, appellant and Dewayne came to Cooper’s apartment with a 12-gauge shotgun, and asked to put it in her closet (Tr. 230-231). Cooper refused to allow

them to store the shotgun at her apartment (Tr. 231). While at Cooper's apartment, appellant and Dewayne again stated that they were "going to get [Alvon]" (Tr. 231).

The day before Turner's murder, appellant and Dewayne returned to Cooper's apartment and talked more about their "discovery" that Turner planned to snitch on appellant (Tr. 232-233). Again they stated they were "going to get Alvon Turner" (Tr. 232-233). Later that evening, Dewayne and Crystal Stanford were driving to a Conoco store on 44th and Paseo, in Kansas City, Missouri, when they saw Turner at a liquor store (Tr. 233-234). The two drove back to Cooper's apartment to tell appellant they had seen Turner at the liquor store (Tr. 233-234). Appellant and Dewayne then drove off to find Turner in order to threaten him regarding some drug money (Tr. 234). Prior to leaving, appellant stated that he "wanted to kill" Turner (Tr. 235).

On September 14, 2002, Turner and Janette Fox were sitting outside Fox's residence at 1314 East 44th Street in Kansas City, Missouri, a location which had a reputation as a "crack house" and a house used for prostitution (Tr. 263-265, 336). Moments after Fox went inside the house to get a drink, appellant and Dewayne arrived at the house (Tr. 209-210, 265-266, 275-276). Denise Harris-Black, who was sitting by a large window of the home, observed Appellant and Dewayne talking to Turner and a few minutes later saw Dewayne walk to the white car and remove a shotgun from the trunk, and hand it to appellant (Tr. 277-279). Appellant pointed the gun toward Turner

and shot him twice in the abdomen (Tr. 210, 266, 278-279, 344). Turner later died as a result of the shotgun blasts (Tr. 306-307).

At trial, appellant did not testify on his own behalf and at the close of the evidence, instructions and argument, the jury found him guilty of murder in the first degree and armed criminal action (Tr. 442-443). Judge Dean sentenced appellant, as a prior and persistent offender, to a life term without the possibility of probation or parole for the murder and a concurrent life term for armed criminal action (Tr. 460; L.F. 52).

The Court of Appeals, Western District, affirmed appellant's convictions and sentence. *State v. Jeremy Banks*, WD63647, slip op. (Mo.App., W.D. June 27, 2006). This Court granted appellant's application for transfer on September 26, 2006.

ARGUMENT

The trial court did not abuse its broad discretion in overruling defense counsel's objection and request for mistrial during the State's rebuttal closing argument because the prosecutor's comment was not improper or unwarranted and did not prejudice appellant.

Appellant claims that the trial court abused its discretion in overruling his objection during the State's rebuttal closing argument and in failing to declare a mistrial when the prosecutor presented a metaphor to the jury which compared, by analogy, appellant to "the Devil" (App. Br. 9).

A. Standard of Review

Broad discretion rests with the trial court in controlling closing argument, with wide latitude accorded counsel in their summation. *State v. Williams*, 97 S.W.3d 462, 474-475 (Mo. banc 2004). A trial court's ruling regarding allegedly improper closing argument will only be disturbed upon a showing of abuse of discretion resulting in prejudice to the defendant. *State v. Simmons*, 944 S.W.2d 165, 178 (Mo. banc 1997); *State v. Manhurin*, 799 S.W.2d 840, 844 (Mo. banc 1990). Abuse of discretion exists only where a prosecutor's statements are plainly unwarranted and clearly injurious to the defendant. *Id.*

Mistrial is a drastic remedy used only in the most extraordinary circumstances when there is a grievous error which cannot otherwise be remedied. *State v.*

Sidebottom, 753 S.W.2d 915, 919 (Mo. banc 1988). Because the trial court observes what, if any, impact the alleged error has on the jury, appellate review of the decision refusing to grant a mistrial is for abuse of discretion. State v. Johnson, 968 S.W.2d 123, 134 (Mo. banc 1998).

B. The Prosecutor's Comment was Not Improper or Unwarranted

As set forth in the above Statement of Facts, the murder of Alvon Turner occurred at a location which had a reputation for being a "crack house" and a house where prostitution took place (Tr. 336). During appellant's trial, defense counsel used the reputation of this house and its occupants to attack the credibility of both the police investigation and the State's witnesses. To this end, defense counsel asked the jury during his closing argument to consider whether it is "reasonable to rely upon somebody smoking crack?" He then provided them with the following answer to his question:

"Now, the detective wants to say, sure, you can. Well, the case is a little bit different in the fact that they shouldn't rely on it. Your better detectives would be sitting here saying you can't rely on crack."

(Tr. 425). Defense counsel furthered this line of argument in attacking State's witness, Denise Harris-Black, who had observed the events through a large window of the house, disparaging her testimony as follows:

"Oh yeah, sitting there looking through the big picture window, smoking crack. Smoking crack, folks. And drinking shots."

(Tr. 422).

Anticipating that defense counsel would attack the credibility of the State's witnesses because of their drug activities, the prosecutor addressed the issue during her closing statement, arguing, in pertinent part as follows:

And who would you expect to be the witnesses in this case at a drug house? A librarian? Your preacher? Someone from church? A guy from the grocery store? No. You're going to expect people who use crack and [are] in this lifestyle. That's who's going to be there. You may not like them. Nobody has to take them home for dinner. But by believing them, believing what they saw doesn't justify, doesn't validate and doesn't say it's okay. You are simply believing them.

(Tr. 416). And after defense counsel did in fact impugn the credibility of the investigation and witnesses, as detailed above, the prosecution used a brief metaphor in rebuttal to refute the assertions. The metaphor, or analogy, used in the State's rebuttal, now at issue before this Court, was as follows:

MS. PARSONS [the prosecutor] [The police detectives] didn't just go on the word of a crack addict. They had several witnesses.

And, ladies and gentlemen, **when the scene is set and held and we have to go and catch the devil, there are no angels as witnesses. This is Hell. He is the Devil. They aren't angels.** He is guilty beyond a reasonable doubt.

(Tr. 438)(emphasis added). Defense counsel objected and moved for a mistrial, arguing that "[c]alling my client a devil is improper argument that was intentional and call[ed] for a mistrial." (Tr. 438). Ms. Parsons responded that she was not name-calling but was

instead using an analogy that she was finished with (Tr. 438). The Court then overruled the objection (Tr. 438).

Missouri law is well-settled that in closing argument, a prosecutor may comment on the evidence presented at trial as well as any reasonable inferences drawn therefrom. *State v. Ringo*, 30 S.W.3d 811, 820 (Mo. banc 2000) *cert. denied*, 532 U.S. 932 (2001). *State v. Clayton*, 995 S.W.2d 468, 480 (Mo. banc 1999) *cert. denied*, 528 U.S. 1027 (1999). The corollary, as rightly annunciated by appellant, is that it is improper for counsel to argue facts outside the record or to present false issues. *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995). Appellant is also correct in the assertion that “name-calling in closing argument is unacceptable” and the prosecutor should not be allowed to be “personally abusive to the defendant” (App. Br. 15). But here, the prosecutor did not employ any name-calling, was not personally abusive to the defendant, did not argue facts outside the record, or present false issues. Instead, Ms. Parsons, employed an analogy or metaphor in attempting to convince the jury to believe the State’s witnesses, witnesses who were, no doubt, of questionable moral character.

Most of the witnesses, the defendant, and the victim were all involved in criminal drug activity and the house at which Turner was murdered was known to be a “crack house” and a place where prostitution took place. Given this background it is plain that Ms. Parsons’ comment was designed to explain to the jurors, through the use of metaphor, that they should not dismiss the testimony of drug addicts and those involved

in criminal activity. After all, in circumstances such as those out of which this crime occurred, the jury should know that the State's witnesses need not be discounted simply because they were drug addicts or otherwise involved in criminal activity, because there are few "good law-abiding citizens" hanging out at a crack house or with drug dealers. Ms. Parsons was merely arguing that the place where the crime occurred was filled with what mainstream society would call "bad guys" without whom qualitatively worse individuals, such as appellant, would never be brought to justice. The metaphor was not used for the purpose of inflaming the jury and there is no reason to believe that the jurors were unfairly influenced by the passing reference.

As Judge Spinden, writing for the majority in the Western District, correctly stated:

The prosecuting attorney . . . was not engaging in illegitimate characterization or personal castigation. Her analogy was not calculated to inflame the jury's passions against Banks. It did not appeal to the jurors' passion and prejudice. Her intent was not to heap personal abuse on Banks. Her analogy was clearly connected to the evidence. She was endeavoring to persuade the jury that her otherwise unbelievable witnesses should be believed-that they were deserving of credibility. Given the character of her witnesses, it was a tough sell, and she concluded that she needed an analogy to persuade the jury.

* * *

The prosecutor's purpose was to make a legitimate analogy in response to Banks' argument concerning the credibility of the state's eyewitnesses. She did not intend to use an epithet to inflame the jury to convict Banks on the basis that he was an evil man.

State v. Banks, WD 63647, slip op. at 2-3 (Mo.App., W.D. June 27, 2006).

Appellant's counsel attempts to literalize this properly presented metaphor, arguing that:

Mr. Banks is not evil incarnate and is not the Devil, nor did he claim to be. There was no evidence that the shooting arose out of devil worship or Satanism . . . Mr. Banks is simply a man who was on trial for first degree murder and armed criminal action and who was entitled to a fair trial in a Missouri court.

(App. Br. 15). The State has never asserted that Mr. Banks is literally the Devil, or evil incarnate, and it is absurd to assume that the jurors were so unsophisticated that they could not understand metaphor or analogy. To assume that the jury would have literalized the State's metaphor to the point of believing that Ms. Parsons was asserting that appellant was actually Satan himself, or that he was involved in Satanic worship, belies a very low view of the reasonableness of the jury.

Appellant asserts that “[t]he prohibition against referring to the defendant as Satan, the Devil, diabolical, or the embodiment of evil has been recognized since at least 1890, and this Court has not deviated from this prohibition.” (App. Br. 15). He is correct that a significant history of precedent exists regarding *ad hominem* attacks, but the State disagrees with the characterization that such precedent exists dealing with the particular argument here before the Court. The line of cases cited by appellant did involve the use of the terms “Satan” or “devil” but did not involve the use of metaphor or analogy. These are all clearly cases of personal characterization or attack.

For instance, in *State v. Young*, a prosecutor stated in closing argument that “[t]he defendant is a mean, low-down, wicked, dirty devil - - that is the kind of man he is.” *State v. Young*, 12 S.W. 879, 883-884 (Mo.banc 1890). This Court held that the statement was “mere personal abuse of the prisoner, and not to be tolerated.” *Id.* at 884.

Sixteen years later this Court took up the case of *State v. Barrington* wherein the prosecutor, during his opening statement, told the jury that his conception of Satan had changed as a result of the trial. *State v. Barrington*, 95 S.W. 235, 257 (Mo. banc 1906). He stated that if he “were to portray [Satan] to [them] now, [he] would not paint him as hoofed and horned, lurid with purgatorial fires, but rather would picture him . . . as arrayed in white vest and Prince Albert coat, with a voice as soft as the breath of summer, and a steel gray eye.” *Id.* While the prosecutor “painted” his new conception of Satan for the jury he pointed at the defendant and was describing the attire worn by the

accused. *Id.* This Court held that while the statement was probably better left unsaid, it “was not of that low order of abuse and denunciation of defendant as indicated in the decisions which [this Court] has held prejudicial.” *Id.* at 258.

Again, in 1919, the issue of personal attacks involving the “devil” or “Satan” came before the Court in *State v. Goodwin*. In *Goodwin*, the defendant was accused of allowing a female under the age of eighteen into a “common bawdyhouse.” *State v. Goodwin*, 217 S.W. 264 (Mo. banc 1919). During closing argument the prosecutor argued that the defendant had the “devil in her heart” and that the “defendant is guilty of white slavery.” *Id.* at 266. This Court held that even though the trial judge had sustained objection to the remarks, the comment should have been “met with immediate and stern rebuke.” *Id.* at 267. On this ground, as well as numerous others, this Court reversed and remanded the case. *Id.*

Lastly is the case of *State v. Johnston*, where, in closing argument, the prosecutor pointed to the defendant and stated: “Ladies and gentlemen . . . there sits Satan. There sits the embodiment of evil.” *State v. Johnston*, 957 S.W.2d 734, 750 (Mo. banc 1997) *cert. denied*, 522 U.S. 1150 (1998). The pertinent question before the Court in *Johnston* was whether the trial court had abused its discretion in denying a mistrial based on the foregoing statement. This Court held that:

Such argument is improper. However, Johnston's counsel immediately objected and the trial court sustained the objection, instructing the jury to disregard the statement.

* * *

Giving the trial court the benefit of its superior position to weigh impact, we cannot say that the trial court erred in limiting the remedy to the instruction it gave.”

Id.

Appellant relies heavily on *Banks*, at 3; (App. Br. 15). Specifically, appellant states that under *Johnston* “[i]t is improper to refer to the defendant as Satan or the Devil.” (App. Br. 15). But contrary to this characterization the *Johnston* decision did not issue a blanket prohibition on the words “devil” or “Satan.” Rather, *Johnston* reiterated that it is improper to engage in personal attacks upon the accused.

Neither *Johnston* nor the previous three cases provide the specific guidance for the case at bar that appellant asserts they do. Each of these four cases involved direct characterizations of an accused as the “devil,” or “Satan,” or with “having the devil” in their heart. Here the prosecutor employed a metaphor which happened to include the devil as a character. Variations of the metaphor employed by the prosecutor here are frequently employed to express to juries that the State recognizes the witnesses used are

not necessarily the “best” people, but are the best available witnesses given the circumstances wherein many crime occurs.

While there is an absence of case law in Missouri directly involving this particular metaphor, the Supreme Court of North Carolina has addressed its use on two separate occasions and in each instance found it to have been proper. *State v. Willis*, 420 S.E.2d 158 (N.C. 1992); *State v. Bell*, 603 S.E.2d 93 (N.C. 2004). The first case involved a contract killing wherein the State was forced to call witnesses connected with the crime in order to prove its case. *Willis*, 332 N.C. 151. During closing argument the prosecutor addressed the credibility concerns raised by the defense by stating that “when you try the devil, you have to go to hell to find your witnesses.” *Id.* at 171. *Willis* argued, just as appellant does here, that the prosecutor characterized him as the devil in this statement and that he was prejudiced therefrom. *Id.* The North Carolina Supreme Court disagreed holding that they did “not believe the district attorney was characterizing Willis as the devil [but instead] used this phrase to illustrate the type of witnesses . . . available in a case such as this one.” *Id.*

Twelve years later the North Carolina Supreme Court took the metaphor up again in a case wherein the State’s “star” witness had been involved in the crime for which Bell was charged. *Willis and Simmons*, 944 S.W.2d at 178. The preceding analysis demonstrates that Ms. Parsons’ metaphor was not “plainly unwarranted” in the circumstances at trial. Appellant also fails to demonstrate that he was “clearly” injured

by the comment. The jury did not convict appellant because of the prosecutor's passing reference to the "devil" but instead convicted him because of the strong evidence against him.

Appellant's friend, Galenda Cooper, testified to his repeated statements indicating his intent to harm or kill the victim (Tr. 228, 231, 232-233, 235). She testified that appellant asked to store a twelve gauge shotgun, like the one used in Turner's murder, in her apartment (Tr. 230-231). Additionally, witnesses testified to seeing appellant talking with the victim just before the shooting and also appellant with the shotgun in his hand before and after the shooting (Tr. 209-210, 265-266, 275-276, 277-279, 344). Given this evidence there is no reason to believe that the jury was convinced to convict appellant by a metaphor involving hell and the "devil." Appellant has failed to show that the comment was "plainly unwarranted" and he cannot demonstrate any prejudice. Therefore it cannot be said that the trial court abused its broad discretion in overruling his objection and denying his request for the drastic remedy of mistrial.

CONCLUSION

In view of the foregoing, the respondent requests that appellant's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ 14a06 of December, 2006.

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RESPONDENT'S APPENDIX

TABLE OF CONTENTS

Judgment A-2