

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-354

JULY TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 3,
	}	Orange Circuit
v.	}	
	}	DOCKET NO. 183-5-97 Oecr
Mark Pombar	}	
	}	Trial Judge: John P. Meaker
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury convictions of reckless driving and leaving the scene of an accident involving serious bodily injury. He argues that the prosecutor's improper comments during closing argument require reversal of the convictions. We affirm.

As the result of a two-car collision, defendant was charged with: (1) driving while intoxicated (DWI), with seriously bodily injury resulting, 23 V.S.A. § 1201(a), (c); (2) grossly negligent operation of a motor vehicle, with serious bodily injury resulting, 23 V.S.A. § 1091(b); (3) leaving the scene of an accident in which someone was seriously injured, 23 V.S.A. § 1128; and (4) driving with a suspended license, 23 V.S.A. § 674. The DLS charge was severed and considered in a separate proceeding. Following a three-day trial, the jury acquitted defendant of the DWI charge, but convicted him of reckless driving and leaving the scene of an accident involving serious bodily injury. On appeal, defendant argues that his convictions must be reversed because during closing argument the prosecutor commented on his failure to make exculpatory statements to police immediately following the accident.

During his closing argument, defense counsel criticized the police for failing to adequately investigate the accident and then rushing to judgment as to defendant's guilt. In his rebuttal argument, the prosecutor stated, in relevant part, as follows:

Keep in mind, that when [defendant] left the Orange County Sheriff[']s Department, his attitude was, just give me my citation, and he was joking. There was no attempt to provide anybody with any information whatsoever. It was, " No, I refuse. I want out of here. I' m done with this." Not, " Hey, let me tell you something, Officer Singer, I was with Gloria Duprey earlier in the day, and I' ve had nothing whatsoever to drink," and that fact can be supported . . .
."

At this point, defense counsel objected, arguing that the prosecutor was commenting on defendant' s right to remain silent. The prosecutor stated that he was merely responding to defense counsel' s closing argument by showing that defendant did not provide any information to investigators.

On appeal, defendant contends that the prosecutor' s comments deprived him of a fair trial by compromising his right to remain silent in the face of criminal accusations. He relies on State v. Mosher, 143 Vt. 197, 204, 206 (1983), where we held that " the defendant is not required to provide an exculpatory explanation to law enforcement officers," and that " the State commits error when it uses the defendant' s failure to deny accusations, after defendant has been given his Miranda warnings, as a tacit admission of guilt." The State responds that the prosecutor' s comments were not improper

because they were intended merely to rebut defense counsel' s claim that police rushed to judgment after failing to adequately investigate defendant' s role in the accident. See State v. Kennison, 149 Vt. 643, 650 (1987) ("comments made by the State in retaliation to defense counsel's closing arguments are properly within the scope of rebuttal").

We need not consider whether the prosecutor's comments were proper in light of defense counsel's closing arguments because even if the comments were improper, they were harmless beyond a reasonable doubt. See Mosher, 143 Vt. at 207-08 (State' s use of defendant' s silence or failure to deny accusations, although of constitutional magnitude, is not per se reversible error; error is harmless if reviewing court can declare beyond reasonable doubt that defendant was not adversely affected and evidence of guilt was overwhelming). First, the challenged rebuttal comments were plainly directed at defendant' s failure to provide police with exculpatory evidence on the issue of his intoxication. Obviously, the jury disregarded the prosecutor' s comments because defendant was acquitted on the DWI charge. Second, there was overwhelming evidence of defendant' s guilt on the two charges for which he was convicted. Eyewitnesses testified to seeing defendant swerve around a corner at an excessive rate of speed, causing the car to fishtail and cross the center line, colliding into the victim' s oncoming vehicle. The testimony of a certified accident investigator supported the eyewitness accounts. Eyewitnesses also testified that, immediately following the accident, defendant walked passed the victim, who was seriously injured and pinned behind the wheel of her car, and down the road away from the accident. He was found by a police officer about two-tenths of a mile from the accident site. In short, the record demonstrates beyond a reasonable doubt that the prosecutor' s challenged comments, even if improper, did not impact the jury' s verdict or result in defendant' s convictions for reckless driving and leaving the scene of an accident.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned