

No. _____

18-9347

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINIAL

SHERRICK A. SIMS — PETITIONER
(Your Name)

VS.

STATE OF KANSAS — RESPONDENT(S)

FILED
APR 29 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF KANSAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SHERRICK A. SIMS #87685
(Your Name)

E.D.C.F. P.O. BOX 311
(Address)

EL DORADO, KS 67042
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Was Mr. Sims denied due process of law when the District Court and Kansas Supreme Court upheld a conviction obtained by the State's violation of Three separate Limine orders, which introduced highly prejudicial testimony to go before the jury, in violation of the XIV Amendment to the U.S. Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[x] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. 18A 874.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 11/30/2018. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including 4/29/2019 (date) on 2/27/2019 (date) in Application No. 18A 874.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment XIV

"nor shall any State deprive any person of life, liberty, or property, without due process of law."

K.S.A. 22-3423 Mistrials

~~(d)~~ The trial court may terminate the trial and order a mistrial at any time that he finds termination is necessary because:

(c) Prejudicial conduct, in...the courtroom, makes it impossible to proceed with the trial without injustice to...the defendant..."

STATEMENT OF THE CASE

Issue: Mr. Sims was denied due process of law under the XIV Amendment to the U.S. Constitution when the State Prosecution violated all Three provision of the Court's Limine Order, introducing Highly Prejudicial Evidence to the Jury.

"Substantial Due Process prevents the government from engaging in conduct that shocks the conscience" Rochin v. California, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205; and Palko v. Connecticut, 302 U.S. 319, 82 L.Ed 288, 58 S.Ct. 149.

The issue before this Court is that the Kansas Supreme Court erred when it decided the government's actions as the Trial Judge's abuse of discretion, rather than the denial of the most basic due process, of the right to a Fair Trial. The Government's over zealous acts of violating the limine order in all three aspects denied Mr. Sims a fair trial under the XIV Amendment. The prejudicial effect of the restricted evidence was predetermined to be just that, prejudicial. The Kansas Supreme Court's decision should be reviewed and reversed. Opinion at *12-15. Pursuant to Sup. Ct. Rule 10(c).

On a June weekend evening, Sherrick Sims was visiting J.A.'s house, which was located across the street from his girlfriend's mother's house in Kansas City, Kansas. (R.12, 383). Mr. Sims and J.A. were frequent acquaintances and, on the evening in question, Mr. Sims was drinking with J.A. and a gathering of others in J.A.'s garage. At one point Mr. Sims and J.A. even went to a liquor store together to get more alcohol. (R.10, 77; R.12, 386). Mr. Sims planned to sit and drink with J.A. while his girlfriend

was at her mother's with their kids. (R.12, 395). Unfortunately, events spun out of control ending with Mr. Sims shooting and killing J.A.

While hanging out with J.A., Mr. Sims testified that a couple of other men came over and he left with them for a short time to conduct some personal business and then returned. (R.10, 103, 131; R.12, 393). Mr. Sims indicated that J.A. owed him some money and when he approached J.A., about the money, J.A. pulled out a \$100 bill and gave it to Mr. Sims. (R.10, 87, 131; R.12, 396, 420). Mr. Sims responded to J.A. "no money, no money." (R.10, 104, 137; R.12, 396).

Mr. Sims testified that J.A. went from mellow to semi-aggressive and that J.A. reached in his pocket. (R.12, 396). Mr. Sims testified that he thought J.A. had a weapon, based on prior incidents. (R.12, 397). Mr. Sims indicated that a gun was pushed into his hand by an unknown person and that he immediately fired the gun. (R.10, 88; R.12, 397). Mr. Sims testified that he didn't ask for a gun and that he didn't know who gave him the gun. (R.12, 398). He didn't remember cocking the gun or aiming the gun. (R.12, 399). But he immediately realized what he had done and was shocked. (R.12, 400). Other witnesses confirmed that the conversation had been friendly between Mr. Sims and J.A. until right before the shooting. (R.10, 100). Those witnesses testified that they saw Mr. Sims take the safety

off and cock the gun before shooting. (R.10, 116, 139). But even one of those witnesses testified that everything was so fast, no one would believe it. (R.10, 152).

At first, Mr. Sims didn't see any bleeding and thought that J.A. was not hit. (R.12, 401-02). He left with the other two men, who dropped him off around the corner until his girlfriend picked him up later. (R.12, 402). When Mr. Sims went back to J.A.'s later to apologize, he saw police cars and drove past. (R.12, 403). Mr. Sims called his friend Nicholas Treat to pick him up and Mr. Sims' girlfriend later told him that J.A. had died. (R.12, 405). At trial, Mr. Sims admitted that he had shot J.A. and that J.A. died because of the shooting. (R.12, 407). But Mr. Sims testified that he did not intend to shoot or kill J.A. (R.12, 407).

When police arrived on the scene they found J.A. in a chair in his garage with a fatal gunshot wound to the neck. (R.10, 23, 33; R.11, 270). Police eventually arrested Mr. Sims at Treat's residence. (R.11, 248). Treat said that Mr. Sims was an acquaintance and had called him needing a place to hang out. (R.11, 238). Treat said that Mr. Sims indicated he had been in a shooting, that he had shot the guy twice and that is was over some money the guy owed him. (R.11, 241, 244). Treat indicated that Mr.

REASONS FOR GRANTING THE PETITION

Issue: Mr. Sims was denied due process of law under the XIV Amendment to the U.S. Constitution when the State Prosecution violated all Three provision of the Court's Limine Order, introducing Highly Prejudicial Evidence to the Jury.

"Substantial Due Process prevents the government from engaging in conduct that shocks the conscience" Rochin v. California, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205; and Palko v. Connecticut, 302 U.S. 319, 82 L.Ed 288, 58 S.Ct. 149.

The issue before this Court is that the Kansas Supreme Court erred when it decided the government's actions as the Trial Judge's abuse of discretion, rather than the denial of the most basic due process, of the right to a Fair Trial. The Government's over zealous acts of violating the limine order in all three aspects denied Mr. Sims a fair trial under the XIV Amendment. The prejudicial effect of the restricted evidence was predetermined to be just that, prejudicial. The Kansas Supreme Court's decision should be reviewed and reversed. Opinion at *12-15. Pursuant to Sup. Ct. Rule 10(c).

Prosecution witnesses violated an order in limine on three separate occasions. Defense counsel objected each time and requested a mistrial each time. (R. 10, 80; R.11, 242, 263; R.12, 330). The district court overruled each request for a mistrial. (R.10, 81; R. 11, 264; R. 12, 330). Defense counsel also renewed the motion for mistrial at the end of the state's case-in-chief. (R.12, 363). The district court overruled the renewed motion. (R.12, 370). Defense counsel subsequently noted the repeated violations of the motion in limine in a post-trial motion for new trial. (R.1, 62; R.13, 3-7). The district

court overruled the post-trial motion as well. (R.13, 11). Therefore, this issue is preserved for appeal.

Standard of Review

On appeal, the trial court's decision denying a motion for mistrial is reviewed under an abuse of discretion standard. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011). An appellate court focuses on two questions "(1) Did the trial court abuse its discretion when deciding if there was a fundamental failure in the proceeding? and (2) Did the trial court abuse its discretion when deciding whether the conduct resulted in prejudice that could not be cured or mitigated through jury admonition or instruction, resulting in an injustice?" 292 Kan. at 551.

Analysis

Motion in limine granted

Prior to trial, defense counsel moved for an order in limine to exclude any testimony that would have appeared to have linked Mr. Sims to other crimes, particularly violent crimes. (R.1, 35). Specifically, the motion requested exclusion of "a history of the procurement of drugs or prostitutes by the defendant for the decedent" and "evidence relating to a rifle as mentioned in the statement of Nick Treat." (R.1, 35-36; R.8. 4). At the hearing on the motion, the prosecutor agreed that there should be no

mention of a rifle during testimony regarding Nick Treat and the district court granted the motion in limine in that regard. (R.8, 9). The district court also noted that the prosecutor did not object to exclusion of evidence of a history of procurement of drugs or prostitutes by the defendant for the decedent and granted the motion in limine in that regard as well. (R.8, 10).

Strike one

During the first day of trial, during direct examination of Efrain Campos, the prosecutor was asking about the day in question:

Q: What happened next, then?

A: Um, well, um. I don't know. They started talking, and I'm not sure how my friend was talking to him, because he spoke Spanish, but my friend, he didn't speak much English and there was some deal where they were going to go, um, beat up someone who supposedly had stolen a chain from my friend Jose. [(R.10, 79)].

Defense counsel immediately asked for a side bar, noted the apparent violation of the in limine order, and requested a mistrial. (R.10, 80). The prosecutor indicated that it did not appear intentional. (R.10, 80). The district court overruled the motion for mistrial and indicated that it didn't know what else to do except admonish the jury, which it did. (R.10, 80, 82). Afterwards, the district court indicated that "I think in this one particular instance we can cure it with an admonition, but in the future we

need to make sure that all of the witnesses understand." The prosecutor agreed. (R.10, 83).

Strike two

During the second day of trial, during direct examination of Nicholas Treat, the prosecutor was asking about conversations that had allegedly taken place between Treat and Mr. Sims:

Q: Um, did he—other than him at that point saying he was involved in a shooting, did you press him for any more details or did he tell you anything else?

A: Yeah, he told me he got the guy twice and that it was all over some money the guy owned him over a fight. He put a hit on somebody – [(R.11, 241)].

Defense counsel immediately requested a side bar and indicated his belief that another violation of the in limine order had taken place. (R.11, 241-42). There was some lack of clarity over exactly what Treat said. (R.11, 242). After a recess, the district court had the court reporter read back the record and confirmed that Treat had indicated that Mr. Sims was owed money "based upon a hit." (R.11, 262). Defense counsel renewed the motion for mistrial. (R.11, 263). The prosecutor argued that the motion for mistrial should be denied because "it's obvious from the testimony that there was an argument over money." (R.11, 263). The district court overruled the request for a mistrial, but noted that "this is the second

request for a mistrial by Mr. Sims in the case so the record is clear about it. However, the Court does not find that it's overly prejudicial to Mr. Sims at this point." (R.11, 264). No discussion of admonishing the jury took place and the district court never admonished the jury regarding Treat's testimony.

Strike three

On the third day of trial, during direct examination of Detective Bye, the prosecutor asked an open ended question:

Q: Okay. Um, did Mr. - I'm sorry, did Mr. Treat-- what did Mr. Treat tell you?

A: Excuse me. He gave us a statement. He said that he saw Mr. Sims with a rifle in the—

Q: Sorry. Let me ask you, did you - [(R.12, 329)].

Defense counsel immediately requested a side bar, noted that this was the *third* violation of the in limine order and renewed his request for a mistrial. (R.12, 330). The prosecutor indicated that she had advised the detective about the order several times, but still suggested the violation wasn't intentional. (R.12, 330). The district court held that "[t]his is the third time that's happened. It seemed like it was cut off before there was really much said about it. . . . I'll overrule your motion at this time. I don't think it's prejudicial to Mr. Sims, but it doesn't go any further." (R.12, 330).

No discussion of admonishing the jury took place and the district court never admonished the jury regarding Bye's testimony.

Violations of in limine orders are inherently prejudicial

"Intrinsically, violations of orders in limine have a prejudicial effect because the requisite for obtaining such orders is showing that the mere offer or reference to the excluded evidence would tend to be prejudicial. The primary purpose of an order in limine, after all, is to prevent prejudice during trial." *State v. Santos-Vega*, 299 Kan. 11, 25, 321 P.3d 1 (2014). In the instant case, the district court agreed that the prosecution witnesses had violated the in limine order three times. (R.12, 369). These violations constitute a fundamental failure in the trial proceedings. If these violations do not result in a fundamental failure, it is difficult to understand why a party would request an in limine order at all.

Prejudice

But the district court went on to hold that Mr. Sims was not entitled to a new trial because the violations individually and cumulatively did not prejudice Mr. Sims. The district court reasoned that the amount of evidence in the case against him was overwhelming and that the jury's verdict was not influenced by the "three single words that came out of each one of these individuals' mouths." (R.12, 369-70; R.13, 10).

In order to establish prejudice necessary to evince "injustice" stemming from non-constitutional error that would mandate a mistrial, a party must show that there is a "reasonable probability that the error will or did affect the outcome of the trial." *Ward*, 292 Kan. at 565. In *Ward*, this Court noted that when considering this question, "an appellate court's vantage point may be broader than was that of the trial court. An appellate court will examine the entire record whereas, depending on the timing of the motion for mistrial, the trial court may have made the assessment before the trial's end." *Ward*, 292 Kan. at 551. This Court has held, for example, that two short responses referring to a prior trial did not constitute sufficient prejudice to require a mistrial. *See State v. Albright*, 283 Kan. 418, 427, 153 P.3d 497 (2007)(where prosecutor immediately corrected mistake, mistake had little weight in minds of jurors).

In the instant case, as observed by the district court, Mr. Sims did not dispute that he shot and killed J.A. (R.13, 10). But Mr. Sims hotly contested whether he did so with premeditation or intent to kill and, in fact, the district court gave several lesser-included offense instructions reflecting that there was a real dispute over Mr. Sims' state of mind. (R.1, 59). The prejudice that need be shown is not a reasonable probability that Mr. Sims would have been found not guilty; it is sufficient to show that

there is a reasonable probability that Mr. Sims would have been found guilty of something besides first-degree premeditated murder. The violations should be evaluated in light of their possible impact on *that* question.

Unlike *Albright*, the prosecutor failed to take steps to prevent further violations. Although the prosecutor indicated that each of these violations was inadvertent, they simply kept occurring. Even the most specific order in limine – to keep out testimony about Treat’s statements about seeing Mr. Sims with a rifle – was violated after two previous in limine violations. This does not appear “isolated.” *See Albright*, 283 Kan. at 427 (prosecutor’s mistakes were “inadvertent and isolated”). Unlike *Albright*, even after being warned twice, the violations of the district court’s order in limine continued.

Defense counsel requested an order in limine because of the prejudicial effect of the statements regarding prior illegal activities and prior carrying of an unrelated rifle because such evidence could be misconstrued by a jury as evidence of a violent past, which might have been construed as evidence of premeditation. For the first two violations, the statements indicated that J.A. and Mr. Sims had prior illicit and violent dealings and could have allowed the jury to improperly infer that Mr. Sims

was a violent person, which could explain what otherwise would seem a very sudden and unprovoked attack. For the last violation, the statement inferred that Mr. Sims had been seen with a rifle and, therefore, was potentially a dangerous person. Each of these violations went to an aspect of Mr. Sims' state of mind. Defense counsel requested an in limine order because he feared that, although there was no connection between these statements and the incident on trial, a jury could make such an improper connection.

When deciding whether a particular situation requires reversal, this Court can consider whether the jury was admonished regarding any in limine violations. *Ward*, 292 Kan. at 569-70. In the instant case, the district court admonished the jury to ignore the first violation. (R.10, 82). The judge did not offer to admonish the jury after the other violations and the jury was not admonished after the other two violations.

Summary

Prosecution witnesses repeatedly violated the district court's order in limine. Although the district court admonished the jury related to one violation, other violations—including specific testimony that was supposed to be excluded—went uncorrected. Because the primary question in this case was determination of Mr. Sims' state of mind and

because the evidence introduced in violation of the order in limine had a prejudicial effect and negatively influenced the jury, resulting in a finding of guilt, when the Petitioner was only protecting himself and two month old daughter, whom he was holding in his arms, when A.J. reached into his pocket and knew that Mr. Sim's only wanted an appoligy, not money. This Court should grant the writ and find that Mr. Sim's XIV Amendment Right to a fair trial was violated by the Goverment's deliberate actions to violate the Limine order Three times.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Sherrick Sims

Date: April 26 2019