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Summary of Watters v. State, 129 Nev. Adv. Op. 94

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CRIMINAL PROCEDURE & TRIAL ADVOCACY

Summary

The Court determined whether the prosecution's use of a PowerPoint slide during opening statement with the defendant's booking photo and the word "guilty" superimposed across the photo was improper advocacy and undermined the defendant's presumption of innocence.

Disposition

The Court, en banc, determined that the prosecution's use of a PowerPoint slide during opening statement with the defendant's booking photo and the word "guilty" superimposed across the photo undermined the defendant's presumption of innocence.

Factual and Procedural History

At trial, the prosecution used a PowerPoint slide to support its opening statement to the jury. This PowerPoint slide included the defendant's booking photo and the word "guilty" superimposed across the photo. The defense reviewed and objected to this slide before opening statements, but the district court overruled this objection.

Discussion

"A criminal defendant has a fundamental right to fair trial secured by the United States and Nevada Constitutions."² The Court noted that while the presumption of innocence is not articulated in the Constitution, it "is a basic component of a fair trial under our system of criminal justice."³

At trial, a prosecutor may use PowerPoint slides to support his opening statement so long as the slide's content is consistent with the scope and purpose of opening statements and does not put inadmissible evidence or improper argument before the jury. An opening statement outlines "what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument."⁴ While the prosecution may ask jurors to find a defendant guilty, it may not declare a defendant's guilt. A PowerPoint or other presentation that displays a defendant's booking photo with a pop-up that labels him guilty directly declares his guilt and is therefore an improper argument.

Allowing such a presentation amount to an error and constitutes an abuse of discretion. This error undermines the presumption of innocence, which is a basic component of "[the] fair

¹ By Brian Vasek.

² *Hightower v. State*, 123 Nev. 55, 57, 154 P.3d 639, 640 (2007) (citing U.S. Const. amend XIV; Nev. Const. art. 1, § 8).

³ *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

⁴ *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

trial” guaranteed by the Fourteenth Amendment “under our system of criminal justice.”⁵ Furthermore, allowing such presentations “does not serve an essential state interest and poses an unacceptable risk that the jury’s mindset will be tainted and the fairness of its fact-finding function impaired.”

Reversal of a presumption-of-innocence error is necessary if the State fails to prove, beyond a reasonable doubt, that the error did not contribute to the verdict obtained. Here, even though the PowerPoint slide was displayed briefly, the slide was not admitted into evidence, the jury was instructed at the beginning and end of trial on the presumption of innocence, and the evidence of the defendant’s guilt was overwhelming, “[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined,” and the Supreme Court “has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.”⁶

Allowing the prosecutor’s use of the PowerPoint slide during opening statement that declared the defendant “guilty” carried a genuine risk of unfair bias. If the district court had promptly ordered the prosecution to remove the slide and given the jury an immediate curative instruction, the error may have been harmless. Instead, the district court deemed the slide permissible, and the judge did not provide a curative instruction. Furthermore, the presumption of innocence instructions that the jury received had no connection to the PowerPoint slide. Therefore, the State failed to prove beyond a reasonable doubt that the slide did not affect the jury’s determination of the defendant’s guilt.

Conclusion

The prosecution’s use of a PowerPoint slide during opening statement with the defendant’s booking photo and the word “guilty” superimposed across the photo created a risk of unfair bias and undermined the defendant’s presumption of innocence. The Court reversed and remanded the case for a new trial.

⁵ *Williams*, 425 U.S. at 504.

⁶ *Id.* at 504.