

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1183

STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

ROY FRANKLIN HILLBERRY,

*Defendant Below,
Petitioner.*

SUMMARY RESPONSE

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SUMMARY RESPONSE

I.

STATEMENT OF THE CASE

The State agrees with the petitioner's Statement of the Case.

II.

ARGUMENT

A. **The prosecutor's remarks in this case, were not manifestly intended to be, nor were they of such character that the jury would naturally and necessarily take the remarks to be a comments on the failure of the accused to testify. If the remarks constituted error, it was harmless due to the overwhelming nature of the State's case in both the jury trial and the recidivist trial.**

1. **Standard of Review**

To analyze impermissible comments at trial, the Court adopted a four part test in *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995):

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which

the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Id. at Syl. Pt. 4.

In regards to the first prong, this Court in Syllabus Point 3 *State v. Noe*, 160 W. Va. 10, 18, 230 S.E.2d 826, 831 (1976) stated, “[i]t is prejudicial error in a criminal case for the prosecutor to make statements in final argument amounting to a comment on the failure of the defendant to testify.”

Recently, in *State v. Keesecker*, 222 W. Va. 139, 663 S.E.2d 593 (2008), this Court analyzed comments on the defendant's failure to testify under the harmless error doctrine:

this Court has succinctly stated that “[e]rrors involving deprivation of constitutional rights will be regarded as harmless . . . if there is no reasonable possibility that the violation contributed to the conviction.” (citation and footnote omitted). In the attempt to determine whether a constitutional violation is harmless, the United States Supreme Court held in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the burden is on “the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”

2. Underlying Jury Trial

The petitioner alleges that the prosecuting attorney made certain prejudicial remarks during closing argument which impermissibly commented upon the his failure to testify. Primarily, the petitioner takes issue with the prosecutor's statement, “Did anybody under oath testify to that? Not a one.”¹

¹The petitioner also assigns as error two other prosecutorial remarks during closing. The first comment reads as follows:

(continued...)

In *State v. Swafford*, 206 W. Va. 390, 393-94, 524 S.E.2d 906, 909-10 (1999), this Court stated that:

The general rule formulated for ascertaining whether a prosecutor's comment is an impermissible reference, direct or oblique, to the silence of the accused is whether the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a reminder that the defendant did not testify. *United States v. Harbin*, 601 F.2d 773 (5th Cir. 1979); *United States v. Muscarella*, 585 F.2d 242 (7th Cir. 1978); *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974); *United States ex rel. Leak v. Follette*, 418 F.2d 1266 (2nd Cir. 1969), *cert.*

¹(...continued)

Because whenever in any case you have evidence of such an overwhelming nature as we do here. An avalanche of facts. A landslide of evidence. It's all one-sided in this case. Everything. Everything points to Roy Franklin Hillberry II as going into the High Life Lounge on East Park Avenue, with a gun, pointing it at two people, getting cash out of the safe and leaving.

(App. at 359.)

And the second remark:

When the state presents just overwhelming evidence, there's only a few straws that a defense can grasp at. And the first is to distract you. To get you a view from over here where the evidence is, over here on some wild herring. To flush out a couple of wild geese to get you to chase those. And that's what happened here. That's all that was presented from the defense at any point in time.

If that tactic fails, and you will hear this referenced numerous times. They're going to talk about the presumption of innocence.

(*Id.* at 361-62.)

First it is worth mentioning, that these comments were never objected to at trial. Also, the petitioner attempts to distort the intention of the remarks by isolating provocative statements. However, after viewing the remarks in a larger context, it is clear that the prosecutor did not reference the petitioner's failure to testify, but rather, the comments merely emphasized the strength of the State's case and defense counsel's focus on unimportant facts. These are statements that have never been disallowed by this Court and do not constitute any error, much less plain error.

denied, 397 U.S. 1050, 90 S.Ct. 1388, 25 L.Ed.2d 665 (1970); *Hayes v. Oklahoma*, 617 P.2d 223 (Okl.Cr.App.1980).

This Court further explained in *State v. Clark*, 170 W. Va. 224, 227, 292 S.E.2d. 643, 647 (1982):

Under this formula the prosecution is free to stress the strength of the government's case and to argue the evidence and reasonable inferences therefrom, and the prosecutor is not constitutionally forbidden from telling the jury the fact that the evidence on any given point in the case stands uncontradicted. A prosecutor's statement that the evidence is uncontradicted does not "naturally and necessarily" mean the jury will take it as a comment on the defendant's failure to testify. In many instances someone other than the defendant could have contradicted the government's evidence. *See, e.g., United States v. Lipton*, 467 F.2d 1161 (2nd Cir. 1972), cert. denied, 410 U.S. 927, 93 S.Ct. 1358, 35 L.Ed.2d 587 (1973). It is only in those cases where the defendant alone could possibly contradict the government's testimony that remarks concerning lack of contradiction have been held forbidden. *See, e.g., United States ex rel. Leak v. Follette, supra*, for an excellent discussion.

Similar to *Clark*, the prosecutor's remark in this case, was not manifestly intended to be, nor was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *See Clark*, 170 W. Va. at 228, 292 S.E.2d at 648. When the State's comment is examined contextually, it is clear that the prosecutor simply intended to highlight the inconsistencies between defense counsel's opening statement and the evidence that was actually extracted from the witnesses at trial. Specifically, the prosecutor intended to demonstrate how the trial failed to produce the evidence that the defense counsel promised during opening remarks.

During opening remarks, defense counsel stated:

And you heard Mr. Freeman indicate that Mr. Hillberry had financial problems. That he had a gambling problem. He worked at a coal mine, and you're going to hear, making about 20 bucks an hour. Pretty good money.

You're going to see the car in these pictures that he told you about. You're going to see the car that he was driving. That he was paying for. A practically new, blue Chevy full-size Tahoe. But he had financial problems. The evidence will show

that he left for work that morning. He received a voicemail from his boss saying that work was canceled due to a fan being down.

(App. at 58-59.)

Defense counsel explained to the jury what he expected the evidence to prove at trial. Therefore, it was entirely permissible for the State to highlight instances where the evidence adduced at trial failed to corroborate the opening remarks. The prosecutor emphasized these inconsistencies during closing by stating:

What are the distractions? First of all, in his opening, Mr. Tipton said, "Hey, I'm going to show you without a doubt he was somewhere else." No, didn't happen. The CAD report. A document prepared by the dispatcher about the radio traffic. What's that mean? It matches the times. It's a distraction. It's a wild goose. Don't chase it.

The defendant makes all this money. Twenty dollars an hour was mentioned several times. He works at a coal mine. Any relevance to that? Any testimony to that? Anybody under oath ever say that he made \$20 an hour? No. Anybody ever say, any testimony under oath, how many hours he worked? We know he wasn't going to work when he was supposed to. When the police were looking for him to serve the warrant, he wasn't at work. He [sic] boss thought he was underground, but he wasn't there. We know for a fact he didn't go to work on July 15 now. A lot of references to this fan being down. Did anybody under oath testify to that? Not a one.

(*Id.* at 367-68.)

After the objection by defense counsel, the prosecutor continued to respond to defense counsel's opening remarks:

Mr. Tipton cross examined every state witness extensively. He didn't extract from any state witness any evidence that this phone call saying the fans were down. Never took place. Not a bit.

He asked numerous persons about the vehicle that Mr. Hillberry drives, or drove I should say. That is was an expensive vehicle. He didn't extract one answer from any of the state's witnesses about the value of that vehicle or whether he owed any money on it.

(*Id.* at 368.)

Similar to *Clark*, “this is not a case where the jury’s attention was focused on the defendant’s failure to testify because he alone could contradict the government evidence.” *Clark*, 170 W. Va. at 228, 292 S.E.2d at 648. Several of the witnesses cross examined by defense counsel could have contradicted the State’s theory regarding the petitioners’s financial condition or his whereabouts at the time of the crime. Indeed, the defense counsel specifically assured the jury that he would extract contradictory evidence on the aforementioned subjects by stating that “you will hear that he made 20 bucks an hour” and that “the evidence will show that he left for work that morning . . . and received a voice mail from his boss saying that work was canceled due to a fan being down.” (App. at 58-59.)

Moreover, even if the remark was found to be error, it would be harmless error due to the strength of the State’s case.² Mr. Wade, the petitioner’s former coworker, testified that, he and the petitioner, had previously discussed robbing gaming establishments. (*Id.* at 154.) Mr. Wade also noted that the petitioner specifically told him that he robbed the High Life Lounge. Mr. Wade further testified that the petitioner indicated that he was changing his hair style because the robbery had been captured by surveillance cameras. (*Id.* at 155.) Indeed, several witnesses at trial identified the petitioner as the suspect depicted on the surveillance video. (*Id.* at 170, 224, 294.)

Officer Aaron Dalton testified that after stopping the defendant in his car, he immediately recognized the petitioner as the suspect from the surveillance video. (*Id.* at 85-86) Officer Dalton described the traffic stop as following:

²The court’s charge instructed the jury “the fact that the defendant did not testify as a witness on his own behalf cannot be taken or considered by you as any evidence or even a circumstance showing or tending to show in the slightest degree the guilty of the accused.” (App. at 347.) The judge again, upon counsel’s objection, instructed the jury that the defendant had no obligation to testify or present evidence. (*Id.* at 368.)

It was obvious to me that he was the person. I spoke with him there briefly. He got out of the vehicle. And I noticed that he had on the same type of tennis shoes that I had saw in the video that I had watched so many time. Identical match as far as the tennis shoes go. He met the same build as the person. And he also moved the same way. He had the same type of swagger, if you will, on the roadside. Also while speaking with him, I advised Corporal Staley, who had initiated the traffic stop and who was in charge of the shift at the time, that I believed this was the person in the video and that I believed we should detain him at that point.

While speaking with them, I moved around the vehicle and looked inside the vehicle. And I recognized in the back of the vehicle what I believed to be a robbery kit. Possibly the same kit used at the High Life.

(*Id.* at 85-86.)

Amy King, the petitioner's former roommate, testified that she had no reservations or doubt that the petitioner was the person who robbed the High Life Lounge. (*Id.* at 294.) She also testified that she recognized the petitioner's shirt, shoes and the scar on his lip from the video. (*Id.* at 299.) The State later admitted a shirt, retrieved from Amy's home, that substantially matched the shirt worn by the suspect in the video. (*Id.* at 208-11.) Also, the State confirmed the petitioner's proximity to the High Life Lounge at the time of the robbery via the testimony of Amy King, and the use data from local cell phone towers. (*Id.* at 198-99.) There being no reasonable possibility that the remark contributed to the conviction, this Court should find it harmless beyond reasonable doubt. Further, as argued above, the State does not concede that the argument was error at all. *Chapman v. California*, 386 U.S. 18 (1967).

3. Recidivist Trial

The petitioner assigns as error, the prosecutor's remarks describing the evidence as "uncontested." Clearly, the prosecutor is referring to the evidence of identification when asserting

germane issue at the recidivist trial. The petitioner argues that the remarks unfairly refer to the defendant's failure to testify. The petitioner is wrong.

This Court has stated, “[a] prosecutor’s statement that the evidence is uncontradicted does not ‘naturally and necessarily’ mean the jury will take it as a comment on the defendant’s failure to testify. In many instances someone other than the defendant could have contradicted the government's evidence.” *Clark*, 170 W. Va. at 227, 292 S.E.2d at 643.

The petitioner’s reliance on *State v. Bennett*, is unfounded, because someone other than the petitioner in this case could have contradicted the State’s evidence in this case. How can it be possibly maintained that the petitioner was the only person that could have contradicted the State’s evidence of identification such as the petitioner’s birth date, social security numbers, and conviction information? Thus, the prosecutor’s reference was not manifestly intended to be, nor was such of character, that a jury would naturally and necessarily take it to be a reminder that the defendant did not testify; but rather, the remarks were simply intended to stress the strength of the State’s case.

Further, even if it the comments were error, such error is harmless beyond a reasonable doubt due the overwhelming nature of the State’s evidence in the recidivist case. Therefore, the Court should deny the petitioner’s appeal on this issue.

B. The witnesses’s brief and isolated remark regarding the defendant’s pretrial silence could not have prejudiced the petitioner in this case.

The petitioner alleges that the trial court committed reversible error by permitting the State to elicit testimony that referenced the defendant’s invocation of pretrial silence and right to counsel during the following exchange:

Q. Did you participate at any point in time in the questioning of Mr. Hillberry after he was Mirandized and gave a statement?

A. I walked into the interview after Sergeant Pigott had been speaking with him for quite some time already. I kind of interrupted the interview and walked in on it.

Q. Was Mr. Hillberry attired and wearing the same style of clothing as in the videos? Or as he was dressed today?

A. I don't recall as far as his trousers and shirt what type he had on. But I noted that he did not have the Nike Air Jordan tennis shoes on that you see in the video or that I took the photographs of.

Q. Did he provide you any explanation of what happened to those shoes?

A. When I asked him what happened to those shoes, he advised me that he did not wish to speak with me any further and that he would like to have a lawyer.

Q. And did that end your participation in asking him any questions?

A. Yes, it did.

MR. FREEMAN: I have no other questions of Corporal Dalton at this time, Your Honor. Thank you.

(App. at 97-98.)

The State disagrees. This Court has held:

Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.

Syl. Pt. 1, *State v. Hamilton*, 177 W. Va. 611, 355 S.E.2d 400 (1987).

The evidentiary rulings of a circuit court, including those affecting constitutional rights, are reviewed under an abuse of discretion standard. *See McDougal v. McCammon*, 193 W. Va. 229, 235, 455 S.E.2d 788, 794 (1995) (deference is required given how quickly evidentiary rulings must be made, and trial courts must be able to make these decisions without fear of reversal); *United*

States v. Jackson, 67 F.3d 1359, 1366 (8th Cir.1995); *United States v. Quintana*, 70 F.3d 1167, 1170 (10th Cir.1995). “Even if we find the circuit court abused its discretion, the error is not reversible unless the defendant was prejudiced.”

In *Hamilton*, this Court declined to find reversible error when an officer answered “no” to the prosecutor’s question, “[a]fter you read the Miranda warnings to him, did he say anything to you.” *State v. Hamilton*, 177 W. Va. 611, 615, 355 S.E.2d 400, 403 (1987). This Court reasoned that the question’s “prejudicial effect was minimal” and was “not aimed at having the witness make some comment about the defendant’s failure to give his story or alibi at the time he was arrested.” (*Id.*) The Court also noted that in cases where remarks on the defendant’s pretrial silence constituted reversible error, “the prosecutor did impeach the defendant by questioning him at some length about the fact that he never disclosed his in-courtroom alibi story to the police after his arrest and Miranda warnings.” (*id.*) (explaining contrary holdings in *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977), and *State v. Oxier*, 175 W. Va. 760, 338 S.E.2d 360 (1985)).³

Here, the officer simply answered the prosecutor’s question regarding the defendant’s explanation of what happened to his Nike Air Jordans. Similar to *Hamilton*, the prosecutor’s question was not intended to compel the witness to make some comment about the defendant’s failure to give his story or alibi, but merely, to inform the jury why certain questioning or conduct

³The petitioner unintentionally confuses the Court’s holding in *State v. Marple*, 197 W. Va. 47, 475 S.E.2d 47 (1996). (*See* Pet’r’s Br. at 13.) (“In *Marple*, the Court found reversible error . . .”) While the Court noted that the comments constituted error, the same was not reversible because the petitioner’s substantial rights were not affected. *Marple* at 53-54 (stating, “we believe the jury would have reached the same verdict absent the post-Miranda silence testimony, and we are in no way persuaded that the assigned error contributed to the conviction.”)

of the police was terminated. This isolated comment was never emphasized nor was it repeated. Further, the petitioner has failed to demonstrate any prejudice resulting from the questioning.

Therefore, this Court should not grant the petitioner's appeal on this issue.

C. The recidivist information was properly filed.

The petitioner alleges the recidivist information filed by the Marion County Prosecuting Attorney was fatally flawed in that it did not set forth the records of the defendant's prior convictions and sentences as required by law. Again, the State disagrees.

This Court held in Syllabus Point 3 of *State ex rel. Housden v. Adams*, 143 W. Va. 601, 103 S.E.2d 873 (1958):

A person convicted of a felony cannot be sentenced under the habitual criminal statute, [W. Va.] Code § 61-11-19, unless there is filed by the prosecuting attorney with the court at the same term, and before sentencing, an information as to the prior conviction or convictions and for the purpose of identification the defendant is confronted with the facts charged in the information and cautioned as required by the statute.

The information in this case satisfied all of the above requirements. The prosecutor in this case filed an information after the conviction of the underlying charge but prior to sentencing. (App. at 33-34.) Said information included: the nature and timing of the convictions, as well as this finding, the statute and jurisdiction under which convictions derived, and the possible punishment for each offense. (*Id.*) Also, the court properly confronted the petitioner with the information during the same term of the underlying conviction. Clearly, the description of the prior offenses contained in the information was sufficient enough for the petitioner to answer whether he was the same person named in each conviction as contemplated under West Virginia Code § 61-11-19.⁴

⁴During the arraignment hearing, when the petitioner was presented with the question of
(continued...)

Moreover, if error exists, the same is harmless due to the strength of the State's case at the recidivist trial, in which the government presented detailed and undisputed records of the petitioner's prior convictions. Accordingly any prejudice against the petitioner due this alleged error was minimal at best, and therefore, should not serve as a basis for reversal.

D. The photo array in this case was not impermissibly suggestive because the photos contained were fairly representative of the defendant's physical features. Also, the petitioner was not prejudiced by the victim's in court identification.

1. Standard of Review

In Syllabus Points 4 and 6 of *State v. Harless*, W. Va., 285 S.E.2d 461 (1981), we set the general rule regarding the admissibility of identification evidence in photographic arrays:

“4. A pretrial identification by photograph will be set aside if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”

“6. Most courts have concluded that a photographic array will not be deemed excessively suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features. The fact that some of the photographs are dissimilar to the defendant's appearance will not taint the entire array.”

State v. Watson, 173 W. Va. 553, 561-62, 318 S.E.2d 603, 612 (1984).

2. Photo Array

The petitioner argues that the pretrial photo display was impermissibly suggestive. The petitioner is wrong. At trial, Sergeant William Matthew Pigott described the process of compiling the photo array during the following direct examination:

⁴(...continued)
identity as contemplated under W. Va. Code § 61-11-19, defense counsel never objected to the sufficiency of the Information. (Arraignment Hr'g Tr. at 1-7.)

SERGEANT PIGOTT: On this particular occasion I found six photographs total. One of the six being Mr. Hillberry. The other five being as close of a resemblance as we have within our database of photographs.

MR. FREEMAN: And did you have some other limitations in finding matching individuals, such as background or anything like that in the photograph?

A. In specific, in this instance, the photo array that we had, I didn't have, say, a booking photo of Roy Hillberry that would allow me to go and have every single photograph in my photo array have what we call a booking plate that says Fairmont Police Department in front. I had a photographs of Mr. Hillberry on the side of the road. So if he was the only person that didn't have a booking plate, that would be extremely obvious. So I had to then go find at least one other picture that was another picture from somewhere outside of a police department setting.

I was able to find two others that were as close as possible. You know, I had the limiting factor of having a person that has a mustache. I had a person that was bald. It was difficult to find five other people that we've arrested that had the large build, mustache, and bald. So I had to do the best I could with what photographs I had available to me. I can't make up photographs that I don't have. So I took the six best that I had and I presented them in a photo array.

Q. And what did you do with the photo array?

A. I took the photo array that was actually shown here earlier today and I made contact with Ms. Lee. And I believe it was the next day on the 24th, without reviewing specifically, but I believe the very next morning I was able to meet Ms. Lee. I believe she was working again at the High Life. And I was able to drive over and meet her there. And I presented her with the photo array and asked her if she recognized anybody at all out of the photo array.

Q. And she was able to say Mr. Hillberry?

A. That is correct.

Q. And did she make her mark and sign it, as she . . .

(App. at 173-74.)

Apparent from the testimony at trial, the array included photographs of individuals with similar skin tone, facial hair, body build and hair cut.⁵ The pictures did not need to fully match the defendant's appearance, "as long as it contains some photographs that are fairly representative of the defendant's physical features." *See* Syl. Pt. 6, *State v. Watson*, 173 W. Va. 553, 318 S.E.2d 603 (1984). Further, there was no evidence that the officer impermissibly aided the victim in identifying the petitioner. Accordingly, this Court should find that the photo array was not impermissibly suggestive.

3. In-Court Identification

The petitioner also argues that the trial court committed error by permitting the victim's in court identification during the following exchange:

Q. This individual on the screen or on the screen in front of you the person who robbed you on July 15, 2009?

A. Yes.

Q. Is that the same individual you selected from the photo array?

A. Yes.

Q. Mr. Hillberry is seated here in the courtroom to your right --

MR. TIPTON: Objection, Your Honor.

⁵The petitioner needlessly belabors the victim's initial description of the suspect as a "light skinned black male." The skin tone of the defendant only constituted a portion of the description the victim provided. Moreover, without delving into the intricacies of racial and ethnic skin tones, it is entirely understandable and reasonable for a victim to confuse a white male with a "light skinned black male." Perhaps, if the victim had described the defendant as a "dark skinned black male," the petitioner's argument would hold more weight. Given the potential similarities in skin tone between a white male and a light skinned black male, the State submits that it was exceedingly more important that the victim's description matched less ambiguous aspects of the petitioner's appearance at the time of the crime.

(App. at 129.)

Admittedly, the State should avoid mentioning the defendant's general location in the court room, but if the prosecutor committed error, said error was harmless because of the overwhelming nature of the States evidence, including substantial evidence of identification. Indeed, the victim, along with several other witnesses, identified the petitioner as the suspect depicted robbing the High Life Lounge in the surveillance video. (*Id.* at 70, 85, 127, 294.) The evidence conclusively revealed that the petitioner was the person identified in the photo array and the person captured in the surveillance video. Therefore, any prejudice stemming from this alleged error could not have alter the outcome of this trial. Accordingly, this Court should deny the petitioner's appeal on this issue.

III.

CONCLUSION

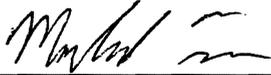
Therefore, based upon the foregoing arguments of law, and recitations of fact, the State of West Virginia, by counsel, respectfully requests that the petitioner's petition for appeal be denied.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent

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CERTIFICATE OF SERVICE

I, MARLAND L. TURNER, Assistant Attorney and counsel for the respondent, do hereby verify that I have served a true copy of the *SUMMARY RESPONSE* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this ____ day of April, 2013, addressed as follows:

To: Kevin T. Tipton, Esquire
Tipton Law Offices
316 Merchant St., Suite 100
Fairmont, WV 26554



MARLAND L. TURNER