

Davis, C.J., dissenting:

FILED
June 29, 2007
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In this proceeding the majority opinion has granted Brian Daniel Murray (hereinafter referred to as “Mr. Murray”) a new trial, because of purported misconduct by the prosecutor in commenting upon Mr. Murray’s failure to testify. I agree fully with the dissenting opinion of Justice Maynard that the prosecutor’s comments were taken out of context by the majority opinion and twisted to give the appearance of improper comments. Simply put, “no constitutional error was committed because the remark[s], when read in context, w[ere] not manifestly intended to be, nor w[ere] [they] of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.” *State v. Clark*, 170 W. Va. 224, 228, 292 S.E.2d 643, 648 (1982). While I agree with Justice Maynard’s position, I have chosen to write a separate dissent to emphasize that, even if it had been properly found that the prosecutor commented on Mr. Murray’s failure to testify, the error was harmless beyond a reasonable doubt.

No Prejudice Resulted from the Prosecutor’s Comments

This Court “has long . . . held that Article 3, § 5 of the West Virginia Constitution and *W. Va. Code*, 57-3-6, make it . . . reversible error for the prosecuting attorney to expressly comment before the jury upon the failure of the defendant to testify in

his own behalf.” *State v. Clark*, 170 W. Va. 224, 227, 292 S.E.2d 643, 647 (1982) (footnotes omitted) (citations omitted). *See also* Syl. pt. 3, *State v. Noe*, 160 W. Va. 10, 230 S.E.2d 826 (1976) (“It 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.”). However, we have also made clear 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.” Syl. pt. 20, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974). *See also* Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975) (“Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.”). Indeed, the general rule around the country is that “improper comments on a defendant’s invocation of his right to remain silent are subject to a harmless error analysis and need not require reversal if the Court is convinced, beyond a reasonable doubt, that the error did not contribute to the verdict.” *Jones v. State*, 748 So. 2d 1012, 1021-1022 (Fla. 1999). *See also Taylor v. State*, 561 S.E.2d 833, 836 (Ga. Ct. App. 2002) (“Even if we assume that there was an improper comment on [defendant’s] silence, such an impropriety does not automatically require reversal and may be harmless error.”); *State v. Tucker*, 62 P.3d 644, 647 (Idaho Ct. App. 2003) (“Commentary on a defendant’s right to remain silent, if determined to be constitutional error, is subject to the harmless error analysis[.]”); *State v. Ezzell*, 642 S.E.2d 274, 278 (N.C. Ct. App. 2007) (“[A] comment implicating a defendant’s right to remain silent, although erroneous, is not invariably prejudicial. Indeed, such error will not earn the

defendant a new trial if, after examining the entire record, this Court determines that the error was harmless beyond a reasonable doubt.”); *State v. Shuler*, 577 S.E.2d 438, 444 (S.C. 2003) (“While the State may not comment on the defendant’s right to remain silent, an improper reference is subject to harmless error analysis.”). In deciding the issue of 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), that 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.” *Id.* at 24, 87 S. Ct. at 828.

Assuming, for the sake of argument, that the majority opinion got it right in finding the prosecutor made improper comments on Mr. Murray’s failure to testify, the State has proven beyond a reasonable doubt that such comments did not contribute to the jury’s verdict.

To begin, Mr. Murray’s defense was that, on the night in question, he did not see what it was he hit with his vehicle and thought perhaps it was an animal. Although he allegedly stopped and looked around, he could find nothing to indicate what he had actually hit. Mr. Murray purportedly drove home, but immediately returned to the scene of the collision accompanied by his wife, and traveling in her vehicle. The two drove past the scene of the accident finding nothing, but did not exit the vehicle. Thereafter, Mrs. Murray phoned the local law enforcement office to report the collision. In response, a police officer arrived

at Mr. Murray's home. Mr. Murray told the officer that he had hit an animal and wished to file a report for insurance purposes. The officer inspected the vehicle and completed a report, but did not visit the scene of the collision. The next morning, Mr. Murray again inspected his vehicle. Upon this inspection, Mr. Murray observed blood and shreds of clothing imbedded around his right headlamp. He allegedly returned to the accident scene and discovered the victim, already deceased, in tall grass. Mr. Murray then returned home and called 911.

The State theorized that Mr. Murray knew all along that he had struck a human; because, when Mr. Murray struck the victim, the victim's head smashed into Mr. Murray's windshield. Mr. Murray then slammed on his breaks, and the victim bounced off the car, skidded along the pavement, and came to rest on the shoulder of the road. The State sought to establish that Mr. Murray had been drinking that evening and had feared being charged with driving under the influence of alcohol, which motivated him to move the victim's dead or dying body, along with his bicycle, into the tall grass, to deny knowledge of what he had hit, and to delay reporting the collision to the authorities.

In support of this theory, the State admitted into evidence photographs of the scene of the impact. Officer John Droppleman testified with respect to the photographs, and explained that they displayed gouged out areas of the shoulder of the road, which had been created by the victims body. The photographs also showed scuff marks left behind when the

victim's body skidded along the road following the impact, and a pair of socks, apparently belonging to the victim, that were located in a separate area from where the body had been found.

The State's evidence demonstrated further, through photographs and testimony, extensive damage to Mr. Murray's vehicle resulting from the impact. Not only were there black marks on the bumper left by the victim's bicycle seat, and remnants of the bicycle's paint on the car, but there was a deep dent in the passenger side fender, above the headlight, a dent in the car's hood, and most strikingly, the smashed windshield.

Dr. Hermada Mahmoud, Chief Medical Examiner for the State, testified that the victim had sustained blunt force trauma to his head and back that were consistent with being hit by a car and then thrown to the pavement. Dr. Mahmoud further stated that there were brush abrasions on the victim's left cheek and abdomen that were caused by "sliding the skin over a rough surface." Dr. Mahmoud stated that the brush abrasions were not consistent with the grassy area where the victim's body had been found.

The State also presented the testimony of two accident reconstructionists, Corporal Geoffrey S. Petsko, of the West Virginia State Police, and Charles Bean, Jr. These two witnesses presented evidence that the victim's body hit the pavement at two separate locations. The farthest landing location of the victim's body was approximately eighty feet

from the skid marks left by Mr. Murray's car, yet the body was found in tall grass approximately ten feet from the road, and approximately ninety-six feet from the skid marks. Furthermore, Mr. Bean opined that the bicycle, as found, was plainly not where it landed as part of an uncontrolled crash. With respect to the charge that Mr. Murray had failed to maintain control of his vehicle, these two witnesses demonstrated how the evidence established that Mr. Murray's vehicle had crossed the solid white line on the right side of the road in order to strike the victim.

Finally, to establish its theory that Mr. Murray had been driving under the influence of alcohol, the State presented evidence that the Murray's call to local authorities reporting the collision was not made until approximately one hour after the event. The State also presented the testimony of Officer Droppleman, who related that when he took Mr. Murray's statement, Mr. Murray said that he had consumed a glass of homemade wine while at a friend's house prior to striking the victim, and that once he arrived home following the collision, he consumed a shot or two of scotch.¹ Likewise, Officer John Vanorsdale, Jr., the officer who responded to the Murray's call on the night of the collision, testified that when he arrived at the Murray home, Mr. Murray was holding a beverage that smelled of alcohol.

¹The State's theory was that Mr. Murray confessed to consuming a small amount of alcohol prior to driving home, and claimed to have quickly consumed additional alcohol once at home, in order to conceal the fact that he had been driving under the influence of alcohol.

Without question the foregoing evidence was sufficient to convince the jury that Mr. Murray was guilty, beyond a reasonable doubt, of failing to render aid at an automobile accident involving death and of failing to maintain control of his automobile. Thus, assuming *arguendo* that the prosecutor's comments were improper, the State has proven beyond a reasonable doubt that those comments did not contribute to the jury's verdict. Accordingly, I dissent.