

FILED

Maynard, Justice, dissenting:

December 16, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

December 17, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I dissent because I do not believe the prosecutor's statements at trial violated the defendant's constitutional right not to testify.

This Court has reversed a murder conviction and a conviction for sexual abuse of a four-year old child within the space of two weeks based on the arguments of prosecutors. *See State v. Stephens* (No. 25893, December 3, 1999). It appears from these decisions that this Court does not believe that prosecutors should be allowed to make any effective closing arguments to a jury. It must be remembered that criminal trials are adversarial proceedings in which prosecutors represent the people as well as the victims of crime. Accordingly, prosecutors have not only the right but the duty to make persuasive and compelling arguments. Further, prosecutors have wide latitude within the rules in making their arguments. This Court, however, has tied the hands of prosecutors with a perplexing collection of arbitrary, complex and unfair prohibitions, scattered among several cases, which no one can follow. These prohibitions have granted too much power to defendants and left prosecutors hamstrung and weakened.

The majority errs in the instant case by taking the prosecutor's remarks out of context and misconstruing them. This Court has stated:

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."

State v. Clark, 170 W.Va. 224, 227, 292 S.E.2d 643, 646 (1982) (citations omitted). It is not manifest or obvious that the language used by the prosecutor was intended to be a reminder that the defendant did not testify. Rather, the prosecutor was responding to defense counsel's closing argument wherein he attacked the validity of the testimony of the defendant's accomplices who testified for the State. Defense counsel asserted that these witnesses were proven liars and the State offered their testimony only because it had no other evidence linking the defendant to the charged crime. Defense counsel further characterized the witnesses' plea bargains with the State as inducements to lie:

And boy, do these girls ever have an incentive to come in and lie to you again on the witness stand to talk about this young man's alleged involvement, because they all three got a heck of a good deal. And I commend their lawyers, whoever they are, for working out the deals that each of them got.

In response, the prosecutor contrasted the testimony of these witnesses with the inability of the deceased victim to take the stand. "But for [the defendant] and Mark Yoney, [the victim] would be alive today. You didn't hear from [the victim] from that witness stand. That's why

the testimony of those girls was important.” The prosecutor further emphasized the importance of the accomplices’ testimony by stating that the State’s case was insufficient if these witnesses had chosen to remain silent. One simply cannot reasonably conclude from this that the prosecutor’s language was obviously intended to be a reminder that the defendant did not testify.

Also, the prosecutor’s language was not of such a character that the jury *would naturally and necessarily* take it to be a reminder that the defendant did not testify. Again, it was more likely that the jury would take the prosecutor’s remarks as a defense of the accomplices’ plea bargains and testimony. This is how the trial court interpreted the remarks, stating, “[i]t’s the Court’s recollection that the remarks made by the prosecutor . . . were addressed[] with regard to why these [plea bargains] were made.” The trial judge witnessed not only the content but also the tenor and context of the prosecutor’s comments. Therefore, the trial judge, and not this Court, is in the best position to determine the nature and intent of those comments.

Finally, the majority reverses the defendant’s conviction based upon syllabus point 5 of *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979) which states that “[r]emarks made by the State’s attorney in closing argument which make specific reference to the defendant’s failure to testify, constitute reversible error and defendant is entitled to a new trial.” However, the prosecutor clearly did not make a specific reference here. At best,

the remarks made by the prosecutor are ambiguous and *could possibly* be construed to be references to the defendant's silence. Thus, the majority adopts, *sub silentio*, a much more stringent test for determining whether the prosecutor committed reversible error by improperly commenting upon the defendant's decision not to testify.

In summary, the majority isolates a small portion of the prosecutor's response, takes it out of context, and unreasonably interprets it as a reference to the defendant's failure to testify. The result is the unwarranted reversal of a first-degree murder conviction. I, on the other hand, would find the prosecutor's comments proper in the context in which they were made and affirm the trial court. Accordingly, I dissent.