No. 26657 - State of West Virginia v. Gene Harold Walker

Maynard, Chief Justice, dissenting:

FILED
June 28, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
June 30, 2000
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SUPREME COURT OF APPEALS
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I dissent because I believe that the appellant did not preserve his cross examination and closing argument issues for appeal.

The majority's finding that the prosecution made improper use of the appellant's post-*Miranda* silence appears to be correct. However, our law is settled that before this Court will consider such error, it must have been raised below in a timely manner so that the trial court has an opportunity to correct it. This was not done here.

The majority states that the appellant did not make a contemporaneous objection to the prosecutor's cross examination but motioned for a mistrial "subsequent to the cross examination." However, the majority does not disclose just how subsequent to the cross examination the motion for a mistrial occurred. After the complained of cross examination of the appellant, there was redirect examination and then recross examination. At that point there was a discussion at the bench in which two exhibits were discussed. This discussion was followed by a recess. After the recess, appellant's witness, Betty Walker, testified. After Ms. Walker's testimony, the jury was dismissed for the evening and a lengthy discussion concerning jury instructions occurred between the trial court and the parties. The trial

court inquired whether there were "any loose ends or matters to take up[.]" At that point, the appellant said nothing about the allegedly improper cross examination.

After a three-day weekend, the trial reconvened and the defense called two more witnesses, Larry DeHus and Mel Curry. At the end of this testimony, the court recessed due to the unavailability of a witness, and another lengthy discussion was held concerning jury instructions. At the end of this discussion, the trial court asked whether there were "any other loose ends or matters I haven't ruled or passed upon." The appellant still said nothing about the cross-examination. After a recess for lunch, the appellant called his final witness, Dr. Echols Hansbarger. At the conclusion of this testimony, the defense rested and repeated its motion for acquittal initially made at the end of the State's evidence. Following the motion, the court asked whether there were any other motions. *Finally, at that point*, the appellant moved for a mistrial based on the State's cross-examination of the appellant, four days and four witnesses after the trial court and the jury heard the complained of testimony. The majority's conclusion that this alleged error was properly preserved for appeal is contrary to our jurisprudence.

Rule 103(a)(1) of the West Virginia Rules of Evidence states, in part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [i]n case the ruling is one admitting evidence, a *timely* objection or motion to strike appears of record[.]" (Emphasis added). This Court has explained that "[o]nce it is believed that evidence of a prejudicial nature has been introduced, to satisfy the requirements of Rule 103(a) an objection must be interposed *at the time the evidence has been offered and the trial court thus be given an*

opportunity to rule on the admissibility of the evidence." *Reed v. Wimmer,* 195 W.Va. 199, 204, fn. 4, 465 S.E.2d 199, 204, fn. 4 (1995) (emphasis added). Further, the Court has opined that "[w]e disfavor the technique of not first making a timely objection to the error and instead waiting until a later time to move for a mistrial." *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 309, 418 S.E.2d 738, 755 (1992). When measured against this law, it is plain that the appellant failed to preserve his alleged cross examination error.

The majority says that one of the justifications behind the requirement of contemporaneous objections is to give the trial court an opportunity to rule on an objection before it is brought to this Court. By motioning for a mistrial, reasons the majority, the appellant gave the trial court such an opportunity. However, the timeliness requirement is also designed to give the trial court a chance to rule on the evidence *before* it is admitted so that the jury does not hear inadmissible evidence. Although this cannot always be done, the objection must soon follow the alleged error so that the trial court can take effective corrective measures if necessary. In the instant case, the appellant's dilatory conduct robbed the trial court of any effective means of correcting the alleged error. After a four-day period, it would have been futile and confusing for the trial court to instruct the jury to "disregard the cross-examination of the defendant you heard last week concerning his silence after Detective Westfall read him his *Miranda* rights."

Next, the majority finds that the alleged error involving the prosecution's use of post-*Miranda* silence during the State's closing argument was adequately preserved for appeal under syllabus point 3 of *Lacy v. CSX Transp. Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999). The difficulty with this

finding is that there was no motion *in limine* to exclude the defendant's silence, and there was no previous timely objection to the use of such evidence. Therefore, the Court also should have found that this issue was not preserved for appeal.

The immediate effect of the majority's decision is that the State now has to retry the appellant after he has already been convicted by a jury, based on substantial evidence, of voluntary manslaughter with the use of a firearm. My concern, however, is with the potential long term effects of the decision. I fear that the Court has significantly weakened Rule 103 of the West Virginia Rules of Evidence by removing its timeliness requirement. The Court has also ignored our body of settled law that demands timely objections to alleged errors in the trial court. Accordingly, I dissent.