

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

No. 33193

FILED

June 5, 2007

released at 10:00 a.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

BRIAN DANIEL MURRAY,
Defendant Below, Appellant

Appeal from the Circuit Court of Morgan County
Hon. Gray Silver, III, Judge
Case No. 04-F-58

REVERSED AND REMANDED

Submitted: April 17, 2007
Filed: June 5, 2007

Darrell V. McGraw, Jr.
Attorney General
R. Christopher Smith
Assistant Attorney General
Charleston, West Virginia
Attorneys for Appellee

Byron Craig Manford, Esq.
Martinsburg, West Virginia
Attorney for Appellant

The Opinion was delivered PER CURIAM.

CHIEF JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “This Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

2. “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syllabus Point 5, *State, ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

3. “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.” Syllabus Point 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

4. “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.” Syllabus Point 3, *State v. Noe*, 160 W.Va. 10, 230 S.E.2d 826 (1976), overruled on other grounds by *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

5. “Remarks 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.” Syllabus Point 5, *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979).

6. “An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus Point 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

7. “To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Per Curiam:

The appellant appeals his conviction for failure to render aid at an automobile accident involving death and his conviction for failure to maintain control of his automobile. The appellant assigns ten grounds as error. For the reasons stated herein we reverse and remand for a new trial.

I.

On the evening of June 15, 2004, the appellant, Brian Daniel Murray, was driving home from a friend's house in McConnellsburg, Pennsylvania. As he neared his home in Morgan County, West Virginia, at approximately 9:30 p.m., appellant's vehicle collided with a bicycle ridden by Justin McAnulty, who was eighteen years of age. In his statement to a police officer, the appellant claims that he did not see what he collided with, but that he immediately stopped his vehicle, got out, looked around, and did not see anything except some damage to the right front fender and passenger side of his car.

Appellant then drove home from the accident scene and told his wife about the incident. The appellant and his wife returned to the scene and made two slow passes of the area where the collision occurred, but did not find anything. Upon returning home, the appellant's wife called the local police who came to their home and took a report.

The appellant further claims that the next morning he inspected his car in the daylight and discovered blood and shreds of clothing imbedded around the right headlight

of his car. He then returned to the scene of the accident and found the body of Justin McNulty. The appellant returned home and called 911 and went back to the scene to assist authorities in locating the body of the victim.

On September 7, 2004, the appellant was indicted by the grand jury of Morgan County for: “COUNT I (Failure to Render Aid at Accident Involving Death),” a violation of *W.Va. Code*, 17C-4-1; “COUNT II (Obstructing),” a violation of *W.Va. Code*, 61-5-17(a); and “COUNT III (Failure to Maintain Control),” a violation of *W.Va. Code*, 17C-6-1.

The trial on these charges began on Wednesday, February 23, 2005. At the beginning of the trial, during the *voir dire* process, the trial judge discussed with jurors how long the instant case might take to complete, indicating that a jury worked until 11:00 p.m. to complete a case the previous week. Similar comments were made by the judge on several other occasions during the trial.

In her opening statement the prosecuting attorney stated to the jury: “This case is about *accepting responsibility* when you are behind the wheel of a car and driving that car, and the Defendant, Mr. Murray’s *failure to accept that responsibility*.” (Emphasis added.) Additionally, the prosecuting attorney stated to the jury: “Now, he [defendant] did talk to the police and Mr. Murray *tells us* that he did go back and he looked and he just didn’t see anything.” (Emphasis added.) The prosecuting attorney also stated to the jury: “How do we intend to prove *what the Defendant knew*? It’s a hard thing to do, *what’s in somebody’s mind*, what they saw, okay.” (Emphasis added.) Finally, in her opening statement, the prosecuting attorney told the jury: “[T]he State is going to ask you, the jury, to force Brian

Daniel Murray *to accept the responsibility* that he agreed to accept when he got behind that wheel of the car and he drove . . .” (Emphasis added.)

During closing arguments, the prosecuting attorney said, “. . . *accepting responsibility*; the Defendant, Brian Daniel Murray, needs to *accept responsibility* for his conduct.” (Emphasis added.) The prosecuting attorney also stated: “So, how do I prove this? *Do I just ask the Defendant, “Did you know? Did you see him? Okay, you said you didn’t know, you said you didn’t see him, we’ll let you go . . .”* (Emphasis added.) Finally, the prosecuting attorney stated, “That’s a person [another witness] that saw Justin McNulty’s bicycle at an hour when nobody could have seen it, if you believe the *testimony* – not the testimony, the statements – *of the Defendant.*”¹ (Emphasis added.)

The defendant did not take the stand in his own defense.

The case was submitted to the jury at 9:56 p.m. on Friday, February 25, 2005, the third day of the trial. Thereafter the appellant noted on the record his objections to the prosecuting attorney’s comments during closing argument regarding the prosecuting attorney’s use of the phrase “testimony . . . of the Defendant,” and moved for a mistrial because the defendant did not testify at the trial. The appellant’s motion was denied.

¹We also observe from the record that in one instance the prosecuting attorney expressed her personal opinion of the evidence as follows:

“I don’t think the evidence supports that [defendant’s inability to see the victim due to the victim not having lights and reflectors on his bicycle]. I think the evidence supports that the accident occurred just over the fog line right where Officer Bean put that car on Trooper Petsko’s drawing.”

At 12:30 a.m. on Saturday morning, February 26, 2005, the jury sent the judge a note which read, “First charge [Failure to Render Aid at Accident Involving Death] locked 11 guilty to one; second charge [Obstructing] locked, ten guilty to two; three [Failure to Maintain Control], guilty. What do we do?” In response the court read a *Blessing*² instruction, and at 12:43 a.m. the jury returned to further consider their verdict.

Eleven minutes later at 12:54 a.m., the jury returned a verdict of guilty to Failure to Render Aid at Accident Involving Death, not guilty to Obstructing, and guilty to Failure to Maintain Control.

Thereafter, on March 8, 2005, the appellant filed a “Motion of the Defendant for New Trial; Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury.” The trial judge denied the appellant’s motion and sentenced the appellant to a determinate sentence of three years in the penitentiary on the Failure to Render Aid at Accident Involving Death charge, and fined the defendant one hundred dollars on the Failure to Maintain Control charge. The judge further ordered that if the appellant was not paroled upon the completion

²The trial court in the instant case gave substantially the same instruction as that which was given in *Blessing*.

In *State v. Blessing*, 175 W.Va. 132, 331 S.E.2d 863 (1985) (*per curiam*) the jury foreman reported a deadlock and the court provided the jury with further instructions regarding their continued deliberation. This Court in affirming the trial court cited Syllabus Point 2 of *State v. Johnson*, 168 W.Va. 45, 282 S.E. 609 (1981) as follows:

Where a jury has reported that it is unable to agree and the trial court addresses the jury urging a verdict, but does not use language the effect of which would be to cause the minority to yield its views for the purpose of reaching a verdict, the trial court’s remarks will not constitute reversible error.

of one year in the penitentiary, that he be brought back before the court to be ordered to serve the balance of the sentence on home confinement.

It is from this conviction and sentence that the appellant appeals.

II.

Appellant argues that the trial judge's decision not to grant his motion for a mistrial was error. This Court has indicated that the decision to declare a mistrial and discharge a jury is a matter within the sound discretion of the trial court. *State v. Williams*, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983) citing *State v. Craft*, 131 W.Va. 195, 47 S.E.2d 681 (1948).

We also stated in Syllabus Point 4 of *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996):

This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.

We begin our analysis with the appellant's second assignment of error relating to remarks made by the prosecuting attorney during closing argument.³ The appellant's

³The appellant's second assignment of errors states as follows:

The Trial Court committed plain and prejudicial error by not granting the Defendant's Motion for Mistrial after the Prosecuting Attorney of Morgan County, made an impermissible reference in closing regarding the Defendant's failure to testify, and expressed her own personal opinions as to the credibility of the State's witnesses; such comments were in violation of the State's duty to remain fair and impartial,

assertion that the prosecuting attorney's remarks were a comment upon the appellant's failure to testify implicates the Fifth Amendment of the *Constitution of the United States* and Article III, Section 5 of the *Constitution of West Virginia*.⁴

Historically, this Court has scrupulously protected a defendant's right to remain silent. *See State v. Nuckolls*, 166 W.Va. 259, 261, 273 S.E.2d 87, 89 (1980). Also, we have consistently held that "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus Point 5 of *State, ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

In order to protect the right against self-incrimination, the West Virginia Legislature adopted *W.Va. Code*, 57-3-6 (1923), which provides that the failure of the defendant to testify cannot be the subject of comment before the court or jury by anyone.⁵

especially in light of the nature of the offense charged.

⁴*W.Va. Const.*, Art. III, Sec. 5 states as follows:

3-5. Excessive bail not required.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the state for any offence committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence.

⁵*W.Va. Code*, 57-3-6 (1923) reads as follows:

Competency of accused as witness.

In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, with his consent (but not otherwise) be a competent witness on such trial or

In *State v. Taylor*, 57 W.Va. 228, 235, 50 S.E. 247, 249 (1905) this Court explained the origin of the rule against self-incrimination by stating that “. . . the law, having brought the prisoner into court against his will, did not permit his silence to be treated or used as evidence against him.” Later, this Court in *State v. Boyd*, 160 W.Va. 234, 240, 233 S.E.2d 710, 716 (1977), explained that:

The basis for the rule prohibiting the use of the defendant’s silence against him is that it runs counter to the presumption of innocence that follows the defendant throughout the trial. It is this presumption of innocence which blocks any attempt of the State to infer from the silence of the defendant that such silence is motivated by guilt rather than the innocence which the law presumes.

In order to analyze cases involving issues of impermissible comments on the defendant’s failure to testify at trial, this Court in Syllabus Point 6 of *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995) held:

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

examination; and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by anyone.

deliberately placed before the jury to divert attention to extraneous matters.

The law relating to questions involving comments by a prosecuting attorney before a jury has continued to be refined by the Court over the years. In *State v. Noe*, 160 W.Va. 10, 230 S.E.2d 826 (1976), overruled on other grounds by *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), a first-degree murder case, the prosecuting attorney in final argument said “Now, Freddie Joe Noe can’t have his cake and eat it too. Now, you’ve either got an alibi or you don’t.” This Court in discussing the prosecuting attorney’s comments stated “. . . by *inference*, it [prosecuting attorney’s remarks] comments on *his* [the defendant] failure to explain how his fingerprints got on the pane of glass.” (Emphasis added.) *Noe*, 160 W.Va. at 18, 230 S.E.2d at 831. In reversing the conviction this Court held:

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.

Syllabus Point 3 of *Noe, supra*. The Court in *Noe* further explained:

We recognize that a certain latitude must be given to an attorney either for the defense or for the prosecution in final argument. We are aware that the intensity of the moment may be productive of language which is intemperate or overdrawn. However, this can never justify disregard for constitutional and statutory guarantees either directly or by inference or innuendo.

Noe, 160 W.Va. at 18, 230 S.E.2d at 831.

In *State v. Lindsey*, 160 W.Va. 284, 293, 233 S.E.2d 734, 740 (1977) this Court said that “. . . the State should studiously avoid even the slightest hint as to the defendant’s

failure to testify.”

In *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979), a second-degree sexual assault case, the prosecuting attorney said in final argument:

“None of those facts are in dispute. No one said those things didn't take place. . .” “You know, there is one thing I know which has been hidden in this case. . . . If Fred Muth [defense counsel] can think of one reason, one lousy little reason at all why this girl would turn a finger at his client sitting over there, other than the fact that he committed this crime, he would tell you what it was. . . . There is a motive, you know what it is, I know what it is, everybody knows what it is. It is because he did it. Whether he hangs his head there and won't look at you or not, he did it, and there is no one in this Court Room that ever said he didn't do it. . . .” “Let me tell you reasonable doubt is not a cloak people come in and hide behind, and point fingers at people and says, ‘Uh-huh, prove it.’”

Green, 163 W.Va. at 695, 260 S.E.2d at 265. In reversing the conviction in *Green*, this Court stated that “the remarks by the prosecution amounted to specific reference to Green's failure to testify” and held that:

Remarks 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.

Syllabus Point 5 of *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979).

In *State v. Nuckolls*, 166 W.Va. 259, 273 S.E.2d 87 (1980), a murder case, the prosecuting attorney in final argument said:

If Lucille Nuckolls hadn't killed her husband that night we wouldn't be here. I haven't seen her, you haven't seen her, nobody in the Court Room has seen her. She is a person of mystery. No one has seen her. Did any one of the psychiatrists

tell you this was catatonic schizophrenia? Catatonic is when you sit and stare with no expression at all. Don't say anything, you don't do anything, and it is also a way to snow people. It is a way to get in here and act and behave so that you say, "Why look at her. She is not paying any attention. She didn't do this, she didn't do that." It is what the psychiatrists told you when she took her examination didn't they? I want to know what was in Lucille Nuckolls' mind when she killed her husband . . .

Nuckolls, 166 W.Va. at 262, 273 S.E.2d at 89. In reversing the conviction in *Nuckolls*, this Court cited to Syllabus Point 3 of *Noe, supra*, and found that the prosecuting attorney's statements "amounted to a comment upon the failure to the defendant to testify." *Nuckolls*, 166 W.Va. at 262, 273 S.E.2d at 89. Further, the Court, citing ABA Code DR 7-106(C)(4),⁶ observed that the decision to reverse was reinforced by the prosecutor's prejudicial and inflammatory conduct during trial when the prosecutor offered to the jury his personal opinion when he said "[i]f Lucille Nuckolls doesn't have to pay under the law, I would be the first one, as chief law enforcement officer of this county, to tell you she didn't have to." *Nuckolls*, 166 W.Va. at 263, 273 S.E.2d at 90.

In *State v. Bennett*, 172 W.Va. 131, 304 S.E.2d 35 (1983) (*per curiam*), a delivery of a controlled substance case, the prosecuting attorney repeatedly said in final argument that the State's evidence was uncontradicted and had not been denied. Again

⁶*See also* Rules of Professional Conduct, 3.4(e):

A lawyer shall not:

...

(e) in trial, . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

relying on Syllabus Point 3 of *Noe, supra*, this Court found that the prosecuting attorney's remarks constituted an impermissible comment upon the failure of the of the defendant to testify, since the defendant was the only one who could have denied the drug offense.

In *State v. Swafford*, 206 W.Va. 390, 524 S.E.2d 906 (1999) (*per curiam*), a murder case, the prosecuting attorney said in final argument:

But for Walter Swafford and Mark Yoney, Joseph Hundley would be alive today. You didn't hear from Joseph Hundley from that witness stand. That's why the testimony of those girls was important.

Where would the State have been in this case if those girls had a good lawyer like Mike Gallaher [defense counsel] and they had said, 'We ain't telling you nothing. We don't' - 'We got our constitutional rights. We ain't telling you nothing.' Where would we be? Where would we be? All five of them would be walking the street, wouldn't they?

Swafford, 206 W.Va. at 393, 524 S.E.2d at 909. In reversing *Swafford* 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. denied*, 397 U.S. 1050, 90 S.Ct 1388, 25 L.Ed.2d 665 (1970); *Hayes [Hays] v. Oklahoma*, 617 P.2d 223 (Okla. Cir App. 1980).

Swafford, 206 W.Va. at 393-4, 524 S.E.2d at 909-10, *quoting State v. Clark*, 170 W.Va. 224,

227, 292 S.E.2d 643, 646-7 (1982). The *Swafford* Court went on to compare the prosecuting attorney's statements with those in *Green, supra*, stating comments in each case suggested that the defense counsel had advised the defendant not to testify. Further, the Court observed that by referring to the fact that co-defendants did testify and that the victim could not testify, the prosecuting attorney's remarks "served to remind the jury that the defendant did not testify." *Swafford*, 206 W.Va. at 394, 524 S.E.2d at 910. With these observations, this Court reversed the conviction based upon the remarks of the prosecuting attorney.

In *State v. Mills*, 211 W.Va. 532, 566 S.E.2d 891 (2002) (*per curiam*) this Court held as reversible error the following comment by a prosecuting attorney made during closing argument: "[t]here are cases in which the murderer himself says, 'I am so sorry; I am so sorry. I beg your forgiveness.'"

More recently, in *State v. Sprague*, 214 W.Va. 471, 590 S.E.2d 664 (2003) (*per curiam*), a malicious assault case, the prosecuting attorney said in closing argument:

Now there's been a lot of talk and I do want to talk to you about venue. The Defendant, as you have noted, as you've seen from this trial, has not contradicted any of the State's evidence or any of the State's testimony basically about the events that occurred at Sta[]dard Hall.

Sprague, 214 W.Va. at 474, 590 S.E.2d at 667. In reversing the conviction this Court stated:

As the appellant did not testify, no matter what the intention of the prosecutor was, the prosecutor's comments necessarily served to accentuate and highlight the fact that the appellant sat silently without taking the stand, and no matter how harmless the intent, the remarks plainly amount to comment on the appellant's choice not to testify.

Sprague, 214 W.Va. at 474, 590 S.E.2d at 667.

As made clear by the foregoing cases, this Court has consistently held that when statements are made by the prosecuting attorney to the jury that suggest either that the defendant should have testified at his trial, or that direct the jury's attention to the fact that the defendant did not testify, we will reverse the conviction and remand the case for a new trial.

We next address whether this Court should apply the "plain error doctrine." At trial, appellant's counsel failed to raise contemporaneous objections to any statements of the prosecuting attorney. Instead, defense counsel called to the attention of the court only the statement by the prosecuting attorney which specifically referred to the "... testimony ... of the defendant," and then only after the jury had retired and began its deliberations. Later, defense counsel in his post-trial motions raised the issue with respect to other statements by the prosecuting attorney that he contends were impermissible comments on the defendant's failure to testify at trial. Further, defense counsel reasserted those grounds as part of the appeal in this case.

The appellee argues that because of the failure of defense counsel to object to the statements of the prosecuting attorney, the appellant waived error, if any, resulting from the trial judge's conduct. See Syllabus Point 6 of *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945).

The appellant argues that this Court should apply the doctrine of "plain error." In Syllabus Point 7 of *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996), this Court

explained the application of the plain error doctrine, as follows:

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Furthermore, Syllabus Point 7 of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), provides:

To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Although counsel for the appellant failed to raise contemporaneous objections to the statements of the prosecuting attorney, we find the statements on their face to be of such magnitude as to justify a review upon a plain error analysis. We find that Syllabus Point 7 of *LaRock, supra*, and Syllabus Point 7 of *Miller, supra*, are dispositive of this issue.

In the instant case there are three areas of prosecutorial comments that the appellant argues constitute an impermissible comment on the appellant’s failure to testify.

First are the comments relating to the appellant’s “failure to accept responsibility.” In her opening statement the prosecuting attorney said: “This case is about *accepting responsibility* when you are behind the wheel of a car and driving that car, and the Defendant, Mr. Murray’s *failure to accept that responsibility*.” (Emphasis added.) Later in

her opening statement the prosecuting attorney also stated: “[T]he State is going to ask you, the jury, to force Brian Daniel Murray *to accept the responsibility* that he agreed to accept when he got behind that wheel of the car and he drove . . .” (Emphasis added.) And in her closing argument the prosecuting attorney again repeated this line of argument by stating: “. . . *accepting responsibility*; the Defendant, Brian Daniel Murray, needs to *accept responsibility* for his conduct.” (Emphasis added.)

We believe that these statements, standing alone, no matter what the intention of the prosecuting attorney was, served to accentuate and highlight the fact that the appellant sat silently without taking the witness stand. No matter how harmless the intent was of the prosecuting attorney, the remarks constituted an impermissible reference to the appellant’s election not to testify.

The second line of comments are those relating to how the prosecuting attorney would prove the case. In her opening statement the prosecuting attorney made the following statement: “Now, he [defendant] did talk to the police and Mr. Murray *tells us* that he did go back and he looked and he just didn’t see anything.” (Emphasis added.) Later in her opening statement the prosecuting attorney said: “How do we intend to prove *what the Defendant knew*? It’s a hard thing to do, *what’s in somebody’s mind*, what they saw, okay.” (Emphasis added.) In her closing argument the prosecuting attorney repeated this line of argument by stating: “So, how do I prove this? [Failure to Render Aid at Accident Involving Death] Do I just ask *the Defendant*, “Did you know? Did you see him? Okay, you said you didn’t know, you said you didn’t see him, we’ll let you [the defendant] go. . .” (Emphasis

added.)

These statements may be the most damning to the State's position. We believe that, when taken as a whole, these statements constituted an impermissible reference to the appellant's election not to testify. Again, no matter what the intention of the prosecuting attorney was, the statements served to accentuate and highlight the fact that the appellant sat silently without taking the witness stand. The prosecuting attorney's use of "*the defendant*," when coupled with the other language used, was of such character that the jury would naturally and necessarily take the prosecuting attorney's statements to be a reminder that the defendant did not testify. This is especially true when coupled with the prosecuting attorney's "*failure to accept responsibility*" statements made by the prosecuting attorney during the opening statement and closing argument as previously discussed.

Finally, we consider the statement by the prosecuting attorney in closing argument that referred to the *testimony* of the defendant. The statement was: "That's a person that saw Justin McAnulty's bicycle at an hour when nobody could have seen it, if you believe the *testimony* – not the testimony, the statements – *of the Defendant*." (Emphasis added.)

While this statement may well have been a slip of the tongue, the inquiry does not end there. We must determine whether or not the statement was of such character that the jury would naturally and necessarily take the prosecuting attorney's statements to be a reminder that the defendant did not testify. We believe that this statement by the prosecuting attorney was such a reminder when considered in light of the other statements of the

prosecuting attorney discussed above.⁷

As we have previously held in *Noe, supra*, statements made in final argument amounting to a comment on the failure of a defendant to testify constitute prejudicial error. Therefore, the first prong of *Sugg, supra*, is satisfied.

We also observe and conclude that the several statements made by the prosecuting attorney were not isolated, but rather were incorporated into both the opening statement and closing argument of the prosecuting attorney. We therefore conclude that the second prong of *Sugg, supra*, is satisfied.

Inasmuch as the appellant's awareness of whether or not he struck a deer or a person or some other object was central to the proof, and there being no other witnesses to the event, the appellant's failure to testify at trial carried heightened sensitivity with the jury. We therefore find that the third prong of *Sugg, supra*, is satisfied.

Finally, *Sugg, supra*, requires us to consider whether the comments of the prosecuting attorney were deliberate. With the exception of the last comment considered by us relating to the testimony of the defendant, we find that the statements made by the

⁷We believe that in cases in which counsel makes an isolated improper remark and timely objection is made, the principle adopted in Syllabus Point 5 of *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987) should be followed:

... If either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks. . . .

Syllabus Point 5, in part, of *Grubbs*. We also believe that when counsel makes an improper remark which is not objected to, the better practice is for the trial court to immediately instruct the jury to disregard the remark.

prosecuting attorney were deliberate. As previously noted, while we consider the intent of the prosecuting attorney in making statements to the jury, a greater concern is whether the statements were of such character that the jury would naturally and necessarily take the prosecuting attorney's statements to be a reminder that the defendant did not testify. Having already so found, we conclude that the fourth prong of *Sugg, supra*, is satisfied.

We therefore find that the prosecutor's statements in this case were prejudicial and reversible error. Because of our decision to reverse the defendant's conviction on the assignment of error as discussed above, we decline to address the appellant's other assignments of error.⁸

IV.

Based on the reasons stated herein, we reverse and remand for a new trial.

Reversed and Remanded.

⁸The appellant included in his assignments of error that the judge committed plain and prejudicial error because of the judge's several remarks to the jury throughout the trial concerning the possibility of "working extended hours." Appellant argues that the judge's comments led to a compromised verdict. The facts in this case demonstrate how fragile jury deliberations can be when the jury engages in continuous and extended consideration of evidence and deliberations. For this reason we urge our judges when addressing juries to refrain from using language which might reasonably be considered as encouraging or demanding that a jury agree to work extended hours.