

FILED

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

Benjamin, Justice, concurring:

I must disagree with my dissenting colleagues. The majority opinion did not take the prosecutor's prejudicial comments regarding the defendant's failure to testify out of context. The record amply demonstrates that the prosecutor repeatedly commented to the jury about Mr. Murray's failure to take responsibility for his actions and emphasized to the jury that the State was therefore unable to ask him to explain his actions. Those comments crossed the line under the well-established precedent of this Court, as well-demonstrated by the majority opinion. Unlike my dissenting colleagues, I refuse to speculate what the prosecutor really meant by these comments.¹ I likewise refuse to assume that a lay jury would be unaffected by such inappropriate comments. Under our law, a prosecutor may not comment upon a defendant's failure to testify. This is a bedrock principle in our system of jurisprudence. In view of the totality of the circumstances presented herein, including a prosecution case built upon inference and speculation, I cannot agree that the prosecutor's

¹I am unpersuaded by the argument presented by one dissenter that the prosecutor's comments regarding accepting responsibility referred to a critical element of the offense charged, failure to render aid at accident involving death, and not to the defendant's failure to testify. Such an argument is, once again, based upon an assumption about the evidence and necessarily requires a State-biased inference of prosecutorial intent not apparent in the trial record.

repeated reference to Mr. Murray's failure to testify constituted harmless error.

I write separate to also address the other significant issue presented in this appeal, an issue not directly addressed by the majority nor mentioned by the dissenters. That issue is the pressure placed upon the jury in this matter to reach a verdict. Beginning with the *voir dire* process and continuing throughout the proceedings, the trial court made comments to the jury regarding the possibility of working extended hours and another jury's willingness to work late into the night the previous Friday. Ultimately, the case was submitted to the jury at 9:56 p.m. on a Friday evening under the threat of an impending snow storm. After deliberating for approximately two and one-half hours, the jury informed the judge that they were deadlocked on two charges (it then being 12:30 a.m. on Saturday morning). At that time, the jury vote was 11-1 guilty on the charge of "failure to render aid at accident involving death" and 10-2 guilty on the charge of "obstructing".

Instead of sending the jury home to reconvene their deliberations the following Monday morning, or even later during the weekend, the trial court read a *Blessing* instruction and sent the jury back to the jury room to resume deliberations. *Eleven minutes* later, the jury returned a split verdict on the two charges on which they were previously deadlocked, finding the defendant guilty on the charge of "failure to render aid at accident involving death" and not guilty of "obstruction." Such a dramatic change in votes in such a short

period clearly shows that the jury may have compromised this verdict in order to go home. Under the circumstances, the jury may well have believed that they would not be permitted to leave until a verdict was rendered. While we can not be sure that such a belief was formed resulting in a compromised verdict, the real possibility that the same occurred is enough to entitle the defendant to a new trial under the specific circumstances presented herein.² While I believe that trial courts are to be afforded significant discretion in conducting jury trials, the circumstances presented in this appeal crossed the line, in my opinion, of acceptable pressure upon a jury to reach a verdict. Accordingly, the defendant is entitled to a new trial.

²In addition to requiring the jury to stay until 1:00 a.m. Saturday morning after having started the work day on Friday morning, the judge received a note from one juror after the verdict was rendered suggesting that the trial court not ask a jury to stay late again. It also appears that two jurors may have been ill at the time of the verdict and another called the circuit clerk's office the following Monday morning to express disagreement with the verdict rendered.