No. 33193 – State of West Virginia v. Brian Daniel Murray

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

I would affirm the judgment of the circuit court below because I do not believe the prosecuting attorney made improper references to the defendant's election not to testify.

This Court has explained that, "[i]t 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*, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Therefore, "[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." Syllabus Point 5, *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979). We have further indicated 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.

State v. Clark, 170 W.Va. 224, 227, 292 S.E.2d 643, 646 (1982) (citations omitted).

In finding that the prosecutor below improperly commented on the defendant's

decision to not testify, the majority first cites the prosecutor's remarks concerning the defendant's failure to accept responsibility. Unfortunately, the majority completely misinterprets these remarks and takes them out of context. When one considers the prosecutor's comments in the context of the crimes charged against the defendant, it is clear that the prosecutor was not making specific reference to the defendant's failure to testify but rather the defendant's failure to accept his legal responsibility to stop and render aid at the scene of the accident. I am confident that this is what the prosecutor intended and it is how the jury understood the prosecutor's remarks. In fact, even the defendant's lawyer did not think the prosecutor's statements were error because he did not object and demand a mistrial at the time the statements were made. Simply put, the prosecutor was commenting on the defendant's state of mind at the time he struck and killed Justin McAnulty and decided to leave the scene.

The defendant was charged with, *inter alia,* "Failure to Render Aid at Accident Involving Death." This crime is defined in W.Va. Code § 17C-4-1 (1999), which provides in part,

> (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and shall remain at the scene of the accident until he or she has complied with the requirements of section three [§ 17C-4-3] of this article[.]

According to W.Va. Code § 17C-4-3 (1998), the driver of any vehicle involved in an accident resulting in injury to or the death of another person is charged with the

responsibility of rendering aid to the injured person, "including the carrying, or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary." Essentially, the defendant was on trial for not fulfilling his legal obligation to stop and render aid to the person he hit with his car. In light of the nature of the crime alleged, which unlike most criminal statutes charges an affirmative duty, the prosecutor's comments are more warranted in this case than in those involving other crimes. Here, the defendant had an affirmative duty imposed by law to stop and render aid to Mr. McAnulty, and he failed to do so. Therefore, the fact that the defendant failed to meet his legal responsibility, which is the essence of the crime charged, made this a fair area of comment for the prosecutor. Accordingly, any reasonable juror would take the prosecutor's words to mean that the defendant is guilty of the crimes charged because he did not meet his legal responsibility to the decedent.

The majority also cites as improper a line from the prosecutor's closing argument, "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 . . . .'" It is obvious to me that the prosecutor refers here to statements the defendant made to police officers during their investigation of the accident. Specifically, the prosecutor indicates that the jury may infer the defendant's intent from these statements. Although a defendant may remain silent without detriment, juries are called upon every day to examine the evidence before them and infer a defendant's mental state and intent from what the

defendant may have said or done.

In addition, the defendant cites the prosecutor's slip of the tongue in confusing the defendant's statement to the police with testimony, an error that the prosecutor immediately corrected without prompting[1]. The record shows that this misstatement was acknowledged by the defendant's trial counsel to be without a change in the tone of the prosecutor's voice. Therefore, this mistake was minor and incidental and had no negative impact on the jury.

In sum, when one considers all of the prosecutor's statements as a whole, I fail to see how these statements come close to constituting specific references to the defendant's decision to not testify. There simply is no evidence in the record to suggest that these statements were manifestly intended to be a reminder of the defendant's election to not testify, nor can I imagine how a jury would necessarily take these statements as such. Instead, I see two wholly permissible arguments and an innocent, promptly-corrected slip of the tongue. In short, there was no improper commentary on the defendant's silence.

Further, it is very significant that the defendant failed to preserve the alleged

[1]"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.)" Maj. op. at 17.

error for appeal purposes. Therefore, in order to reverse the defendant's conviction, the majority found the prosecutor's comments to be *plain* error which is utter nonsense. This Court has held that "[t]o 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). We have also held,

> 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). Incredibly, the majority finds that the prosecutor's comments, which were not timely objected to and which at worst were susceptible to more than one interpretation, amounted to plain error. In other words, the majority actually concludes that the alleged error affected the defendant's substantial rights and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. This is a gross misapplication of the plain error doctrine.

For anyone who fairly evaluates the evidence in this case in the real world, what really occurred here is plain. The defendant, who admitted he had been drinking, was either drunk or impaired at the time he struck Justin McAnulty. The defendant knew when

the accident happened that he had struck and seriously injured or killed a person. But the defendant left Mr. McAnulty lying mortally wounded or dead because he did not want to be arrested and charged with the crime of DUI causing death. The next morning, after he was sober and knew he could pass a Breathalyzer or Blood Test, the defendant returned to the scene of the accident and pretended to find Mr. McAnulty's body for the first time. That is what really happened here and everybody familiar with the evidence knows it. However, I long ago gave up believing that trials are a search for the truth.

Finally, by so unnecessarily restricting the arguments of prosecutors, the majority has effectively muzzled them, rendering them unable to fairly present their side of the case. In so doing, the majority has left the State at a significant disadvantage in the prosecution of criminal defendants which will result in more guilty persons going free. Of course, the ultimate losers are law-abiding citizens who depend upon the State to protect them, their loved ones and their property from dangerous criminals.

Accordingly, for the reasons stated above, I dissent.