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Commonwealth v. Harrison

COMMONWEALTH OF PENNSYLVANIA
v. MICHAEL HARRISON**,** Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action No. 142 of 2006

Prosecutorial Misconduct; Reasonable Inference; Prosecutor's Arguments as Basis for New Trial; "Harmless Error" Standard; Reversible Error; Curative Instruction

1. The law permits a prosecutor to vigorously argue his case so long as his comments are supported by evidence and contain inferences which are reasonably derived from that evidence. Commonwealth v. LaCava, 666 A.2d 221, 231 (Pa. 1995).

2. The standard for granting a new trial because of the comments of a prosecutor is a high one for a Defendant to meet. A prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury in such a way that they would be prevented from properly weighing the evidence and rendering a true verdict. Commonwealth v. Ogrod, 839 A.2d 294, 333 (Pa. 2003)(citing Commonwealth v. Jones, 683 A.2d 1181, 1199 (Pa. 1996)).

3. The standard for evaluating prosecutorial misconduct is "harmless error." Commonwealth v. Holley, 945 A.2d 241 (Pa. Super. 2008). Harmless error exists when: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error so insignificant by comparison that the error could not have contributed to the verdict. Commonwealth v. Watson, 945 A.2d 174 (Pa. Super. 2008).

4. A challenged statement by a prosecutor must be evaluated in the context in which it was made. Commonwealth v. Hall, 701 A.2d 190, 198 (1997). Not every intemperate or improper remark mandates the granting of a new trial. Commonwealth v. Stoltzfus, 337 A.2d 873 (1975).

5. Reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict. Commonwealth v. Cox, 728 A.2d 923, 931 (1999).

6. A trial court's instructions to the jury that arguments of counsel do not amount to facts or evidence may be sufficient to address any risk that the jury misinterpreted the Commonwealth's argument in this regard. Comm v. Robinson, 864 A.2d 460, 519 (Pa. 2004).

Appearances:

Travis L. Kendall, Esquire, *District Attorney*

Philip M. Masorti, Esquire*, Counsel for Defendant*

OPINION

Van Horn, J., June 13, 2008

Statement of the Case

On August 13, 2006, the Defendant, Michael Harrison ("Defendant") was arrested and charged by Trooper Matthew Gordon ("Gordon") of the PA State Police Department with sexual assault and related charges. A jury trial was held October 22, 23 and 24, 2007. Upon the conclusion of the trial, Defendant was found guilty of Rape, Unlawful Restraint, Theft by Unlawful Taking, and Simple Assault. On March 4, 2008, Defendant was sentenced to serve not less than four (4) but not more than ten (10) years of incarceration at a state correctional facility.

On March 14, 2008, a Post-Sentence Motion was filed by Defendant alleging that the prosecutor had committed prosecutorial misconduct and requesting an arrest of judgment and new trial. By Order of Court dated March 24, 2008, the parties were directed to file Memoranda of Law regarding their respective positions no later than May 9, 2008. On May 27, 2008, the Court heard oral arguments on Defendant's Post-Sentence Motion. After hearing arguments and reviewing the memos submitted by the parties in support of their respective positions, the matter is ready for decision.

Discussion

The Defendant alleges that during closing arguments to the jury, District Attorney Dwight Harvey ("Harvey") made statements that were not based upon any factual evidence presented at trial, that some of the statements were made in direct contradiction to the actual evidence presented, and additional improper statements were made concerning both defense counsel's and Defendant's credibility. Defendant argues that these statements constituted prosecutorial misconduct in that they prejudiced the jury by forming in their minds a fixed bias and hostility towards the Defendant.

The law permits a prosecutor to vigorously argue his case so long as his comments are supported by evidence and contain inferences which are reasonably derived from that evidence. Commonwealth v. LaCava, 666 A.2d 221, 231 (Pa. 1995). The standard for granting a new trial because of the comments of a prosecutor is a high one for Defendant to meet. A prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury in such a way that they would be prevented from properly weighing the evidence and rendering a true verdict. Commonwealth v. Ogrod, 839 A.2d 294, 333 (Pa. 2003)(citing Commonwealth v. Jones, 683 A.2d 1181, 1199 (Pa.1996)). Additionally, the standard for evaluating prosecutorial misconduct is "harmless error." Commonwealth v. Holley, 945 A.2d 241 (Pa. Super. 2008). Harmless error exists when: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error so insignificant by comparison that the error could not have contributed to the verdict. Commonwealth v. Watson, 945 A.2d 174 (Pa. Super. 2008).

Defendant makes the following four challenges:

1. Statements relating to evidence found on the hood of Defendant's vehicle

The first statements to which the Defendant objects involved evidence that was found on the hood of Defendant's vehicle upon completion of a forensic analysis (specifically blood lifts) by the PA State Police. During his closing argument, Defense counsel argued that if a sexual assault, as opposed to a consensual act, had occurred on the hood of the Defendant's car, and the victim was supposedly struggling and fighting with the Defendant, then some sort of evidence (i.e. scratches, dents, blood, semen, hair, etc.) should have been detected during the forensic analysis. Defense counsel argued to the jury that the failure of the Commonwealth to present evidence regarding the forensic analysis of the hood of the car gives rise to the inference that no incriminating evidence was found and therefore, raises doubt in the Commonwealth's case.

In response to these statements of Defense counsel, Attorney Harvey argued that a possible reason the forensic analysis did not lead to the discovery of incriminating evidence could be that the Defendant wiped off the hood. The suggestion was argued as an inference for the jury to draw from the un-contradicted fact that the Defendant had thrown the victim's purse out of his car window — "If you're going to get rid of the purse, you're going to wipe off the hood of the car."[1] The Defendant submits that in addition to being an inference which was not reasonably derived from the evidence, since there were no facts presented into evidence that Defendant wiped off the hood, an allegation that he purposely destroyed evidence of a crime gives rise to an inference of guilt on the part of Defendant.

Generally, a prosecutor is permitted to vigorously argue his case so long as his comments are supported by evidence and contain inferences which are reasonably derived from that evidence. Comm. v. LaCava, 666 A.2d 221, 231 (Pa. 1995). Additionally, a prosecutor has reasonable latitude to respond to arguments of opposing counsel and fairly present the Commonwealth's version of the evidence to the jury. Comm v. Cooper, 941 A.2d 655 (Pa. 2007). The Commonwealth submits that it was simply responding to defense counsel's attempt to attack the victim's testimony that she was assaulted on the hood of the Defendant's car with its own version of what might have happened. The Commonwealth further argues that defense counsel "opened the door" to arguments regarding evidence, or lack thereof, on the hood of the Defendant's car and therefore, Attorney Harvey was justified in offering a response. Additionally, no testimony regarding evidence lifted from the hood during the forensic analysis was elicited by either the Commonwealth or the defense during the trial, and neither side had the lifts analyzed to see if they were of any relevance to the case. The Commonwealth submits that the lifts were of little relevance since the victim's statements and the Defendant's statements were consistent insofar as intercourse occurred on the hood of the car, and the Defendant struck the victim in the face while on the hood of the car.

After reviewing the transcript, the Court finds that Attorney Harvey did not state as a fact that the Defendant wiped off the hood of the car. His statement on this matter was a suggested inference for the jury to make based upon the fact in evidence that since the Defendant had gotten rid of the victim's purse, then it is possible that he might have also wiped off the hood of his car to eliminate any evidence that may be found there. Therefore, the Court finds that the Commonwealth was not arguing facts not in evidence. Rather, the District Attorney was suggesting that the jury could infer conduct on the part of the Defendant consistent with his admitted action of throwing out the victim's purse as a possible explanation for the lack of forensic evidence on the hood of the car. This explanation was in response to defense counsel's attempt to attack the victim's testimony that the assault occurred on the hood of the car by claiming a lack of supporting physical evidence.

As previously mentioned, a prosecutor has reasonable latitude during his closing argument to advocate his case by responding to arguments of opposing counsel and presenting the Commonwealth's version of the evidence to the jury. Cooper, 941 A.2d 655 (Pa. 2007). Additionally, when considering the harmless error standard, even if Attorney Harvey's inferences would be considered an error, such an error would be *de minimis* as the factual dispute was not whether intercourse occurred on the hood of the car, but rather whether the intercourse was consensual.

Finally, the Court believes that its instructions to the jury that arguments of counsel do not amount to facts or evidence was sufficient to address any risk that the jury misinterpreted the Commonwealth's argument in this regard. Comm v. Robinson, 864 A.2d 460, 519 (Pa. 2004).

2. Statements relating to the number of times Defendant struck the victim

In his second allegation of prosecutorial misconduct, the Defendant submits that Attorney Harvey again argued facts that were not presented in evidence when he advised the jury that Defendant had struck the victim on three (3) occasions. The specific reference came in the form of a rhetorical question by Attorney Harvey to the jury: "One, two three, was there any justification for hitting her three times?"[2]

In response, the Commonwealth argues that, taken in context with the rest of the statements, Attorney Harvey was asking the jury to infer that the victim was struck at least three times by pointing out the three documented injuries on three different areas of her head and face: 1) a cut on the bridge of her nose; 2) a black eye; and 3) a lump on her head which developed a hematoma.[3] The Commonwealth also points out that immediately following these comments, Attorney Harvey reminded the jury that the victim stated that she did not know how many times she was hit, but that it was more than once. The Defendant suggests that by this last statement, Attorney Harvey implicitly admitted that he was arguing facts which were not in evidence and therefore, committed prosecutorial misconduct, relying on LaCava, 666 A.2d at 231.

The Defendant seems to rely on LaCava for the principle that if and when a prosecutor infers facts not presented in evidence, he has automatically committed prosecutorial misconduct, which is per se prejudicial and harmful to the Defendant. This generalization is inaccurate, as the standard is much more stringent than what Defendant seems to suggest. "Consideration of claims of prosecutorial misconduct is centered on whether the defendant was deprived of a fair trial, not deprived of a perfect trial." LaCava, 666 A.2d at 231 (citing Commonwealth v. Holloway, 572 A.2d 687, 693 (1990)). Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. Id. Additionally, consideration is to be given to all of the

circumstances surrounding the prosecution's question(s), as well as the probability that possible prosecutorial misconduct may be cured by the cautionary instruction given to the jury by the trial court. LaCava, 666 A.2d at 232 (citing generally, Commonwealth v. Richardson, 437 A.2d 1162, 1165 (1981)).

Taken in context, the Court finds it clear that Attorney Harvey was permissibly asking the jury to infer the number of times the Defendant struck the victim based on the documented number of injuries and the locations in which she was injured: a cut on the bridge of her nose, bruises on her eyes, and a lump on her head. And although this was a reasonable inference to ask the jury to draw, Attorney Harvey also immediately pointed out that the victim said she did not know how many times she was hit, but that it was more than once. Additionally, this Court's instruction to the jury that counsels' arguments do not amount to facts or evidence, and that it is the jury's obligation to find the existence of pertinent facts and make whatever inferences they deemed appropriate from the evidence was sufficient to address any risk of misinterpretation. It is only where prosecutorial remarks are of a nature that would seriously threaten the jury's objectivity, and are likely to deprive the Defendant of a fair trial, that curative instructions are inadequate and trial before another jury is required. Commonwealth v. Brown, 414 A.2d 70 (1980). Attorney Harvey's remarks to the jury did not rise this level of prejudice.

3. Statements relating to credibility of Defendant and Defense Attorney

The Defendant alleges that Attorney Harvey made statements to the jury regarding his personal opinion of the credibility of the Defendant and the defense attorney. He references three statements made by Attorney Harvey: 1) the Defendant intended to "get out of it." meaning consequences for the alleged sexual assault, "[b]y lying"[4]; 2) advised the jury that "you know he lies"[5]; and 3) stated that "that defense attorney misled you about this evidence."[6] The Defendant states that the expression of a personal opinion regarding the credibility of a Defendant or defense counsel constitutes prosecutorial misconduct for which a reversal of a conviction is in order. Commonwealth v. Cherry, 378 A.2d 800, 803 (Pa. 1977). Further, the Defendant alleges that Attorney Harvey's statements injected his highly prejudicial personal opinion of Defendant's credibility into evidence, intruding on the jury's duty to evaluate credibility of witnesses for themselves. Commonwealth v. Kuebler, 399 A.2d 116, 118 (Pa. 1979).

The Commonwealth submits that Attorney Harvey's statements to the jury about Defendant's credibility were not matters of personal opinion but rather statements of the evidence in the case and a permissible inference from that evidence. Taken as a whole, the argument was not an opinion but rather was a proper argument. Attorney Harvey was highlighting inconsistencies in the Defendant's statements for the jury, pointing out that the Defendant at first denied to investigators that he had even returned to the bar a second time on the evening in question, but later acknowledged that he did, in fact, return to the bar.

The two cases cited by the Defendant both highlight Section 5.8 of the ABA Standards regarding arguments to the jury. Subsection (b) states that it is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. In Cherry, the prosecutor asked the jurors to imagine themselves as victims, which improperly invoked the sympathy of the jurors and suggested that the jury should render a verdict based on sympathy for the witness rather than the guilt or innocence of the accused. This appeal to the emotions encouraged the jurors to shift their inquiry away from the case before them, and thus prejudiced the appellant in that case. 378 A.2d 300 at 308. In Kuebler, it was held that the prosecuting attorney sought to intrude upon the jury's exclusive province of judging credibility by branding "everything that (appellant) said from that stand, and in every major respect concerning this case" a "big lie." This was found to be misconduct in violation of the ABA Standards, as the statements attacked the credibility of "everything" appellant stated on the witness stand, and unequivocally communicated the prosecuting attorney's personal view of appellant's testimony. 399 A.2d 116 at 119.

The present case is certainly not as extreme as either of the two cases on which the Defendant relies, as Attorney Harvey was pointing out inconsistencies in the Defendant's prior statements to law enforcement, statements that were also testified to by the investigating officer, Trooper Gordon. It is certainly permissible to attack the credibility of a witness by pointing out inconsistencies, a tactic that the defense attorney in this case relied upon heavily. The Court finds that it was a permissible and proper argument to request the jury to infer that if the Defendant would lie to the police about even returning to the bar a second time on the night in question, that he may also lie at trial to avoid the consequences of his actions.

With respect to the statement that "the defense attorney misled you about this evidence," the Commonwealth submits that it was an innocuous statement when taken in context, and at no time did Attorney Harvey claim that the defense counsel misled the jury generally, nor did he state that defense counsel intentionally misled the jury. The thrust of the argument was that the defense claimed that the victim

made a prior statement that she did not know whether she and the Defendant had engaged in oral sex on the night in question. Attorney Harvey pointed out that the medical questionnaire upon which the defense relied for this argument used the proper medical terms for oral sex as "fellatio" and "cunnilingus" and submitted to the jury that the victim's unsure response was more likely a result of her unfamiliarity with those medical terms.[7]

When evaluating whether a prosecutor's comments are improper, a court does not look at the comments in a vacuum, but rather must look at them in the context in which they were made. Commonwealth v. Weiss, 776 A.2d 958 (2001). The Court finds that the statement the Defendant is referring to in his claim was a minor and harmless reference when taken in context. Attorney Harvey was merely responding to an argument of opposing counsel and offering another possible explanation for the victim's response to the medical questionnaire.

4. Statements relating to Defendant's claim to police that he did not ejaculate

The Defendant's final complaint references statements made by Attorney Harvey to the jury regarding Defendant's responses during interviews with law enforcement. More specifically, Attorney Harvey informed the jury that Defendant had told law enforcement that he did not ejaculate during the sexual encounter with the victim.[8] Attorney Harvey then advised the jury that evidence existed that Defendant "did ejaculate completely contrary to what he told the police."[9] Semen was found in the vagina of the victim, but did not contain DNA material that matched the Defendant. This fact came into evidence through stipulated testimony by Tami Kloes of the PA State Police crime lab. Attorney Harvey reasoned that Defendant told law enforcement that he did not ejaculate because "he knows at that point he is not going to give any DNA for proof" due to the fact that Defendant had undergone a vasectomy.[10] The Defendant argues that Attorney Harvey incorrectly believed that semen must stem from an ejaculation and therefore, suggested to the jury that the Defendant lied when he said he did not ejaculate, thereby prejudicing the jury against him.

During the closings, a lengthy discussion was held at sidebar where the defense attorney advised Attorney Harvey that the semen could have stemmed from pre-ejaculation sperm discharge[11] and therefore, the Defendant was not lying when he told law enforcement that he did not ejaculate. For that reason, the Defendant is arguing that Attorney Harvey's statements were again not supported by the evidence and constituted prosecutorial misconduct.

Throughout the trial, there was no testimony, expert or otherwise, regarding the possibility that the semen found in the victim's vagina could have come from pre-ejaculatory material without ejaculation. Even if such evidence had been solicited, it would not have been improper for Attorney Harvey to ask the jury to infer that the Defendant did in fact ejaculate based on the presence of semen. Additionally, even if Attorney Harvey's argument that the semen found in the victim's vagina came from an ejaculation was an error, the Court offers that the error is harmless as other properly admitted and un-contradicted evidence of guilt was so overwhelming and the prejudicial effect of this possible error so insignificant by comparison that it could not have contributed to the verdict, as ejaculation is not a requirement or an element for the finding of rape. Therefore, the issue of semen versus pre-ejaculatory material is *de minimis* in this case and Attorney Harvey's remarks to the jury were permissible.

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Conclusion

A challenged statement by a prosecutor must be evaluated in the context in which it was made. Commonwealth v. Hall, 701 A.2d 190, 198 (1997). Not every intemperate or improper remark mandates the granting of a new trial. Commonwealth v. Stoltzfus, 337 A.2d 873 (1975). Reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict. Commonwealth v. Cox, 728 A.2d 923, 931 (1999).

The Defendant suggests that while the aforementioned statements by Attorney Harvey may not in isolation be enough to have the unavoidable effect of prejudicing the jury, in their totality they effectively form a fixed bias and hostility in the minds of the jurors against the Defendant, thereby preventing them from properly weighing the evidence and rendering a true verdict. The Court does not agree with these assertions.

The matters complained of were not objectionable statements of personal opinion, but were factual statements of the evidence in the record, as well as reasonable inferences that could be drawn from that

evidence. A prosecutor has reasonable latitude to respond to arguments of opposing counsel and fairly present the Commonwealth's version of the evidence to the jury, and such arguments will not result in the granting of a new trial unless they cause the jury to be so greatly prejudiced that they would be prevented from properly weighing the evidence and rendering a true verdict. Any chance of prosecutorial misconduct, evaluated by the "harmless error" standard, has either been deemed to be *de minimis,* or outweighed by the properly admitted and un-contradicted evidence of overwhelming guilt that it could not have contributed to the verdict.

Finally, consideration is to be given to all of the circumstances surrounding the prosecution's comments, as well as the probability that any possible prosecutorial misconduct may be cured by the cautionary instruction given to the jury by the trial court.

Attorney Harvey's repeated reminders to the jury that it was their obligation to find the facts and make appropriate inferences as well as this Court's instructions to the jury that arguments of counsel do not amount to facts or evidence was sufficient to cure for any improper prejudice that may have resulted from the prosecutor's comments. Comm v. Robinson, 864 A.2d 460, 519 (Pa. 2004).

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ORDER OF COURT

And now, this 13th day of June 2008**,** the Court having reviewed the Defendant's Motion for Arrest of Judgment and/or New Trial*,* memos submitted by counsel and oral argument on the same, and having reviewed the applicable law, it is hereby ordered that the Motion for Arrest of Judgment and/or New Trial is denied.

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[1] See Transcript of Proceedings of Closing Arguments, October 24, 2007 at 59:8-13

[2] See Transcript of Proceedings of Closing Arguments, October 24, 2007 at 27:7-9

[3] Id. at 27: 2-11

[4] See Transcript of Proceedings of Closing Arguments, October 24, 2007 at 31: 7-8

[5] Id. at 48: 12

[6] Id. at 41: 9-10

[7] See Transcript of Proceedings of Closing Arguments, October 24, 2007 at 41: 2-22

[8] See Transcript of Proceedings of Closing Arguments, October 24, 2007 at 52: 4-5

[9] Id. at 52: 10-11

[10] Id. at 52: 4-11

[11] Id. at 54: 3-5