[J-133-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 26 EAP 2006
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court at No. 1568 EDA 2004 dated August
	:	18, 2005 which affirmed the Order of the
v.	:	Court of Common Pleas of Philadelphia
	:	County at No. 0207-0479 1/1 dated April
	:	29, 2004
MAURICE PARKER,	:	
	:	882 A.2d 488
Appellee	:	
	:	SUBMITTED: September 1, 2006
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	No. 27 EAP 2006
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 1568 EDA 2004 dated August
	:	18, 2005 which affirmed the Order of the
v.	:	Court of Common Pleas of Philadelphia
	:	County at No. 0207-0479 1/1 dated April
	:	29, 2004
MAURICE PARKER,	:	
	:	882 A.2d 488
Appellant	:	
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	:	

MAJORITY OPINION

MADAME JUSTICE BALDWIN **DECIDED: April 18, 2007**

In this case, one of first impression for this Court, we review whether it is proper for a prosecutor to display a potentially inflammatory tangible piece of evidence to the jury during

his opening statement. The Superior Court held that allowing the prosecutor to show the jury a handgun during his opening statement was an abuse of the trial court's discretion. Commonwealth v. Parker, 882 A.2d 488, 490 (Pa. Super. Ct. 2005). Nonetheless, the Superior Court went on to find that the error was harmless. Id. at 494. Both parties sought allowance of appeal from the respective adverse rulings.[1] We consolidated the cases and granted allocatur. For the following reasons, we now affirm the Superior Court's decision to affirm the judgment of sentence, albeit on different grounds.

During the late hours of April 2, 2002, Ms. Sheila Crump accepted a ride from her brother, Dwayne Crump, and his friend, James Washington, to a local store. Upon arrival at the store, Ms. Crump and her brother exited the vehicle and approached the entrance to the store. Maurice Parker, Defendant below, was exiting the store at the same time the Crumps were approaching. According to Ms. Crump, Parker and her brother gave each other an "odd look." Id. at 490. Ms. Crump remained outside of the store while her brother went inside.

Meanwhile, Parker approached James Washington and inquired into whether Dwayne Crump had "a problem" with him while lifting his shirt to reveal a handgun. Id. An argument arose between the two men that prompted Ms. Crump to enter the store and inform her brother of the developments. Dwayne Crump exited the store and told Parker that everything was "cool." Id. However, the argument continued until Parker removed the gun from under his shirt. Ms. Crump and her brother attempted to gain entry into the vehicle in which they had arrived through the passenger-side doors. Their attempt was thwarted when Parker began firing at the car from the driver's side, hitting Mr. Washington. Mr. Washington drove the vehicle from the lot and continued to the local hospital.

[1] The Commonwealth appealed from the Superior Court's holding that it was error for the trial court to allow the prosecution to display the gun during its opening statement. Parker appealed from the Superior Court's holding that the error was harmless.

According to Ms. Crump, Parker continued to fire the gun at the vehicle as it left the store until the gun ran out of bullets. Mr. Washington was treated at the hospital for multiple gunshot wounds.

Three days after the shooting, Ms. Crump was at the rental office of her apartment complex. She noticed that Parker was walking into the building located next to the rental office. She contacted the Housing Authority Police and informed them that she had located the shooter. Officers Stacey Alston and Rosalind Mason set up surveillance of the premises. A short time later, the officers saw Parker and his mother leaving the complex. They stopped him and determined that he was sixteen years old. The officers asked his mother if they could conduct further questioning about the incident in the community center of the complex.

For safety purposes and because of Parker's nervous and fidgety behavior, Parker was handcuffed during the questioning. Parker asked to use the restroom. His request was granted on the condition that his mother accompany him. Officer Alston remained immediately outside the restroom door. While she waited for Parker, she heard a "loud crash" in the toilet and Parker's mother say, "What are you doing with that?" Id. at 491. The officers immediately entered the restroom, retrieved a loaded .38 millimeter revolver from the toilet, and arrested Parker. Parker was charged with attempted murder,[2] aggravated assault,[3] violations of the Uniform Firearms Act,[4] and possessing an instrument of a crime.[5] The case was set for trial on February 17, 2004.

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[2] 18 Pa.C.S. § 901.

[3] 18 Pa.C.S. § 2702.

[4] 18 Pa.C.S. § 6106.

[5] 18 Pa.C.S. § 907.

Prior to trial, the prosecutor notified the trial court that he intended to show the gun recovered from the toilet to the jury during his opening statement. Defense counsel objected. Defense counsel argued that since the gun would be admitted later at trial, displaying the gun during opening statements would be unnecessary and prejudicial. The trial court found no Pennsylvania authority precluding a prosecutor from displaying a gun during the opening statement. Accordingly, the trial court denied the objection. The trial court did, however, instruct the jury that opening statements by the attorneys are not evidence, and are merely a mechanism by which jurors would learn the nature of the case, and what the attorneys intend to prove.

The Prosecutor displayed the revolver while making the following opening statement:

> While [Parker] was in the rest room one of the officers arranges so that she can look from an angle to make sure that nothing was happening. He was fidgety. The officer will testify that as she sees him fidget she hears a clunk, a thud sound. She pulls open the door and sitting inside the toilet is this particular weapon. And for the record, I have made it safe so there is nothing at this point to be concerned about. She seizes that weapon and takes him to the Central Detective Division.

N.T. 2/18/04, at 68-69. Following two days of testimony, the jury convicted Parker of the aforementioned crimes. The trial court sentenced Parker to seven and one-half to fifteen years of incarceration.

Parker appealed to the Superior Court. The court considered the sole issue of "whether the trial court abused its discretion in permitting, over a defense objection, the prosecutor to display a handgun in his opening statement." Parker, 882 A.2d at 490. Ultimately, that court held that the trial court abused its discretion by permitting the prosecutor to display the gun. However, as explained above, the Superior Court subsequently concluded that the error was harmless. Id. at 494-95.

Noting that this was an issue of first impression, the Superior Court resorted to the standard of review applicable to challenges to the admissibility of evidence in order to address the appeal. Under that standard, an appellate court may reverse a trial court only upon an abuse of discretion. Id. at 492 (citing Commonwealth v. Lilliock, 740 A.2d 237, 243 (Pa. Super. Ct. 1999)). The Superior Court acknowledged that trial courts have broad discretion as to the admissibility of potentially misleading or confusing evidence. Further, a trial court may exclude relevant evidence where its probative value is outweighed by the danger of unfair prejudice or confusion. Id. (citations omitted).

Grafting the admissibility standard onto the unique question presented, the Superior Court determined that, "the definition of what constitutes admissible evidence must be viewed in conjunction with the purpose of opening statements in order to understand why allowing the prosecution to use the handgun in its opening statement constitutes an abuse of discretion." Id. at 492-93. The court noted that the purpose of an opening statement is to inform the jury of the background of the case, how it will proceed, and what each side will attempt to prove. Acknowledging that opening statements are not evidence, the court reasoned that opening statements "can often times be the most critical stages of the trial" where "the jury forms its first and often lasting impression of the case." Id. at 493 (citing Commonwealth v. Montgomery, 533 Pa. 491, 498, 626 A.2d 109, 113 (1993)).

Commenting on the impact of opening statements on juries, the Superior Court found that it is of "paramount importance that the 'playing field' be level during the opening statement and that displays which may tend to prejudice the jury should be prohibited." Id. at 493. The panel acknowledged that, to date, no Pennsylvania court has prohibited a prosecutor from displaying a gun during opening statements. Nevertheless, the Superior Court concluded that the "use of the handgun by the prosecution in its opening statement served no purpose but to possibly influence the jury and predispose the jury to finding the accused guilty of the crimes charged." Id. Moreover, the Superior Court held that showing

the gun to the jury "could not honestly be said to serve any legitimate purpose except to inflame the jury, and therefore, the decision by the trial judge to permit such a display was unreasonable." Id.

In support of its decision, the Superior Court relied on commentary from the case law of our sister States, which disapproved of displaying tangible pieces of evidence during opening statements. Id. at 493-94 (citing Guerro v. Smith, 864 S.W.2d 797, 799-800 (Tex. App. 1993) (in a medical malpractice case, it was improper for the plaintiff's attorney to display a photograph of the plaintiff's injuries to the jury during opening statement); Wimberli v. State, 536 P.2d 945, 951 (Okla. Crim. App. 1975) (criticized prosecutor's display of a knife during opening statement, but held that no prejudice resulted from the display); and People v. Williams, 90 A.D.2d 193, 196 (N.Y.App.Div. 1982) (reversible error where prosecutor pulled a sawed-off shotgun from under his clothing during opening statement)). However, in two footnotes, the court cited cases that are inapposite to its decision. Parker, 882 A.2d at 494 n.4 (citing Sherley v. Commonwealth, 889 S.W.2d 794, 799 (Ky. 1994) (permitting a prosecutor to display a photograph of the victim recovering in a hospital bed because the photograph was admissible to show how the injuries were sustained); and People v. Green, 47 Cal. 2d 209, 214-15, 302 P.2d 307, 311-12 (1956) (allowing the use of photographs of the murder victim and the defendant in prison garb during opening statements because the display might aid the purpose of opening statements)).[6]

In light of the decisions by other states, the Superior Court held that the trial court erred in permitting the prosecutor to display the gun during his opening statement. In doing so, the court stated, "the sight of the gun may possibly have created uneasiness, if not

[6] The Superior Court did not attempt to distinguish the contrary decisions nor explain why it found them less persuasive than the cases cited in the body of its opinion.

outright repulsion, among the jurors." Parker, 882 A.2d at 494. Nonetheless, given the overwhelming amount of evidence of Parker's guilt, the court held that the error was harmless. Id. at 494-95.

Judge Olszewski concurred in the result but disagreed with the analysis the majority employed to reach that result. He found no practical difference between a prosecutor describing the gun in great detail, which is permitted, and actually displaying the gun to the jury. Neither method constitutes evidence, but rather, both are descriptions of the evidence that will be presented at trial. Because in this case the jury would see the evidence later, and there was no dispute over its admissibility, the prosecutor's display of the weapon during his opening statement was merely "oratorical flair." Judge Olszewski, thus, concluded that the display of the actual gun cannot be said to have prejudiced Parker in any way. Id. at 495-96.

As noted, the Commonwealth sought allowance of appeal from that portion of the Superior Court's opinion which held that the brief display of the gun to the jury during the prosecution's opening was an abuse of discretion. Alternatively, Parker sought allowance of appeal from that portion of the Superior Court's decision which held that the trial court error was harmless. We granted allocatur to consider whether it is proper for a prosecutor to display a tangible piece of evidence, in this instance a handgun, to the jury during opening statements. Further, we note that an appellate court has the ability to affirm a valid judgment or verdict for any reason appearing as of record. See generally Commonwealth v. Katze, 540 Pa. 416, 425, 658 A.2d 345, 349 (1995) (opinion divided on other grounds); McAdoo Borough v. Commonwealth, Pa. Labor Relations Bd., 506 Pa. 422, 428 n.5, 485 A.2d 761, 764 n.5 (1984); E.J. McAleer & Co., Inc. v. Iceland Prods., Inc., 475 Pa. 610, 613 n.4, 381 A.2d 441, 443 n.4 (1977); Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 145-46, 189 A.2d 271, 274-75 (1963); Sherwood v. Elgart, 383 Pa. 110, 115, 117 A.2d 899, 901-02 (1955).

The Commonwealth rejects the Superior Court's holding that the trial court abused its discretion. The Commonwealth also takes issue with the Superior Court's use of the decisions of other jurisdictions because it finds Pennsylvania case law that should have controlled the outcome of the matter sub judice. Moreover, even if the use of the law of other jurisdictions was appropriate, the Commonwealth contends that the Superior Court misinterpreted and misapplied those cases.

According to the Commonwealth, Pennsylvania law does not reflect the Superior Court's "repulsion" towards guns. See Commonwealth v. McAndrews, 494 Pa. 157, 430 A.2d 1165 (1981) (trial court did not abuse its discretion by allowing the prosecutor to use a gun as part of a demonstration even though the actual murder weapon had been suppressed); and Commonwealth v. Harris, 492 Pa. 389, 424 A.2d 1245 (1981) (trial court did not abuse is discretion in allowing the jury to briefly view a gun similar to the gun used in the crime alleged). The mere sight of a gun is hardly uncommon, and not inflammatory. More importantly, the display of a gun during opening statements is not prohibited by any Pennsylvania statute, rule of court, or decision, provided that the gun is relevant and admissible. Here, there was no question as to the admissibility of the gun and the trial court granted the prosecutor permission to display the gun prior to trial. The Commonwealth posits that as long as criminals continue to use guns in a criminal fashion, prosecutors should be permitted, with leave of court, to show such evidence to the jury in the Commonwealth's opening statement.

Parker, on the other hand, argues that the Superior Court was correct in finding that the display of the gun could not honestly be said to serve any legitimate purpose other than to inflame the passions of the jury. He offers four distinct points to support his argument: First, Parker asserts that because the weapon had not been recognized as evidence, regardless of whether it would be subsequently admitted, its existence is, at best, theoretical. Parker's Brief at 14. Second, since "opening statements are not considered

evidence and jurors are routinely cautioned to regard those statements as non-evidence, it logically follows that actual evidence, that will be entered during trial, should not be used prematurely." Id. (emphasis omitted). Third, Parker contends that using potentially inflammatory evidence in an opening statement, "gives the State an unfair advantage where jurors are more likely to consider the prosecutor, an agent of the state, to be more credible than the defense attorney who is less likely to be the party using the inflammatory prop in his opening statement." Id. Finally, according to Parker, without a clear statement of the limits of using inflammatory props from this Court, "the instant decision of the Superior Court opens the door to offensive displays whose potential prejudice to the accused will be trivialized by the appellate contention that the [error was harmless because the] 'evidence of guilt was overwhelming'" Id.

We begin with the standard of review. Because "[i]t is axiomatic that a trial judge has broad powers concerning the conduct of a trial . . . ", we review the trial court's decision to allow the prosecutor to display a gun during opening statements for an abuse of discretion. Commonwealth v. Niemetz, 422 A.2d 1369, 1376 (Pa. Super. Ct. 1980).[7] "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous."

[7] Indeed, a trial court's broad discretion over the conduct of a trial encompasses a variety of circumstances. See Commonwealth v. Gibson, 547 Pa. 71, 88, 688 A.2d 1152, 1160 (1997) (scope of cross-examination within sound discretion of the trial court); Commonwealth v. Sallade, 374 Pa. 429, 434, 97 A.2d 528, 530 (1953) (decision of whether a jury should be allowed to see the crime scene lies within the discretion of the trial court); Commonwealth v. Ford, 451 Pa. 81, 85, 301 A.2d 856, 858 (1973) (admission of demonstrative evidence, such as the alleged murder weapon, is within the discretion of the trial court); and Commonwealth v. Rucci, 543 Pa. 261, 283, 670 A.2d 1129, 1140 (1996) (whether to grant request for change of venue or venire is within the discretion of the trial court).

Commonwealth v. Dengler, 586 Pa. 54, ___, 890 A.2d 372, 379 (2005) (citing Grady v. Frito-Lay, Inc., 576 Pa. 546, 560, 839 A.2d 1038, 1046 (2003)).

To determine whether the trial court abused its discretion, we begin with a brief examination of opening statements. "The purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved; but it is not evidence." Commonwealth v. Montgomery, 533 Pa. 491, 498, 626 A.2d 109, 113 (1993) (citing Commonwealth v. Nelson, 311 Pa. Super. 1, 456 A.2d 1383 (1983)). In Montgomery, we acknowledged that "as a practical matter the opening statement can often times be the most critical stage of the trial, because here the jury forms its first and often lasting impression of the case." Montgomery, 533 Pa. at 498, 626 A.2d at 113. The prosecution, as well as the defense, is afforded reasonable latitude in presenting opening arguments to the jury. Commonwealth v. Jones, 530 Pa. 591, 607, 610 A.2d 931, 938 (1992). Such latitude is not without limits.

"A prosecutor's statements must be based on evidence that he plans to introduce at trial, and must not include mere assertions designed to inflame the jury's emotions." Commonwealth v. Begley, 566 Pa. 239, 274, 780 A.2d 605, 626 (2001) (citing Jones, supra). A prosecutor's opening statements may refer to facts that he reasonably believes will be established at trial. Id.

As the Superior Court correctly noted, no statute, rule of procedure, or case law in Pennsylvania specifically precludes a prosecutor from displaying a tangible piece of evidence to the jury during an opening statement as long as that evidence will eventually be admitted without objection. Parker, 882 A.2d at 493. Although Parker urges this Court to create a rule barring tangible pieces of evidence from being displayed during an opening statement, we see no reason to craft such a rule. Indeed, where the tangible piece of evidence falls within the scope of material the prosecutor intends to introduce at trial and its display during the opening argument does not inflame the passions of the jury, the display

of that piece of evidence is wholly proper.[8] Accordingly, we cannot agree with the Superior Court that the trial court abused its discretion by allowing the prosecutor to display to the jury a tangible piece of evidence where the decision was in contravention to no Pennsylvania rule of law, where the evidence was within the scope of the evidence the prosecutor intended to introduce at trial, and where there was no question as to its admissibility.

We also cannot agree with the Superior Court that "the use of the handgun by the prosecution . . . served no purpose but to possibly influence the jury and predispose the jury to finding the accused guilty of the crime charged." Parker, 882 A.2d at 493. The court continued, "the display of the gun could not honestly be said to serve any legitimate purpose except to inflame the jury . . . ." Id. The findings of the Superior Court, however, ignore the purpose of opening statements. Again, that purpose is to apprise the jury of the facts and evidence that the prosecutor intends to prove. See Montgomery supra. Undoubtedly, it is legitimate during opening statements for a prosecutor, or defense counsel for that matter, to verbally describe, in detail, the evidence he intends to prove, including tangible pieces of evidence. We fail to see the distinction between verbally describing that evidence and physically picking up the evidence and displaying it to the jury as the attorney describes what he intends to prove with regard to that particular piece of evidence. The Superior Court's assertion that showing the gun to the jury in the instant case served no legitimate purpose is misguided.

There is also nothing in the record to support the Superior Court's assertion that the display of the handgun during opening statements "created uneasiness, if not outright repulsion, among the jurors." Parker, 882 A.2d at 494. That assertion is belied by the fact

[8] Of course, the scope of the material is limited to evidence that the prosecutor believes, in good faith, will be available and admissible. Commonwealth v. Fairbanks, 453 Pa. 90, 95, 306 A.2d 866, 868 (1973).

that the gun was admissible evidence that would later be admitted into evidence and published to the jury during the prosecution's case-in-chief. It cannot be said that merely viewing a gun can create such "repulsion" during opening statements, but be perfectly tolerable when introduced during trial.

In sum, the trial court's decision to allow the prosecutor to display a gun during opening statements was well within its discretion.[9] We cannot find that the exercise of such discretion was the "result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous." Dengler, supra. Accordingly, because the Superior Court ultimately upheld the judgment of sentence, we affirm the decision, albeit on different grounds.[10] Because we find no error in the trial court's decision, we need not review the Superior Court's application of the harmless error standard.

Mr. Justice Fitzgerald did not participate in the consideration or decision of this case.

Mr. Chief Justice Cappy and Messrs. Justice Saylor, Eakin and Baer join the opinion.

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[9] To be clear, however, permission from the trial court to display a piece of tangible evidence during a prosecutor's opening statement will not serve as a license to display tangible evidence in any way that prosecutor sees fit. While nothing prohibits a prosecutor from displaying admissible evidence, the manner by which the prosecutor conducts the display may itself constitute prosecutorial misconduct or result in a mistrial. For instance, where the display goes beyond permissible oratorical flair, is done in a flamboyant, erratic, or frightening manner, or where the prosecutor effectively converts himself into an unsworn witness, such actions may well result in a mistrial. By way of example, see People v. Williams, 90 A.D.2d 193, 196, 456 N.Y.S.2d 1008, 1010 (N.Y. App. Div. 1983). In Williams, the concealability of a gun was at issue. To demonstrate that it was possible to hide the gun, the prosecutor hid the sawed-off shotgun under his clothing and pulled it out during his opening statement. The Supreme Court of New York, Appellate Division found this reversible error, holding that the demonstration converted the prosecutor into an unsworn witness. That court concluded that the prosecutor's actions created a substantial likelihood that prejudice resulted that could never be dispelled from the minds of the jury. Id.

[10] As noted, an appellate court may affirm a valid verdict or judgment for any reason appearing as of record.

Mr. Justice Castille files a concurring opinion in which Mr. Chief Justice Cappy joins.