IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

_____

No. 31575

_____

FILED
June 17, 2004
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Plaintiff Below, Appellee

v.

HOUSEIN B. KEATON,
Defendant Below, Appellant

Appeal from the Circuit Court of Kanawha County
Hon. Paul Zakaib, Jr.
Case No. 02-F-109

REVERSED AND REMANDED

Submitted: March 31, 2004
Filed: June 17, 2004

Darrell V. McGraw, Jr.
Attorney General
Robert D. Goldberg
Assistant Attorney General
Charleston, West Virginia
Attorneys for Appellee

Jay Craig
Public Defender Corporation
Charleston, West Virginia
Attorney for Appellant

JUSTICE STARCHER delivered the Opinion of the Court.

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

SYLLABUS BY THE COURT

1. "The plain error doctrine . . . enables this Court to take notice of error . . . even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syllabus Point 4, in part, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

2. "The trial judge in a criminal trial must consistently be aware that he [sic] occupies a unique position in the minds of the jurors and is capable, because of his [sic] position, of unduly influencing jurors in the discharge of their duty . . .." Syllabus Point 4, in part, *State v. Wotring*, 167 W.Va. 104, 279 S.E.2d 182 (1981):

3. The best practices to be followed when a trial judge addresses or converses with a juror or the jury in a criminal proceeding are as follows, unless special circumstances – that should be fully spread upon the record – dictate otherwise: (1) the judge should address or converse with jurors on the record and in the presence of the defendant and his or her counsel unless the defendant personally and affirmatively waives the right to be present; (2) when a trial judge addresses or converses with one or more jurors and the defendant and his or her counsel are not present, the defendant and his or her counsel should be furnished with a prompt oral summary by the trial court and a subsequent transcript of the address or conversation; (3) after the substance or transcript of the address or conversation are made known to the defendant and his or her counsel, any alleged error in or problem with

the address or conversation should be promptly presented to the trial court in an appropriate motion – although failure to do so does not *per se* preclude raising any alleged error or problem in the address or conversation on appeal.

Starcher, J.:

In April of 2003 the appellant, Housein B. Keaton, was convicted of malicious wounding in the Circuit Court of Kanawha County. He appeals his conviction, asserting that a comment made by the trial judge when speaking with a juror, just before the jury began its deliberations, created such a possibility of unfair prejudice against the appellant by one or more jurors that the appellant's conviction may not stand. We reverse the appellant's conviction and remand the case for a new trial.

I.
Facts & Background

The appellant's trial began on a Monday. The trial judge, with the consent of the appellant and the prosecution, did not seat an alternate juror. At *voir dire*, one juror told the judge that the juror had a previously scheduled medical appointment for a surgical tooth extraction on the coming Wednesday at 12:00 noon.

The judge told the juror that the appellant's trial "should be through before then" and it appears that all parties agreed with this assessment. However, on Wednesday morning, it became clear that the presentation of evidence would not conclude until mid-morning, meaning that the jury instructions and closing arguments would go on beyond noon.

Anticipating such a possible problem, the appellant's counsel had told the trial judge on Tuesday that he, appellant's counsel, would probably agree to the case going to a

jury of eleven jurors. On Wednesday morning, however, the appellant, after having been advised by the judge outside of the presence of the jury of his constitutional right to a twelve-person jury, told the judge that he wanted to exercise that right. This decision by the appellant left the trial court with two options. One option was to excuse the jury after the evidence was completed, and have the jury return on Friday – after the juror had sufficiently recovered from the surgery – for instructions, closing arguments, and to begin deliberating. The other option was to see whether the juror could reschedule the surgery.

At this juncture, the judge had a colloquy with the appellant and his counsel. Then the judge had a conversation with the juror at which neither the appellant or his counsel were present. The conversation with the juror took place, according to the transcript, "in the jury room." It is in this conversation with the juror that the judge made the remarks that the appellant assigns as error.[1] The entire exchange between the judge, the appellant's counsel, the appellant, and the juror went as follows:

> THE COURT: Okay. Mr. Keaton, you understand you're entitled to a trial of twelve impartial jurors, and a verdict

[1]The record is silent as to whether this was a private conversation, or whether it took place in the presence of any other jurors. This Court was advised at oral argument that not even the court reporter recalls one way or another. The appellant plausibly argues that the other jurors were in the jury room and likely overheard the conversation – because immediately before the conversation, the record shows that the jurors were not in the main courtroom where the judge was discussing the matter with counsel. Whether the conversation was private or not, the juror with whom the judge had the conversation might have told one or more other jurors of the substance of the conversation. Given the state of the record, we will assume *arguendo* that there is a reasonable chance that one or more other jurors either heard or learned the substance of the judge's conversation with the juror who had the medical appointment.

of guilt must be unanimous. And you have to have twelve people finding you guilty before you can be found guilty. And the proof, the degree of proof is, of course, beyond a reasonable doubt. You have the constitutional right to demand that. In the event, as we only have eleven jurors, you may waive that constitutional right and agree to have eleven jurors deliberate and arrive at a verdict. But the Court can't force you to do that. And your lawyer can't force you, and the State can't force you. That is in your hands.

And I would ask you, have you discussed this with your lawyer?

THE DEFENDANT: Yes.

THE COURT: And what, what can we do, if, for example, you do not agree, what we will do is continue the trial of this case for a day or two or three so that we can have the entire jury here, so they can hear the arguments.

MR. DICKINSON: That's what he'd rather do. Your Honor. That's what he rather do.

THE COURT: Pardon me?

MR. DICKINSON [defense counsel]: That's what he would rather do.

THE COURT: What's that?

MR. DICKINSON: Wait until Friday morning.

THE COURT: *You talk to him. Let me ask you – all this, do you have any objection if I were to make an inquiry of that juror with the court reporter and bailiff present, as to what, whether or not she can postpone her surgery for a day or –*

MR. DICKINSON: *No, no, I don't have any objection.*

THE COURT: *Do you have any objection, Mr. Keaton?*

MR. KEATON: *I don't understand.*

THE COURT: *Pardon me.*

WHEREUPON, counsel for the Defendant, Mr. Dickinson and the Defendant have an off-the-record conference.

MR. DICKINSON: *No. We have no objection to doing that.*

THE COURT: All right. Will the court reporter and the bailiff join me in the jury room?

WHEREUPON, The Court, court reporter and bailiff adjourned to the jury room, after which the following proceedings were had in the jury room:

THE COURT: *Ms. ***, we thought we would be through yesterday, we're not. And the Defendant is entitled to a 12-man jury. And we had anticipated that if something like this came up they would go along with eleven. But I think the Defendant is pressing, you know, he wants a 12-man jury. Now, we can do one of several things: I can continue the trial of this case until, say, Friday. Give you time to recover from any surgery you have and come on in Friday morning and have you hear my instructions and argument of counsel and you-all deliberate. Or you can – we can come in tomorrow if you think you're up to it tomorrow. Or you can check with your doctor and see if he can do the surgery tomorrow rather than today.*

I don't know how painful that is.

JUROR: *See, I don't know if they will be able to schedule because it was, like, – I mean, it's been a while. You know, what I'm saying?*

THE COURT: *Uh-huh. Well, first, let me ask you this, is the pain so unbearable that you cannot postpone?*

JUROR: *No, I can postpone it.*

THE COURT: Would you, you can use this phone or go outside and talk to his secretary or whoever does his scheduling and tell her what the problem is and see if you can reschedule it.

JUROR: Okay. Let me see what they say.

THE COURT: Do you want privacy, here, on your phone call? Do you want us to leave?

JUROR: It doesn't matter. I can call. I have to give a call to the person who drove me down here because I'm unable to drive home after sedation. So I have to get a hold of them, also.

THE COURT: Okay.

JUROR: So, it will be all right.

WHEREUPON, this concludes the on-the-record conference held in the jury room.

(Emphasis added.)

The juror then called the juror's doctor and was able to postpone the appointment. Thereafter, the jury deliberated, and the appellant was convicted.

The appellant's counsel learned of the exact words of the conversation that the judge had with the juror two months after the trial ended, when the appellant's counsel was reviewing the trial transcript to prepare an appeal of the appellant's conviction. The appellant's counsel did not make any motions to the trial court after learning of the substance of the conversation – instead raising the issue of the conversation for the first time on appeal.

II.
Standard of Review

There was no post-trial objection or motion made before the trial court regarding the judge's remarks, so our review is *de novo*, to determine if "plain error" occurred. Syllabus Point 4 of *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988), states, in pertinent part:

> The plain error doctrine . . . enables this Court to take notice of error, including instructional error occurring during the proceedings, *even though such error was not brought to the attention of the trial court*. However, the doctrine is to be used sparingly and only in those circumstances *where substantial rights are affected,* or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.

(Emphasis added.) As we discuss in Part III. *infra*, we also apply to the alleged error the standard of "harmless beyond a reasonable doubt."

III.
Discussion

The appellant first argues that he did not personally agree to the trial judge speaking with the juror outside of the defendant's presence – and that therefore the judge's *ex parte* contact with the juror was in itself erroneous.

This Court has stated that "[w]aiver of a defendant's fundamental and constitutional right to be present at every stage of the proceeding may be accomplished[, but i]t must be achieved . . . *by the defendant himself* in the form of a knowing and intelligent waiver." *State v. Hicks*, 198 W.Va. 656, 663, 482 S.E.2d 641, 648 (1996) (emphasis added).

The record shows that the appellant's counsel, after speaking with the appellant about the judge's suggestion, immediately said to the judge, "*We* have no objection to doing that." (Emphasis added.) Was this a waiver "by the [appellant] himself"? *Id.* We conclude that it was.

It would have been better, perhaps, for the trial court to have asked for an "out-loud" statement by the appellant, instead of relying on the appellant's counsel's statement. But the context in which the appellant's counsel's statement to the judge occurred demonstrates to our satisfaction that the appellant consulted with his counsel, and then allowed his counsel to state that the appellant personally agreed to the trial judge speaking with the juror without the appellant being present.[2]

---

[2]This Court has stated that a "trial judge acts at his or her peril when he or she conducts *ex parte* communications with a deliberating jury[.]" *State v. Crabtree*, 198 W.Va. (continued...)

The appellant's argument that the judge's *ex parte* conversation with the juror was itself erroneous is therefore not persuasive.

The appellant next argues that the circuit court's remarks in the conversation were, categorically, either *per se* or presumptively unfairly prejudicial to the appellant – simply because they were comments about the appellant's exercise of a constitutional right. The appellant also argues that without applying any categorical presumption, the judge's remarks nevertheless created a real possibility of unfair prejudice by the jury against the appellant, that denied him a constitutionally fair trial.

In this regard, the appellant argues that the judge's remarks may have led members of the jury to

> . . . draw[] the following negative inferences from the trial court's comments: (1) Keaton was an obstructionist who would resort to sacrifice the health of a juror for the sake of tactical advantage; (2) Keaton lacked sufficient confidence in his defense to submit his case to a jury of eleven members; (3) it was entirely up to Keaton as to whether [the juror] would be relieved from jury duty; and (4) Keaton was completely insensitive to [the juror]'s pain.

(Appellant's brief, emphasis in original.)

The appellant further argues:

> Mr. Keaton does not contend that the trial court acted with actual malice towards him, and acknowledges that the court was faced with an administrative difficulty. Nevertheless, he cannot

---

[2](...continued)
620, 630 n.10, 482 S.E.2d 605, 615 n.10 (1996). As the instant case shows, this peril exists even when the appellant has waived his or her right to be present.

> be reasonably expected to give up his right to a fair trial to accommodate the scheduling demands of the court or the needs of a juror who has been sworn to serve. Clearly, the trial court erred in even *commenting* on the proper exercise of Mr. Keaton's rights, particularly when negative inferences could be drawn from these comments.

Id. (Emphasis in original.)

It would probably go too far – and it is unnecessary in the instant case – to rely upon the appellant's argument that *all* comments in front of the jury about a criminal defendant's exercise of a constitutional right should be *per se* or presumptively erroneous. However, in fact comments before the jury about a criminal defendant's exercise of his or her constitutional rights are very commonly found to be erroneous.

For example, this Court has found error on many occasions in comments regarding a defendant's assertion of the constitutional right to remain silent. *See, e.g.*, *State v. Mills*, 211 W.Va. 532, 566 S.E.2d 891 (2002); *State v. Walker*, 207 W.Va. 415, 533 S.E.2d 48 (2000); *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979); *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).[3]

---

[3]This Court has also recognized the importance of scrupulously respecting a criminal defendant's exercise of the constitutional right to a jury trial. *See Scott v. McGhee*, 174 W.Va. 296, 298, 324 S.E.2d 710, 713 (1984) (municipal court cannot penalize exercise of constitutional right to a jury trial). *See State v. Swafford*, 206 W.Va. 390, 398, 524 S.E.2d 906, 914 (1999), where Starcher, J., concurring, stated:

> The privilege of addressing the jury [afforded to a prosecutor] should never be taken as a license to . . . comment upon . . . issues such as race, religion, economic status, *[or] the accused's exercise of a constitutional right* . . . .

(Emphasis added.)

While our research has not identified any West Virginia cases on point, other jurisdictions that have looked at the issue of comments in front of a jury about a criminal defendant's exercise of the right to a jury trial have ordinarily found the comments to be erroneous – although not always rising to the level of reversible error.[4]

In *People v. Rodgers*, 756 P.2d 980 (Colo. 1988) (*en banc*), *reversing People v. Rodgers*, 734 P.2d 145 (Colo. Ct. App. 1986), a majority of the court held that a prosecutor's comment on the defendant's exercise of his right to a jury was error, but also that the evidence of the defendant's guilt was so overwhelming as to make the error harmless beyond a reasonable doubt. Three justices dissented in *Rodgers*, holding that the prosecutor's comments on the defendant's exercise of his right to a jury trial required reversal "without regard to the strength of the state's case against the defendant." 756 P.2d at 986. *See also Villareal v. State*, 860 S.W.2d 647 (Ct.App.Tx.Waco 1993); *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991) (prosecutor erred in saying he was "offended" by defendant's exercise of right to jury trial); *State v. Thompson*, 118 N.C.App. 33, 41, 454 S.E.2d 271, 276 (1995) ("the exercise of the right to a jury trial is . . . no less fundamental in our jurisprudence than reliance upon the right to remain silent[;]" *People v. Herrero*, 324 Ill. App.3d 876, 888, 756 N.E.2d 234, 245, 258 Ill.Dec. 252, 263 (2001) ("For [the prosecutor] to have commented on [the defendant's] decision to exercise his constitutional

[4]Comments on a defendant's exercise of the constitutional right to refuse to consent to a search have also been found to be erroneous. *See Gomez v. State*, 572 So.2d 952 (Fla.App. 5 Dist.1990).

right to a jury is outrageous, casting a shadow over the proceedings that simply cannot be ignored.")[5]

Having the foregoing principles in mind, we turn to the remarks at issue in the instant case. These remarks amounted to the trial judge telling the juror that because the appellant was "pressing" his constitutional right to a twelve-person jury, the juror could not be excused from the case to attend the scheduled appointment. The consequence of the appellant's exercise of his right was, at the least, a significant inconvenience to either the juror or the entire jury. And the jury learned that the appellant was the cause of the inconvenience from the trial judge.

Initially, it should be observed that the comments at issue came from a court officer – the trial judge – who is recognized as having perhaps the greatest potential for influencing the jury. On this point, Syllabus Point 4 of *State v. Wotring*, 167 W.Va. 104, 279 S.E.2d 182 (1981) states in pertinent part:

> The trial judge in a criminal trial must consistently be aware that he [sic] occupies a unique position in the minds of the jurors and is capable, because of his [sic] position, of unduly influencing jurors in the discharge of their duty . . . [6]

---

[5]The special concurrence in *Herrero* by Presiding Justice Quinn is a thoughtful discussion of the issue of "harmless error" in connection with comments on the exercise of constitutional rights by a criminal defendant.

[6]*Compare State v. Hicks*, 198 W.Va. 656, 482 S.E.2d 641 (1996), where a court clerk's apparent remarks about an evidentiary standard led to a conviction's reversal. As our discussion illustrates, the case law in the area of commenting on a defendant's exercise of constitutional rights – like the right to remain silent, the right to have counsel, and the right (continued...)

While there is no reason to believe that the judge's comment was motivated by anything other than the judge's wish to fully explain the circumstances to the juror, common sense tells us that the judge's inadvertent but unnecessary remarks could have caused a substantial negative feeling toward the appellant by one or more jurors.

As the appellant's brief, quoted *supra*, suggests, the judge's remarks might well have caused one or more jurors to feel annoyed or angry at the appellant for inconveniencing the juror who had surgery scheduled – or for being willing to cause the jury's deliberation to be delayed by two days.

Such juror annoyance or anger at a criminal defendant (about an entirely irrelevant matter) has the inherent potential to improperly affect jury deliberations – by making it harder for jurors to view and weigh the evidence impartially, and to scrupulously afford the defendant the benefit of such difficult-to-apply principles as the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt.[7]

---

[6](...continued)
to a jury trial – arises primarily from situations where the comments in question are made by a prosecutor, often in cross-examination, opening statement, or closing argument. In a case like the instant one, where the comment in question comes from the trial judge, the cautionary lessons of the case law are intensified. This is because prosecutors are ordinarily expected to have a "bias" against the defendant; and prosecutor's remarks are viewed, to a certain degree, in light of that expectation. A trial judge, however, is a neutral party at a trial, and is expected to studiously and zealously avoid any unnecessary conduct or remarks that might be construed by the jury as reflecting adversely upon a criminal defendant.

[7]This is the same sort of animosity-based potentially prejudicial effect that leads

> [a]ppellate courts [to] give strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in

(continued...)

In *People v. Rodgers, supra,* the majority held that erroneous comments before the jury about a criminal defendant's right to a jury trial require reversal of a conviction unless it is shown that the error was "harmless beyond a reasonable doubt" – a standard that this Court applies to many trial errors of a constitutional dimension. 756 P.2d at 985. *See* Syllabus Point 5, *State v. Flippo*, 212 W.Va. 560, 575 S.E.2d 170 (2002); Syllabus Point 5, *State v. Blair,* 158 W.Va. 647, 214 S.E.2d 330 (1975).[8]

Under this standard, if the evidence of a defendant's guilt is so overwhelmingly one-sided that this Court can say that there is absolutely no reasonable possibility that any prejudice flowing from the error could have made a difference in the jury's verdict, then this Court *may* find the error to be harmless beyond a reasonable doubt. The burden to make such a showing is upon the prosecution. *Flippo* and *Blair*, *supra*.

Because the alleged error in the instant case arose from the appellant's exercise of his constitutional right to a twelve-person jury, we agree with the *Rodgers* majority that it is logical to apply the "harmless beyond a reasonable doubt" standard. We also conclude that the serious potential for prejudice flowing from the remarks in question meets the

---

[7](...continued)

> criminal cases. Where these issues are wrongfully injected, reversal is usually the result.

Syllabus Point 9, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

[8]We note that some errors require *per se* reversal of a conviction without any further consideration of the error's possible effect on the trial process. *See, e.g., State v. Haddox*, 166 W.Va. 630, 276 S.E.2d 788, (W.Va. 1981) (giving an instruction in a criminal case that supplies by presumption any material element of the crime charged is reversible error).

"affecting substantial rights" test for plain error set forth in Syllabus Point 4 of *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988), *supra*.[9]

We have looked closely at the totality of the evidence presented at the appellant's trial. Our review shows that the evidence tending to show the appellant's guilt was substantially controverted – by both the appellant taking the stand and telling his "self-defense" version of events, and by eyewitness testimony corroborating the appellant's version of events. While there was sufficient evidence tending to show the appellant's guilt upon which the jury could properly convict the appellant, it cannot be said that the evidence against the appellant was so overwhelming as to meet the harmless-beyond-a-reasonable-doubt standard. For this reason, the appellant's conviction must be reversed and the instant case remanded for retrial.

Additionally, based upon the foregoing discussion, to give trial judges guidance in the future, we hold that the best practices to be followed when a trial judge addresses or converses with a juror or the jury in a criminal proceeding are as follows, unless special circumstances – that should be fully spread upon the record – dictate otherwise: (1) the judge should address or converse with jurors on the record and in the presence of the defendant and his or her counsel unless the defendant personally and affirmatively waives the right to be present; (2) when a trial judge addresses or converses with one or more jurors and the

[9]For a thoughtful and still quite vital discussion of the issue of harmless error, *see State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979) (both the majority opinion and the dissent by Justice Harshbarger).

defendant and his or her counsel are not present, the defendant and his or her counsel should be furnished with a prompt oral summary by the trial court and a subsequent transcript of the address or conversation; (3) after the substance or transcript of the address or conversation are made known to the defendant and his or her counsel, any alleged error in or problem with the address or conversation should be promptly presented to the trial court in an appropriate motion – although failure to do so does not *per se* preclude raising any alleged error or problem in the address or conversation on appeal.

IV.
Conclusion

For the foregoing reasons, we reverse the appellant's conviction and remand the case for further proceedings consistent with this opinion.

Reversed and Remanded.