NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEROME COFFEY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1749 EDA 2011

Appeal from the Judgment of Sentence entered August 31, 1994
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0441911-1993

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

MEMORANDUM BY BENDER, J. **FILED MAY 29, 2013**

Jerome Coffey appeals *nunc pro tunc* from the judgment of sentence of life in prison imposed following his conviction of Murder of the Second Degree, Aggravated Assault, Possession of Instruments of Crime, and Criminal Conspiracy. ***See*** 18 Pa.C.S. §§ 2502, 2702, 903, 907 (respectively). Coffey contends that during his closing argument to the jury, the prosecutor engaged in prosecutorial misconduct by encouraging the sympathy of the jury for the victim's father and invoking language from the New Testament of the Bible. Upon review, we conclude that the prosecutor's language, though not well chosen, does not rise to the level of prosecutorial misconduct and, therefore, does not provide grounds for a new trial. Accordingly, we affirm the judgment of sentence.

The appeal follows the December 12, 1992 shooting death of Johnny Moss who died from a gunshot wound to the head after his assailants pulled him from his vehicle under the pretense of acting as police officers. The evidence at trial established that Moss was seated in his father's vehicle, stopped at the corner of 24th and Thompson Streets in the City of Philadelphia. As Moss talked to his brother, Walker Lee Moss (Walker), who was standing at the curb, two other vehicles pulled in around his, boxing him in and blocking egress. Witnesses testified that three males then exited from the car in front and that one of them, identified as Coffey, yelled "task force," before another male pulled the victim from his own vehicle and pushed him into another. Although Walker struggled to help his brother, the assailants shot him, the bullet finding its place in his arm. When he ultimately reached his brother, he found him slumped in the car, bleeding from the head, with a bullet hole behind his ear. After the shootings, all four assailants fled.

Following Coffey's apprehension, this matter proceeded to a jury trial before the Honorable James J. Fitzgerald[1] in June 1994. Over a considerable number of days, Judge Fitzgerald received the testimony of a member of the Philadelphia Police Mobil Crime Unit who investigated the scene, as well as the supervising homicide detective and the medical examiner who conducted

---

[1] Judge Fitzgerald is now a member of this Court.

the victim's autopsy. In addition, the Commonwealth called Nemo Kennedy, Frank Singleton, and Latoya Singleton, each of whom reported encounters during which Coffey made incriminating statements about Moss's murder that either claimed responsibility or indicated his own complicity.[2] Finally, the Commonwealth called Walker Lee Moss, who positively identified Coffey as one of the assailants. The notes of testimony do not document the presentation of any evidence in Coffey's defense.

At the close of testimony, counsel for the Commonwealth appealed to the jury to return a verdict of guilty based on the evidence presented, but in stating his case, made a questionable appeal to sympathy for the victim's father as a Father's Day gift and also invoked, without attribution, language from the Book of Matthew in the New Testament of the Bible. Counsel delivered that portion of his argument as follows:

> Rather at the outset, I'm privileged to represent the status of [the] Commonwealth and this family here. Because even you as you sit there, I had to do this stuff to present evidence and presenting an argument and all the rest of it and so forth, but you've been taking [sic] out of the realm of your everyday life for a matter of weeks at this point and you say, well, wait a minute, did we do this for a senator? No. Did we do it for the governor or some big shot or house of representatives member or somebody who has a high station in life? No. Did we do it for a guy who sells the Daily News? No. We did it for Johnny Moss, and I submit to you that if we can do this for the least of these my brethren, we're ready for anyone. Do this at least for his

---

[2] Kennedy attempted to recant his original statements to police, but admitted that he had done so because he had been threatened and feared for the lives of his family members.

> sake. These were not a host of criminals and maybe when your verdict slip comes back this three or four days before Father's day[,] I'll be proud to present that to the father of the dead man in case by the grace of God [sic], thank you.

N.T., 6/15/94, at 127-28. Following the arguments of counsel, the court recessed the jury for one day and, upon their return, instructed them on the law, and sent them to deliberate. Thereafter, the jury found Coffey guilty of all charges. At a subsequent hearing on sentencing, the Court imposed the life sentence at issue here as well as concurrent sentences for terms of years on the lesser offenses.

Following entry of the judgment of sentence, the procedural history of the case assumes a tortured path, so sparsely documented that, seven years after the 1994 conviction, a panel of this Court remanded the case to the trial court with direction to supplement the record in view of the absence of several portions of the transcript. Although our remand order was docketed June 20, 2001, the record remained incomplete until March 15, 2007, when counsel for Coffey filed a statement addressing the state of the record. Several months later, however, on September 24, 2007, this Court was constrained to dismiss Coffey's appeal nonetheless due to the failure of Appellant's counsel to file an appellate brief. ***See Commonwealth v. Coffey***, 980 EDA 1999.

Within one year of the date of dismissal of Coffey's original direct appeal, his new counsel filed a post-conviction petition seeking reinstatement of his right to direct appeal. With the Commonwealth's agreement, the trial court granted that petition and reinstated Coffey's right

to direct appeal *nunc pro tunc*. The resulting appeal is before us now, and Coffey states the following question for our review:

> Whether Appellant was deprived of his right to a fair trial under the United States and Pennsylvania Constitutions by the prosecutor's invocation of religious teachings, authority and sentiment in his closing argument to the jury, and also by appealing to the jury to render a guilty verdict based on sympathy for the victim's family and, in particular, by asserting that the jury should render a guilty verdict as a Father's [D]ay gift to the victim's father?

Brief for Appellant at 2.

Coffey's challenge raises a claim of prosecutorial misconduct. "This Court has established that the conduct of the prosecutor at closing argument is circumscribed by the concern for the right of a defendant to a fair and impartial trial." ***Commonwealth v. Sampson***, 900 A.2d 887, 890 (Pa. Super. 2006).

> In defining what constitutes impermissible conduct during closing argument, Pennsylvania follows Section 5.8 of the American Bar Association (ABA) Standards. Section 5.8 provides:
>
>> Argument to the jury.
>>
>> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>>
>> (b) 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.
>>
>> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

Id. "The initial determination whether the prosecutor's remarks were unfairly prejudicial rests within the sound discretion of the trial court and our inquiry of necessity must turn to whether an abuse of discretion was committed." ***Commonwealth v. Correa***, 664 A.2d 607, 609 (Pa. Super. 1995).

> In reviewing prosecutorial remarks to determine their prejudicial quality, comments cannot be viewed in isolation but, rather, must be considered in the context in which they were made. Generally, comments by the district attorney 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.

Sampson, 900 A.2d at 890 (quoting ***Correa,*** 664 A.2d at 609).

Accordingly, although our Supreme Court views a prosecutor's invocation of the divine with skepticism, it has banned it without exception only in capital cases:

> In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of "oratorical flair" and have cautioned that such references are a dangerous practice which we strongly discourage. ***Commonwealth v. Henry,*** 524 Pa. 135, 569 A.2d 929 (1990); ***Commonwealth v. Whitney,*** 511 Pa. 232, 512 A.2d 1152 (1986). We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

> Here, the prosecutor argued, "As the Bible says, 'and the murderer shall be put to death.'" This reference is substantially different than the references tolerated in ***Henry*** and ***Whitney*** where the prosecutor allegorically likened the Defendant to the Prince of Darkness mentioned in the Bible to establish that he was an evil person.
>
> More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for Appellant. By arguing that the Bible dogmatically commands that "the murderer shall be put to death," the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.

Commonwealth v. Chambers, 599 A.2d 630, 644 (Pa. 1991). Consistent with this admonition, our Supreme Court has more recently clarified that the judicial prohibition of appeals to religious authority derives from the imperative that only the laws of this Commonwealth—as opposed to Biblical law—may delimit criminal prosecution. Accordingly, the Court has declined to find reversible error in the prosecution's use of Biblical language, even in capital cases, where the prosecutor's utterances did not attempt to supersede Pennsylvania law with appeals to divine law. The Court made this distinction apparent in ***Commonwealth v. Spotz*** in its disposition of the defendant's claims of undue prejudice at his capital sentencing hearing when the prosecutor invoked biblical language bearing on the defendant's troubled

childhood. ***See*** 756 A.2d 1139, 1164 (Pa. 2000). During closing argument, the defendant's counsel had argued that his client's difficult childhood should mitigate the punishment imposed. ***See id.*** The prosecutor responded, ostensibly invoking *I Corinthians* 13:11, as follows: "Did Mark Spotz have a troubled childhood? I don't know that—I don't know that the Commonwealth would dispute that fact. But long before Dustin Spotz was killed and June Ohlinger and Penny Gunnet were murdered, Mark Spotz became a man and put away childish things." ***Id.*** (explaining the appellant's assertion that "the prosecutor's responsive argument was a direct reference to *[I] Corinthians* 13:11, where St. Paul writes, "when I was a child, I talked like a child, I thought like a child, I reasoned like a child. When I became a man, I put childish ways behind me").

Although the appellant in ***Spotz*** argued that the prosecutor's rhetoric violated our Supreme Court's holding in ***Chambers*** and the related holding in ***Commonwealth v. Brown,*** 711 A.2d 444 (Pa. 1998), the Court concluded that neither case had established an absolute prohibition on such language, so long as the language used did not attempt to substitute Biblical law for that of this Commonwealth. The Court noted as a complementary consideration the fact that the prosecutor had not directly attributed the language to the Bible and that, in any event, such phrases cannot necessarily be stripped from common parlance given the common cultural

heritage from which they derive. Thus, the Court explained its reasoning as follows:

> First, it is not clear that the prosecutor was invoking the Bible. He certainly never mentioned the Bible by name, nor did he otherwise suggest that he was invoking the Bible. This is in sharp contrast to ***Chambers,*** where the reference was explicit, ***see*** 528 Pa. at 585, 599 A.2d at 643 (prosecutor argued, "as the Bible says 'and the murderer shall be put to death' ") or ***Brown,*** where the reference was very thinly veiled, ***see Brown,*** 551 Pa. at 493, 711 A.2d at 457 (in case where defendant was convicted of killing a three-year-old child, prosecutor stated, "there is a page in that book, it says, it is better that you had a millstone tied around your neck and be cast into the deep, than that you harm a child. This is ancient law....").
>
> Here, the prosecutor's statement merely had five words in common with the passage from Corinthians. Furthermore, even if the phrase employed by the prosecutor could be said to have a biblical origin, we cannot say that this phrase was so distinctive that the jury must have believed that a religious document was being invoked. Much of our everyday speech and idiomatic expressions can be traced to biblical sources. To ban all such phrases based upon their etymology might ultimately operate to ban most speech, or certainly most speech concerning moral matters such as criminal responsibility.
>
> More importantly, the impropriety that ***Chambers*** and ***Brown*** sought to eradicate was the invocation of biblical or religious authority *in support of* a death penalty verdict. As we explained in ***Chambers****:* "this argument [that the Bible supports the imposition of the death penalty] advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for [a defendant].... If a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law." ***Chambers,*** 528 Pa. at 586–87, 599 A.2d at 644; ***cf. Carruthers v. State,*** 272 Ga. 306, 528 S.E.2d 217 (2000). We reiterated this point more recently in ***Brown****:* "*[r]eliance* upon the bible in any manner during a closing argument during the penalty phase is reversible error *per se*

> pursuant to ***Chambers***." ***Brown***, 551 Pa. at 493, 711 A.2d at 457 (emphasis added).

Spotz, 756 A.2d at 1164-1165. Thus, contrary to Coffey's assertions, the holding in ***Chambers*** does not impose an unconditional ban on the expression the prosecutor used here; rather, it prohibits attempts by the prosecution to substitute divine law for that of the Commonwealth of Pennsylvania where the penalty at issue is death.

Of course, this case is immediately distinguishable from ***Chambers*** in that the penalty the trial court imposed was imprisonment for a term of years; the record does not indicate that the Commonwealth ever sought imposition of the death penalty. However, this difference in the sentence notwithstanding, this case is distinguishable from ***Chambers*** more fundamentally, as the language the prosecutor used simply does not attempt to substitute divine law for the mandate of the Pennsylvania Crimes Code. Whereas the prosecutor in ***Chambers*** appealed to the jury to choose a penalty for the defendant's crime based on a scriptural imperative, the prosecutor in this case merely appealed to the jurors to recognize that the law applies equally to assure the protection and vindication of even the most humble of persons rather than those who occupy seats of power. Rather than seeking to displace the governing law as a basis for decision, the prosecutor's language embraced the fundamental tenet of equal justice under law that serves as the bedrock of our jurisprudence. Thus, we find no prospect that the language he used may have biased the jury against the

defendant in any manner regardless of whether it derived from the New Testament of the Bible.

As concerns the prosecutor's companion reference, which sought to link a conviction of the defendant with Father's Day and some putative atonement to the victim's father, we find the prosecutor's remarks objectionable and inappropriate. Nevertheless, the prospect that they might in some measure influence the jury to pin a conviction of murder on the defendant on the basis of sympathy rather than evidence strikes us as an exercise in speculation bordering on fancy. We discern no prospect that a jury of twelve reasonable souls would premise a criminal conviction on an oblique and errant reference to Father's Day if the evidence did not otherwise sustain the conviction beyond a reasonable doubt. Coffey offers no authority to the contrary and we are aware of none. Accordingly, we cannot conclude that the prosecutor's attempt to exploit the victim's father's loss in the wake of Father's Day amounted to any more than an ineffectual rhetorical device. In view of the evidence adduced at trial, it offers no grounds for a new trial.

For the foregoing reasons, we find no basis for relief on Coffey's claims of error. Accordingly, we affirm the judgment of sentence.

Judgment of sentence **AFFIRMED**.

Judgment Entered.

Prothonotary

Date: 5/29/2013