

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
STEPHEN MICHAEL HARMER,	:	
	:	
Appellant	:	No. 1902 MDA 2013

Appeal from the Judgment of Sentence entered on October 2, 2013
in the Court of Common Pleas of Lancaster County,
Criminal Division, No. CP-36-CR-0004640-2012

BEFORE: LAZARUS, WECHT and MUSMANNNO, JJ.

MEMORANDUM BY MUSMANNNO, J.:

FILED JULY 24, 2014

Stephen Michael Harmer ("Harmer") appeals from the judgment of sentence imposed following his convictions of one count each of murder of the second degree, robbery, and burglary, and two counts of criminal conspiracy (robbery and burglary). **See** 18 Pa.C.S.A. §§ 2502(b), 3701(a)(1)(i), 3502(a), 903. We affirm.

Lisa Herr ("Lisa") told her friends, including Harmer, that her father, Douglass Herr ("Herr"), kept a large amount of money stored in a safe at their residence in Quarryville, Pennsylvania. Harmer, who was employed at Grace Tar Corporation, approached a co-worker, Cody Wunder ("Cody"), to create a plan to steal Herr's money. Cody then recruited his brother, Kyle Wunder ("Kyle"), to participate in the plan.

In August 2012, Harmer, Cody, and Kyle gathered firearms, masks, gloves, and bags and drove to Herr's home. Upon arriving at the home, Harmer repeatedly contacted Lisa to determine her whereabouts. Upon verifying that Lisa was not home, Harmer explained the layout of the home to Kyle and Cody, and indicated that Herr would be home if a truck was in the driveway. Harmer, complaining of an injured foot, stayed in the vehicle while Kyle and Cody approached Herr's home armed with a 12-gauge shotgun, a sledgehammer, and a pry bar. Kyle and Cody observed a truck in the driveway, but agreed to proceed with the plan. Kyle and Cody entered the home by smashing a glass sliding door. After Kyle and Cody found a safe in an interior room, Herr confronted them with a gun. Herr subsequently shot Cody in the leg. Kyle then struck Herr in the head with the butt of his shotgun, knocking Herr unconscious. Kyle took Herr's gun and placed it in another room. Thereafter, Kyle and Cody opened the safe by shooting the lock off with the shotgun. Kyle and Cody left the home with various items and about \$190,000 in cash. After Kyle and Cody left Herr's home, Cody collapsed on the porch. Cody told Kyle to go back into the house and "shoot that motherfucker." Kyle returned to the home and shot Herr, who was lying unconscious on the floor, in the head at point blank range.

Kyle, Cody, and Harmer drove away from the house. Harmer went back to his home and Kyle and Cody sought medical treatment for Cody's

leg. Harmer later contacted Kyle and Cody to receive his share of the money. Kyle gave Harmer \$30,000.

Harmer, Cody, and Kyle were subsequently arrested and charged with various crimes. Following a jury trial, Harmer was convicted of the above-mentioned crimes.¹ The trial court sentenced Harmer to life in prison. Harmer filed a timely Notice of Appeal. The trial court ordered Harmer to file a Pennsylvania Rule of Appellate Procedure 1925(b) concise statement. Harmer filed a timely Concise Statement and the trial court issued an Opinion.

On appeal, Harmer raises the following questions for our review:

- I. Did the trial court err by failing to grant the Motion for Mistrial after the assistant district attorney committed prosecutorial misconduct during closing argument?
- II. Did the trial court err by giving an inadequate erroneous and/or prejudicial jury instruction on felony murder?

Brief for Appellant at 4 (capitalization omitted).

In his first claim, Harmer contends that the trial court erred by failing to grant a mistrial after the assistant district attorney committed prosecutorial misconduct during closing argument. *Id.* at 10. Harmer argues that the assistant district attorney stated to the jury that Cody and Kyle were “cold-blooded killers,” and that Harmer shared the same culpability as Cody and Kyle. *Id.* at 10-12. Harmer further argues that,

¹ We note that Kyle was convicted of, *inter alia*, murder of the first degree, and Cody was convicted of, *inter alia*, murder of the second degree.

while Harmer and Cody and Kyle were accomplices to the robbery and burglary, Harmer did not intend to kill anyone. **Id.** at 11, 12. Harmer asserts that the assistant district attorney's statements, *i.e.*, that Harmer shared the same level of culpability for killing Herr as Cody and Kyle through the felony-murder rule, was not an inference that could be reasonably derived from the evidence presented at trial. **Id.** at 11-12. Harmer claims that the statements had the effect of creating a bias and hostility toward Harmer, and that a true verdict could not have been rendered. **Id.** at 12, 13.

Our standard of review is as follows:

In criminal trials, the declaration of a mistrial serves to eliminate the negative effect wrought upon a defendant when prejudicial elements are injected into the case or otherwise discovered at trial. By nullifying the tainted process of the former trial and allowing a new trial to convene, declaration of a mistrial serves not only the defendant's interests but, equally important, the public's interest in fair trials designed to end in just judgments. Accordingly, the trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. ... Our review of the resulting order is constrained to determining whether the court abused its discretion.

Commonwealth v. Hogentogler, 53 A.3d 866, 877-78 (Pa. Super. 2012)

(citation omitted).

[I]n 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. Our review of prosecutorial remarks and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial.

It is well settled that a prosecutor has considerable latitude during closing arguments and his arguments are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence. Further, prosecutorial misconduct does not take place unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict. ...

In determining whether the prosecutor engaged in misconduct, we must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel's conduct. It is well settled that the prosecutor may fairly respond to points made in the defense closing. Moreover, prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair.

Id. at 878 (citation and paragraph breaks omitted).

Here, the trial court thoroughly addressed Harmer's claims and determined that they are without merit. ***See*** Trial Court Opinion, 2/7/14, at 4-8. We adopt the sound reasoning of the trial court for the purpose of this appeal and conclude that nothing from the assistant district attorney's statements would have formed in the jury such a bias that would have prevented them from entering a fair verdict. ***See id.***

In his second claim, Harmer contends that the trial court provided an inadequate and erroneous jury instruction on felony-murder. Brief for Appellant at 13. Harmer argues that the trial court improperly instructed the jury with regard to the requirement that the Commonwealth must prove the killing was committed in furtherance of the underlying felony. ***Id.*** at 13-14. Harmer specifically asserts that the trial court included an explanation of

conspiracy liability during the “in furtherance” instruction. **Id.** at 14-15. Harmer claims that the conspiracy instruction misled the jury into reasoning that, if the Commonwealth proved him guilty of conspiracy to commit robbery/burglary, it also proved felony-murder. **Id.** at 16. Harmer argues that the prejudicial instruction deprived him “of having the jury fairly consider that the act of killing was done for reasons wholly independent of the robbery and/or burglary.” **Id.** at 17.

Here, the trial court set forth the relevant law, addressed Harmer’s claims and determined that they are without merit. **See** Trial Court Opinion, 2/7/14, at 2-4. We adopt the sound reasoning of the trial court for the purpose of this appeal. **See id.**

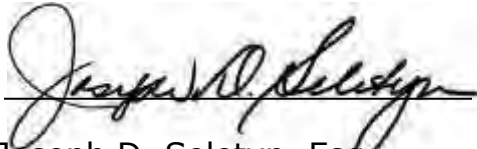
As an addendum, we note that Harmer argues that the killing of Herr was not in furtherance of the robbery and burglary, as Kyle and Cody had left the house with Herr unconscious, and Kyle returned to the house on Cody’s instruction to kill Herr. Brief for Appellant at 17; **see also** N.T., 8/12/13, at 723-27 (wherein during closing argument, Harmer’s counsel stated that the evidence presented at trial demonstrated that the killing was not in furtherance of robbery or burglary).² However, the jury was free to reject Harmer’s argument, and ostensibly found that the killing was in furtherance of the robbery and burglary. **See Commonwealth v. Henkel**, 938 A.2d 433, 446 (Pa. Super. 2007) (noting that the fact-finder “is free to

² Harmer conceded that he was a conspirator and accomplice to the robbery and burglary. N.T., 8/6/13, at 153.

believe all, part, or none of the evidence presented in judging the credibility of the witnesses and the weight to be afforded the evidence produced.”). As the trial court’s felony-murder instruction accurately set forth the appropriate legal principles, we conclude that Harmer’s claims on appeal are without merit. **See Commonwealth v. Hansley**, 24 A.3d 410, 420 (Pa. Super. 2011) (stating that “[a] faulty jury charge will require the grant of a new trial only where the charge permitted a finding of guilt without requiring the Commonwealth to establish the critical elements of the crimes charged beyond a reasonable doubt.”) (citation omitted).

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/24/2014

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

v.

STEPHEN HARMER

No. 4640-2012

CLERK OF COURTS
2014 FEB - 7 AM 11:51
LANCASTER COUNTY, PA

Pa.R.A.P. 1925(a) MEMORANDUM OF OPINION

BY: REINAKER, J.
February 7, 2014

The Defendant, Stephen Harmer, has filed a Direct Appeal to the Superior Court of his conviction, on August 12, 2013, after a jury trial, of Criminal Homicide,¹ Robbery,² Criminal Conspiracy to Commit Robbery,³ Burglary,⁴ and Criminal Conspiracy to Commit Burglary⁵. On October 2, 2013, after a pre-sentence investigation, the Defendant was sentenced to incarceration in a state correctional facility for the remainder of his natural life with no possibility of parole. The Defendant was directed to file a Pa.R.A.P. 1925(b) statement and he has done so. The Commonwealth has filed its Answer.

The Defendant raises two issues in his 1925(b) statement. He asserts that reversible error was committed for the following reasons: (1) the trial Court gave an inadequate, erroneous and/or prejudicial instruction on felony murder; and (2) the Assistant District Attorney committed prosecutorial misconduct during closing arguments by injecting two issues into the case broader than the guilt or innocence of the Defendant under controlling law.

¹ 18 P.S. 2501(a)
² 18 P.S. 3701 (a)(1)(i)
³ 18 Pa.C.S.A. §903(a)(1)
⁴ 18 Pa.C.S.A. §3502(a)
⁵ 18 Pa.C.S.A. §903(a)(1)

First, the Defendant argues that the Court erred by giving an inadequate, erroneous and/or prejudicial instruction on felony murder. Specifically, he argues that the trial Court intermingled the concept of conspiracy liability when it explained the “in furtherance of the felony” element. Allegedly, this resulted in a confusing instruction that misled the jury into reasoning that if the Commonwealth proved the Defendant was guilty of conspiracy, then the “in furtherance of the felony” element was necessarily proven as well. The nature of a Court’s instructions to the jury are “within the discretion of the Court, so long as the Court accurately instructs the jury on the appropriate legal principles involved.” Commonwealth v. Kim, 888 A.2d 847, 852 (Pa. Super. 2005)(citations omitted). The jury charge must be reviewed “not in isolated portions but as a whole to ascertain whether it fairly conveys the required legal principles at issue.”

Commonwealth v. McClendon, 874 A.2d 1223, 1232 (Pa. Super. 2005). A faulty jury charge will require the grant of a new trial only where the charge permitted a finding of guilt without requiring the Commonwealth to establish the critical elements of the crimes charges beyond a reasonable doubt. Commonwealth v. Hornberger, 74 A.3d 279, 282-283 (Pa. Super. 2013)(citation omitted).

Instantly, the charge clearly, adequately, and accurately presented the law to the jury for its consideration. Commonwealth v. McClendon, 874 A.2d 1223, 1232 (Pa. Super. 2005)(citations omitted). The trial Court has broad discretion in phrasing jury instructions and may choose to use its own wording so long as the law is clearly portrayed. When reviewing the jury instruction, the Court charged the jury as follows concerning felony murder:

“You may find the defendant guilty of second degree murder, that is felony murder, if you’re satisfied that the following four elements have been proven beyond a reasonable doubt: first, that Kyle Wunder caused the death of Douglas Herr; second, that Kyle Wunder did so while Kyle Wunder, Cody Wunder and the defendant were partners in committing a burglary and/or a robbery; third, that

Kyle Wunder did the act that killed Douglas Herr in furtherance of the burglary and/or the robbery; and fourth, that the defendant was acting with malice.

You can infer that the defendant was acting with malice if you're satisfied beyond a reasonable doubt that he was an accomplice or a co-conspirator in committing, attempting to commit or fleeing from a burglary and/or a robbery. Because both burglary and robbery are crimes inherently dangerous to human life, there does not have to be any further proof of malice." (Notes of Trial Testimony, (N.T.) Volume 6 of 6, 772-773).

Further, the Court instructed the jury:

"I'll now explain for you the meaning of the in furtherance element. A partner's act that kills is not in furtherance of the felony if the partner does the act for his own personal reasons which are independent of a felony" (N.T. Volume 6 of 6, 779).

This charge, which came verbatim from Instruction 15.2502(B) of the *Pennsylvania Suggested Standard Criminal Jury Instructions*, was consistent with existing case law as it pertains to the inference that may be made from the Defendant's participation in the conspiracy to commit robbery and/or burglary which are inherently dangerous felonies. See Commonwealth v. Olds, 469 A.2d 1072 (Pa. Super. 1983).

As such, the Court's entire jury instruction adequately and accurately reflected the applicable law. The Court thoroughly instructed the jury on second degree murder, robbery, burglary, and conspiracy. (N.T. Volume 6 of 6, 772-783). It was made clear to the jury that they may return a verdict of guilty for felony murder if they found that the killing occurred while the Defendant was acting with malice as an accomplice or a co-conspirator in committing, attempting to commit or fleeing from a burglary and/or a robbery. (N.T. Volume 6 of 6, 773). Essentially, the Defendant is asking the Court to find reversible error when the trial Court clearly and adequately defined felony murder as it is explicitly detailed pursuant to Pennsylvania Law. The Defendant did not suffer any prejudice from the Court's instruction regarding felony murder or conspiracy. When the instructions are viewed as a whole, it is clear that they were adequate to

guide the jury in their deliberations and that they did not prejudice the Defendant. The Defendant's assertion that that the Court erred by giving an inadequate, erroneous and/or prejudicial instruction on felony murder is meritless.

Next, the Defendant argues that the Court erred in denying Defendant's Motion for Mistrial based upon two instances of prosecutorial misconduct during the Commonwealth's closing statement. Specifically, the Defendant alleges that the prosecutor committed prosecutorial misconduct by 1) reminding the jury that present counsel, during opening statements, called Cody Wunder a "cold-blooded killer" subsequently comparing the relative culpability of Cody Wunder and the Defendant; and 2) told the jury why he believed the Pennsylvania State Legislature enacted the felony murder law.

A prosecutor's comments during closing argument must not be viewed in isolation, but in the context in which it was made when determining whether the comments were improper. Commonwealth v. Farmer, 758 A.2d 173 (Pa.Super. 2000). "Prosecutorial misconduct does not occur unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict." Commonwealth v. Rose, 960 A.2d 149, 155 (Pa.Super. 2008). Furthermore, a mistrial is only required when an incident is of such a nature that its unavoidable effect is to deprive the defendant of a fair and impartial trial. Commonwealth v. Tejada, 834 A.2d 619, 623 (Pa. Super. 2003).

First, the Defendant argues that the Court erred in denying Defendant's Motion for Mistrial based upon prosecutorial misconduct during the Commonwealth's closing statement. Specifically, during his closing argument the prosecutor stated the following:

"Ladies and Gentlemen, as I said, this is the scenario that specifically is addressed by the felony murder statute. And so remember back in Mr. Lyden's

opening statement. He said to you, Kyle Wunder and Cody Wunder are cold-blooded killers. That's what he told you. He calls Cody Wunder a killer. How can you do that? Well, he applies the felony murder rule. Cody Wunder clearly participated in a robbery of Douglas Herr. During the course of that robbery and burglary, it went horribly wrong. A struggle, a confrontation ensued, a shoot-out ensued, and it resulted in the death of Douglas Herr.

And that death of Douglas Herr was clearly related to the robbery and the burglary, and so in applying the felony murder statute, Mr. Lyden appropriately and accurately refers to Cody Wunder as a killer.

Well, guess who else in the room participated in the robbery of Douglas Herr and the burglary of his home? That guy right there, Stephen Harmer. As an accomplice, he participated in the robbery. As an accomplice, he participated in the burglary. The same robbery and burglary that Cody participated in is the same robbery and burglary that led to a struggle and a gun fight and the same robbery and burglary that led to the death of Douglas Herr in the course of the robbery and burglary.

So, the very same factual analysis and legal analysis that allows Mr. Lyden to accurately call Cody Wunder a murderer applies to the defendant. The facts say murder, the law says murder and now I'm asking you to say it. Apply the Judge's instructions in the law to the facts as you find them and find him guilty." (N.T. Volume 6 of 6, 747-748).

The prosecutor's comments constituted a fair response to statements made by defense counsel in his opening statement and closing argument. In Defense Counsel's opening statement, he talked about the culpability of Kyle and Cody Wunder. He stated, "Kyle Wunder and his brother Cody, well, they're just a couple of cold-blooded killers. That's all. And when they murdered Douglas Herr, it was an act of retaliation." (N.T. Volume 2 of 6, 153). In Defense counsel's closing argument he attempted to distinguish the Defendant's culpability from that of Kyle and Cody Wunder by attempting to differentiate the roles of each co-conspirator and their respective states of mind. The Commonwealth was free to respond by appropriately applying the relevant legal concepts of Second Degree Murder (felony murder) as it related to the evidence.

Subsequently, the Court responded to Defense counsels Motion for Mistrial by stating the following:

"Well, I think – I view that in terms of fair argument by counsel. He's taken a position based upon the things you've said and made an analogy. And it

may not be one that you agree with, but I think that based upon the evidence in the case, it's a fair argument to make." (N.T. Volume 6 of 6, 751).

As such, this was not a situation where the effect of the prosecutor's statement deprived the Defendant of a fair and impartial trial. The Commonwealth did not argue the official disposition of Cody Wunder's criminal charges nor any evidence not already on the record. Therefore, the Court properly denied the Defendant's Motion for Mistrial and the Defendant's claim concerning prosecutorial misconduct is meritless.

The Defendant raises another claim asserting the Court erred in denying Defendant's Motion for Mistrial based upon prosecutorial misconduct in the Commonwealth's closing statement. Specifically, during his closing statement the prosecutor stated the following:

"Ladies and Gentlemen, the facts that you heard over the course of the last week are textbook felony murder. This scenario is exactly what the legislature envisioned when it drafted the felony murder rule.

Somehow though, the Defendant wants to divorce himself from the ugly part of what he did with the Wunders. He wants to somehow stand and nobly say, well convict me of robbery and burglary but somehow he wants to divorce himself from the ugly part of it, how the robbery and burglary was accomplished and how it all went horribly wrong and resulted in the death of Douglas Herr.

Well, that's not the way it works. That's not what the law says in Pennsylvania. Your inquiry really is going to be the in furtherance part. The killing in furtherance of the robbery and/or burglary." (N.T. Volume 6 of 6, 730).

The prosecutor's comments constituted a fair response to statements made by defense counsel in his opening statement and closing argument. In Defense Counsel's opening statement, he stated the following:

"He sees Douglas Herr lying on the ground unconscious, totally defenseless, walks up to him and shoots him in the head at pointblank range. My client, Stephen Harmer, was in the truck when that took place. He didn't see what happened. He didn't participate in any way in the decision to kill this man.

He did, however, agree and plan to steal money, and he was there that night to accomplish that plan. He accepts full responsibility for that, and he should be found guilty of the appropriate charges." (N.T. Volume 2 of 6, 153).

In Defense Counsel's closing arguments he attempted to further distinguish the Defendant's culpability from that of Kyle and Cody Wunder as it relates to felony murder:

"And when you do that, your conclusion should be what I said at the beginning of this case, that Douglas Herr, when he was murdered, it was an act of retaliation, it was done out of anger and totally unnecessary to completing this crime. Any why is that important? Why is it so important to this trial? Well, felony murder has four parts to it called elements, okay? And each one of those elements has to be proven to you beyond a reasonable doubt.

One of the elements is that the act of killing be done in furtherance of the crime. The Commonwealth has to prove to you beyond a reasonable doubt that the act of killing was done in furtherance of the crime. If you have a reasonable doubt about that, then you have to find Stephen Harmer not guilty of criminal homicide." (N.T. Volume 6 of 6, 726-727).

As such, the Commonwealth was free to respond by explaining the legal concepts and principles of the law in an effort to inform the jury prior to their deliberation. Part of the jury's deliberation efforts include the task of applying the law to the facts as they find them based on the evidence. The prosecutor simply responded to Defense counsel's comments with a position based upon his arguments.

In response to Defense counsel's second Motion for Mistrial concerning prosecutorial misconduct, the Court responded as follows:

"Mr. Lyden: Then the whole point of even talking about it was irrelevant. It serves – it's absolutely irrelevant to this case.

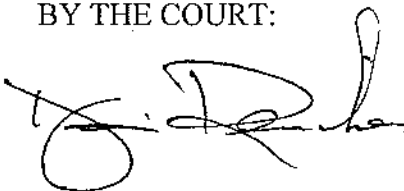
The Court: Well that may well be, but my determination is I don't find anything prejudicial in the prosecutor's comments in terms of this case by mentioning the reason for the legislature passing this particular law. The point is they did. So I'm not going to give any cautionary instruction with regard to any of those comments by Mr. Brown." (N.T. Volume 6 of 6, 754).

This was not a situation where the effect of the prosecutor's statement deprived the Defendant of a fair and impartial trial. The jury was properly and adequately instructed by the Court that arguments made by counsel were not evidence and that their verdicts must be based solely on the evidence presented during the trial. The Commonwealth's comments did not prejudice the

defendant and did not impart any improper influence on the jury's deliberations. Therefore, the Court properly denied the Defendant's Motion for Mistrial and the Defendant's second claim concerning prosecutorial misconduct is meritless.

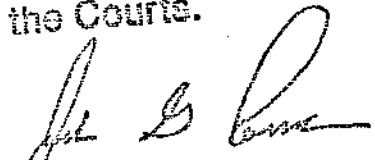
Accordingly, I conclude the grounds identified by the Defendant in his Pa. R.A.P. 1925(b) statement are meritless.

BY THE COURT:



DENNIS E. REINAKER
JUDGE
FEBRUARY 7, 2014

certify this document to be filed
the Lancaster County Office of
the Clerk of the Courts.


Joshua G. Parsons
ATTEST: Clerk of the Courts

Copies to:

Todd E. Brown, Esquire
Christopher P. Lyden, Esquire