NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. FREDERICK R. WILLIAMS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2661 EDA 2011

Appeal from the Judgment of Sentence September 21, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0011484-2009

BEFORE: STEVENS, P.J., BOWES, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J. Filed: March 5, 2013

This is an appeal from the judgment of sentence entered by the Court of Common Pleas of Philadelphia County after a jury convicted Appellant Frederick R. Williams of Possession With Intent to Distribute (PWID) Cocaine.[1] Appellant claims there was insufficient evidence to support his conviction and contends the trial court erred in failing to grant a mistrial based on two comments the prosecutor made during trial. We affirm.

The trial court aptly summarized the factual background of this case as follows:

> On April 2, 2009, Jody Haney was working as an escort when she was approached by [Appellant]. [Appellant] asked Ms.

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* Former Justice specially assigned to the Superior Court.
[1] 35 Pa.C.S.A. § 780-113(a)(30).

Haney if she "wanted to party." Ms. Haney responded yes … and charge[d] [Appellant] one hundred dollars an hour. [Appellant] told Ms. Haney that he wanted two hours.

Ms. Haney traveled with [Appellant] to his home, a one bedroom apartment. When they arrived at [Appellant's] apartment, [Appellant] gave Ms. Haney one hundred dollars upfront. [Appellant] then inquired if Ms. Haney used cocaine, explaining that he was selling fifty-dollar bags. [Appellant] gave Ms. Haney his telephone number, telling her to call anytime that she needed something, noting that he always had a "quarter key [sic]." [Appellant] then cooked up some cocaine and took a "hit." While Ms. Haney was only supposed to stay for two hours, she did not leave until much later.

Two days later, on the morning of April 4, 2009, Ms. Haney received a phone call from [Appellant]. [Appellant] told Ms. Haney that he had the money he owed her. Ms. Haney called a friend, William Davis, and asked him to drive her to [Appellant's] home at 733 North 16th Street to pick up money. While Ms. Haney went inside, Ms. Davis stayed outside.

Although [Appellant] owed Ms. Haney one hundred dollars, he did not have the one hundred dollars. Instead, [Appellant] gave Ms. Haney fifty dollars and a fifty-dollar bag of cocaine powder. [Haney alleged after Appellant had used more cocaine, he pointed a gun at her and forced her to give him oral sex.] Eventually, when Ms. Haney did not exit [Appellant's] apartment, Mr. Davis placed a call to the fire department. Ms. Haney exited the apartment after the fire department arrived on the scene.

After exiting the apartment, Ms. Haney approached Philadelphia Police Officer David Brodheim. [Officer Brodheim had stopped on North 16th Street after observing a fire engine blocking the street.] In an encounter which lasted approximately fifteen seconds, Ms. Haney said to Officer Brodheim, "he has a lot of cocaine in there." Following her brief interaction with Officer Brodheim, Ms. Haney went to the Special Victims Unit at Front Street and Lehigh Avenue.

At the Special Victims Unit, Detective Frank Dragon interviewed Ms. Haney and Mr. Davis. Following these interviews, Detective Dragon obtained a search warrant for 733 North 16th Street, second floor. Detective Dragon traveled to 733 North 16th Street, where he was met by two Highway Patrol Unit officers, and executed the search warrant. When no one answered the door, the officers forced their way into the apartment. After securing the apartment and finding no one inside, Detective Dragon called [Appellant]. [Appellant] then

returned to 733 North 16th Street where he was met by the Highway Patrol officers and arrested. [Appellant] informed the Highway Patrol officers that he lived on the second floor of the building.

Following a request by Detective Dragon for assistance in the execution of the warrant, Narcotics Field Unit Sergeant Jeffery Seaman, Officer Anthony Parrotti, and Officer John Speiser traveled to [Appellant's] apartment. Upon arrival, the narcotics officers commenced a search of the apartment. In the rear bedroom, Sergeant Seaman recovered a loaded semi-automatic handgun with a round in the chamber from under the bottom shelf of the nightstand. Inside a pocket of the jacket which was located in the bedroom closet, Officer Speiser found a sandwich bag containing three smaller bags of cocaine and another knotted sandwich bag containing bulk cocaine. One of the smaller bags contained 768 milligrams, and the three smaller bags together were found to contain a total of 2.482 grams of cocaine. The larger bulk bag was found to contain 7.449 grams of cocaine.

The officers then searched [Appellant's] kitchen. Inside a kitchen cabinet, Officer Parrotti recovered a scale and two bags containing numerous new and unused clear packets which matched the packets recovered from the bedroom. Officer Parrotti noted that, in his experience as a Philadelphia police officer, the scale was significant – since it was found with the other items which were seized – as it could be used to break up different weights of narcotics for packaging. In Officer Parrotti's experience, the sandwich bags were significant since they are [used by] people who manufacture and sell narcotics. Officer Parrotti also found, inside a kitchen cabinet, a Rossi Revolver loaded with five rounds and a five-round speed loader for the revolver. In the living room, Officer Parrotti recovered a PGW bill in [Appellant's] name and address and a piece of mail from the Philadelphia Traffic Court bearing [Appellant's] name and address.

Officer George Burgess testified as an expert on the subject of narcotics. Officer Burgess noted that the scale indicated the drugs were used to make a profit. He also told the jury that a person in possession of cocaine for consumption would not buy packaging in which to put the cocaine or bring his own packaging to carry cocaine. Cocaine is only put inside little packages for the purpose of transferring it to another person. While a cocaine bag containing 728 milligrams was short, Officer Burgess noted that it was sellable. When guns are found near

> narcotics, they are there to protect the narcotics. In his expert opinion, Officer Burgess concluded [Appellant] possessed the drugs with intent to deliver.

Trial Court Opinion (T.C.O.), 6/21/12, at 2-5 (citations omitted).

In connection with these events, Appellant was charged with PWID, Involuntary Deviate Sexual Intercourse, Sexual Assault, and Possession of an Instrument of Crime. On June 22, 2011, a jury found Appellant guilty of PWID, but were hung on the remaining charges, which were later *nolle prossed*. On September 12, 2011, after determining that Appellant was subject to the mandatory minimum sentence set forth in 42 Pa.C.S.A. § 9712.1, the trial court sentenced Appellant to a mandatory five to ten years imprisonment. This timely appeal followed.

Appellant raises two issues for our review on appeal:

> A. Whether the evidence was insufficient as a matter of law to convict Appellant of Possession With Intent to Deliver where the evidence indicated Appellant possessed the drugs for his personal use?
>
> B. Whether the Court erred in denying a mistrial where the Commonwealth made improper moral judgments about the evidence and improperly commented on the evidence at trial?

Appellant's Brief, at 5.[2]

When reviewing a challenge to the sufficiency of the evidence, our standard of review is well-established:

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[2] We note with displeasure that the Commonwealth failed to submit an appellate brief to this Court.

> The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by a fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Bowen, 55 A.3d 1254, 1260 (Pa. Super. 2012) (citation omitted).

When reviewing a challenge to the sufficiency of the evidence supporting a PWID conviction, "the Commonwealth must prove both the possession of the controlled substance and the intent to deliver the controlled substance." ***Commonwealth v. Lee***, 956 A.2d 1024, 1028 (Pa. Super. 2008) (citations omitted). All facts and circumstances surrounding possession are relevant to determine if contraband was possessed with intent to deliver. ***Id***.

Appellant concedes that he possessed the cocaine confiscated from his apartment, but claims the Commonwealth failed to prove he had intent to deliver the cocaine as the amount of cocaine found in his apartment was not

inconsistent with possession simply for personal use. Although intent to deliver can be inferred from the quantity of the drugs possessed, "the amount of the controlled substance is not "crucial to establish an inference of possession with intent to deliver, if ... other facts are present." ***Commonwealth v. Ratsamy***, 594 Pa. 176, 182, 934 A.2d 1233, 1237 (2007)). Our courts have further provided that:

> When the quantity of the controlled substance is not dispositive as to the intent, the court may look to other factors ... including the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash found in possession of the defendant. The final factor to be considered is expert testimony. Expert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use.

Commonwealth v. Taylor, 33 A.3d 1283, 1288 (Pa. Super. 2011) (quoting ***Ratsamy***, 594 Pa. at 183, 934 A.2d at 1237–38). In ***Ratsamy***, the Supreme Court found there was sufficient evidence to convict the appellant of PWID although he only possessed one-quarter ounce of cocaine as Appellant was also found in possession of a loaded handgun, numerous used ziplock bags, and a large amount of U.S. currency. ***Ratsamy***, 594 Pa. 176, 183, 934 A.2d 1233, 1237–38).

In this case, officers executing a search warrant on Appellant's apartment found Appellant in possession of several packets of cocaine, two loaded firearms in close proximity to the drugs, a scale, and new and unused plastic baggies identical to those containing cocaine. Ms. Haney testified

that Appellant gave her cocaine in exchange for sex and told her to contact him if she ever needed anything because he always had a "quarter key." Further, the Commonwealth presented the testimony of a narcotics expert who opined that the facts and circumstances supported an inference that Appellant possessed the cocaine with intent to deliver. Accordingly, we find sufficient evidence to support Appellant's PWID conviction.

Appellant also claims the prosecutor made two improper comments that were so prejudicial that they deprived him of a fair trial. We review a trial court's ruling on a claim of prosecutorial misconduct for an abuse of discretion. ***Commonwealth v. Noel***, 53 A.3d 848 (Pa. Super. 2012) (citation omitted). "Comments by a prosecutor constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in the jurors' minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict." ***Commonwealth v. Thomas***, ---Pa.---, 54 A.3d 332, 337-38 (Pa. 2012) (quoting ***Commonwealth v. Hutchinson***, 611 Pa. 280, 25 A.3d 277, 307 (2011)).

Appellant first claims the prosecutor made improper moral judgments about the credibility of the complainant, Jody Haney, during closing argument. The prosecutor attempted to ask the jury to apply the law to Ms. Haney, a prostitute, in the same manner it would to any other victim. The prosecutor made this remark:

> When I was thinking about this case, I [c]ame across a quote and it reads: The man once stated that the moral test of our society is how we treat people in the dawn of our life and the one that walk in the shadow of life is the sick and afflicted. She walked into the light of the courtroom and revealed disgusting, painful, humiliating details of herself and what he did to her and asks you to apply the law to her as it would apply to you or I.
>
> If you accept that, that the law applies equally to anyone, if you heard that certain laws don't apply to everyone because you seem to have made the mistake.

N.T. Trial, 6/20/11, at 29-30.

Appellant claims this statement "was almost biblical in reference" and was meant to suggest that the jury "should not impose any moral judgment against the complainant." Appellant's Brief, at 13. As an initial matter, we fail to see how this statement was religious in nature; Appellant does not identify that Bible passage that he believes the prosecutor intended to reference. The trial court surmised that the prosecutor attempted to quote a speech given by Vice-President Hubert H. Humphrey in 1977 in which he stated "the moral test of government is how the government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly, and those who are in the shadows of life – the sick, the needy, and the handicapped." T.C.O. at 9, n. 6.

Moreover, our courts have not established a *per se* rule that prosecutors must refrain from making any religious or moral references during trial. Appellant relies on ***Commonwealth v. Chambers***, 528 Pa. 558, 586, 599 A.2d 630, 644 (1991), where our Supreme Court vacated the appellant's death sentence and remanded for resentencing, as the

prosecutor quoted the Bible during the penalty phase of trial, stating "the murderer shall be put to death." The Supreme Court held that "reliance upon the Bible or any other religious writing in support of a penalty of death is reversible error *per se*." ***Id***. However, this holding in ***Chambers*** only applies to religious arguments in favor of a death sentence, which "invite[] the jurors to consider factors outside of those specifically established by our Legislature, and in a manner that is considered to have the unavoidable effect of prejudicing their minds to impose the death penalty." ***Commonwealth v. Natividad***, 595 Pa. 188, 214, 938 A.2d 310, 325 (2007). In ***Natividad***, the Supreme Court found that a prosecutor's reference to God during his guilt-phase closing argument did not prejudicially impact the appellant's convictions. ***See Commonwealth v. Neff***, 860 A.2d 1063, 1068 (Pa. Super. 2004) (finding prosecutor's statement that "the law has always been, thou shall not kill" was not improper as the statement did not suggest to the jury that there was a biblical basis, independent of the law, for convicting the defendant).

In this case, we find that the trial court correctly denied Appellant's request to ask the jury to disregard prosecutor's statement asking the jury to apply the protections of the law to Ms. Haney as it would for another victim of a sexual crime. Despite Appellant's argument to the contrary, the prosecutor did not make a moral judgment regarding Ms. Haney's credibility

or ask the jury not to impose any moral judgment against her. We find the prosecutor's statement was appropriate and did not constitute misconduct.

Appellant also claims the prosecutor vouched for Ms. Haney's credibility when she discussed her testimony at Appellant's preliminary hearing:

> Let's talk about the preliminary hearing and every time the witness was asked to talk about it, it is more and more details. There are 30 pages of testimony most of which is her testimony. Of the 30 pages, we are talking about one area that the defendants want to make her seem like she is lying and that had to do whether or not she cooked up her crack or his own. I submit that is another consistent statement.

N.T. Trial, 6/20/11, at 11.

The prosecutor made this statement to respond to defense counsel's repeated attempts to impeach Ms. Haney's credibility. Defense counsel pointed out slight inconsistencies in Ms. Haney's preliminary hearing testimony and her testimony at trial in which Ms. Haney gave uncertain answers on whether Appellant took a "hit" from the $50 bag of cocaine he gave Ms. Haney or whether he used his own supply of cocaine. As Appellant attempted to use this testimony to claim all of Ms. Haney's testimony was untrue, the prosecutor was simply responding to Appellant's attacks on Ms. Haney's credibility to point out that this inconsistency was only a small part of her testimony. A "prosecutor must be allowed to respond to defense counsel's arguments, and any challenged statement must be viewed not in isolation, but in the context in which it was offered." ***Thomas***, ---Pa.---, 54

A.3d at 338. Moreover, we find that this comment was not so prejudicial as to cause the jurors to be unable to render a fair verdict. Accordingly, we find there is no merit to either of Appellant's claims of prosecutorial misconduct.

For the foregoing reasons, we affirm.

Judgment of sentence affirmed.