NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TYSON A.A. KINT,	:	No. 279 EDA 2012
Appellant	:	

Appeal from the PCRA Order, December 5, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-1302902-2006

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND SHOGAN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 16, 2013

Tyson A.A. Kint appeals from the order of December 5, 2011, dismissing his petition for post-conviction collateral relief. We affirm.

> The facts underlying the instant case are as follows: In September of 2006, twelve year old T.Y. lived with her mom, dad, and little sister. [Appellant], Tyson Kint, was her cousin and was temporarily living with the family. Shortly after [appellant] moved in, he and T.Y. were watching a movie and [appellant] started touching her. At first, he rubbed her back, and then her private areas; eventually they engaged in intercourse. This kind of activity occurred over a period of one and one-half months. She never told anyone, because she thought that she and [appellant] were boyfriend and girlfriend; she loved him, and she thought that he loved her. T.Y. told her parents that she and [appellant] were intimate after [appellant] brought his girlfriend (now wife) and her baby to the house to spend the night.

Trial court opinion, 5/8/08 at 2.

On October 19, 2007, following a jury trial, appellant was found guilty of rape, involuntary deviate sexual intercourse ("IDSI"), aggravated indecent assault, indecent assault, indecent assault – course of conduct, and corruption of minors. On January 31, 2008, appellant was sentenced to an aggregate term of 5 to 10 years' imprisonment, followed by 5 years' probation. Post-sentence motions were denied, and appellant filed a timely direct appeal. On December 17, 2008, this court affirmed the judgment of sentence, and our supreme court denied appellant's petition for allowance of appeal on May 28, 2009. ***Commonwealth v. Kint***, 965 A.2d 297 (Pa.Super. 2008) (unpublished memorandum), ***appeal denied***, 601 Pa. 695, 972 A.2d 521 (2009).

Appellant filed a timely ***pro se*** PCRA[1] petition on November 4, 2009. Counsel was appointed, and filed an amended petition on appellant's behalf. On December 5, 2011, following Rule 907[2] notice, appellant's petition was dismissed without further proceedings. A timely notice of appeal was filed on January 3, 2012. The PCRA court filed an opinion on March 15, 2012.[3]

Appellant argues that trial counsel was ineffective for failing to object to the prosecutor's closing statement. According to appellant, the

[1] Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

[2] Pa.R.Crim.P., Rule 907, 42 Pa.C.S.A.

[3] The PCRA court did not order appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A.

prosecuting attorney, assistant district attorney Cara Coyne, Esq., improperly expressed her personal belief as to appellant's guilt and the veracity of witnesses; unfairly characterized him as a "predator"; engaged in conduct designed to inflame and arouse the passions of the jury; and told the jury that they should not even consider the possibility of reasonable doubt. Appellant contends that trial counsel could have had no reasonable basis for failing to object to these statements, and that he suffered prejudice as a result. Appellant complains that he would have been entitled to a mistrial or, at the very least, curative instructions. (Appellant's brief at 25.)

Initially, we note our standard of review:

> Our standard of review of a PCRA court's dismissal of a PCRA petition is limited to examining whether the PCRA court's determination is supported by the evidence of record and free of legal error. ***Commonwealth v. Ceo***, 812 A.2d 1263, 1265 (Pa.Super.2002) (citation omitted). Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa.Super.2001) (citation omitted).

Commonwealth v. Wilson, 824 A.2d 331, 333 (Pa.Super. 2003) (***en banc***), ***appeal denied***, 576 Pa. 712, 839 A.2d 352 (2003).

> The right to an evidentiary hearing on a post-conviction petition is not absolute. A hearing may be denied if a petitioner's claim is patently frivolous and is without a trace of support either in the record or from other evidence. A post-conviction petition may not be summarily dismissed, however, as 'patently frivolous' when the facts alleged in the

> petition, if proven, would entitle the petitioner to relief.

Commonwealth v. Granberry, 644 A.2d 204, 208 (Pa.Super. 1994), citing ***Commonwealth v. Box***, 451 A.2d 252 (Pa.Super. 1982).

> "To prevail on a claim alleging counsel's ineffectiveness, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness." ***Commonwealth v. Wallace***, 555 Pa. 397, 407, 724 A.2d 916, 921 (1999), citing ***Commonwealth v. Howard***, 538 Pa. 86, 93, 645 A.2d 1300, 1304 (1994) (other citation omitted). In order to meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a "'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Commonwealth v. Kimball***, 555 Pa. 299, 308, 724 A.2d 326, 331 (1999), quoting ***Strickland v. Washington***, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A "'[r]easonable probability' is defined as 'a probability sufficient to undermine confidence in the outcome.'" ***Id.*** at 309, 724 A.2d at 331, quoting ***Strickland***, 466 U.S. at 694, 104 S.Ct. 2052.

Commonwealth v. Jones, 811 A.2d 1057, 1060 (Pa.Super. 2002), ***appeal denied***, 574 Pa. 765, 832 A.2d 435 (2003).

> The standard for granting a new trial because of the comments of a prosecutor is a high one. Generally, a prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict. This standard permits us to grant a new

> trial based on the comments of a prosecutor only if the unavoidable effect of the comments prevented the jury from considering the evidence. A prosecutor must have reasonable latitude in fairly presenting a case to the jury and must be free to present his or her arguments with logical force and vigor.

Commonwealth v. Poplawski, 852 A.2d 323, 327 (Pa.Super. 2004) (citation omitted). ***See also Commonwealth v. Hood***, 872 A.2d 175, 185 (Pa.Super. 2005), ***appeal denied***, 585 Pa. 695, 889 A.2d 88 (2005).

We are further mindful of the following:

> 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.
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> ***Commonwealth v. Judy***, 978 A.2d 1015, 1019-1020 (Pa.Super. 2009) (quotations, quotation marks, and citations omitted). ***See Commonwealth v. Ragland***, 991 A.2d 336 (Pa.Super. 2010).

Commonwealth v. Hogentogler, 53 A.3d 866, 878 (Pa.Super. 2012).

We will examine the challenged statements one by one. First, appellant argues that ADA Coyne infringed upon his due process rights and stripped him of the presumption of innocence by indicating that the jury could not even consider the possibility of reasonable doubt. (Appellant's brief at 22.) ADA Coyne remarked, in relevant part, as follows:

> Ladies and gentlemen of the jury, your job in this trial as I mentioned in my opening is to search for the truth. It's not a search for doubt. We can find doubt in anything if we want to. But that's not your job in the trial. Your job is to look for what really happened, what the truth is.

Notes of testimony, 10/18/07 at 75.

> Counsel talked about reasonable doubt. And I just want to touch on it briefly because like Judge Geroff said, he is the final say on the law, and he is going to give you instructions that you must follow. And he is going to tell you about reasonable doubt. He is going to tell you reasonable doubt is not a mathematical certainty. It doesn't mean that the Commonwealth has to prove the case beyond every inch or millimeter of doubt.
>
> It means that your doubt, if you have a doubt, it must be reasonable. It must make sense. It can't be imagined to keep from doing an unpleasant duty, which, let's face it, even just coming and reporting for jury duty is unpleasant. But you took an oath, every single one of you, and you stood up and said that you're going to look for the truth and you're going to find the truth, and you're going to return the verdict based on the truth. And so you're going to look for the truth and not doubt.

Id. at 78.

Appellant mischaracterizes the prosecutor's statements. ADA Coyne did not tell the jury that they could not find doubt in appellant's case. She simply reminded them that the Commonwealth only has to prove the charges beyond a reasonable doubt, not beyond all doubt. ADA Coyne merely reminded the jury of their duty to search for the truth. There was nothing objectionable about her statements in this regard. In addition,

ADA Coyne was responding to defense counsel's closing statement in which he argued that the Commonwealth had failed to meet its burden of proof. (***Id.*** at 68.)

Next, appellant argues that ADA Coyne unfairly branded him a "predator." (Appellant's brief at 23.) According to appellant, by painting him as a "predator," she engaged in conduct designed to inflame the passions of the jury. (***Id.*** at 25.) The complained-of statement, taken in context, is as follows:

> Yes, [T.Y.] had a crush on this man. And you know what, a lot of 12-year-old girls have crushes on older people, camp counselors, life guards, guys on TV. But most people can be protected by those crushes. Usually those crushes are just that, crushes. They might hang a poster in their locker, or talk about how excited they are to be in the cute teacher[']s class. But nothing ever goes further because those people don't put themselves in that situation. Those men don't pray [sic] on young girls like this man did. They don't invite them to play movies, talk to them about what boys want, tell them they love them, tell them this is natural. And that's what happened here.

Notes of testimony, 10/18/07 at 76.

ADA Coyne's remarks were well within the bounds of oratorical flair. Appellant attacked T.Y.'s credibility on cross-examination and in his closing argument, and the prosecuting attorney was simply responding to those attacks by attempting to place T.Y.'s testimony into context of other young girls' experiences. Defense counsel stated during his closing argument: "I suggest to you that she had some kind of a crush on him, some kind of

fantasy and her mother or her father or someone put some words into her head to say that [appellant] raped her. I suggest to you, that it is totally unbelievable." (***Id.*** at 67-68.)

Defense counsel portrayed T.Y. as infatuated with appellant, and jealous of appellant's relationship with his girlfriend. ADA Coyne was certainly allowed to respond to this line of attack by arguing that many young girls T.Y.'s age have crushes on older men, but those men act responsibly and do not seek to take advantage of the young girls' emotions. Usually, such crushes are harmless; here, appellant preyed on T.Y. ADA Coyne's comments were not improper and there were no grounds for objection. ***See Commonwealth v. Van Horn***, 797 A.2d 983, 989 (Pa.Super. 2002) (finding that, put in context, the Commonwealth's characterization of the victim as the defendant's "prey" and a "plaything" was within the limits of proper oratorical flair), citing ***Commonwealth v. Miles***, 545 Pa. 500, 681 A.2d 1295 (1996) (holding that prosecutor was permitted to refer to the defendants as "hunting animals of prey").

Next, appellant contends that ADA Coyne expressed her personal belief or opinion as to his guilt. Appellant also argues that she openly vouched for the credibility of Commonwealth witnesses.

> It is well-settled that it is improper for a prosecutor to express a personal belief or opinion as to the guilt of the defendant or the credibility of the defendant and other witnesses. However, such comments by the prosecutor will not constitute reversible error unless the unavoidable effect is to prejudice the jury

> so that they could not weigh the evidence and render a fair and impartial verdict.

Commonwealth v. Hawkins, 549 Pa. 352, 389, 701 A.2d 492, 510 (1997) (citations omitted). ***See also Commonwealth v. La***, 640 A.2d 1336, 1347 (Pa.Super. 1994), ***appeal denied***, 540 Pa. 597, 655 A.2d 986 (1994) ("During closing argument, a prosecutor may comment on the credibility of a Commonwealth's witness, especially where that witness' credibility is attacked by the defense."), citing ***Commonwealth v. Barren***, 501 Pa. 493, 498, 462 A.2d 233, 235 (1983); ***Commonwealth v. McKendrick***, 356 Pa.Super. 64, 514 A.2d 144 (1986), ***appeal denied***, 514 Pa. 629, 522 A.2d 558 (1987).

Appellant points to the following comments as examples of the prosecuting attorney personally vouching for the credibility of witnesses. With regard to the victim's mother, K.K., ADA Coyne stated:

> So first we will start with [K.K.]. She testified that she didn't want [appellant] living with her. She just didn't want people living in the house. Did she tell you any other reason that she would make up this elaborate lie about [appellant]? Did defense counsel ask for anything that would give you any hint to what she would want to make up about him? This is her nephew.

Notes of testimony, 10/18/07 at 75-76.

The Commonwealth was merely responding to defense counsel's closing statement, in which he attacked K.K.'s credibility. (***Id.*** at 66.) ADA Coyne pointed out that K.K. is appellant's aunt and that she had no

compelling reason to make up her story. This is in the nature of fair response to a defense argument. Furthermore, we reject appellant's claim that ADA Coyne somehow shifted the burden of proof to appellant by criticizing defense counsel's cross-examination. (Appellant's brief at 21 n.1.) ADA Coyne simply remarked on the lack of any apparent motive to lie.

Regarding the victim, T.Y., and her father, G.Y., ADA Coyne stated:

> So what's [T.Y.]'s motive to make up this huge fabrication? What is she getting out of this? Then you heard from [G.Y.], and he [h]as to live with the fact that this was going on under his nose and he didn't do anything about it. He has got to live with that every single day of this life, and that was clear from the way he testified on the stand. And that's corroboration, ladies and gentlemen, in a case like this. That's corroboration.

Notes of testimony, 10/18/07 at 76-77.

Earlier, ADA Coyne remarked, in regards to the victim:

> It was clear in everybody's mind that lived in that house that she did have a crush on him. I'm not disputing that. Counsel is right. But what is in dispute is if she made up this whole big fantasy lie about them having sex, for what? What is she getting out of it?

Id. at 72.

Again, the Commonwealth's comments were fair response to appellant's attacks on the witnesses' credibility. In his closing statement, defense counsel argued that T.Y. was unbelievable and that "her mother or her father or someone put some words into her head to say that [appellant] raped her." (***Id.*** at 67.) Defense counsel also claimed that T.Y. was being

coached. (***Id.*** at 64-65.) The Commonwealth was entitled to respond to these arguments.

Appellant also complains that the Commonwealth vouched for the veracity of its own witnesses when ADA Coyne remarked, "And the officers did nothing but corroborate everything else you heard in the case." (***Id.*** at 77.) However, taken in context, ADA Coyne stated:

> And the officers did nothing but corroborate everything else you heard in the case. There is no physical evidence. I told you that in the beginning. There is not going to be any DNA. There is not going to be any hairs [sic] put somewhere else. And the reason that there is no hairs [sic] or DNA or something like that, is because of what we talked about. It was a few days after the incident occurred and also he was living there. You would expect to find his DNA in that house.

Id.

This was in direct response to defense counsel's closing statement, in which he argued the lack of any physical evidence to the jury: "As I said, if there was evidence of trauma to [T.Y.], that would have been presented to you I'm sure. If there was evidence of DNA, I'm sure that would have been presented to you. It's basically her word." (***Id.*** at 67.)

> They have no corroboration. There is no DNA. There is no physical evidence. In fact, Officer Wilson from the Special Victims Unit didn't even go to the house to go look for some DNA or some stains or anything. She just stayed in her office. It seems like in this case they took the complainant's statement and that's it. Done deal. Defendant guilty. That's what they say. What investigation did they do? Nothing. They just took her word.

Id. at 63-64.

Certainly, the Commonwealth was permitted to respond to appellant's argument by defending the officers' handling of the case and pointing out that the presence of appellant's DNA would have been irrelevant, because appellant lived in the same house as the victim. Additionally, there were no allegations that appellant beat the victim, and the victim's parents did not contact police until several days after appellant and the victim last had sexual relations. Thus, the lack of physical evidence was not probative of the crime. We determine that ADA Coyne's comments were well within the bounds of oratorical flair and constituted fair response to appellant's attacks on the witnesses' credibility.

We note that although appellant alleges that the prosecutor offered her personal opinion as to his guilt, he does not recite any such comments, nor are we able to discern any from the transcript. We reject appellant's suggestion that ADA Coyne expressed her personal belief of his guilt "by indirect figure of speech." (Appellant's brief at 21.) Obviously, the Commonwealth is permitted to sum up the testimony at trial during closing argument and argue to the jury why it believes it has satisfied its burden of proving every element of the crimes charged beyond a reasonable doubt. In short, appellant's claims lack arguable merit. We find no portion of the Commonwealth's closing argument objectionable, and, therefore, trial

counsel cannot be held ineffective for failing to do so. Certainly there was nothing that would have required a mistrial.

Furthermore, the trial court warned the jury several times that the attorneys' arguments are not evidence, and that they are not bound by the attorneys' recollections of the evidence. (Notes of testimony, 10/18/07 at 60-61, 83.) ***See Hawkins***, 549 Pa. at 374, 701 A.2d at 503 ("any prejudicial effect from the prosecutor's statement was cured by the trial court's general cautionary instruction to the jury following closing arguments that none of the closing arguments were evidence and that the Commonwealth always bore the burden of proof and that the defendant did not have to prove that he is not guilty. Our law presumes that juries follow the court's instructions as to the applicable law."), citing ***Commonwealth v. Baker***, 531 Pa. 541, 559, 614 A.2d 663, 672 (1992).

For these reasons, we conclude that trial counsel was not ineffective for failing to object to the above-referenced statements, and that a mistrial would not have been warranted in any event. Appellant's claims of trial counsel ineffectiveness are without merit, and the PCRA court did not err in dismissing appellant's petition without a hearing.

Order affirmed.