[J-18-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 403 CAP
	:	
Appellee	:	Appeal from the September 5, 2000
	:	Judgment of Sentence, the October 28,
	:	2002 Order Denying Post Sentence
v.	:	Motions and the January 22, 2003 Order
	:	granting permission to appeal nunc pro
	:	tunc the underlying charges in the Court of
	:	Common Pleas of Blair County, Criminal
WILLIAM L. WRIGHT, III,	:	Action Number 1980 of 1998.
	:	
Appellant	:	ARGUED: March 3, 2004

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: December 22, 2008**

I join the Majority Opinion in full, with the exception of two points. My first concern arises from footnote 22. I agree with the observation that "post-verdict motions should not become an accepted repository for laundry lists of collateral-appropriate complaints . . . ." Maj. Slip Op. at 37 (quoting Commonwealth v. Rega, 933 A.2d 997, 1032-33 (Pa. 2007) (Castille, J., concurring, joined by Saylor, J. concurring). Nevertheless, this Court has previously provided an exception to the holding in Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), delaying claims of counsel ineffectiveness until PCRA review, and allowed review of claims of ineffectiveness on direct appeal that were raised and addressed by the trial court on post-verdict motions, see, Commonwealth v. Bomar, 826 A.2d 831 (Pa. 2003). The Court, however, has never held that such process would result in waiver of subsequent full PCRA review. To the extent that footnote 22 attempts to change our jurisprudence *in*

dicta supported only by cites to two concurring opinions, I respectfully disagree. I believe our established case law permits the review of claims under the Bomar exception without affecting a defendant's right to seek PCRA relief. Of course, in accordance with well-established judicial principles, claims that have been previously litigated at the time the PCRA is filed are barred. 42 Pa.C.S. §9543(a)(3).

I also write separately to express my disagreement with the Majority's assessment of the harmlessness of the prosecutor's violation of Appellant's right to silence. While the Majority characterizes its assessment as "not a close case," Maj. Slip Op. at 29, I view the matter as extremely tenuous. This is especially so given this Court's longstanding protection of the right to silence and the stringent standards we have set forth for a finding harmless a violation of that right. Nonetheless, in respect for this Court's prior decisions, I join the Court's denial of relief to Appellant.

I join in full the Majority's presentation of the law and the determination that the prosecutor's references in this case constituted a violation of Appellant's right to silence. Maj. Slip. Op. at 28. Indeed, it is difficult to imagine a more direct reference to a defendant's decision not to testify than the statements made by the prosecutor in this case. This is not a case where there is an implied reference to the decision to remain silent; nor is there any confusion whether the silence referenced was pre-arrest, rather than the vigilantly protected post-arrest silence.

As recounted by the Majority, the defense's theory of this case is that Mrs. Mowery, wife of the victim, killed her husband and framed Appellant. Ultimately, the jury's determination of whether the defense's theory created reasonable doubt was dependent upon the credibility of Mrs. Mowery and implicitly the credibility of the story Appellant's defense put forth, in light of all of the evidence. In his closing argument, the prosecutor discredited the defense's version of what occurred inside the house by noting that the "two best Commonwealth witnesses here are the two that didn't testify in person." He made it

clear that the decedent was "not here to face ya [sic] and tell you that in person" because he had been murdered, leaving the jury to wonder why Appellant, as the only other person who was in the home when the murder occurred, did not testify to contradict Mrs. Mowery, and in support of his own defense's story.

We have previously been reluctant to find error harmless based upon overwhelming evidence and stated that such a finding should not be arrived at lightly. See Commonwealth v. Story, 383 A.2d 155, 166 (Pa. 1976); Commonwealth v. Davis, 305 A.2d 715, 720 (Pa. 1973). We have noted that "it is far worse to conclude incorrectly that the error was harmless than it is to conclude incorrectly that the error was reversible." Davis, 305 A.2d at 719. Overwhelming evidence, furthermore, cannot cure an error that may have contributed to the verdict:

> If there is a finding that the improperly admitted evidence could have contributed to the verdict, then the error cannot be harmless regardless of the overwhelming and uncontradicted evidence of guilt. It is impossible to determine that there is a possibility that the error contributed to the verdict, and at the same time determine that the error was harmless. The two findings are mutually exclusive.

Commonwealth v. Rodriguez, 626 A.2d 141, 145 (Pa. 1993). To render an error harmless based upon overwhelming evidence, "the properly admitted and *uncontradicted* evidence of guilt [must be] so overwhelming and the prejudicial effect of the error . . . so insignificant by comparison that the error could not have contributed to the verdict." Commonwealth v. Young, 748 A.2d 166, 193 (Pa. 2000) (emphasis added).

The Majority correctly observes that this case contained substantial evidence pointing toward Appellant; unlike the Majority, however, I pause before finding the evidence "overwhelming" because of the substantial prejudice accompanying the overt reference by the prosecution and the requirement in our caselaw that we consider only the uncontradicted evidence before concluding that the prosecutor's error was harmless. As

noted above, Appellant's counsel contradicted the basic premise of the Commonwealth case by challenging Mrs. Mowery's account of the events that occurred inside the Mowery home between the time of the argument in the yard prior to 6:00 a.m. and the time of Mrs. Mowery's phone call to 911 at 6:49.[1] Furthermore, counsel challenged the authenticity of Appellant's alleged confession by noting inconsistencies in the officers' reports. Nonetheless, the uncontradicted evidence includes the 911 calls that establish a six-minute window of time beginning with Appellant shooting his way into the Mowery home and ending with Mrs. Mowery calling to report the murder, the trail of Appellant's blood from the door to the murder scene of the bedroom, and the evidence of the police chase tracking Appellant's immediate flight from the house after the murder by himself and his arrest with the murder weapon, which had his own blood on the clip.

Accordingly, the question in this case is whether the references to Appellant's failure to take the witness stand, and the shadow we can presume it cast on the defense theory that Mrs. Mowery killed her husband and framed Appellant, may have been what ultimately tipped the scales in the Commonwealth's favor. This Court was faced with a similar quandary in Commonwealth v. Mitchell, 839 A.2d 202 (Pa. 2003), where the defendant contradicted the narrative of the shooting. In that case, we noted that the uncontradicted evidence established the defendant's presence at the scene, the events preceding the shooting that provided the defendant a motive to harm the victims, and the defendant's flight from police.[2] Although the reference to Appellant's right not to testify was more overt

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[1] I note that the Court need not conclude that the defense theory is credible to determine that the evidence is not overwhelming. See Commonwealth v. Young, 748 A.2d 166, 194 n.16.

[2] Justice Saylor authored a compelling dissent in Mitchell noting his view that Mitchell constituted a "dilution of the harmless error standard which the Court took pains to apply correctly in Young." Mitchell, 839 A.2d at 218

in this case than the reference in Mitchell, which could have been interpreted to reference pre-arrest silence, the uncontradicted evidence in this case is more substantial. Accordingly, following, as I must, the precedent established in Mitchell, I somewhat hesitatingly join the denial of relief in this case based upon my conclusion that the uncontradicted evidence of guilt was sufficiently overwhelming that the prejudicial effect of the prosecutor's comments did not contribute to the verdict.

In all other respects, I join the decision of the Majority.