No. 33377 - State v. Mindy Keesecker

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Chief Justice, dissenting:

In this case, the appellant, Mindy Keesecker, a church worship leader, counselor and a person in a position of trust, was convicted of sexually assaulting a fifteen-year-old boy. The appellant presented several assignments of error; yet, the majority reversed her conviction for only one reason–improper comments by the prosecutor during his closing argument. I dissent from the majority's decision because I do not believe that the prosecutor made impermissible references to the appellant's failure to testify. Furthermore, even if the prosecutor's comments were improper, the error was clearly harmless. Accordingly, I would have affirmed the appellant's conviction.

In *State v. Clark*, 170 W.Va. 224, 227, 292 S.E.2d 643, 647 (1982), this Court explained that,

> [T]he prosecution is free to stress the strength of the government's case and to argue the evidence and reasonable inferences therefrom, and the prosecutor is not constitutionally forbidden from telling the jury the fact that the evidence on any given point in the case stands uncontradicted. A prosecutor's statement that the evidence is uncontradicted does not "naturally and necessarily" mean the jury will take it as a comment on the defendant's failure to testify.

The majority essentially ignored *Clark* in reaching its decision in this case. Even though *Clark* is the most factually on-point precedent, the decision is only briefly mentioned in the

majority opinion. Instead of utilizing *Clark*, the majority misconstrued the prosecutor's comments and took them out of context in order to reverse the appellant's convictions based on cases where there was a direct reference to the defendant's failure to testify.

Contrary to the majority, I do not believe that the prosecutor's comments constituted prejudicial error. As this Court observed in *Clark*,

> The general rule formulated for ascertaining whether a prosecutor's comment is an impermissible reference, direct or oblique, to the silence of the accused is whether the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a reminder that the defendant did not testify.

170 W.Va. at 227, 292 S.E.2d at 647. When the prosecutor's comments in this case are read in context, I am unable to find that they were manifestly intended to be, or were of such character, that the jury would have naturally and necessarily taken them to be a comment on the failure of the appellant to testify.

The record in this case clearly shows that the prosecutor did not make a direct reference to the appellant's failure to testify. Rather, he merely pointed out that no one had contradicted the statement the appellant gave to the state police. Similar comments were made by the prosecutor in *Clark.* In that case, the defendant was accused of murdering his wife in their home by shooting her once in the head with a sawed-off shotgun. The defendant claimed that his wife's death was an accident and made several statements to the police in

that regard. During closing argument, the prosecutor, referring to a statement made by the defendant to the police, said, "*There is no evidence to contradict that. There is no evidence to contradict what the defendant said there in the living room so we have to take that as what he said.*" 170 W.Va. at 226, 292 S.E.2d at 646 (emphasis in original).

This Court concluded in *Clark* that the prosecutor's comments did not constitute a specific reference to the defendant's failure to testify and, therefore, were proper. In reaching that decision, this Court noted that it was apparent that the prosecutor was merely attempting to emphasize one piece of the State's evidence–the statement made by the defendant shortly after the crime was committed. The same is true in this case. At trial, the voluntariness of the appellant's confession was a hotly contested issue. The appellant presented several witnesses, including her brother, a state trooper, and two experts, for the purpose of showing that her statement was not voluntary. The prosecutor's remarks at issue here were made just before he began to summarize the testimony of these witnesses and were obviously an attempt to emphasize one piece of the State's evidence–the appellant's confession. There is simply nothing in the prosecutor's remarks which could even obliquely suggest that the jury should draw an adverse inference of guilt because the appellant did not testify.

Even if the prosecutor's remarks were improper, I do not believe that the appellant was entitled to a reversal of her conviction. If error occurred, it was harmless. The

record shows that the jury was instructed on the appellant's right not to testify and that they could not draw an inference of guilt from the fact that she did not take the stand. Moreover, the record indicates that the appellant was actually found not guilty of five counts. It seems to me that if the prosecutor's comments actually had the impact that the majority attributes to them, then the appellant would have been convicted of all counts.

Accordingly, for the reasons set forth above, I dissent.