No. 35271 - *State of West Virginia v. Richard Alan Poore*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WORKMAN, Justice, dissenting:

Like the majority, I too am concerned with certain errors committed during the appellant's trial. I disagree with the majority, however, because I cannot conclude that any one of the errors, taken alone, was so prejudicial as to rise to the level of plain error. As this Court has often stated, " 'the doctrine [of plain error] is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.' Syllabus Point 4, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988)." Syl. Pt. 2, in part, *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007). Because none of the errors in this case, standing alone, rise to the level of plain error,[1] the issues presented would be addressed more appropriately in the context of habeas corpus. Therefore, I respectfully dissent.

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[1]By failing to object to the prosecutor's remarks during opening statement, and by failing to request a hearing on the issue of pre-indictment delay, the appellant in this case failed to preserve either of these issues for appeal. Ordinarily, " '[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958)." Syl. Pt. 10, *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997). In its discretion, however, the Court can reverse a case on the basis of an unpreserved error if such error amounts to "plain error." "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Accordingly, to reverse the appellant's conviction in this case, this Court has to find that the alleged errors meet the "plain error" test.

The majority reverses and remands the case on two grounds: first, that the prosecutor committed plain error by making certain remarks during the opening statement, and second, that the circuit court was required to conduct a hearing on pre-indictment delay despite the appellant's failure to request such a hearing.

While I agree with the majority that the prosecutor's comments during the opening statement, in reading Ricky, Jr.'s obituary, discussing his funeral, and displaying pictures of his grave site, appear to have been inappropriate and possibly intended to inflame the jury, I do not agree that the prosecutor's statements regarding the appellant's unemployment and violent nature were improper. The State introduced testimony at trial as to each of these facts. This Court has always held that a prosecutor may properly address, in an opening statement, facts which will be admitted into evidence. *See*, *e.g.*, *State v. Hottinger*, 194 W. Va. 716, 720, 461 S.E.2d 462, 466 (1995) ("the prosecutor should not refer to material facts which *will not be introduced at trial* during an opening statement"). Accordingly, because the State introduced evidence[2] at trial that the appellant was not employed and was violent towards other members of the family, I do not believe the remarks as to these issues in the opening statement were in error.

[2]To the extent that the appellant argues that some of this evidence should not have been admitted, it should have been challenged via a motion in limine, a timely objection, or through a challenge under West Virginia Rule of Evidence 404(b), in the form of a *McGinnis* hearing, which the majority correctly directs be conducted on remand.

I would, therefore, limit the prosecutorial error in this regard to the remarks regarding Ricky, Jr.'s obituary and funeral services, and the photos displayed of the obituary and his grave site. Evidence relating to Ricky, Jr.'s obituary, funeral and grave site could not have been properly admitted and, therefore, the prosecutor erred in addressing them during the opening statement. As noted by the majority, however, to reverse a case on the basis of improper prosecutorial comment, four factors should be considered.

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). When applied to just the comments relating to the obituary, funeral and grave site, these four factors do not weigh in favor of reversal in this case. Although the prosecutor's comments may have been prejudicial to the appellant, they cannot be seen as misleading the jury on any disputed issues; the fact of Ricky, Jr.'s death was never contested. Moreover, the comments and photos at issue were isolated in that they were only addressed during the opening statement and not re-addressed during the closing argument. Finally, the remarks concerning Ricky, Jr.'s obituary and the photos of his grave site were purely extraneous and, therefore, they did not impact the other evidence offered by the State to establish the appellant's guilt.

Consequently, while erroneously made, I would not find that these comments rise to the level of plain error and, therefore, they are not reversible error. Rather, I believe the appellant could more appropriately raise this error in the context of a habeas corpus petition arguing that his attorney's failure to object to these statements constituted ineffective assistance of counsel.

Similarly, while I agree with the majority that, given the twenty-five year delay in this case, a pre-indictment delay hearing would have been appropriate, I find no legal basis for mandating such a hearing given that the appellant did not request one. This Court's recent opinion in *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009), which sets forth the standards for conducting such hearings, clarifies that the defendant bears the initial burden of proving that pre-indictment delay caused actual prejudice. *Id.* at Syl. Pt. 3. Because the defendant would bear the initial burden of proof, I find it unusual for this Court to require a trial court to conduct a pre-indictment delay hearing when the defendant has not requested such. Of course, this too could be made the subject of an ineffective assistance of counsel claim and resolved in the context of habeas corpus. Accordingly, I dissent on this basis as well.

In sum, while I agree that errors occurred in this trial, I do not join the majority in finding that such errors reach the level of plain error. Rather, given that the appellant's

attorney failed to object to the prosecutor's opening statements and failed to request a pre-indictment delay hearing, the defendant could pursue, in a habeas corpus action, a new trial on the basis of ineffective assistance of counsel. *See* Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992) ("It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim."). For these reasons, I respectfully dissent.