Commonwealth v. Clay

Appeals Court of Massachusetts

January 9, 2017, Entered

16-P-178

Reporter
2017 Mass. App. Unpub. LEXIS 30 *; 90 Mass. App. Ct. 1124; 75 N.E.3d 1147

COMMONWEALTH *vs.* WILSON CLAY.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE* V. *CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

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Judges: Green, Agnes & Desmond, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth concedes that the trial prosecutor's question directed to the defendant, asking whether he reported his self-defense claim to police, violated the prohibition established by *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), but contends that the error was harmless beyond a reasonable

doubt.[1],[2] We disagree, and reverse the defendant's convictions on two charges of assault by means of a dangerous weapon.

As the Commonwealth acknowledges, "the nature of a *Doyle* error is so egregious that reversal is the norm, not the exception." *Commonwealth* v. *Mahdi*, 388 Mass. 679, 698, 448 N.E.2d 704 (1983). We discern in the circumstances of the error in the present case no cause to treat it as an exception to the norm.

In considering whether a *Doyle* error is harmless beyond a reasonable doubt, we consider: "(1) the relationship between the evidence and the premise of the defense; (2) who introduced the issue at trial; (3) the weight or quantum of evidence of guilt; (4) the frequency of the reference; and (5) the availability or effect of curative instructions." *Id.* at 696-697. In the present case, the central premise of the defense was self-defense, and the Commonwealth's question (which, of course, the Commonwealth itself introduced) sought directly [*2] to undermine it. Though the judge administered a curative instruction, its force or effectiveness was undermined by two factors. First, it was not administered until the morning following the prosecutor's improper question. Second, and more importantly, the curative instruction, when given, erroneously assumed that the defendant did not answer the question. Accordingly, the instruction neither struck the defendant's answer nor directed jurors to disregard it. Instead it merely advised jurors that questions are not evidence, only answers are, thereby leaving intact the defendant's answer for the jury's consideration.[3]

We disagree with the Commonwealth's assertion that the strength of the evidence against the defendant was so overwhelming that the error should be considered harmless. The Commonwealth's case rested in large part on the version of events described by the victim, her father, and her older brother. No disinterested witnesses offered testimony describing the incident. By attempting to undermine the credibility of the defendant's version, based on his postarrest silence, the Commonwealth improperly elevated the credibility of the competing version

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[1] Because the error is both preserved and constitutional in dimension, the defendant is entitled to review under the most stringent standard available. See *Commonwealth* v. *Vasquez*, 456 Mass. 350, 360-361, 923 N.E.2d 524 (2010).

[2] We note that the record reflects that the trial judge appears to have acted in the mistaken belief that the witness did not answer the Commonwealth's improper question, and that neither the trial prosecutor nor the defendant's counsel corrected him. It is unclear from the record whether counsel also suffered from the same mistaken belief, or whether they were aware of the mistake and chose not to bring it to the attention of the judge. If the latter, we observe that both counsel, for independent reasons, had an obligation to alert the judge to his mistake so that it could be corrected during the trial, and that failure to do so could affect our standard of review.

[3] As the defendant observes, the Commonwealth's reliance on *Greer* v. *Miller*, 483 U.S. 756, 759-760, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987), is inapposite. In that case, the defendant did not answer the question and the trial judge immediately instructed the jury to disregard the question.

offered by witnesses related [*3] to the victim. In such circumstances, the fact that the improper reference occurred only once is inadequate, in our view, to preserve the judgments.

The judgments are reversed and the verdicts are set aside.

So ordered.

By the Court (Green, Agnes & Desmond, JJ.[4]),

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[4] The panelists are listed in order of seniority.