IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

2114 EDA 2015

COMMONWEALTH OF PENNSYLVANIA

V.

ANTHONY ROMANELLI, APPELLANT

REPLY BRIEF FOR APPELLANT

On Appeal from the May 29, 2015 Judgment of Sentence in the Court of Common Pleas, Philadelphia County, Docket CP-51-CR-0300422-2005.

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I. STATEMENT OF THE CASE

This matter comes before this Court following a timely filed appeal. Appellant Anthony Romanelli filed his principal brief on May 27, 2016 and the Commonwealth filed its appellee's brief on August 3, 2016. Appellant sought and received an extension of time in which to file his reply brief and now timely files this reply brief. Appellant relies upon the Statement of the Case in his original brief.

II. SUMMARY OF THE ARGUMENT

Relying upon Bruton v. United States, 391 U.S. 123 (1968), Anthony Romanelli moved to sever his trial from that of his co-defendant, Joseph Mumma, because each had made statements implicating the other. His severance motion was denied and each defendant's statement was redacted so that at trial Mr. Mumma's statement only referred to Mr. Mumma and the involvement of "the other guy." Mr. Romanelli's statement only mentioned Mr. Romanelli and "the other guy." However, in its brief in this Court the Commonwealth ignores Mr. Romanelli's constitutional right of confrontation. The Commonwealth improperly (and repeatedly) rewrites the evidence introduced at trial to now suggest that Mr. Mumma had directly implicated Mr. Romanelli. Not only does this violate Mr. Romanelli's right of confrontation, it is critical in assessing the merits of Mr. Romanelli's argument that because he did not kill and the jury never found that he had the intent to kill, he could not be sentenced to life without parole. The properly admitted evidence does not establish that Mr. Romanelli actually was the killer or intended to kill. This Court should remand for resentencing where a life sentence without parole could not be imposed.

In addition, the sentencing judge improperly refused to apply the presumption of immaturity mandated by Miller v. Alabama, 132 S. Ct. 2455 (2012) and Montgomery v. Louisiana, 136 S. Ct. 718 (2016) to Mr. Romanelli because he was

a couple months shy of 18 years old. The judge also predominantly concentrated upon the facts of the homicide rather than evidence of his demonstrated rehabilitation.

III. ARGUMENT

A. MILLER AND MONTGOMERY ESTABLISH A PRESUMPTION AGAINST IMPOSING LIFE WITHOUT PAROLE SENTENCES ON JUVENILES.

Appellant relies upon the arguments contained in his principal brief to respond to the Commonwealth's arguments on this claim.

B. BECAUSE APPELLANT DID NOT KILL OR INTEND TO KILL, HIS LIFE WITHOUT PAROLE SENTENCE IS INCONSISTENT WITH ADOLESCENT DEVELOPMENT AND NEUROSCIENCE RESEARCH AND UNCONSTITUTIONAL PURSUANT TO MILLER, GRAHAM, AND MONTGOMERY AND THE PENNSYLVANIA CONSTITUTION.

Mr. Romanelli argued that it would be unconstitutional to impose of life without parole sentence upon him as he was not found guilty of an intentional killing (first degree murder), but was found guilty of second degree murder (felony murder). Because a second degree murder verdict does not require a factual finding that he killed, intended to kill or foresaw that a life would be taken, a life without parole sentence would violate Graham v. Florida, 560 U.S. 48 (2010). *See* Brief of Appellant at 25-26.

In response, the Commonwealth first maintains that Mr. Romanelli did, indeed, personally kill the decedent. In its brief the Commonwealth argues, "Mumma said [that] Romanelli grabbed the victim by the hair and cut her throat" (Commonwealth's Brief as Appellee at 6). There are three problems with the Commonwealth's argument. First, the Commonwealth intentionally misstates the record. Second, the Commonwealth ignores the jury's verdict. Third, the Commonwealth ignores federal constitutional law.

The parties had litigated a pre-motion to sever based upon Bruton v. United States, 391 U.S. 123 (1968) because the statements each had given the police specifically mentioned actions of the other (See N.T. 11/21/06, 4-9). As a result, Judge Lerner had carefully redacted each statement to eliminate direct reference of the other in each defendant's statement (N.T. 11/21/06, 21-22). Hence, Mr. Romanelli's statement, the only evidence admissible against him, mentioned what he had told the police that he had done and what an unnamed guy had also done. Mr. Mumma's statement declared what he had done and what an unnamed guy had done.

In its brief in this Court, the Commonwealth mentions twelve times what Mr. Mumma allegedly had said that Mr. Romanelli had done and nine times what Mr. Romanelli had allegedly said that Mr. Mumma had done. See Brief for Appellee at 5-6, 8. To support this the Commonwealth cites "N.T. 11/20/06, 57-78, 191-245;

N.T. 11/21/05, 55-62, 126-136)" (*See* Commonwealth's Brief for Appellee at 5). An examination of those pages of the record reveals that Mr. Mumma said what he had done and what "the other guy" had done (N.T. 11/20/06, 217-228). So, for example, the record reflects that Mr. Mumma said that "the other guy" grabbed the decedent "by her hair and pulled her head back and cut her throat" (N.T. 11/20/06, 220). However, in this Court the Commonwealth rewrites the record (in violation of Bruton) to instead declare that "Mumma said Romanelli grabbed the victim by the hair and cut her throat." Commonwealth's Brief for Appellee at 6; *see also* Commonwealth's Brief for Appellee at 23 ("Mumma's statement asserted that defendant personally killed the victim.").

Not only is that argument by the Commonwealth constitutionally barred and factually contradicted by the record, it is contrary to what the jury actually found here. Judge Woods-Skipper had instructed the jury in response to a question, "To sum up, a Defendant may not be found guilty of the crime of murder in the first degree where the death is caused by another person unless the Defendant himself, as a conspirator or as an accomplice, had the specific intent or goal of bringing about the murder in the first degree. So a Defendant must have his own specific intent to bring about the murder in the first degree" (N.T. 11/30/06, 6). By finding Mr. Romanelli guilty of second degree and not first degree murder (N.T. 11/30/06, 14-15), the jury explicitly

found that the evidence did not establish beyond a reasonable doubt that he had the specific intent to kill. The jury did not specifically find that he was the person who, in fact, stabbed the decedent.

The only evidence admissible against Mr. Romanelli was his statement that he gave the police.[1] In that statement he was asked if he participated in the robbery and murder of Marie Lundgren (N.T. 11/21/06, 242). He said that he participated in the robbery, but did not have anything "to do with the murder" (N.T. 11/21/06, 242-243). According to Mr. Romanelli, it was "the other guy" who had a knife and slit Ms. Lundgren's throat (N.T. 11/21/06, 244). The jury, by not finding either defendant guilty of first degree murder and instead finding each guilty of second degree murder, obviously could not conclude beyond a reasonable doubt who was actual killer and whether the "other guy" had the specific intent to kill.

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[1] Judge Woods-Skipper instructed the jury that,"A statement made before a trial may be considered as evidence only against the Defendant who made that statement. Thus, you may consider the statement of Mr. Romanelli if you find he made it voluntarily as evidence against him and him alone. And you may consider the statement of Mr. Mumma, if you find it voluntary, as evidence against him and him alone." (N.T. 11/29/06, 38). Even the prosecutor at trial understood that the statement Mr. Mumma made to Detective McLaughlin could not be considered against Mr. Romanelli. She explained that, "This witness is being used strictly against Mr. Mumma as to the statement. If there were separate trials he would not be hitting the stand. Nothing he said had anything to do with Mr. Romanelli." (N.T. 11/20/06, 283-284). Yet in this Court the Appellee cites and relies upon the statement of Detective McLaughlin as evidence against Mr. Romanelli.

Who was the actual killer and whether that person intended to kill or foresaw that a life would be taken is critical to determine whether a life without parole sentence can constitutionally be imposed. As the United States Supreme Court found in Graham, to impose a constitutional life without parole sentence the fact finder must determine that the defendant killed, intended to kill or foresaw that a life would be taken. Here, the admissible evidence and the jury verdict do not establish that factual predicate.[2] To overcome that constitutional deficiency the Commonwealth resorted to the rewriting of the trial record and violating Bruton.

The Commonwealth cites Commonwealth v. Chester, 587 A.2d 1367, 1372 (Pa., 1991) (Commonwealth's Brief for Appellee at 23) as holding that when two co-defendants participate in an attack and blame the other for the fatal blows, each are responsible. However, the relevant evidence in Chester was statements that each defendant made to a third party. Unlike the instant case, there was no Bruton issue in Chester. Chester is irrelevant to the instant case.

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[2] The Commonwealth maintains that the fact that Mr. Romanelli was found guilty only of second degree murder "did not amount to a finding that he did *not* kill or intend to kill." Commonwealth's Brief as Appellee at 22. Actually, it does. The jury's instructions on first degree murder and its verdict that Mr. Romanelli was only guilty of second degree murder amounts to a finding that the evidence was legally insufficient to establish beyond a reasonable doubt that Mr. Romanelli killed or intended to kill. While the Commonwealth declares that the evidence was "easily sufficient to prove *first* degree murder and specific intent to kill" (Commonwealth's Brief as Appellee at 23), the jury disagreed with the appellate prosecutor's argument just as it did with the trial prosecutor's argument.

Similarly, Commonwealth v. Williams, 570 A.2d 75 (Pa. 1990) (Commonwealth's Brief as Appellee at 24), is irrelevant. In Williams the jury had found the defendant guilty of first degree murder by intentionally killing the victim. The Supreme Court found that it, therefore, made no sense for the defendant's attorney to argue in the capital phase of the trial that the defendant had not been found guilty of killing the victim. Here, the jury rejected that Mr. Romanelli had intentionally killed the victim. Hence, by its verdict the jury concluded that there was insufficient evidence to demonstrate that Mr. Romanelli killed, intended to kill or foresaw that a life would be taken.

This Court should also reject the Commonwealth assertion that second degree murder and its lawful sentence was somehow discussed by the Pennsylvania Supreme Court in Commonwealth v. Cunningham, 81 A.3d 1, 2-3 (Pa. 2013) (Commonwealth's Brief for Appellee at 18). An examination of the pages cited by the Commonwealth as relevant (pages 2-3 of Cunningham) merely reflect that the Cunningham Court accurately noted that Cunningham was found guilty of second degree murder and that Miller invalidated Pennsylvania sentencing for juveniles convicted of first and second degree murder. The Pennsylvania Supreme Court did not assert that there was any significance to the fact that Cunningham was found guilty of second degree murder.

As part of his argument on the separate protections under the Pennsylvania Constitution, Appellant argued that after the ruling in Miller that the Pennsylvania's sentencing statutes unconstitutionally mandated life without parole for juveniles convicted of first and second degree murder the legislature eliminated the possibility of a sentence of life without parole for second degree murder while retaining it in appropriate circumstances for first degree murder. Brief for Appellant at 29. The Commonwealth asserts that appellant misreads the new statute, 18 Pa.C.S.A. §1102.1. Commonwealth's Brief for Appellee at 27-28. The new statute provided that a juvenile convicted of first degree murder shall be sentenced to a term of life imprisonment without parole or a term of imprisonment, the minimum of which shall be at least 35 years to life for a juvenile fifteen or older and 25 years to life for a juvenile under fifteen. 18 Pa. C.S.A. §1102.1 (a). The statute for second degree murder, 18 Pa.C.S.A. §1102.1 (c), provided that a juvenile convicted of second degree murder shall be sentenced to a minimum of which shall be at least 30 years to life for a juvenile fifteen or older and 20 years to life for a juvenile under fifteen. Language authorizing life without parole appears in the statute for first degree murder and does not in the statute for second degree murder. "[A]n intrinsic aid to statutory construction is found in the maxim *expressio unius est exclusio alterius*. The maxim establishes the inference that, where certain things are designated in a statute, all

omissions should be understood as exclusions." Commonwealth v. Walls, 2016 PA Super. 156 (Pa. Super. July 19, 2016) quoting Commonwealth v. Richards, 128 A.3d 786, 789 (Pa. Super. 2015). While the Commonwealth is correct that the second degree murder statute does not have a upper limit on the minimum sentence permitted, life without parole as a minimum sentence is not permitted as a matter of statutory construction.

Consideration of the evidence that was properly introduced at trial, when coupled with the jury's verdict proves that the evidence did not establish that Mr. Romanelli killed or intended to kill. As a result, a life without parole sentence is in violation of the United States Constitution, Miller, Graham, And Montgomery and the Pennsylvania Constitution.

C. RE-SENTENCING ANTHONY ROMANELLI TO LIFE WITHOUT PAROLE WAS UNCONSTITUTIONALLY ARBITRARY AND CAPRICIOUS.

Appellant relies upon the arguments contained in his principal brief to respond to the Commonwealth's arguments on this claim.

D. THE IMPOSITION OF LIFE WITHOUT PAROLE ON ANTHONY ROMANELLI IS INCONSISTENT WITH MILLER V. ALABAMA.

When evaluating what sentence to give a juvenile convicted of second degree murder, several procedural protections are mandated. First, the facts of the case cannot be permitted to overpower mitigation based upon youth. Second, there is a presumption of immaturity that the Commonwealth must overcome. The Commonwealth first maintains that review in this Court of the imposition of a life without parole sentence must be by an abuse of discretion standard.

The Georgia Supreme Court recently recognized that Miller and Montgomery vastly restrict a sentencing court's discretion to impose upon a juvenile life without parole sentences. *See* Veal v. State, 784 S.E.2d. 403, 411 (Ga. 2016) ("The Montgomery majority's characterization of Miller also undermines this Court's cases indicating that trial courts have significant discretion in deciding whether juvenile murderers should serve life sentences with or without the possibility of parole."). Because juvenile life without parole sentences must be "rare," "uncommon," and reserved only for "irreparably corrupt" young offenders, appellate courts must have the ability to carefully scrutinize a sentencing court's decision to impose juvenile life without parole. Miller, Montgomery. Hence, the appropriate standard of review must be *de novo*. As counsel noted (Brief for Appellant at 2), this precise issue is currently

before the Pennsylvania Supreme Court in Commonwealth v. Batts, ___ A.3d___, *appeal docketed*, No 45 MAP 2016 (Pa., April 19, 2016).

There is substantial evidence here that, contrary to the requirements of Miller and Montgomery, the trial judge allowed the facts of the case to overpower the mitigation of youth. Here, the judge noted that this case was one of the most heinous crimes she had seen and it was the heinous nature of it that impacted the victim's family and the community. Brief for Appellant at 39-40. The Commonwealth, too, seems to have had its good judgment overwhelmed by the facts of the case as Appellant is accused of ignoring "the unique circumstances of the crime, in which he and his accomplice brutalized, sexually abused, maimed, and ultimately murdered a frail, elderly victim for no reason other than their own depraved amusement." Commonwealth's Brief for Appellee at 36. This is ignoring the fact that the Commonwealth, as discussed above, violated Bruton in making this assertion.

Here, there was ample evidence of mitigation which should have constitutionally precluded a life without parole sentence. The defense introduced expert reports and copies of certificates earned by Anthony Romanelli while in prison (N.T. 5/29/15, 66-68). Mr. Romanelli testified about the positive things he had accomplished while in prison: he was part of the team that established a re-entry program for people when they leave the prisons; he was president of the Hope for

Change Program (N.T. 5/29/15, 34-35). They donated money to hospitals and schools (N.T. 5/29/15, 35). They also donated money to a program that trains dogs for disabled veterans (N.T. 5/29/15, 35). He was pursuing a degree in business from Adams State University in Colorado (N.T. 5/29/15, 36). Judge Woods-Skipper agreed that Anthony Romanelli had grown and matured since the time of the crime: "I certainly have seen and I look at Mr. Romanelli today and I know that these years later you are certainly different. You certainly have matured. Age does do that to us" (N.T. 5/29/15, 63).

However, Judge Woods-Skipper did not properly credit this mitigation because she was overwhelmed by the facts of the case. In addition, she refused to properly credit this mitigation because, while she agreed that he was seventeen at the time, he was "a mere two months'" shy of his eighteenth birthday (N.T. 5/29/15, 62). She found this fact to be "one of the most compelling issues" (N.T. 5/29/15, 62). Hence, rather than the Commonwealth's wishful interpretation that maybe Judge Woods-Skipper simply disbelieved the mitigation (Commonwealth's Brief for Appellee at 36), instead the record demonstrates that while she believed that Mr. Romanelli had grown, matured and changed, she refused to factor that into the sentence because the facts overwhelmed her judgement and she refused to properly factor this mitigation in because he was two months shy of 18 years old. Mr. Romanelli was improperly

resentenced to life without parole. The sentencing judge improperly refused to apply the presumption of immaturity mandated by Miller and Montgomery. Moreover, her proper assessment of mitigation was overpowered by the evidence in the case.

IV. CONCLUSION

For the reasons stated above, Anthony Romanelli requests that this Honorable Court vacate the judgment of sentence and remand for a new sentencing hearing for which a life without parole sentence would be barred.

Respectfully submitted,

/s/_____

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