

IN THE COURT OF APPEALS OF MARYLAND

NO. 115

SEPTEMBER TERM, 1996

JEAN ALEX CLERMONT

v.

STATE OF MARYLAND

Bell, C. J.

Eldridge

Rodowsky

Chasanow

Raker

Wilner

Karwacki, Robert L., (retired, specially
assigned)

JJ.

Dissenting Opinion by Bell, C. J.

FILED: January 20, 1998

The majority holds that the trial court did not err either in limiting the appellant's cross-examination of the State's principal witness or in requiring the appellant to allocute before the State's rebuttal closing argument. I respectfully dissent. Because I believe that the trial court's limitation of the appellant's cross-examination was in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, that to treat allocution, which is neither argument nor testimony, differently in a capital case than in a non-capital one, is impermissible, thus error, and that neither error is harmless, inasmuch as their effect, both separately and in combination, denied the appellant a fair trial, I would reverse the appellant's convictions and remand this case for a new trial.

I

The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to be confronted with the witnesses against him. See Merzbacher v. State, 346 Md. 391, 411-12, 697 A.2d 432, 442 (1997); Marshall v. State, 346 Md. 186, 192, 695 A.2d 184, 187 (1997). See also Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 353 (1974); State v. Gray, 344 Md. 417, 420, 687 A.2d 660, 662 (1997); Ebb v. State, 341 Md. 578, 587, 671 A.2d 974, 979 (1996). Encompassed in this right is a defendant's opportunity to test the State's case by cross-examining the State's witnesses on matters likely to affect their credibility, including bias, prejudice, or ulterior motive. See

Pointer v. Texas, 380 U.S. 400, 403-04, 85 S.Ct 1065, 1068, 13 L.Ed.2d. 923, 926 (1965); Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956, 956-59 (1968). “The exposure of a witness’s motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” Davis, 415 U.S. at 316-17, 94 S.Ct. at 1110, 39 L.Ed.2d at 354. See also Smallwood v. State, 320 Md. 300, 306, 577 A.2d 356, 359 (1990). Such information is necessary if jurors are to test properly the weight and credibility of a witness’s testimony. See California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489, 497 (1973); Mattox v. United States, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339, 39 L.Ed 409, 410-11 (1895).

Rawle White, an admitted participant in the crimes with which the appellant was charged and tried, testified for the State, as its principal witness. He did so in exchange for a reduced sentence — one that, in effect, amounted to thirty years — for his own murder conviction. On direct-examination, White identified the appellant as the principal in the first degree, *i.e.*, the one who pulled the trigger. On cross-examination, the appellant sought to discredit White by showing both his bias and “that [he] was motivated to implicate [the appellant] because he had been told by a detective (truly or falsely) that [the appellant] had implicated him.” The latter attempt is reflected in the following colloquy (emphasis added):

“[DEFENSE COUNSEL] Q. You went down to the police station.

“[WHITE] A. Yes, sir.

“Q. In fact, what happened, Detective Rositch is the one who questioned you, is that correct?”

“A. I guess. I can’t remember his name, its been so long.

“Q. And he said to you, I believe that [Clermont] is lying and trying to save himself, and [Bonner] is telling the truth.

“Is that what he said to you?”

“A. No, sir.

“Q. He didn’t say that to you?

“A. He came at me and said Alex Clermont claimed that I pulled the trigger that night.

“Q. And so you claim that Alex Clermont pulled the trigger that night.

“[STATE’S ATTORNEY]: Objection. Move to strike.

“THE COURT: Sustained. Grant the motion to strike.

“Ladies and gentlemen of the jury, the last statement is stricken from the record, and is not to be used by you in your deliberations.”

Reading the sentence — “And so you claim that Alex Clermont pulled the trigger that night” — as a declarative, rather than an interrogative, sentence, the majority upholds the trial court’s limitation of the appellant’s attempt to explore, on cross-examination, the witness’s motivation. It reasons:

“Every aspect of the record . . . indicates that the sentence spoken by defense counsel that is last quoted above was a declarative sentence, asserting something as a fact, and not an interrogative sentence, asking a question. Had the sentence been spoken with a rising tone, the court reporter should have ended the sentence with a question mark, but the reporter used a period. It is clear that the State’s Attorney interpreted defense counsel’s sentence as a statement asserting a fact. Not only did the State object, but it moved to strike,

even though White had not given any answer to the question. The object of the motion to strike, which is usually accompanied by a request for an instruction to the jury to disregard certain evidence, is to remove matters which have not been properly admitted as evidence from the jury's consideration In the instant matter defense counsel's statement of an asserted fact was not evidence and was properly the object of the motion to strike.

“The record also clearly reflects that the trial court had the same understanding of defense counsel's statement as did the court reporter and the State's Attorney. The court sustained the objection, granted the motion to strike, and, without the need for an express request from the State, instructed the jury to disregard ‘the last statement.’”

___ Md. ___, ___, ___ A.2d ___, ___ (1998) [slip op. at 6-7]. More than that, however, the majority states that, “even if defense counsel used a rising tone to indicate a question, the trial court could, under the circumstances, consider that defense counsel was not really seeking an answer, but that defense counsel was simply indulging in a tactic to focus the jury on the legal issue that would be affected if the jury believed that White was lying.” Id. at ___, ___ A.2d ___ [slip op. at 9-10]. The majority concludes that, “if we treat the sentence in issue as a question, it is at best an argumentative one,” that carries considerable baggage, requiring the State to object and thereby protect its witness on cross-examination. Id. [slip op. at 10]. I disagree.

The majority relies on the fact that the court reporter ended the sentence with a period rather than a question mark. In so doing, it places undue emphasis on a court reporter's typographical notes and not enough on the context in which the sentence appears, which, in turn and by the way, has everything to do with the point the appellant sought to make and the manner in which he sought to make it. In other words, neither the interpretation given

the sentence by the court reporter — how he or she chose to report it — nor any other court actor, including the court or the prosecutor, nor the punctuation that the court reporter may have used in connection with it is, and, indeed, should not be, dispositive.

Certainly, the appellant had every right to ask the State's principal witness whether he was testifying that the appellant pulled the trigger because he had been told that the appellant had accused him of being the trigger man. Whatever the witness's response, the accused is entitled to elicit it because the witness's demeanor as he answered the question bears on the witness's credibility; the jury's opportunity of seeing and assessing how the witness answers the question is extremely relevant. In fact, having the benefit of that opportunity may well be critical in that regard. Had the transcript shown, with regard to the sentence at issue, a question mark instead of a period, I wonder if the majority would be taking the position that it has taken in this case. A matter as important as this - a man's life is at stake - ought not depend on the interpretation that a court reporter may give a particular sentence or phrase. Context and purpose should prevail.¹ And when the meaning of a sentence, or whether the sentence is a question, is ambiguous, the benefit of the doubt, as is

¹I am aware that the majority seeks to justify its conclusion that the subject sentence is a declarative sentence by analyzing the appellant's cross-examination as a whole. I am not persuaded. Only a cursory review of the transcript reveals the fallacy of that assertion. Just prior to the disputed sentence, the appellant's counsel stated, "He didn't say that to you." The court reporter interpreted it as a question, as reflected by the question mark appended to it. Like the disputed sentence, however, it was not phrased as questions traditionally are. Similarly, "Like you did with the police," at another point in the cross-examination of White, was interpreted as a question. Again, the court reporter's interpretation ought not, as here, be dispositive.

the case with the interpretation of ambiguous statutes, must be given to the accused.

Reading the sentence in question in the context of the appellant's cross-examination of White, the particular focus being on White's motivation for implicating the appellant, clearly shows that counsel was posing a leading question, not making a rhetorical or declarative statement. A leading question, one of the most effective tools of a cross-examiner, is "one that suggests to the witness the answer desired by the examiner." McCormick on Evidence, §6 at 17 (4th Ed.1992).

"The question which contains a phrase like, 'did he not?' is obviously and invariably leading, but almost any other type of question may be leading or not, depending upon the content and context. It is sometimes supposed that a question which can be answered yes or no is by that fact marked as leading."

Id. In this case, the question — "And so you claim that Alex Clermont pulled the trigger that night" — suggests the answer the appellant sought and it could be answered yes or no. See Harward v. Harward, 173 Md. 339, 350, 196 A.2d 318, 323 (1938); 3 Wigmore, Evidence, §773 at 165 (Chadbourn rev. 1970) ("[I]t is well settled that on cross examination of an opponent's witness, ordinarily no question can be improper as leading.").

At trial, the court determines what evidence is material and relevant, and the extent to which a witness may be cross-examined for the purpose of showing bias or, in this case, more accurately, ulterior motive. Ebb, 341 Md. at 587, 671 A.2d at 978; Bruce v. State, 328 Md. 594, 624, 616 A.2d 392, 407 (1992), cert denied, 508 U.S. 963, 113 S.Ct. 296, 124 L.Ed.2d 686 (1993); Shields v. State, 257 Md. 384, 392, 263 A.2d 565, 569 (1970). "The trial judge retains discretion to impose reasonable limits on cross-examination to protect

witness safety or to prevent harassment, prejudice, confusion of the issues, or inquiry that is repetitive or marginally relevant.” Marshall, 346 Md. at 193, 695 A.2d at 187. That discretion, however, may not be exercised “until the constitutionally required threshold level of inquiry has been afforded the defendant.” Id. A cross-examiner must be given wide latitude in attempting to establish a witness’s bias or motivation to testify falsely. Ebb, 341 Md. at 587, 671 A.2d at 978; Smallwood v. State, 320 Md. 300, 307-08, 577 A.2d 356, 359 (1990). No such latitude was given the appellant in this case. Indeed, considering that White was the State’s principal witness who fingered the appellant as the trigger person, I believe that the trial court’s limitation of the cross-examination of White prevented the appellant from reaching his “constitutionally required threshold level of inquiry.” This is evident by the trial court’s decision to not only sustain the State’s objection, but also to strike the question from the record and not permit defense counsel to rephrase the question.

II

The traditional timing of allocution² is as follows:

“The trial is over, the jury has reached a verdict and the accused is guilty of the crime with which he was charged. Now he stands at the bar of justice, a prisoner, and the judgment of the law is to be pronounced. But, before the

²Allocution, or allocutus, is defined in Black's Law Dictionary as follows:

“[The] [f]ormality of court's inquiry of defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction; or, whether he would like to make [a] statement on his behalf and present any information in mitigation of sentence.”

court decrees the inexorable legal consequences which necessarily follow the finding of guilt, the court formally addresses the prisoner, informs him of the jury's verdict and directly puts the interrogatory, 'Do you know of any reason why judgment should not be pronounced upon you?'"

Paul W. Barrett, Allocution, 9 Mo. L. Rev. 115 (1944). In response to this invitation, defendants often express remorse, take responsibility for their crimes, or, as is more often the case, beg for forgiveness and present information in mitigation of sentence.

During the penalty phase of appellant's trial, the following exchange took place between defense counsel and the trial court:

"[DEFENSE COUNSEL]: Two issues, if I may Your Honor.

"The first issue is the issue of allocution. I think we both agree that the defendant has an absolute right to allocute, which is in addition to any argument made by counsel for the State or counsel for the defense.

"It is my position and my request that after closing argument by counsel the defendant address the jury by allocution. I think historically in our jurisprudence system, before sentence is imposed the last person that the sentencing authority hears from is the defendant.

"In a normal proceeding the court would say to the defendant, do you have anything to say before sentencing is imposed?"

"THE COURT: Do you have any authority other than what you have just given me as to how — the order for that in a death penalty proceeding?"

"[DEFENSE COUNSEL]: There is no authority.

* * * *

"THE COURT: I will deny that request. I believe that since the State has the burden of proof in this trial that the State will have the last argument to the jury.

"[The appellant] has an absolute right to allocute, and that can either be after

the State's first argument and before the defense argument, or after the defense argument and before the [S]tate[']s rebuttal argument, and I will review that tactical decision.”

Thus, defense counsel requested that the trial court permit the appellant to allocute at the time customary in non-capital cases, just prior to the sentence being determined. Because, in capital cases, sentencing may be, and in this case was, done by a jury, that meant that the appellant be permitted to allocute after closing arguments. The trial court refused the request, however, ruling, and the majority agrees, that, because the State bears the ultimate burden of proof and is entitled to open and close arguments during a jury capital sentencing, the appellant is required to allocute to the jury before the State’s rebuttal closing argument.

Agreeing with the trial court's ruling and rationale, the majority holds that "absent some compelling reason for a contrary result, the State has the last word before the jury in a capital sentencing," and that "any allocution by the capital defendant almost universally must precede, at some point, the State's rebuttal closing argument." ___ Md. at ___, ___ A.2d at ___ [slip op. at 28]. This holding creates, unnecessarily and without good reason, a procedural difference in capital cases where the jury, rather than the court, is the sentencing authority. Moreover, it does not comport with fundamental fairness.

Maryland Rule 4-342(e) applies in non-capital cases. It provides:

“(e) Allocution and Information in Mitigation. — Before imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.”

Maryland Rule 4-343(d), pertaining to capital cases, similarly provides:

“(d) Allocution. — Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.”

It is perhaps of some interest that in non-capital cases, allocution is coupled with “information in mitigation of punishment.” This is perhaps because in capital cases, the rules provide for the production of mitigation evidence and that process is a more formal one than in non-capital cases. See Md. Rule 4-343 (b); Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 413.

Although the majority acknowledges that “[R]ule [4-343(d)] does not specify when, ‘[b]efore sentence is determined,’ the allocution may or must be made,” ___ Md at ___, ___ A.2d at ___ [slip op. at 28], the majority interprets the Rule in such a way as to force defendants, in jury capital sentencing proceedings, to allocute prior to the State's rebuttal closing argument. In contrast, in non-jury capital sentencing proceedings, and in non-capital cases generally, that may not be the timing; the defendant may be permitted to decide whether to allocute before, during, or even after closing arguments, as is customarily done.

In 1982, when the Rules Committee of this Court considered the present rules governing allocution in non-capital and capital cases,³ Md. Rules 4-342(e) and 4-343(d),

³A note discussing this Court's decision in Thanos v. State, 330 Md. 77, 622 A.2d 727 (1993) chronicles the common law and statutory history of the right of allocution in Maryland, as follows:

“The Court of Appeals first addressed the right of allocution in 1914. In Dutton v. State, the court endorsed the practice of providing the defendant with an opportunity to address the court in all cases in which the sentence of death or imprisonment could be imposed. In 1962, the judiciary adopted rule

respectively, there was discussion concerning defendants allocuting after final arguments, and in the case of jury capital sentencing, immediately before the jury retires. The Minutes of the October 15/16 1982 meeting of the Rules Committee provides, in pertinent part:

“[Chairman of the Criminal Rules subcommittee] recommended that [Rule 4-703, the non-capital sentencing rule,] and Rule 4-704[, the capital sentencing rule,] should be revised so as not to make the right of allocution, set forth in section (d) of Rule 4-703, limited exclusively to non-capital cases. Judge McAuliffe concurred with this recommendation noting that there are hybrid cases where both capital and non-capital sentences are imposed. In such cases the defendant will want to allocute at least as to the non-capital sentence, especially in light of the fact that the capital sentence may be subsequently reversed on appeal. Judge McAuliffe further suggested that the defendant might want, and should have the opportunity, to make a statement in favor of imposition of a sentence of life imprisonment as opposed to death.”

* * * *

“[The Chief of the Criminal Division of the Attorney General’s Office] asked whether the right of allocution, if permitted in capital cases, should be limited to being exercised before final arguments are made. The Chairman suggested that the timing of allocution ought to be left to judicial discretion. [The Criminal Division Chief] noted that she anticipates concern in the State’s

761, which applied to both capital and noncapital cases and provided that ‘before imposing sentence the court shall afford an accused or his counsel an opportunity to make a statement and to present information in mitigation of punishment.’ Rule 761 was subsequently rescinded and replaced by rule 722, which like its predecessor, applied to both capital and noncapital cases In 1979, the Court of Appeals amended rule 772 to apply only to noncapital cases and adopted rule 772A for application in capital cases. Rule 772A did not address a defendant’s right to allocution and remained the law in Maryland until the adoption of rule 4-343 in 1984. Rule 4-343(d) . . . governs the right of allocution in Maryland courts today.”

Daniel L Owel, Clarifying Trial Court’s Obligation to Conduct Sua Sponte Inquiries Into A Defendant’s Competence to Stand Trial and Defendants’ Right to Allocution, 53 Md. L. Rev 793, 798 (1994)(footnotes omitted).

Attorney's office about unsworn statements being made by the defendant immediately prior to the jury's retiring to consider its verdict.

“[The Chairman] proposed that section (d) of Rule 4-703 be amended to simply provide that the court shall afford the defendant the opportunity personally or through counsel to make a statement in mitigation of punishment. The simplified version of the section could then be added to Rule 4-704.”

As we observed in Booth v. State, 306 Md. 172, 507 A.2d 1098 (1986), “[t]he Rules Committee then voted to recommend to this Court that the rule applicable to noncapital cases be amended" and "make the amended allocution rule applicable to capital cases." 306 Md. at 197-98, 507 A.2d at 1111. In short, the Rules Committee addressed the concern of a defendant allocuting after the State's rebuttal closing argument, and it decided to treat allocution in jury and non-jury cases similarly, to wit, the decision of when a defendant chooses to allocute would not, as the majority now holds, be “subject to the constraints of a jury proceeding.” Instead, all criminal defendants would be afforded the same benefits of allocution. This Court accepted the Rules Committee's recommendation to adopt a rule governing allocution in capital sentencing. That recommendation is now Rule 4-343(d).

The Court's decisions subsequent to the adoption of Rule 4-343(d) reveal the manner in which allocution has been treated in Maryland. In Harris v State, 306 Md. 344, 509 A.2d 120 (1986), for example, a trial court ruled that the defendant should not be permitted to allocute before the jury in addition to defense counsel's closing argument because "allocution was nothing more than a form of argument." We remanded for resentencing, holding that allocution was separate from and not synonymous to the term "argument," as the allocutory

process, unlike closing arguments, provides the defendant with a unique opportunity to confront the sentencing authority. Id. at 358, 509 A.2d at 127("Section 413(c)(1)(i) states that any evidence relating to any mitigating circumstances is admissible at the capital sentencing proceeding. These statutory provisions reflect a strong public policy of providing the sentencing body in capital cases with the broadest possible range of relevant information that may counsel leniency."). See also Thanos v. State, 330 Md. 77, 90, 622 A.2d 727, 733 (1993)(defendant has ultimate decision whether and when to allocute); Shifflett v. State, 315 Md. 382, 388, 554 A.2d 814, 817 (1989)("The ability to speak in mitigation of punishment under the circumstances of this case necessarily entailed the opportunity to respond to the new substantive remarks of the prosecutor.").

Other than allocution, there is no other point at which the difference between the role of the court and the jury, as sentencing authorities in capital sentencing proceedings, is so pronounced. The majority's sole justification for this difference is stated as follows:

"[I]n the jury capital sentencing context, should a conflict between the defendant and trial counsel emerge over when allocution will be made, the holding from Thanos that the decision is ordinarily that of the defendant will be transportable to the jury context. But, in that context, the court's discretion in establishing the defendant's range of options is additionally subject to the constraints of a jury proceeding. In a jury capital sentencing, the later any allocution is postponed in the proceeding, the greater is the opportunity for sandbagging and for confusing the jury."

___ Md. at ___, ___ A.2d at ___ [slip op. at 35]. The majority's concern with the jury being sandbagged and confused can be readily cured with an appropriate jury instruction explaining the nature and purpose of allocution.

The instant case is not a case where the capital defendant used allocution as an opportunity "to contest a disputed factual basis for the sentence," present new factual or legal arguments, and, in effect, make a surrebuttal to the State's closing rebuttal argument. To the contrary, in the instant case, the appellant used his allocution simply to plead for mercy:

“First of all, I would like to apologize to the family and the loved ones, because I am sorry for the part that I took in this drama, and there is nothing that I can do to bring his life back, but I feel right now, I have taken responsibility for my part in taking Mr. McMullen's life, and I want to apologize to the family, and tell them that I am sorry, and I would like to ask the jurors for mercy.”

This plea was appellant's last cry for mercy, pleading for the jury to impose a life sentence and spare his life. Allocution is one of the humanizing features of a death penalty proceeding and it is a right of the capital defendant that should not be abridged without good cause. See Caren Myers, Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity, 97 Columbia L. Rev. 787 (1997). Nor in my view ought it to be unduly burdened or diluted as to be largely meaningless. Treating allocution as what we have clearly said it is not, argument or evidence, and subjecting it to the strictures applicable to those forms of address to the jury has that effect and, for that reason, is fundamentally unfair.