ORIGINAL

No. 21-7260

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE MACKIE
(Petitioner)

v.

COMMONWEALTH OF MASSACHUSETTS
(Respondent)

ON PETITION FOR A WRIT OF CERTIORARI TO

MASSACHUSETTS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

George Mackie
30 Administration Road
Bridgewater, MA. 02324

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

RELATED CASES		Judgment Ordered
Commonwealth v. George Mackie	0885 CR 01449	August 12, 2009
Commonwealth v. George Mackie	2013-P- 00198	March 7, 2014
Commonwealth v. George Mackie	FAR-	2014
Commonwealth v. George Mackie	0885 CR 01449	September 8, 2021
Commonwealth v. George Mackie	2020-P-1307	November 30, 2021
Commonwealth v. George Mackie	FAR-28615	January 14, 2022

QUESTIONS PRESENTED

A. DID THE APPEALS COURT ERR IN HOLDING THAT THE ERROR-LADEN CLOSING ARGUMENT BY THE PROSECUTER, TAKEN IN ITS TOTALITY, CREATE A SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE.

B. DID THE APPEALS COURT ERR IN ITS HOLDING THAT THE TOTALITY OF ERRORS[1] COMMITTED BY DEFENDANT'S TRIAL COUNSEL[2] CONSTITU CONSTITUTE ENEFFECTIVE ASSISTANCE OF COUNSEL, WHERE SUCH ERRORS INCLUDED FAILING TO OBJECT TO JURY INSTRUCTIONS WHICH SEPARATED THE JURY'S ROLE AS FACT FINDER FROM THE REASONABLE DOUBT STANDARD OF PROOF, WHERE THE DEFENDANT'S ENTIRE CASE RELIED ON THE ARGUMENT THAT THE JURY COULD NOT CONCLUDE BEYOND A REASONABLE DOUBT WHETHER THE DEFENDANT'S OR THE COMPLAINANT'S VERSION OF EVENTS WAS TRUE.

Note 1: The errors included the failure to impeach the alleged victim, which was considered a "reasonable tactical decision" by the Appeals Court

Note 2: Trial Counsel was suspended from the practice of law for Three years after pleading guilty to insider trading violations, some of which took place during the time trial counsel represented the defendant. See 33 Mass. Att'y Disc. R. 375 (2017)

TABLE OF AUTHORITIES CITED

CASES:

UNITED STATES SUPREME COURT

MASSACHUSETTS CASES:

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INDEX TO APPENDICES

OPINIONS BELOW

For Cases from State Courts:

[X] The opinion of the Highest State Court to review the merits appears at Appendix "A", to the petition and is
[X] reported at 2021 Mass. App. Unpub. LEXIS 738 - Rule 23

[X] The opinion of the Supreme Judicial Court appears at Appendix "B" to the petition and is reported at: 488 Mass 1105 (10/15/21) Commonwealth v. Mackie

JURISDICTION

[X] For cases from State Courts:
The date on which the Highest Court decided my case was November 30, 2021. A copy of that decision appears at Appendix "A".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Providions:
Sixth Amendment: Effective Counsel

Statutory Provisions:
M.G.L. c. 265 §23
M.G.L. c. 268 §13B

STATEMENT OF THE CASE

The forty-six year old defendant developed a friendship with the thirteen year old victim and the victim's friend. Among other activities, the defendant took the boys fishing, to restaurants, to a bike store, and to a "monster jam" truck event. He also gave the victim an iPod and a cell phone but told the victim that he "could only use it to call [the defendant]." On one of the outings the defendant drove the victim to a boat ramp by "the lake in Clinton"."[I]t was dark out at this time." There, the defendant unzipped the victim's pants, pulled out the victims penis, and placed it into his mouth. A few days later, the defendant drove the victim to the same area and placed the vicim's penis into his mouth a second time. After each incident, the defendant told the victim, "What happens in the car stays in the car." The defendant admitted at trial that he took the victim to restuarants and bought him various things. He also admitted that he took the victim to the boat ramp on at least two occasions but testified that he did so to go fishing. He denied any sexual contact with the victim.

WHY REVIEW IS APPROPRIATE

A. DID THE APPEALS COURT ERR IN HOLDING THAT THE ERROR-LADEN CLOSING ARGUMENT BY THE PROSECUTOR, TAKEN IN ITS TOTALITY, CREATE A SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE.

A. Closing arguments must be limited to facts in evidence and the fair inferences that may be drawn from these facts. Commonwealth v. Rutherford, 476 Mass. 639, 643 (2017). Notwithstanding this straightforward legal principal, the prosecutor appeared to go out of his way to violate it. In fact, he managed to pack into a closing argument consisting of a mere 15 transcript pages the following prodigious list of prejudicial statements which had absolutely NO basis in the facts in evidence:

-A wholly unsupported description of the typical child rape case, followed by multiple efforts to fit the facts of the instant case into such purportedly typical case, including the complainant's failure to report promptly, the lack of DNA evidence, the lack of video evidence or a photograph of Mr. Mackie raping the complainant, and wholly unsupported references to the location of the attack as "in the woods;"

-A statement that the crime scene looked like the jurors' "backyards at 9:00 o'clock at night;"

-Statements that although the prosecutor's 13-year-old son lies, he would never lie about rape;

-Stunning declarations regarding a police officer's personal opinion about whether Mr. Mackie raped the complainant; and

-A shocking assertion that the complainant didn't tell his parents about the alleged rape because the complainant's parents "probably didn't know what's right and what's not right" because they were poor.

These errors were made worse by the prosecutor's outright vouching for the credibility of the complainant, and by the overall tone of the closing argument, which implied that the prosecutor (and those working with the prosecution) believed the complainant, and believed that Mr. Mackie was guilty.

The most egregious examples of such vouching included the prosecutor's closing flourish: "I hope at some point you all ... figured out what was really going on here," after telling the jury that at some point in the case, he had said "Aha" to himself. In so doing, not only did the prosecutor imply that his opinion was that the complainant was truthful (and that the defendant was not), but he also altered the jury to the fact that he (the prosecutor) knew "what was really going on here."

The prosecutor also communicated to the jury that he had personal knowledge outside the evidence to vouch for the credibility of the police officer who testified (and indirectly, to vouch for the credibility of the complainant) when he said, "Do you think for one minute we would be here if Officer Silvester didn't thing it happened?" and, "So that's incorrect, when someone suggests to you that Officer Silvester didn't think it happened." See Commonwealth v. Stuckich, 450 Mass. 449, 457 (2008) (official belief in a criminal complaint irrelevant to the issue of the defendant's guilt and "extremely prejudicial").

And the prosecutor committed essentially the same error when he vouched for the complainant's credibility by stating, "I have a 13-year-old son, and I know they all tell stories," followed by a series of sarcastic questions implying that 13 year-old boys don't lie about rape. (The complainant was 13 at the time of the

alleged assaults.) In effect, in this section of the closing, the prosecutor was presenting himself to the jury as an expert in the behavior of 13-year-old boys, expressing his opinion that although "they all tell stories," they don't lie when they claim to have been raped. Compare Commonwealth v. Beaudry, 445 Mass. 577, 580 - 581 (2002) See also, Commonwealth v. Fredette, 56 Mass. App. Ct. 253 (2002) ("prosecutorial presumption to provide expert opinion" in closing prejudicial).

The prejudice created by the prosecutor's remarks was manifest. The Commonwealth's case was weak. There was no physical or forensic evidence corroborating the complainant's allegations. Indeed the only corroboration of any kind was first complaint evidence which was far from compelling because of the delay between the alleged attack and the complaint.

Predictably, the defense emphasized those weaknesses in its closing argument. And the Appeals Court was wrong to use the defendant's closing to justify the prosecutor's missteps. Contrary to the Appeals Court's decision, defense counsel's remarks[3] did not entitle the prosecutor to effectively ignore the bounds of appropriate argument, and allow him to repeatedly inject facts not in evidence, including his own beliefs, into his presentation to the jury. See Commonwealth v. Kozec, 399 Mass. 514, 519 (1987) (prosecutor may not fight 'fire with fire' and exceed normal bounds of closing argument because defense closing was inappropriate or excessive).

Note 3: To the degree that the defendant's trial attorney's remarks gave the prosecutor free rein to blatantly ignore limits on closing arguments, such remarks constitute an additional example of ineffective assistance of counsel. see infra.

Indeed, the prosecutor's final remarks to the jury were so laden with prejudiccial statements that they require further judicial review.

B. DID[1] THE APPEALS COURT ERR IN ITS HOLDING THAT THE TOTALITY OF ERRORS[1] COMMITTED BY DEFENDANT'S TRIAL COUNSEL[2] CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE SUCH ERROR INCLUDED FAILING TO OBJECT TO JURY INSTRUCTIONS WHICH SEPARATED THE JURY'S ROLE AS FACT FINDER FROM THE REASONABLE DOUBT STANDARD OF PROOF, WHERE THE DEFENDANT'S ENTIRE CASE RELIED ON THE ARGUMENT THAT THE JURY COULD NOT CONCLUDE BEYOND A REASONABLE DOUBT WHETHER THE DEFENDANT'S OR THE COMPLAINANT'S VERSION OF EVENTS WAS TRUE.

By failing to object to jury instructions which disconnected the jury's fact-finding role from the reasonable doubt standard, and trial counsel failed to impeach the alleged victim, the defendant's attorney was ineffective.

Defense counsel made clear to the jury that they would not be able to decide beyond a reasonable doubt whether to believe the complainant's or Mr. Mackie's version of events, and that Mr. Mackie was therefore entitled to a verdict of not guilty. (It's going to be about two stories, and you're not going to be able to find out what really happened.")

This strategy relied on the jury's understanding that its role was to determine whether the Commonwealth proved beyond a reasonable doubt that the complainant's version of the facts was true. See In re: Winship, 397 U.S. 358, 364 (1970). However, the judge repeatedly undermined the defendant's strategy by instructing the jury that its fact-finding role was separate from the reasonable doubt standard. The jury was told that they were first to determine the truth of what happened (without any mention of applying the reasonable doubt standard while doing so), and second, they were to apply the reasonable doubt standard to that already-determined

truth in order to assess whether the defendant was guilty. The relevant passages (with emphasis added) are as follows:

> - As the jury, you determine the facts of the case. You are the sole and exclusive judges of the facts. You alone determine what evidence to believe, how important any evidence is that you do believe, and what conclusions all the believable evidence leads you to believe. You will have to consider and weigh the testimony of all the witnesses who will appear before you, and you alone will determine whether to believe any witnesses, and the extent to which you believe any witness.
> - It is part of your responsibility to resolve any conflicts in testimony that might arise during the course of the trial, and to determine where the truth lies. Ultimately, you must determine whether or not the Commonwealth has proved the charge or charges beyond a reasonable doubt.
>
> - Members of the jury, you're about to begin your final duty, which is to decide the fact issues in this case. ...Your function as the jury is to determine the facts of this case. You are the sole and exclusive judges of the facts. You alone determine what evidence to accept, how important any evidence is that you do accept, and what conclusions to draw from all the evidence. You must apply the law as I give it to you to the facts as you determine them to be in order to determine whether the Commonwealth has proved the defendant guilty of these charges.
>
> You should determine the facts based solely on a fair consideration of the evidence.
>
> - The word "verdict" comes from two Latin words meaning "to tell the truth," and that is what the law looks to your verdict to do. Your function as the jury is to find the facts, and to decide whether on those facts the defendant is guilty of the crime charged.

In these passages, the jury was essentially told that they were the sole judges of fact in the trial, they were to "resolve conflicts in testimony," "find the facts," and "determine where

the truth lies." Second, they were then to "decide whether on those facts" the defendant was guilty beyond a reasonable doubt. That is, the jury was directed to apply the reasonable doubt standard only after they had determined the facts, rather than to apply the reasonable doubt standard in determining the facts. This separation of the jury's fact-finding role from its responsibility to determine whether the defendant was guilty beyond a reasonable doubt was reinforced at the conclusion of the instructions, when the judge told the jury that "no one of you jurors is any more or less qualified to decide the facts of this case or to deliberate on a verdict."

It should be noted that this flawed description of the jury's function might well have been furthered by the conspicuous absence of the words "facts" or "fact-finding" whenever the court discussed reasonable doubt in its instructions. Indeed, the term reasonable doubt was never used in connection with the jury's role as fact-finder at any point during the instructions. This was a critical flaw in the instructions because "the constitutional issue of burden of proof goes to the very heart of the truth-finding function of the criminal trial." Commonwealth v. Stokes, 374 Mass. 583, 589 (1978). In addition to those sections of the instructions cited above which separated the jury's role as fact-finder from its responsibility to determine whether guilt was proved beyond a reasonable doubt, the remaining passages alluding to fact-finding in the instructions (with emphasis added) are as follows:

- "you are not to decide this case based on what you may have heard outside of this courtroom. You are not to engage in any guesswork about any unanswered questions that remain in your mind, or to speculate about what the real facts might or might not have been."

- "Your oath as jurors was that you would perform your duty of finding the facts without being swayed by bias or perjudice toward either side."

- "You are to decide what the facts are solely from the evidence admitted in this case and not from suspicion or conjecture. ... You might find that a smaller number of witnesses who testify to a particular fact are more believable than a larger number of witnesses who testify to the opposite."

- "Some things that occur during a trial are not evidence, and you may not consider them as evidence in deciding the facts."

- "There are two types of evidence which you may use to determine the facts of a case, direct evidence and circumstantial evidence."

- "You are to use all of your common sense, experience, and good judgment in filtering all this testimony, and deciding what you believe and what you don't believe."

The court repeatedly alluded to the jury's responsibility to "find," "determine," and "decide" the facts of the case. But "[t]his language does not describe precisely what degree of persuasion is required -- whether beyond a reasonable doubt, or by a preponderance, or something in between." Connolly v. Commonwealth, 377 Mass. 527, 534 (1979). Such confusion, of course, flies directly in the face of the constitutional requirement made explicit in the holding of In re: Winship, supra, that the Commonwealth must prove beyond a reasonable doubt every fact necessary to constitute the crime.

REASONS FOR GRANTING THE PETITION

A Writ of Certiarari is appropriate where the Appeals Court failed to acknowledge that errors in the prosecutors closing

argument, taken in totality, created a substantial risk of a miscarriage of justice, and trial counsel was ineffective as counsel regarding his failure to object to jury instructions which separated the jury's role as fact-finder from the reasonable doubt standard of proof, where the defendant's entire case relied on the argument that the jury could not be concluded beyond a reasonable doubt whether the defendant's or complainant's version of events was true, taken in totality of trial counsel's other errors, including failure to impeach victims testimony with phone records.[1]

CONCLUSION

WHEREFORE, for the above stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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