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Comments to the Jury on Defendant's Failure to Testify

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COMMENTS TO THE JURY ON DEFENDANT'S FAILURE TO TESTIFY

At early common law, the accused in a criminal prosecution was considered incompetent to appear as a witness on his own behalf, and the prosecution could not call him as a witness. The one concession to him was permission to address the jury at the close of the evidence with a plea as to extenuating circumstances which would tend to palliate his guilt. In the middle of the 19th century, legislatures began to grant the accused the privilege of taking the stand, and the same statutes invariably permitted the accused the additional privilege of declining to testify.[1] The question soon arose as to whether the normal inference should arise in this situation that one who fails to produce evidence within his control does so because such evidence is adverse to himself. On the theory that this inference would discourage the use of the privilege, statutes were enacted by nearly all the states which forbade comment by the court or the prosecuting counsel on the matter.[2]

At present, England forbids such comment by the prosecutor, though the court may refer to the failure of the defendant to testify.[3] In Canada, neither court nor counsel is permitted to comment.[4] In the United States the majority of jurisdictions forbid comment by court or counsel on the lack of testimony of the accused,[5] though a minority say that the failure to testify raises a strong presumption that the defendant could not truthfully deny the implicatory facts.[6]

The presently applicable Pennsylvania statute on the subject states that in no criminal trial shall the defendant be forced to testify on his own behalf,

> nor may the neglect or refusal of any defendant, actually upon trial in a criminal court, to offer himself as a witness, be treated as creating any presumption against him, or be *adversely* referred to by court or counsel during the trial.[7] (Emphasis added.)

This statute, then, while it prohibits *adverse* comments by court and counsel, impliedly allows non-adverse comments on the failure of the accused to take the stand.

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[1] For a complete tracing of the history of the rule, see 8 WIGMORE, EVIDENCE, § 2272 (3d Ed. 1940).

[2] MCCORMICK, EVIDENCE, § 132 (1954).

[3] 1898 st. 61 & 62 Vict. c. 36 (b) CRIMINAL EVIDENCE ACT.

[4] REVISED STATUTES 1927, c. 146, § 143, EVIDENCE ACT § 4(5). The English and Canadian statutes are set out in 2 WIGMORE, EVIDENCE, § 488.

[5] 8 WIGMORE, EVIDENCE § 2272(1).

[6] For a statement of the minority rule, see State v. Corby, 28 N.J. 106, 145 A.2d 289 (1958).

[7] PA. STAT. ANN. tit. 19, § 631 (1887).

It is difficult to determine precisely what constitutes an adverse comment, and it is no simple task to abstract a solution to the problem from the case law. The most popular test used by the courts is that:

> Reference to the failure of a defendant to testify on his own behalf, to constitute reversible error, must call the jury's attention to the fact that the defendant has not testified, and must reasonably lead to an inference that he would have taken the stand if not guilty.[8]

But the manner in which this standard is applied, if it is the sole standard applicable, becomes somewhat obscure upon examination of the decisions. There is a marked distinction between its utilization in cases where the issue is the adverseness of a comment by the prosecutor and in those cases where a statement by the court is involved. Further, factors other than the nature of the comment itself are important in determining whether the error, if any, is reversible.

Either court or counsel may refer, with nothing more, to the fact that certain evidence is uncontradicted. The court's instruction was held permissible in a case where the court told the jury that in passing on the credibility of a witness, the jury should consider the fact that every statement he made was unchallenged.[9] Remarks by the prosecuting counsel that the evidence of the Commonwealth was not denied have been held allowable,[10] as has been the more emphatic: "The tremendous mass of evidence on the part of the Commonwealth has been undenied. . . ."[11]

The court has been permitted to refer, in its remarks to the jury, to the fact that defendant did not tell his story. In a murder case, a charge that, "[the victim] is not here to tell his story. She [the defendant] is alive; she is here on trial," was held not to be reversible error.[12] In this case, though, the Commonwealth had strong evidence of the act, and although the indictment was for murder, the jury had returned a verdict of voluntary manslaughter. It appears that the strength of the evidence against the defendant and the severity of the verdict are considered by appellate courts; the strength of the evidence in determining whether a particular comment will be adverse *per se,* and the severity of the verdict in determining whether the jury in fact drew an inference from it. The appellate court in this case indicated that it considered the language in question to be on the border line, but said it was not convinced that it trans-

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[8] Commonwealth v. Holley, 358 Pa. 296, 56 A.2d 546 (1948); Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954). *cert. denied* 348 U.S. 875 (1954).
[9] Commonwealth v. Martin, 34 Pa. Super. 451 (1907).
[10] Commonwealth v. Bova, 180 Pa. Super. 359, 119 A.2d 866 (1956).
[11] Commonwealth v. Smith, 186 Pa. Super. 89, 140 A.2d 347 (1958). (Dicta).
[12] Commonwealth v. Nelson, 294 Pa. 544, 144 Atl. 542 (1929).

gressed the rule.[13] The two factors here were probably the deciding ones, as the comment, standing alone, was rather distinctly bent against the defendant.

A similar comment by a prosecutor has been said to be adverse. Where counsel pointed out: "There's no one else to take the stand and deny it but [defendant]. That has not been denied." The court indicated that the language was prejudicial.[14]

When a court makes a comment that might constitute error, a subsequent instruction to the jury that they are not permitted to attach prejudice from failure to testify can cure the possible mistake. A trial court which charged: "[defendant] does not make a denial that he was with Michael Senkovich on the early morning when this robbery occurred", and followed with a charge that the defendant has a right not to testify and that the jury may not make anything of it, was held not to be in error. The appellate court pointed out that the first part of the instruction might be error if allowed to stand alone, but in conjunction with the remainder of the charge, the error was cured.[15]

It appears that where the comment was not directed toward the jury, a remark, otherwise adverse, may not be deemed reversible error. In one case the court had advised defendant's counsel not to explain in his remarks to the jury the fact that the accused had failed to testify. But counsel essayed to do so anyway, and the court interrupted with, "Go on, remember my warning to you. You will take the risk." On appeal it was held that, while the court went further than needed, its remarks did not restrict the defendant's rights.[16]

Where the court informs the jury that if it finds certain facts to be true, the defendant has a duty to explain them, it has been held that the remarks were not adverse. For example, the court might indicate that if the jury finds defendant had certain goods in his possession, "it is his duty to explain to you how he came into possession of them." [17]

On the other hand, a statement that defendant, "did not take the witness stand. You may make something of that" has been cause for reversal when followed by a statement that the law could not compel the accused to testify, but it is a matter for the jury to consider.[18] Also, a comment that it is entirely proper for the jury to consider the fact that defendant did not testify was grounds

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[13] *Id.* at 548, 144 Atl. at 544.
[14] Commonwealth v. Carr, 137 Pa. Super. 546, 10 A.2d 133 (1939). (Dicta).
[15] Commonwealth v. Kloiber, *supra* note 8.
[16] Commonwealth v. Duca, 312 Pa. 101, 165 Atl. 825 (1933). Explanation by defense of accused's failure to testify operates as waiver of defendant's immunity from adverse comment. See Commonwealth v. Kaufman, 179 Pa. Super. 247, 116 A.2d 316 (1955).
[17] Commonwealth v. Rizzo, 78 Pa. Super. 163 (1922).
[18] Commonwealth v. Viscuso, 82 Pa. Super. 403, (1923).

for reversal.[19] Thus if the remark of the court would clearly and unequivocally permit the jury to infer the defendant's guilt from his failure to take the stand, the court will be reversed.

As has been noted, counsel for the state may refer to the fact that certain evidence of the Commonwealth is undenied,[20] but he may not bring it to the jury's attention that the accused did not testify.[21]

Further, statements by the prosecuting attorney as to defendant's failure to prove that he was not present at the scene of the crime have also been held not objectionable. Examples of this are: "That Rizzo was there is not denied" [22] and, "Why didn't he prove where he was?" [23]

Counsel cannot, however, say that defendant does not deny the crime. A statement such as, "You have this woman here without denial" [24] has been held adverse. Nor can counsel refer to defendant as the only person capable of presenting an explanation, and point out that defendant did not come forward and propose that explanation. The comment, "There is no one on earth who can tell you how these things came into the possession of the prisoner but the prisoner" has led to a reversal.[25]

Another type of statement by counsel which has been held adverse is one which implies that defendant does not take the stand because he would perjure himself by denying the evidence. A prosecutor who noted that although the defendant had an alibi before, the jury heard nothing of it at the trial, was held to be violating the defendant's rights, even though the attorney then asked the jury to disregard the comment.[26]

Though the cases indicate that the particular facts wield considerable influence in determining whether a given comment is adverse, it appears that there is some distinction between the type allowed by the court and that permitted the prosecuting attorney. However, such delineation has never been

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[19] Commonwealth v. O'Toole, 159 Pa. Super. 592, 49 A.2d 267 (1946).

[20] Commonwealth v. Bova, *supra* note 10; Commonwealth v. Smith, *supra* note 11.

[21] Commonwealth v. Carr, *supra* note 14.

[22] Commonwealth v. Rizzo, *supra* note 17. Comments both by court and counsel were at issue in this case.

[23] Commonwealth v. Saldutte, 136 Pa. Super. 52, 7 A.2d 121 (1939). The Superior Court said at p. 57, "Defendant's presence at some place other than Kramer's store . . . could have been proved by the testimony of other witnesses than himself. An unsupported alibi would not have availed him much."

[24] Commonwealth v. Foley, 24 Pa. Super. 414 (1904). "There was but one deduction to be drawn from the remark . . . that the refusal of the defendant to testify on her own behalf was significant of her guilt."

[25] Commonwealth v. Green, 233 Pa. 291, 82 Atl. 250 (1912). In contrast with Commonwealth v. Saldutte, *supra,* note 23, it would seem that where the knowledge of the fact must be within the sole grasp of the defendant, this is given some weight, to make the defendant more susceptible to adverse comment.

[26] Commonwealth v. Zukovsky, 324 Pa. 588, 188 Atl. 349 (1936).

expressly set forth by the courts, and so the variance between the two lines of cases must be assigned to one or both of two factors. First, appellate courts are hesitant to overrule trial judges in this area, preferring to leave some amount of discretion in them as to whether a comment is warranted in the particular case, and, if so, what the nature of the comment should be in order to allow the jury to properly determine the case. Second, adverseness is much more readily discernible in the remarks of a prosecutor, since he is himself an adverse party in the proceedings.

The question at the core of any analysis of the law in this area is whether the rule regarding comments by court and counsel affords the defendant adequate protection of his privilege; that is, whether there is sufficient restriction of comments to allow the accused an actual choice of whether or not to take the stand, or whether the choice allowed is a mere illusion, since the defendant will be prejudiced no matter which alternative he takes. It is difficult to see how the Pennsylvania rule, which allows such a broad range of comment, can effectively achieve a just end. As we have seen, a comment must imply the defendant's guilt in a direct manner before it will be held adverse. Yet an indirect implication can be just as damaging in the prejudice it incites, especially in a close case.

The most obvious flaw in the Pennsylvania system of allowing limited comment is that a comment which might appear on the record to be perfectly permissible can be in fact a sardonic or thundering condemnation of the defendant for his failure to appear before the cross examiner. This is accomplished with facility by the mere lifting of an eyebrow or inflection of the voice. Of course, no appellate court has at its disposal a record so complete as would depict for it the raising of eyebrows or a stentorian emphasis on the word "not."

There is great merit to the contention which has been made that the inference of guilt arises in the jury's mind at the moment they learn that the defendant will be absent from the stand.[27] The most simple, logical explanation for the lack of testimony forthcoming from the accused would be that the defendant who has nothing to hide will certainly take the stand to aid his cause; this defendant did not take the stand, so he has something to hide. This syllogism lacks the perfection of formal logic, but it is sufficient in its force to convince the juror of its conclusion, particularly in a sensational type of trial, where the testimony of the accused has been actually anticipated, and the jury might well consider itself deprived of one of its own rights by his refusal to testify. Consequently, the problem becomes not the best way to prevent an inference, but just how the *existing* inference may be most effectively minimized. It is no solution to say that, since the inference is admittedly present, why try to avoid it. The

[27] 8 WIGMORE, *op. cit. supra* note 1, at 409, 410.

privilege exists to allow the accused to prevent possible self-incrimination. If his silence is permitted to lead to the same thing, then a defendant's opinion of whether to testify or not becomes illusory [28] in direct ratio to the freedom given the inference.

The jurors, of course, are not prevented from discussing the defendant's failure to testify among themselves. Thus the inference could well assume as much significance during the jury's deliberation as it would were it emphasized during the trial proper. It would seem desirable, then, that some instruction on the matter should be given them, in order to confine the prejudice which is inherent in the inference. This, however, is no reason for allowing comment by the prosecutor.[29] A prosecutor, who states that the accused was not heard to testify, undoubtedly would not inform the jury that this fact may not be made the basis for a prejudicial inference. Prosecutors have been allowed, however, to make the bare remark that the defendant has failed to testify. This, standing alone, could serve no purpose save to spotlight the inference and bring it to the fore of the jurors' minds, where it is in postion to bear a strong influence on the outcome of the issue of guilt. The comment could not be taken as being purely objective in meaning, where its author is under a duty to the public to prosecute criminal defendants with diligence.

Regarding remedies which would better protect the defendant from prejudice, there are several, each of which attacks the problem from a different angle. The Uniform Laws of Evidence propose a solution by allowing the prosecutor, as well as the court, to comment on the failure of the accused to testify, and allowing the jury to draw from his absence any reasonable inference,[30] while prohibiting cross-examination of a defendant who does take the stand on the subject of past crimes and convictions.[31] This is based on the theory that the only valid reason for refusal to take the stand is that the defendant would then be subject to examination on his past record. With this obstacle eliminated, there is no good reason for refusing to take the stand, hence there is room for a valid inference.[32] Such a rule, if its theory is sound, would fit well in Pennsylvania, where cross-examination on past crimes is forbidden during the trial in capital cases,[33] except for the purpose of attacking the credibility of a defendant who

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[28] *Id.* at 425.

[29] McCORMICK, *op. cit. supra* at 281.

[30] UNIFORM RULE OF EVIDENCE, 23(4).

[31] UNIFORM RULE OF EVIDENCE, 21.

[32] Commissioners' Comment to Rule 21.

[33] Formerly, cross-examination was permitted on past crimes during the trial in capital cases, in order to aid the jury in setting the penalty. Commonwealth v. Kurutz, 312 Pa. 343, 347, 168 Atl. 28, 29. A recent statute provides that if the jury returns a verdict of guilty, then only will evidence of past crimes be admitted for setting the penalty. Thus, cross examination on past crimes can no longer be admitted during the trial for this purpose. Pa. Laws 1959, act 594.

has given evidence of his good character, or has testified against a co-defendant.[34] But the theory loses its strength in cases where a defendant with little self-presence is confronted by strong circumstantial evidence which is difficult to rebut. This is an instance where the defendant may have good reason to decline to take the witness stand, and yet the inference is not justified. Also, this theory seems to attach too much significance to the validity or lack of validity of the inference. It does not meet the problem of protecting the defendant's option.

Of course, if defendant's counsel raises the subject himself, in an attempt to justify the failure of the accused to testify, then there is a waiver of the defendant's immunity from adverse comment, for the prosecution must be allowed to rebut the claim of defendant's counsel.[35] However, this should only be allowed where the remark by the prosecutor is in the nature of a rebuttal, and where his rebuttal was necessitated by the remarks of defendant's counsel.

A possible solution to the problem is to forbid any comment by either court or counsel. This would be based on the premise that the inference exists from the beginning in the minds of the jurors, and that the solution lies in determining the best means of inhibiting this inference so the defendant has a real choice of whether or not to testify, and not just an illusory one. Since the subject is not expressly laid before the jurors, their tendency would be to make no more an issue of it than the base realization of the accused's absence from the stand. The inference would then wax no greater than its initial impact. But this leaves more to chance than to the potency of the rule. If nothing is said about it, there can exist no shackle on the jurors to prevent them, individually, from making something entirely unwarranted of the absence of the accused. Nor could they then be prevented from discussing the inference among themselves, thereby multiplying its effects. Thus, if any inference exists in the beginning it is unbridled, and may have quite a heavy impact on the outcome of the trial—*not* because of its initial influence, but because it has such a potential for growth.

Another solution would consist of two mandates. First, the court should be *required* to instruct the jury that it may not draw an adverse inference from the failure of the accused to testify. Second, in no instance should the prosecuting attorney be permitted to refer to defendant's failure to testify.[36] This is not to say that the prosecutor shall be denied his right to refer to the case for the

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[34] PA. STAT. ANN. tit. 19, § 711 (1925).

[35] Commonwealth v. Kaufman, *supra* note 16.

[36] Indiana has a statute to this effect: BURNS' ANN. ST. § 9-1603: "[H] is failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to or in any manner considered by the jury trying the same; and it shall be the duty of the court, in such case, to instruct the jury as to their duty under the provisions of this section."

Commonwealth as being the stronger for lack of evidence rebutting it. But any attempt to tear down the case for the defendant by reference to his failure to take the stand should be prohibited.

It must be admitted that neither of the latter two solutions proposed is without imperfection. If the judge is not permitted to instruct the jurors as to the law prohibiting inference, there is the possibility that the jury may see fit to attach great weight to the failure to testify. It might be said that if the defendant's absence from the stand is not mentioned, the jury will not tend to make this a major issue in the case, but would lean toward only vaguely conceiving of it as affecting the issue of guilt. On the other hand, if the court is required to instruct the jury, the jury might tend to disregard the law as applied to the particular situation. A charge that no defendant is required to take the stand, and that no inference may be drawn from this, may well serve to focus undue attention on the matter, with consequent inquiry that, "Though no man may be required to testify on his own behalf, why did not this *particular* defendant attempt to rebut the evidence presented against him?" The answer to this may be that he had something to hide. But if, for example, the judge was prohibited from giving this type of charge, and a jury subsequently requested additional instructions as to the significance of the lack of testimony from the accused, the same problem would arise. Refusal to charge on the matter would then pinpoint the issue, and the jury, totally ignorant of the law prohibiting inference, would consider itself free to make of it what it would.

As can be seen, no solution is foolproof because of one variable factor—the minds of the jurors. The difference in significance which given juries may attach to the failure to testify is probably very considerable. On the average, a lesser influence by the inference would be promoted by prohibiting all comment. But this does not cope with the inherent possibility that the jury will in a particular case, attach an extremely disproportionate significance to its reasoning. In this respect, a rule prohibiting all comment does not protect the privilege of any individual defendant as well as might be done.

Approaching the problem from defendant's viewpoint, the most practical means of dealing with the court's charge is to permit defendant's counsel the option, immediately prior to the court's charge, of not permitting the court to give this portion of its charge. This rule has the advantage of flexibility, inasmuch as defendant's counsel may observe the entire proceedings and make his choice after he has determined whether an instruction is needed to protect the defendant's rights in the particular case. Also, the rule gives a choice to the one whose rights are at stake; hence, if defendant is ultimately prejudiced by his selection, he will have no cause to complain.

Of course, if defendant does not make a choice, or if he chooses to request a charge, then the court should be required to instruct the jury that it could not draw any inference from defendant's failure to testify. The instruction would be mandatory under the basic rule which was proposed above.

In the absence of defendant's exercising his option to prohibit instruction, the rule which would require instruction by the court would be less susceptible to abuse in particular cases. It would, granted, tend to distract from the main issues of fact. And, as already mentioned, there is the danger that the jurors would disregard the instruction, once the fact of defendant's absence from the stand was made salient in their minds. But on the whole, a more *uniformly* low weight will be given the inference by enlightening the jury as to the law on the subject. If the accused does not appropriately disallow the charge on this matter, the great variability possible under the solution which eliminates all comment would be inhibited. The jury would be confined in its consideration of the absence of the accused from the stand, or if not absolutely confined, at least restricted in the best manner available. The jury would be more consistently disallowed to be satisfied with very much less proof than they otherwise would require for conviction. It would better avoid uncontrolled prejudice and reduce the possibility of unjust conviction. A jury is the more reliable where it is enlightened on the subjects it is *not* to consider, as well as those on which it must base its decision.

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