Codefendant Comments on Evidence

BY STEPHEN A. SALTZBURG

The Supreme Court has made clear that neither a prosecutor nor a trial judge may comment on the fact that a defendant has exercised his or her privilege against self-incrimination and declined to testify at trial. (*See* Griffin v. California, 380 U.S. 609 (1965).) But, when two defendants are tried together and one testifies, may the lawyer for the testifying defendant comment on the fact that the codefendant did not take the stand? There is not much law on this issue, but it is addressed squarely in *State v. Daluz*, 143 A.3d 800 (Me. 2016).

THE CRIME FACTS

On August 11, 2012, Nicholas Sexton renewed a rental agreement on a Pontiac Grand Prix in Rhode Island and picked up his friend Randall Daluz in Massachusetts. They met with Daniel Borders and his girlfriend, Nicolle Lugdon, at a hotel where Sexton and Daluz displayed cocaine, heroin, and Percocet for sale and had two guns visible on a bed. Borders and Lugdon, who had a history of buying drugs from Sexton and Daluz, were more recently buying from Lugdon's brother, but they bought some cocaine in an effort to keep Sexton and Daluz happy. The conciliatory gesture was not very successful, because Sexton confronted Lugdon and demanded to know where she was getting her drugs.

The next day, Sexton, Daluz, and a friend drove to Bangor, Maine, in the Pontiac. Borders and Lugdon were also in Bangor selling drugs and wanted to obtain some Percocet for a customer, so Borders called and texted Sexton, who was in a bar with Daluz, to obtain the drug. They managed to get it from another source, Lucas Tuscano, and Borders called Sexton to tell him that they no longer needed it. Sexton appeared angry and went to the apartment where Borders and Lugdon were. He pretended to be someone named Mike, but Borders and Lugdon identified him. Borders, Lugdon, and Tuscano left the apartment with Sexton in the Pontiac. The apartment tenants tried to call and text Borders and Lugdon to tell them that there were more drug customers at the apartment, but neither ever responded.

On August 13, 2012, at about 3:30 a.m., a Pontiac Grand Prix was found burning in a Bangor industrial park. Inside were the bodies of Borders, Lugdon, and Tuscano. Each died of a single gunshot wound to the head with a bullet having entered behind the left ear of each victim.

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TRACKING THE KILLERS

Cell phone records showed that both Sexton and Daluz were using their cell phones in the vicinity of the apartment where the three victims had been before driving off with Sexton. The records showed them using their cell phones near a different city, Dedham, where the owner of a house in which a friend of Sexton and Daluz lived saw a car drive slowly past his house and a few days later realized that a blue can of diesel fuel was missing. Cell phone records showed Sexton and Daluz traveling back to Bangor, and a camera showed the Pontiac entering the industrial park. Not long after a man exited the car, the car was visibly burning.

In March 2013, months after these events, a man using a metal detector at a Bangor river discovered two firearms, several rounds of ammunition, and a cell phone. One firearm had been purchased by Sexton from an acquaintance before the shootings, and a forensic specialist concluded that this firearm was used to fire the bullet into Lugdon. The expert was unable to rule the other firearm in or out of the other murders.

THE CHARGES AND TRIAL

The State charged Sexton and Daluz with three counts of murder and one count of arson and elected to try them together. It initially had a problem, however, because Daluz had confessed to both law enforcement officers and a cellmate, and the State wanted to use his confessions. This meant that there had to be a severance as a result of *Bruton v. United States,* 391 U.S. 123 (1968). The joint trial proceeded only after the State decided not to use the confessions.

Sexton testified on day 13 of the trial and claimed that during a struggle in the Pontiac, Daluz shot Borders accidentally and then shot Tuscano without warning. Sexton also claimed (1) he feared Daluz and drove wherever Daluz directed him, (2) he and Daluz stole gasoline from the Dedham house, (3) Daluz threatened to kill Sexton and his children if he told anyone what happened, and (4) Daluz shot Lugdon through a broken window in the car while Sexton and Daluz were standing outside it. Sexton admitted setting the car on fire but said he did so only because Daluz threatened to kill him if he refused. Sexton's testimony was not consistent with the evidence that Borders and Lugdon were each killed by a single gunshot behind the ear.

The next day at trial, Daluz called three witnesses and elected not to take the stand. Once he concluded his presentation, the parties delivered closing arguments. At the conclusion of the closing arguments, Daluz's counsel objected to two references by Sexton's counsel that Daluz could "explain something." The trial judge asked whether Daluz wanted a limiting instruction, and Daluz declined it. Daluz also made no request for a mistrial. The trial judge instructed the jury that a defendant had a right not to testify and that the jury could draw no adverse inference from a defendant's decision not to testify.

The jury found Daluz guilty on all counts and found Sexton guilty of the murder of Lugdon and arson; the jury hung as to the other two murder charges against Sexton. Daluz moved for a new trial and argued that Sexton's counsel's argument had denied Daluz due process. The trial judge denied the motion.

THE APPEAL AND THE LEGAL STANDARD

On appeal to the Maine Supreme Judicial Court, Daluz challenged the two references to his being able to "explain something" and for the first time also complained that Sexton's counsel effectively commented on Daluz's failure to testify by focusing on discrepancies between the State's reconstruction of events and Sexton's reporting what had happened. For example, Sexton's counsel said: "What is the only explanation for the broken window in the back seat? The only explanation—don't use poetic license. What is the only factually accurate representation you have heard here today that explains that?" *(Daluz,* 143 A.3d at 816.)

The Maine Supreme Judicial Court stated the law regarding comment as follows: "Comment by a prosecutor about a defendant's decision not to testify is forbidden by the United States and Maine Constitutions, which protect a criminal defendant's right not to bear witness against himself or herself." (*Id.* at 815.) It added that it had "not yet had occasion to decide whether counsel for a co-defendant is similarly barred from commenting on the other co-defendant's decision not to testify." (*Id.*) The court had little difficulty in resolving the issue:

> Other jurisdictions, however, have recognized that a defendant's right to silence is protected against prejudicial comments by counsel for a co-defendant. *E.g.*, *De Luna v. United States*, 308 F.2d 140, 141 (5th Cir. 1962) ("In a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney.").
>
> Today, we hold that a defendant's right to remain silent is protected against improper comments by counsel for his or her co-defendant regarding the defendant's decision not to testify. We decline to define the parameters of this protection beyond what the facts of this case require. Our prosecutorial misconduct jurisprudence is founded not only upon constitutional protections but also upon the special ethics of prosecutors, *see, e.g., [State v.] Robinson,* 2016 ME 24, ¶ 23, 134 A.3d 828, and some comments that would be improper for a prosecutor to make may not be improper when made by defense counsel in a case with multiple defendants, if those comments do not violate the appealing defendant's constitutional right to a fair trial.

(Daluz, 143 A.3d at 815–16.)

APPLYING THE STANDARD

Daluz's counsel had failed to make a timely objection to Sexton's closing argument, rejected the trial judge's offer of a curative instruction, and did not seek a mistrial or new trial until a post-trial motion. Therefore, the Maine Supreme Judicial Court held that it would only review the closing argument for "plain" or "obvious" error, a difficult standard to meet for the defense.

The court examined Sexton's counsel's two references to Daluz being able to "explain" and conceded that "[c]ounsel's choice of words was poor, as it could be viewed as an ambiguous comment that Daluz could not explain his conduct during the trial." (*Id.* at 816.) But, the court concluded that this was not the likely view:

> The context in which these comments were made, however, indicates that the thrust of the comments was to argue, based on Sexton's self-serving testimony, that Daluz was panicking after shooting the first two victims, and that the "explanation" in question concerned how, at the time of the events, Daluz could explain what had happened if he were discovered in the car with the victims' bodies.

(Id.)

As for Sexton's pointing out discrepancies between his testimony about events and the State's reconstruction of them, the court had little difficulty rejecting Daluz's complaint: "It was proper closing argument for Sexton to argue that the jury should accept his testimony rather than finding what the State argued the evidence demonstrated. The complained-of comments were tied to Sexton's argument regarding the State's case, as the comment was in the example above, rather than tied to Daluz's silence." (*Id.*)

LESSONS

1. There is not much case law addressing the question whether a codefendant's comment on another defendant's failure to testify would violate the other defendant's privilege against self-incrimination. But the answer given by the Fifth Circuit and by the Maine Supreme Judicial Court that it would seems clearly correct. A defendant has a right to be tried without the jury drawing an adverse inference as a result of the defendant's valid exercise of his or her privilege against self-incrimination. Regardless of where the suggestion to draw an adverse inference comes from, it asks the jury to do what it is forbidden to do.
2. It is doubtful that a curative instruction would actually do much good if there were a clear comment on a defendant's failure to testify. Consider an example in which one defendant testifies and another doesn't, and counsel for the testifying codefendant argues: "When X took the stand you could judge his credibility when he explained to you that he acted under duress caused by Y, who has just sat through this trial without taking the stand and denying a single word that X said, so we ask you to compare X's courage in testifying with Y's cowardly silence." Could any jury that heard this put it out of mind simply as a result of a judge saying, "A defendant has a right not to testify, and you must not draw an adverse inference from his exercise of that right"? It is difficult to think that the jury, which might not even understand the concept of adverse inference, will forget the closing argument.
3. Not all closing arguments in multidefendant cases include comments on a nontestifying defendant's decision not to take the stand. In *Daluz,* the court found that Sexton's counsel did not actually comment on Daluz's decision not to testify. Although the Maine Supreme Judicial Court was confident

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(*Id.* at 5.)

As this passage indicates, independence is not the only issue. Whether the director is a police officer or scientist is also an issue. "In the 2015 ASCLD/LAB accreditation report, the Crime Lab was criticized for having a non-scientist as its Director." (*Id.* at 13.)

ACCREDITATION

Although the grand jury recognized that accreditation is "vitally important," it found that "[a]ccreditation is not enough." (*Id.* at 21.) It noted two issues:

> An accreditation survey is done using a standard checklist. However, what happens when inspectors are presented with discrepancies not on their checklist? This happened during the 2010 ASCLD/LAB review when accreditation was awarded despite the fact that the criminal scandal that led to the closure of the Drug Lab was occurring at the same time, and the deficiencies of the Bicycle Case were being debated in the forensic community.
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> Moreover, what if a quality breach occurs just after an accreditation review cycle? Because accreditation is done every five years for the entire lab and an external review is done every two years in the DNA lab, months to years might pass before the next external review, although the Lab is required to self-report "incidents" on an annual basis.

(*Id.* at 21–22 (footnote omitted).)

QUALITY ASSURANCE

Although ASCLD/LAB requires each accredited lab to have a quality assurance manager (QAM), "this important position was essentially unfilled by a QAM specifically dedicated to the position starting in 2013, when the previous QAM retired, to March 2015." (*Id.* at 22.)

The grand jury commented: "A robust quality assurance program is needed to address day-to-day problems and go beyond the basic check list of accreditation. The quality assurance manager (QAM) position should be accorded utmost importance and have sufficient authority to shut down laboratory operations if necessary until a problem is resolved." (*Id.* at 23.)

PROFESSING ERRORS

"In the past, attempts were made to hide errors . . . . By contrast, Crime Lab supervisors now admit openly that errors do happen. Their admissions reflect a national trend in forensics toward greater transparency." (*Id.* at 22.) However, the grand jury was "especially concerned by the frequency of contamination errors in the Lab . . . , and [concluded] that admitting to errors is not sufficient. Corrective procedures need to be developed and metrics established to determine whether corrective processes have been successful in reducing future incidents." (*Id.*)

EXTERNAL REVIEW

The grand jury also recommended "[a]n independent external review by respected forensic experts whom all stakeholders agree are trustworthy. These auditors should not be selected by the City on the basis of lowest cost but rather because of their trusted reputation." (*Id.* at 6.) All the stakeholders, public and private, agreed to the appointment of two nationally respected forensic experts as reviewers. However, the grand jury was informed that the city may require that the audit be put out for competitive bidding. According to the grand jury, "the entire purpose of such an audit would be defeated if the auditors were unknown or untrusted by the stakeholders." (*Id.* at 26–27.)

OTHER ISSUES

The grand jury examined a number of other issues: (1) the backlog of DNA cases; (2) the outsourcing of DNA tests; (3) the lack of a modern laboratory information management system; (4) the lack collaboration with stakeholders of the crime lab (the district attorney, police inspectors, and the defense); and (5) the establishment of a scientific advisory board.

CONCLUSION

San Francisco is not an outlier. Numerous other lab scandals have occurred. (*See* Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. Rev. 163 (2007).)■

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about what Sexton's counsel intended in the argument, a jury might have heard it differently, which is why prudent defense counsel will object and seek an instruction from the court as soon as there is any reasonable probability that counsel for one defendant is commenting on the exercise of the self-incrimination privilege by another defendant.

4. Especially prudent counsel in multidefendant cases will ask the trial judge to admonish counsel for codefendants before closing arguments begin that they, like the prosecution and the court, must avoid commenting on any defendant's decision not to testify.
5. It is also important to keep in mind that Daluz simply makes clear that one defendant is no more entitled to comment on a codefendant's failure to testify than the prosecutor or judge. It does not seek to equate the restrictions on argument that prosecutors must recognize with those of defense counsel, and specifically leaves open how it will deal with other forms of argument by defense counsel.■