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Prosecutors Are Permitted to Display Admissible Weapons to Juries during Opening Statements in Pennsylvania: *Commonwealth v. Parker*

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Prosecutors are Permitted to Display Admissible Weapons to Juries During Opening Statements in Pennsylvania: *Commonwealth v. Parker*

PENNSYLVANIA — CRIMINAL LAW — OPENING STATEMENTS — EVIDENCE — HANDGUN — The Pennsylvania Supreme Court held that the trial court did not abuse its discretion in allowing a prosecutor to display a tangible object during the opening statements where the prosecution intended to introduce the object during trial as evidence and where there was no issue as to the admissibility of the evidence.

Commonwealth v. Parker, 919 A.2d 943 (Pa. 2007).

On the evening of April 2, 2002, Sheila Crump and her brother Dwayne Crump arrived at a store with their friend, James Washington.[1] Upon approaching the entrance, Sheila and Dwayne encountered Appellee Maurice Parker.[2] Sheila claimed that Parker and her brother shared a suspicious look, so she waited outside as her brother entered the store.[3] Parker then encountered Washington and began an argument, in which Parker displayed a handgun.[4] Dwayne became involved, causing Parker to begin shooting; a bullet hit Washington, who left the scene and drove himself to the hospital.[5] Sheila claimed that Parker did not stop firing the weapon until he ran out of ammunition.[6] In the subsequent trial, the prosecutor's display of this weapon during the opening statements and the consequential effect on the jury created the issue considered by the Pennsylvania Supreme Court in *Commonwealth v. Parker*.[7] The issue presented was whether it is admissible for prosecutors to display physical pieces of evidence during opening

1. Commonwealth v. Parker, 919 A.2d 943, 945 (Pa. 2007).
2. *Parker*, 919 A.2d at 945.
3. *Id.* Sheila described the look as an "odd look." *Id.*
4. *Id.*
5. *Id.* at 945-46. Dwayne informed Parker that everything between them was "cool." *Id.*
6. *Id.* at 946.
7. *Parker*, 919 A.2d at 945.

statements, when that evidence would be admitted at a later point in the trial: a question of first impression.[8]

On April 5, 2002, Sheila saw Parker at her apartment complex and contacted Officers Stacey Alston and Rosalind Mason, who also observed Parker and his mother at the apartment.[9] The officers questioned Parker, learned he was sixteen years old, and based on his demeanor, found it necessary to place him in handcuffs.[10] During the questioning, Parker requested a restroom break, which was granted on the condition that his mother enter the restroom with him while Officer Alston stood at the door.[11] Officer Alston heard noises coming from the restroom followed by Parker's mother inquiring about an object belonging to Parker.[12] Alston entered the restroom and found a loaded .38 caliber handgun in the toilet.[13] Alston detained Parker, charging him with attempted murder, aggravated assault, violations of the Uniform Firearms Act, and possessing an instrument of a crime.[14]

Parker's trial was set for February 17, 2004.[15] Prior to trial, the prosecutor notified the court that it was his intention to display Parker's handgun during his opening statement.[16] Parker's counsel objected, claiming the display was unnecessary because the handgun would be admitted during the trial and because it would be prejudicial.[17] The trial court denied the objection, finding no Pennsylvania statues or case law prohibiting such a display during opening statements.[18] The judge instructed the jury regarding the purpose of opening statements.[19] The prosecutor showed the jury Parker's handgun during his opening statements.[20] The jury

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8. *Id.* at 948.
9. *Id.* at 946.
10. *Id.* The officers believed Parker's behavior created a safety concern. *Id.*
11. *Id.*
12. *Parker*, 919 A.2d at 946.
13. *Id.*
14. *Id.* The charges were pursuant to 18 PA. CONS. STAT. ANN. §§ 901, 2702, 6106 and 907 (West 1998 and Supp. 2008), respectively.
15. *Parker*, 919 A.2d at 946.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* The trial court explained to the jury that opening statements were not evidence, but an introduction to the case and to defenses by the respective attorneys. *Id.*
20. *Parker*, 919 A.2d at 946. In his opening statement, the prosecutor said:

> While [Parker] was in the restroom one of the officers arranges so that she can look from an angle to make sure that nothing was happening. He was fidgety. The officer will testify that as she sees him fidget she hears a clunk, a thud sound. She pulls open the door and sitting inside the toilet is this particular weapon. And for the record, I have made it safe so there is nothing at this

subsequently found Parker guilty of all charged crimes, and Parker was sentenced to seven and a half to fifteen years in prison.[21]

On appeal, the superior court ruled that the trial court abused its discretion in denying defendant's objection to the display of the weapon, but that the abuse of discretion was a harmless error.[22] Justice Bender, writing for the majority, discussed the abuse of discretion standard, which is the applicable standard for evidentiary challenges; he explained that "discretion" implied an objective and rational approach based on legal concepts and reason alone.[23] In considering admissibility of evidence, trial courts may exercise wide discretion in balancing the prejudicial nature against the probative value of the evidence and are allowed to exclude the evidence only where the unduly prejudicial effect outweighs the probative value.[24]

Next, the superior court analyzed the purpose of opening statements in a criminal trial and the prejudicial effect of an inflammatory piece of evidence used in the course of those statements.[25] In describing opening statements as an outline of each attorney's case, Justice Bender acknowledged the importance of this portion of the trial since the jury is at a critical point in developing initial

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> point to be concerned about. She seizes that weapon and takes him to the Central Detective Division.

Id.

21. *Id.*

22. Commonwealth v. Parker, 882 A.2d 488, 494-95 (Pa. Super. Ct. 2005). In explaining the issue, Judge Bender said: "Appellant presents for our review an issue of first impression in Pennsylvania, that being whether it is proper for a prosecutor to display or use as a prop, a potentially inflammatory piece of evidence during opening statements." *Parker*, 882 A.2d at 492.

23. *Parker*, 882 A.2d at 492. On the discretion of the trial court, the superior court quoted:

> The term "discretion" imports the exercise of judgment, wisdom, and skill so as to reach a dispassionate conclusion, within the framework of the law. . . . Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice, or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias, or ill will.

Commonwealth v. Widmer, 744 A.2d 745, 753 (Pa. 2000).

24. *Parker*, 882 A.2d at 492. *See* PA. R. EVID. 403: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Unfair prejudice means a tendency to suggest decisions on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially. *See* PA. R. EVID. 404(b)(3).

25. *Parker*, 882 A.2d. at 493.

opinions of the facts.[26] The superior court also recognized that at this crucial stage, the jury should not be prejudiced by displays of evidence so that at the start of the trial the prosecution and defense have a fair opportunity to prove their case.[27] Like the trial court, the superior court also pointed out that there is no Pennsylvania statute or case law governing this issue.[28] The superior court, finding no Pennsylvania authority, looked to cases from other jurisdictions for guidance.[29]

Justice Bender ultimately concluded that there is no reasonable purpose to display a handgun during opening statements, and that such a display would only disrupt the important balance between the parties, unfairly influencing the jury.[30] The superior court held that the trial court abused its discretion in refusing to grant Parker's objection, reasoning that it was unnecessary to use visuals and props during opening statements to achieve their intended purpose and that a weapon may create bias and discomfort among the jurors.[31] Due to the prosecutor's strong case and the overwhelming evidence of Parker's guilt, the superior court held that the display during the opening statements did not affect the outcome of the case, ruling it a harmless error.[32]

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26. *Id.* Judge Bender said: "Since the jurors' minds are essentially 'blank slates' at this stage of the trial, opening statements can have a tremendous impact on the ultimate outcome of the trial." *Id.*

27. *Id.*

28. *Id.* at 492. Rule 604 of the Pennsylvania Rules of Criminal Procedure does not rule on the use of evidence or displays during the statements but states: "After the jury has been sworn, the attorney for the Commonwealth shall make an opening statement to the jury. The defendant or the defendant's attorney may then make an opening statement or reserve it until after the Commonwealth has presented its case." PA. R. CRIM. P. 604.

29. *Parker*, 919 A.2d at 496. In opposition to the Government's argument, the court considered *Sherley v. Commonwealth*, 889 S.W.2d 794, 799 (Ky. 1994) (allowing a prosecutor to display photographs during opening statements) and *People v. Green*, 302 P.2d 307 (Cal. 1956). *Parker*, 882 A.2d at 493. In support of Parker's argument, the court considered cases from other jurisdictions. *Id.* at 493-95. *See* Guerrero v. Smith, 864 S.W.2d 797, 799-800 (Tex. App. 1993) (plaintiff's attorney was not permitted to show a photograph during opening statements); Wimberli v. Okla., 536 P.2d 945 (Okla. Crim. App. 1975) (knife was permitted to be shown during an opening statement despite criticism of the practice); People v. Williams, 456 N.Y.S.2d 1008 (N.Y. App. Div. 1982) (prosecutor was not permitted to display a shotgun during opening statements).

30. *Parker*, 882 A.2d at 494.

31. *Id.*

32. *Id.* at 494-95. "The harmless error doctrine, as adopted in Pennsylvania, reflects the reality that the accused is entitled to a fair trial, but not necessarily a perfect or error-free trial." *Id.* at 495 (citing Commonwealth v. Drummond, 775 A.2d 849, 853 (Pa. Super. Ct. 2001)).

> An error may be deemed harmless by an appellate court where the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the error is so insignificant by comparison, that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict.

Judge Olszewski wrote a concurring opinion, finding that the majority ruled correctly in affirming the verdict, but that the trial court did not abuse its discretion in allowing the prosecutor to display a handgun during opening statements.[33] Judge Olszewski concluded that the jury would not be unfairly prejudiced by viewing the weapon during the opening statements because the jury would eventually see the handgun when admitted into evidence during the trial and because the prosecutor would still describe the handgun in detail.[34]

Both parties filed appeals based on the superior court holding, with the Commonwealth arguing that there was no abuse of discretion and Parker claiming that the error was not harmless.[35] The Supreme Court of Pennsylvania granted *allocatur* on these issues.[36] Writing for the majority, Justice Baldwin held that the trial court did not abuse its discretion and that the superior court erred in its holding, especially in citing cases from other jurisdictions having no authority in Pennsylvania.[37]

Justice Baldwin began with an interpretation of the possible and likely impact on jurors that would result after viewing the criminal weapon.[38] She wrote, again reiterating a lack of Pennsylvania authority prohibiting the display, that the Superior Court incorrectly weighed the effect of the sight of a handgun on jurors and opined that the display of handguns should be admissible as long as criminals continue to use weapons for the charges at issue.[39]

Parker set forth four arguments during the trial which Justice Baldwin subsequently addressed.[40] First, Parker argued that the weapon had not yet been admitted as evidence when displayed to

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Id. (citing Commnw. v. Story, 383 A.2d 155, 165-66 (Pa. 1978)). The court found overwhelming evidence based on Sheila's testimony and identification of Parker, Officer Alston's identification of the gun, and Officer Bottomer testimony as to the gun residue found at both locations by the same weapon. *Id.*

33. *Id.* at 495 (Olszewski, J., concurring).

34. *Id.* at 495-96.

35. *Parker*, 919 A.2d at 948.

36. *Id.*

37. *Id.* at 950.

38. *Id.* at 949.

39. *Id.* The Pennsylvania Supreme Court cited *Commonwealth v. McAndrews*, 430 A.2d 1165 (Pa. 1981), which held that a trial court was correct in allowing a prosecutor to use a weapon for a demonstration, despite the fact that the weapon was not admissible at trial. *Id.* The court distinguished *McAndrews* from *Parker*, where the weapon displayed was admissible at trial. *Id.* It also cited Commonwealth v. Harris, 424 A.2d 1245 (Pa. 1981), where the prosecutor was allowed to display a weapon only similar to the weapon involved in the crime. *Id.*

40. *Parker*, 919 A.2d at 949.

the jury.[41] Justice Baldwin rebutted this argument, stating there was no question as to the admissibility of the weapon displayed.[42] Parker further alleged that it was unnecessary to use the weapon in the opening statement, as opening statements are not to be evidentiary in nature and the weapon was evidence that would be admitted later.[43] The court responded that viewing a weapon did not create any unwarranted prejudicial feelings, reasoning that the weapon was displayed to the jury in the trial's initial stages and that the court provided instructions that the opening statements were not evidence.[44] Parker's third argument involved the prejudice between the parties, as it is less likely for a defense attorney to have evidence that would cause an emotional response upon its display during opening statements.[45] Finally, Parker expressed concern regarding the administrative effects that would result from the lack of a limitation on the use of evidence during opening statements, which was addressed in Justice Castille's concurring opinion.[46]

Justice Baldwin, like the superior court, began with a review of the abuse of discretion standard.[47] Next, she discussed the purpose of opening statements, reiterating that they are not evidentiary in nature, but an introduction to the facts and the positions of each party.[48] Parties to a criminal case are permitted broad judgment in deciding the substance of their statements.[49] However, Justice Baldwin then examined the limitations of opening statements, noting that they must not be based on statements

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41. *Id.*

42. *Id.* at 950. The Court did not comment on the question when there is a conflict as to the admissibility of an object, as it is not an issue in this case. *Id.* at 950 n.8.

43. *Id.* at 949.

44. *Id.* at 951.

45. *Parker*, 919 A.2d at 949. The Court said:

> Parker contends that using potentially inflammatory evidence in opening statements "gives the State an unfair advantage where jurors are more likely to consider the prosecutor, an agent of the state, to be more credible than the defense attorney who is less likely to be the party using the inflammatory prop
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> . . . .

Id. (quoting Parker's Brief at 14).

46. *Id.* at 952 (Castille, J., concurring).

47. *Id.* at 949-50 (majority opinion). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." *Id.* (quoting Commonwealth v. Dengler, 890 A.2d 372, 379 (Pa. 2005)).

48. *Id.* at 950.

49. *Id.*

made for the sole purpose of provoking an emotional reaction where there is no basis in fact.[50]

The court ultimately held that the prosecutor was permitted to use the evidence during the opening statements because the displayed object was within the scope of evidence intended to be introduced and because the object was admissible during trial.[51] Justice Baldwin rebutted the superior court argument that the weapon served no valuable purpose but to prejudice the jury.[52] She held that the purpose of opening statements is ultimately to provide a verbal summary of the facts and evidence, and displaying the very weapon used is one means by which to achieve this purpose.[53] Thus, the court affirmed the superior court's ultimate holding, finding no abuse of discretion at the trial level, rendering it unnecessary for the court to decide the issue of harmless error.[54]

Justice Castille authored a concurring opinion agreeing with the majority decision that the display of the weapon had a purpose beyond that of creating an emotional response and sparking an early decision among the jurors.[55] Justice Castille believed that jurors would not find the sight of a weapon so uncommon as to allow such a reaction.[56] Justice Castille also expressed concern of the administrative effects of the case.[57] While he agreed with the majority's description of the purpose of opening statements, he worried that opening statements would become too expansive and attorneys would lose sight of the purpose of those statements under the new rule.[58] He justified both the court's decision and the prosecutor's desire to use a prop during opening statements by admitting that, according to preconceived societal notions, jurors have limited attention spans and are looking to compare opening

50. *Parker*, 919 A.2d at 950. The prosecutor must have a good faith belief that the evidence will be available and admissible. *Id.* at 950 n.8. Also, the prosecutor is limited to displaying the evidence in an appropriate manner. *Id.* at 951 n.9.

51. *Id.* at 951. "Indeed, where the tangible piece of evidence falls within the scope of material the prosecutor intends to introduce at trial and its display during the opening statement does not inflame the passions of the jury, the display of that piece of evidence is wholly proper." *Id.* at 950.

52. *Id.* at 951.

53. *Id.* at 950-51.

54. *Id.* at 951.

55. *Parker*, 919 A.2d at 952 (Castille, J., concurring). Chief Justice Cappy joined the concurring opinion. *Id.*

56. *Id.* Justice Castille explained that if the jurors had such a strong reaction to a handgun, then one would not be permitted during trial, let alone opening statements, due to the prejudice. *Id.*

57. *Id.*

58. *Id.* "[The opening statement] is a chance to outline and describe the prosecution (or defense) case, and not an opportunity to pre-try the matter . . . ." *Id.*

statements to dramas or alternative sources of entertainment.[59] Therefore, Justice Castille agreed that there is no prejudicial effect in showing evidence in opening statements, but posited that the practice should be discouraged as outside the limited purpose of opening statements.[60]

The origins of opening statements reflect a practice adopted early in Great Britain, where a judge instructed a prosecutor to state all that was going to be proven prior to the presentation of the case.[61] Throughout the development of criminal procedure in the United States, many changes were instituted from the British system.[62] The United States Court of Appeals for the Second Circuit considered the right to opening statements and its history, due to an absence of any federal statute concerning the matter, in *United States v. Salovitz*.[63] At the trial level, Salovitz requested the ability to present an opening statement and was denied based on the ground that the statement would be unnecessary.[64] Salovitz's argument rested in the constitutional right to a jury trial and the right to counsel found in the Sixth and Fourteenth Amendments, but the court disagreed, holding that the right to an opening statement is not guaranteed by the Constitution.[65] When the Framers drafted the Sixth Amendment in 1789, there was no British law concerning opening statements, and it was therefore not incorporated specifically into the United States Constitution.[66] Consequently, the addition of opening statements to the trial happened on a state-by-state basis through their own procedural statutes.[67] The Second Circuit held that the procedural requirements of opening statements should be determined by the trial court's

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59. *Id.*

60. *Parker*, 919 A.2d at 952 (Castille, J., concurring).

61. *See* Calhoun v. Commonwealth, 378 S.W.2d 222, 223 (Ky. 1964). The Kentucky court explained:

> In an 1835 English murder trial, Rex v. Orrell, 173 Eng. Rep. 337, 338, counsel for the prosecution, after stating the facts, indicated that there was evidence of previous expressions and declarations of the prisoner which he (the prosecutor) would not detail, whereat the presiding judge, upon consultation with an associate, ruled as follows: "We think the fair course toward the prisoner is to state all that is intended to be proved."

Calhoun, 368 S.W.2d at 223.

62. United States v. Salovitz, 701 F.2d 17 (2d Cir. 1983). Changes largely involved the testimonial procedure. *Salovitz*, 701 F.2d at 19-20.

63. 701 F.2d at 17.

64. *Id.* at 19.

65. *Id.*

66. *Id.*

67. *Id.* at 19-20.

exercise of discretion, due to the lack of constitutional authority on the matter.[68]

Criminal proceedings in Pennsylvania are governed by the Pennsylvania Rules of Criminal Procedure, which allow the Commonwealth to present an opening statement to the jury after the jury is sworn.[69] The content and extent of opening statements, as well as the delivery techniques, arguably have a drastic effect on the jury deliberation process.[70]

The Supreme Court of Pennsylvania held in *Commonwealth v. Montgomery*[71] that the purpose of opening statements is to provide an outline of the party's case to the jury; the outline should include a brief history and description of the facts and the inferences to be subsequently concluded from those facts.[72] In *Montgomery*, the appellant was convicted of attempted rape, terroristic threats, and indecent assault.[73] During opening statements, the defense attorney referenced the prosecutor's lack of corroborating evidence, based on the fact that a test on a piece of evidence did not produce the presence of semen from the alleged crime.[74] On the afternoon of the trial, further tests were conducted and semen stains were found on the evidence.[75] The defense filed for mistrial, arguing that the jury's impression would be prejudiced

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68. *Salovitz*, 701 F.2d at 20. "We have held in a civil case that 'opening is merely a privilege to be granted or withheld depending on the circumstances of the individual case.'" *Id.* (quoting United States v. 5 Cases, More or Less, Containing "Figlia Mia Brand," 179 F.2d 519 (2d Cir. 1950)). The Second Circuit quoted the Supreme Court in *McGautha v. California*, 402 U.S. 183, 221 (1971), which stated: "The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected." *McGautha*, 402 U.S. at 222. (quoting *5 Cases, More or Less*, 179 F.2d 519).

69. PA. R. CRIM. P. 604(A).

70. JOHN GUINTHER, THE JURY IN AMERICA 60 (1988). Guinther described the impact of the opening statement:

> The lawyer's opening statement to the jury has been described as a "potentially awesome opportunity . . . to describe [the] client's case in a convincing and persuasive manner," the time "for attempting to focus the jury's attention on those few issues which when resolved by the jury in his or her client's favor, will return a favorable verdict."

Id. (quoting DAVID S. SHRAGER, OPENING STATEMENT ON BEHALF OF PLAINTIFF 1 (Roscoe Pound Foundation n.d.)).

71. 626 A.2d 109 (Pa. 1993), *abrogated by* Commonwealth v. Burke, 781 A.2d 1136 (Pa. 2001).

72. *Montgomery*, 626 A.2d at 113. "[A] prosecutor's opening statement should be confined to a brief statement of the issues of the case, an outline of anticipated material evidence, and reasonable inferences to be drawn therefrom." 23A C.J.S. *Criminal Law* § 1690 (2007).

73. *Montgomery*, 626 A.2d at 110.

74. *Id.* at 111.

75. *Id.*

against the defense.[76] The Pennsylvania Supreme Court recognized that, while opening statements are not evidence, they are delievered at a critical stage of the trial at which the jury is likely to form strong opinions about the case.[77] It held that there was a prejudice created based on the opening statements that could potentially affect the integrity of the defendant's argument and the outcome of the case, and therefore granted defendant's motion for a new trial.[78]

Furthermore, Pennsylvania courts have held that prosecutors should be awarded broad discretion and significant latitude in determining the content of their opening statements.[79] The Pennsylvania Supreme Court restricted this latitude by limiting the content of opening statements to that which the prosecutor plans to prove in good faith based on the evidence, rather than allegations aimed at producing emotional responses from the jury.[80] The Third Circuit held, in *United States v. Somers*,[81] that an Assistant United States Attorney was overly dramatic in his delivery of opening statements, thereby exceeding the permissible scope of opening statements and prejudicing the jury against the defendant.[82]

In *Commonwealth v. Hughes*,[83] the defense argued that the prosecutor made a remark during opening statements that was so prejudicial that the defendant would be deprived of his right to a fair trial.[84] The supreme court explained that for evidence to be prejudicial, the probative value must be outweighed by the prejudice to the defendant.[85] In *Hughes*, the Court held that the statement was not prejudicial and thus was within the realm of the purpose of the opening statement.[86]

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76. *Id.*

77. *Id.* at 113.

78. *Montgomery*, 626 A.2d at 113-14.

79. Commonwealth v. Begley, 780 A.2d 605, 626 (Pa. 2001).

80. Commonwealth v. Hughes, 383 A.2d 882, 886 (Pa. 1978). "A district attorney's remarks in his opening statement must be fair deductions from the evidence the Commonwealth in good faith expects to develop, not merely assertions intended to inflame the passions of the jury." *Hughes*, 383 A.2d at 886.

81. 496 F.2d 723 (3d Cir. 1974).

82. *Somers*, 496 F.2d at 737. The defendant alleged prosecutorial misconduct after the Assistant U.S. Attorney "departed from that objective [of opening statements] by studding his opening with overly-dramatic, unnecessary characterizations." *Id.*

83. 383 A.2d at 886.

84. *Id.*

85. *Id.*

86. *Id.* The prosecutor informed the jury that the appellant had remarked during the robbery: "Kill the white mother fucker." *Id.*

In *Commonwealth v. Allen*,[87] the superior court allowed the jury to examine blood-stained scissors that had been used in an alleged assault.[88] To determine whether the exhibit was for the sole purpose of sparking an intense passion in the jury, the court balanced the value of the evidence with the likelihood of it creating a prejudicial response.[89]

The opening statements of a criminal trial are not evidence themselves, but are vital in increasing a juror's ability to understand the facts of the case.[90] To prevent the jury from becoming confused, prosecutors may decide to use visual aids to supplement their oral descriptions of evidence.[91] These visual aids and references to descriptions of evidence must refer only to admissible evidence, even though they are not themselves considered evidence.[92] However, opening statements are supposed to be both brief and general in nature.[93] Because the rules allow for the prosecutor to test the boundaries of opening statements, the Supreme Court of Pennsylvania has held that the admission and references of evidentiary matters is within the discretion of the trial court, allowing the appellate court to find reversible error only where there is a flagrant abuse of discretion.[94]

The display of an instrument of crime or weapon to the jury is also within the discretion of the trial court.[95] The determination of whether a weapon should be displayed in court involves the Pennsylvania Rules of Evidence when the issue is the admissibility of evidence during the trial.[96] To be admissible, the evidence must be relevant, which means it will make an issue or fact in the case more or less likely.[97] Additionally, the trial court has the dis-

87. 361 A.2d 393 (Pa. Super. Ct. 1976).
88. *Allen*, 361 A.2d at 397.
89. *Id.* Here, it is also important to note that the court instructed the jury to avoid allowing the exhibits to prejudice their opinions of the defendants. *Id.* "The opening statement of the prosecuting attorney should not refer to anything that may tend improperly to prejudice the accused in the eyes of the jury." 23A C.J.S. *Criminal Law* § 1690 (2007).
90. 2 LANE GOLDSTEIN TRIAL TECHNIQUE § 10:6 (3d ed. 2007).
91. *Id.*
92. *Id.* § 10:5.
93. 23A C.J.S. *Criminal Law* § 1690 (2007).
94. Commonwealth v. Powell, 241 A.2d 119, 121 (Pa. 1968).
95. *Allen*, 361 A.2d at 397.
96. Commonwealth v. DeJesus, 880 A.2d 608, 614 (Pa. 2005).
97. PA. R. EVID. 401.

cretion to exclude the relevant evidence if it unfairly prejudices the jury.[98]

Pennsylvania had not yet determined the combination of the two issues involving the opening statements and the displays of weapons; specifically, it had not decided whether admissible evidence may be displayed in opening statements prior to admission in trial.[99] Other jurisdictions have produced varying results.[100] The Court of Criminal Appeals of Oklahoma did not find prejudicial a display of a murder weapon, but criticized the use of such a technique by the prosecuting attorney.[101] The Court of Appeals for Texas, in a civil case, held that there was no abuse of discretion in permitting the appellee's attorney to display an inflammatory photograph.[102] However, the court said that the Texas Rules of Civil Procedure do not allow detailed descriptions or displays of facts that will be proposed as evidence.[103]

The Supreme Court of New York's Appellate Division ruled that a prosecutor had unfairly prejudiced the jury and became an unsworn witness when he showed the jury that he had hid the murder weapon on his body throughout his entire opening statements.[104] The same court distinguished these circumstances in a subsequent case where it first expressed criticism of a display of a weapon by the prosecutor, but ultimately held that because the weapon was later admitted and because it was not unsworn testimony, there was no abuse of discretion in the trial court's rul-

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98. PA. R. EVID. 403. The rule states: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

99. *Parker*, 919 A.2d at 950.

100. *Id.* at 947-48.

101. Wimberli v. Oklahoma, 536 P.2d 945, 951-52 (Okla. Crim. App. 1975). The District Attorney displayed a knife that had been used in the alleged crime and that was later admitted into evidence. The court said, "We further find that the conduct of the DA in displaying the weapon during the opening statement may not be the model for emulation . . . ." *Wimberli*, 536 P.2d at 952.

102. Guerrero v. Smith, 864 S.W.2d 797, 800 (Tex. App. 1993) (holding that in a medical malpractice case, it was not proper to display a photograph of the plaintiff's injuries to the jury during opening statements, but was deemed a harmless error).

103. *Guerrero*, 864 S.W.2d at 799. The court opined: "This practice misleads and confuses the jurors as between counsel's mere expectations and evidence that is actually admitted." *Id.*

104. People v. Williams, 90 A.D.2d 193 (N.Y. App. Div. 1982). Concealability of the murder weapon was an issue in this case. *Williams*, 90 A.D.2d at 196. The prosecutor stressed this issue in his opening statements and then showed that he had been able to conceal the weapon throughout his statements. *Id.* Through the prosecutor's demonstration and because concealability was an issue in the case, he became an unsworn witness causing likely prejudice. *Id.* at 196.

ing.[105] In approval of displays of evidence during opening statements, the Supreme Courts of California and Kentucky both held that there was not an abuse of discretion by allowing a prosecutor to display photographs during opening statements.[106]

Throughout American history, there has been continual debate concerning the effectiveness of the common-law adversarial jury system and the use of a panel of laypeople to decide important questions of rights and liberties.[107] Despite opposition to the jury system, it has survived and continues to be a guaranteed right, subject to some minor limitations.[108] The debate about the effectiveness of the jury trial and the competency of a jury first began between Thomas Jefferson and Alexander Hamilton.[109] Hamilton's argument expressed the concern that arose in *Parker*. He believed that the jury was unqualified to make important decisions based on complex rules of law because the jurors could not possibly understand the laws and their applications.[110] For example, although the jury is instructed that items displayed during opening statements are not considered evidence, it is debatable whether jurors properly make such a distinction during deliberation. The issue of whether a jury is unduly prejudiced by viewing the criminal weapon during the opening statements is a reflection of the trust that the American jury system places in the members of the jury. The court in *Parker* did not effectively consider the jury's role in the trial process, and more specifically, it was insufficient in its analysis regarding the effect opening statements have on jury deliberation.[111]

While the Pennsylvania Supreme Court recognized that opening statements have a significant impact on the jurors' decision, it did

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105. People v. Priester, 102 A.D.2d 942 (N.Y. App. Div. 1984). This case is distinguishable from *Williams* because the attorney merely discussed the weapon during the display rather than providing a demonstrative statement. *Priester*, 102 A.D.2d at 942.

106. People v. Green, 302 P.2d 307, 313 (Cal. 1956); Sherley v. Commonwealth, 889 S.W.2d 794 (Ky. 1994). "Even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement." *Green*, 302 P.2d at 312 (quoting State v. Sibert, 169 S.E. 410, 412 (W. Va. 1933)).

107. GUINTHER, *supra* note 70, at 31.

108. *Id.* at 35. Subsequent limitations include limiting juveniles' rights to jury trials, limiting corporations' rights to jury trials where the only sentences are fines, and cases that require certain tests to be applied. *Id.*

109. *Id.* at 31. Thomas Jefferson referred to the jury as "more precious to the maintenance of a democracy than even the vote." *Id.*

110. *Id.* Alexander Hamilton "declared that jurors could understand only the most simple and obvious points." *Id.*

111. *Parker*, 919 A.2d at 949-50.

not apply that fact to its analysis of the issue of whether displaying the weapon during opening statements was prejudicial.[112] Between 1953 and 1959, the University of Chicago conducted an extensive study linking social sciences to trial techniques, with portions subsequently interpreted to establish that eighty percent of the verdicts reached by juries at the conclusion of trials are the same as if they based their decisions solely on the attorneys' opening statements.[113] However, insufficient weight was given to the fact that while eighty percent of jurors did not change their opinions, other factors such as the strengths of the cases were a more determinative resulting effect. The author of the study, Hans Zeisel, later wrote that his own proposition has no support in research and has been since misunderstood.[114] Furthermore, in opposition to the original research, a subsequent study conducted by The Pound Foundation found that after opening statements, sixty percent of jurors admitted that they did not have a conclusive opinion about one party or the other, with opinion formation not complete until the trial's end.[115]

Finally, Zeisel's position was met with rebuttal from Litigation Sciences, a jury consulting firm, and an attorney who works specifically with others to improve opening statements.[116] As a firm that does construct valid research on such a topic, the authors suggested that jurors connect final decisions to points or themes from opening statements.[117] Litigation Sciences also concluded that because members of juries often think less academically than

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112. *Parker*, 882 A.2d at 493. "Since the jurors' minds are essentially 'blank slates' at this stage of the trial, opening statements can have a tremendous impact on the ultimate outcome of the trial." *Id.*

113. Richard J. Crawford, *Opening Statement for the Defense in Criminal Cases*, 8 LITIGATION 26, 26 (1982). Crawford said:

> The third reason why the opening statement is so important is that jurors usually make up their minds long before the trial is over. The Chicago Project in the 1960s suggested that 80 percent of jurors do not change their minds following opening statements; my own judgment is that it is probably higher than that. Real persuasion in a trial therefore comes before the presentation of evidence.

Id. at 26.

114. Hans Zeisel, *A Jury Hoax: The Superpower of the Opening Statement*, 14 LITIGATION 17 (1987-1988) (discussing the misinterpretation of his prior published works).

115. GUINTHER, *supra* note 70, at 61.

116. Donald E. Vinson & Robert F. Hanley, *Do Not Ignore This Opening Statement – or Any Others: A Reply to Professor Zeisel*, 15 LITIGATION 1 (1988-1989) (discussing the importance of opening statements).

117. *Id.* at 54. The authors suggest that jurors rely on early decisions based on human nature to reach conclusions quickly. *Id.* Furthermore, because of anxiety of either difficult or important questions, jurors will attempt to minimize their apprehension by relying on early decisions. *Id.*

professors such as Zeisel, members will reach conclusions differently and base their conclusions on the least confusing area of the trial and the point where they are most attentive, which usually falls during the opening statements.[118] Nevertheless, all studies agreed that the nature of the opening statements, and that which is included in opening statements, are to some degree important to the initial impression of the case on the jurors.[119] The Pennsylvania Supreme Court, while reaching the correct decision in *Parker*, failed to accurately detail this potential threat, which jeopardizes the balance used in determining the prejudicial effect of the display.[120]

Additionally, the Pennsylvania Supreme Court failed to respond to Parker's argument that the prosecution's ability to display evidence such as a handgun in the opening statements in a criminal case is unfairly prejudicial to defendants, who are not likely to have such evidence to assist their case and presentation.[121] The prosecution and defense should be at equal starting points, without any jury members having a bias, at the beginning of the substantive trial. Due to the nature of the defendant's case, proving his or her innocence and the lack of involvement in the charges at issue does not allow the defendant many opportunities to put forth physical evidence in front of the jury. However, there is a lack of discussion about this issue throughout jurisdictions who have decided similar cases.

Steven Lubet, in his trial advocacy hornbook, agrees that the opening statements are vital, as human beings tend to think in images, and therefore the images the attorneys create during opening statements will influence the interpretation of all subsequent facts and testimony.[122] Lubet also dispels Parker's contention that the only purpose for the display was to prejudice or spark emotion in the jury by asserting that visual aids and exhibits in opening statements aid in the jury's understanding of the attorney's presentation, fulfilling the purpose of opening statements.[123] Thus, while there does appear to be a benefit to displaying items

118. *Id.* at 55.
119. GUINTHER, *supra* note 70, at 60.
120. *Parker*, 919 A.2d at 949-50.
121. *Id.* at 949.
122. STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 411 (2004) (1993). Lubet wrote: "The attorney who is successful in seizing the opening moment will have an advantage throughout the trial because the jury will tend to filter all of the evidence through a lens that she has created." *Id.*
123. *Id.* at 459.

during opening statements, it is related to trial and persuasion techniques rather than the delineated scope and purpose of opening statements.

There is also a counter-argument that the use of visual aids and displays of potential evidence is expanding the intended purpose of opening statements. Again, Justice Baldwin in her opinion failed to adequately apply the issue at hand to the purpose of opening statements beyond merely mentioning the purpose. Instead, Justice Castille, in his concurring opinion, discussed the concern that such a display of evidence during opening statements may broaden the purpose to a fault.[124] The United States Supreme Court has referred to opening statements as opportunities to state that which will be presented and to provide an outline of the attorney's case.[125] The purpose of opening statements implies exactly what the name conveys, the use of a statement rather than displays of visuals to achieve their purpose. Additionally, confusion may arise from the distinction between evidence and opening statements. While the jury will receive an instruction that opening statements are not evidence, the display of evidence during opening statements will likely invite the jurors to create connections between the object displayed and the attorney's statements, leading the members to make inappropriate connections and give excessive weight to opening statements during deliberation. The Pennsylvania Supreme Court's opinion did not adequately represent or examine these possible prejudicial effects on the jury, which ultimately could have threatened the defendant's case.

Although the prosecutor's display of the handgun in Parker's case was not prejudicial and was harmless as to Parker's conviction, it was an unwarranted expansion of the leading purposes of opening statements. Justice Castille, in his concurring opinion, reached the underlying and practical rationale for the expansion of the scope of opening statements.[126] He suggested that the change in content of opening statements reflects a change in society, that jurors have a desire for the dramatization of trials to reflect what they perceive and expect based on television and movies.[127] The expectations of jury members places pressure on attor-

124. *Parker*, 919 A.2d at 952 (Castille, J., concurring).
125. Escobedo v. United States, 402 U.S. 951 (1971); United States v. Dinitz, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).
126. *Parker*, 919 A.2d at 952 (Castille, J., concurring).
127. *Id.*

neys to attempt to be innovative and entertaining during what should be an informative introduction to the issues, evidence, and theories of a case, in order to concentrate on impressing the jurors.

The debate remains similar to that between Jefferson and Hamilton, whether laypeople can be trusted to be attentive to facts and rules of law so as to reach a rational and just decision. To truly reflect the original concept and ideals of the American jury system, which places the very essence of our democracy at the hands of jurors, not only must juries be trusted to reach just results as to the protection of our rights and liberties, but they must also be trusted to do so without the need for elaborate and sensationalized displays by either prosecutors or defense attorneys in their opening statements.

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