

[J-69-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 72 W.D. Appeal Docket 1997
	:	
Appellee	:	Appeal from the Order of the Superior Court dated November 4, 1996 at No. 117PGH96, affirming the Judgment of
v.	:	Sentence entered by the Court of Common Pleas of Indiana County, Criminal Division, entered July 31, 1995 at No. 34 CRIM 1995.
DAVID JOHN BANGO,	:	
	:	
Appellant	:	ARGUED: March 10, 1998
	:	

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: DECEMBER 20, 1999

I respectfully disagree with the majority's conclusion that the trial court did not abuse its discretion by permitting the jury to review transcripts of tape-recorded conversations during its deliberations. Accordingly, I dissent.

The majority correctly notes that since the transcripts given to the jury in the instant case do not fall into any of the categories of items specifically prohibited by Pa.R.Crim.P. 1114(2) or the case law, the question becomes whether the trial court abused its discretion by permitting the jury to review the transcripts during its deliberations. See, e.g., Commonwealth v. Hawkins, 701 A.2d 492, 512 (Pa. 1997)(trial court's decision as to which exhibits may be taken out with the jury will not be reversed absent abuse of discretion so long as exhibits are not strictly prohibited by court rule or case law). An abuse of discretion will only be found where a lower court has "overridden or misapplied [the law], or the judgment exercised is manifestly

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unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence of record. . . .” Commonwealth v. Rucci, 543 Pa. 261, 285, 670 A.2d 1129, 1141 (1996)(quoting Melzer v. Witsberger, 505 Pa. 462, 475, 480 A.2d 991, 997 (1984)). Where the probative value of properly admitted evidence outweighs its prejudicial value, there is no abuse of discretion. Id., 543 Pa. at 286, 670 A.2d at 1141.

Appellant argues that the trial court abused its discretion by permitting the transcripts to be sent out with the jury during its deliberations because the transcripts have the same potential to be unduly emphasized by the jury during its deliberations as does transcribed trial testimony, which is prohibited from being sent out with the jury by Pa.R.Crim.P. 1114(2). Furthermore, Appellant contends that the procedural safeguards present in the instant case¹ were insufficient to ameliorate the prejudicial effect of the jury’s opportunity to review the transcripts during its deliberations. I agree.

The Pennsylvania Rules of Criminal Procedure have been designed in part to ensure that jury verdicts are based on jurors’ collective recollection of all of the evidence and testimony presented to them during the course of the trial. Therefore, the Rules attempt to limit the opportunity for juries to unduly emphasize individual pieces of evidence. For example, Pa.R.Crim.P. 1113 prohibits jurors from taking notes during the course of trials because they might place undue emphasis and reliance on their notes, rather than rely on their collective recollection of the evidence and testimony presented

¹ The procedural safeguards that Appellant refers to were his opportunity to challenge the accuracy of the transcripts both prior to and during his trial and the cautionary instructions that the trial court gave the jury concerning the limited purpose for which it could use the transcripts.

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at the trial. See Pa.R.Crim.P. 1113; Thornton v. Weaber, 380 Pa. 590, 596-97, 112 A.2d 344, 347-48 (1955)(discussing rationale underlying the prohibition of juror note-taking in the Commonwealth of Pennsylvania); see also Commonwealth v. Kelly, 245 Pa. Super. 351, 373, 369 A.2d 438, 451 (1977)(Hoffman, J. dissenting). Similarly, Pa.R.Crim.P. 1114(2) prohibits trial judges from permitting a jury to review transcripts of trial testimony during its deliberations, because of the risk that the jury will place undue emphasis on the testimony set forth in the transcripts and abandon its duty to rely on its collective recollection of the evidence and testimony presented at trial. See Pa.R.Crim.P. 1114(2); Commonwealth v. Canales, 454 Pa. 422, 427-28, 311 A.2d 572, 575 (1973)(discussing rationale underlying the long-standing rule in the Commonwealth of Pennsylvania that portions of trial transcripts may not be sent out with the jury during its deliberations).

In the instant case, the majority concludes that the trial court did not abuse its discretion by permitting the transcripts to go out with the jury during its deliberations because the trial court gave cautionary instructions to the jury concerning the limited purpose for which it could use the transcripts. However, the prejudicial effect of the transcripts in the instant case is not grounded in the failure of the trial court to adequately instruct the jury as to the limited purpose(s) for which it could use them. Rather, the prejudicial effect of the transcripts is grounded in the opportunity for the jury to place undue emphasis on the contents of the transcripts, and in the danger that the availability of the transcripts in its deliberations will prompt the jury to abandon its responsibility to rely on its collective recollection of the evidence and testimony

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presented during the trial.²

Therefore, I agree with Appellant that the procedural safeguards that were present in the instant case did not, and could not, ameliorate the prejudicial effect of the jury's opportunity to review the transcripts during its deliberations. In addition, I believe that the dangers to the deliberative process that are created when a trial court permits a jury to review transcripts of tape-recorded conversations during its deliberations outweigh any potential probative value that the transcripts may have. Accordingly, I would find that the trial court's decision to permit the jury to review the transcripts of the tape-recorded conversations during its deliberations was manifestly unreasonable, and therefore constituted an abuse of its discretion.

² In my view, the transcripts of the tapes provided to the jury during its deliberations in the instant case were tantamount to transcripts of trial testimony, which juries are never permitted to take with them during their deliberations pursuant to Pa.R.Crim.P. 1114(2). In much the same manner as calling individuals to testify at trial, playing the tapes for the jury allowed it to hear Appellant and numerous other individuals relay information concerning the drug transactions which formed the basis of the Commonwealth's case against Appellant. Therefore, I fail to see an appreciable distinction between permitting a jury to review transcripts of live trial testimony and permitting the jury in the instant case to review the transcripts of the tape-recorded conversations. In addition, I see little difference between permitting the jury to review a defendant's recorded confession during its deliberations, which is prohibited by Pa.R.Crim.P. 1114(2), and permitting the jury to review the transcripts during its deliberations in the instant case. In the taped conversations that were the subject of the transcripts here, Appellant himself discussed multiple potential purchases and sales of illegal drugs. Although the tapes do not technically constitute confessions by Appellant to the crimes with which he was charged, I believe that the potential prejudicial effect of the transcripts is similar, if not identical to the prejudicial effect that would result from the jury having an opportunity to review a defendant's recorded confession during its deliberations.

Mr. Justice Zappala joins in the Dissenting Opinion.