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20-P-160

Appeals Court

COMMONWEALTH vs. YEFFREY DELACRUZ.¹

No. 20-P-160.

Essex. November 12, 2020. - February 9, 2021.

Present: Green, C.J., Desmond, & Lemire, JJ.

Jury and Jurors. Practice, Criminal, Jury and jurors, Voir dire, Conduct of juror, Record, Recording of proceedings. Constitutional Law, Jury.

Complaint received and sworn to in the Lynn Division of the District Court Department on January 8, 2016.

The case was tried before Albert S. Conlon, J., and motions to reconstruct the record and to correct the record were considered by Matthew J. Nestor, J.

Kathleen J. Hill for the defendant.
Catherine Langevin Semel, Assistant District Attorney, for the Commonwealth.

DESMOND, J. Following a jury trial in the Lynn Division of the District Court Department (Lynn District Court), the

¹ The defendant's first name is spelled "Yeffry" in the complaint, but the District Court docket indicates the spelling was amended to Yeffrey.

defendant was convicted of possession with intent to distribute a class A substance, in violation of G. L. c. 94C, § 32 (a), and refusing to stop for a police officer, in violation of G. L. c. 90, § 25. In this consolidated appeal, the defendant appeals from his convictions and from an order on his postjudgment supplemental motion to reconstruct the record. The defendant argues that his convictions should be reversed because a biased juror was permitted to sit on the jury. He also seeks a new trial, arguing that the reconstructed trial record is insufficient for adequate appellate review of his claims. The Commonwealth cross-appeals from an order denying its motion to correct the record. In addition, the Commonwealth has filed, in this court, a motion to correct the record, pursuant to the authority granted to us by Mass. R. A. P. 8 (e) (2), as appearing in 481 Mass. 1611 (2019). For the reasons that follow, we allow the Commonwealth's motion to correct the record, affirm the order on the defendant's supplemental motion to reconstruct the record, and affirm the defendant's convictions.

Background. As the defendant's and the Commonwealth's appeals pertain primarily to jury voir dire and sidebar discussions at trial, we need not recite the facts underlying the defendant's convictions in detail. It suffices to say that the defendant initially failed to stop his vehicle for a State

trooper who attempted to conduct a traffic stop by activating his emergency lights. When the defendant stopped his vehicle, the trooper observed the defendant swallow seven to ten "twists," and the trooper subsequently discovered several additional twists of heroin on the defendant's person and in his vehicle.

The defendant was ultimately convicted of possession with intent to distribute a class A substance and refusing to stop for a police officer.² The defendant appealed from these convictions. After it was learned that the court's recording system failed to record several material sidebar discussions at trial, the defendant's appeal was stayed pending reconstruction of the transcript. Pursuant to Mass. R. A. P. 8 (e) (3), the defendant and the Commonwealth jointly stipulated to many portions of the transcript that were deemed inaudible. They, however, could not agree on four inaudible portions of the transcript, and the defendant filed a motion in the District Court seeking approval of the joint stipulations and requesting

² The judge declared a mistrial on two firearm charges after the jury indicated that they were deadlocked. (The docket in the record before us indicates that on retrial before a different judge, the jury acquitted the defendant of these charges.) The Commonwealth filed a nolle prosequi on one count of possession of a firearm during the commission of a felony and on two counts of possession of ammunition without a firearm identification card. Following the trial, the trial judge found the defendant not responsible for two civil motor vehicle infractions.

that the trial judge settle the portions of the transcript that remained in dispute. Because the trial judge retired after the trial, the First Justice of the Lynn District Court presided over the defendant's motion. The First Justice initially did not act on the defendant's motion, but instead stated that the trial judge had no memory of the case.³ The defendant then filed a supplemental motion to reconstruct the record. The First Justice approved the joint stipulations concerning the inaudible portions of the transcript, but he made no findings regarding the disputed inaudible portions.⁴ The defendant appealed from that order, and the appeal was consolidated with the appeal from his convictions.

The defendant filed his appellate brief, which asserted that his convictions should be reversed based on a juror's transcribed response to a voir dire question during jury empanelment. Believing that the transcript did not accurately reflect the juror's response during the voir dire, the Commonwealth moved to stay the appellate proceedings to correct the record. A stay was granted, and the Commonwealth filed a motion in the Lynn District Court, pursuant to Mass. R. A. P.

³ It appears that the First Justice contacted the retired trial judge to determine if he had any information that would assist the First Justice in reconstructing the record.

⁴ The First Justice's endorsement of the motion explained that the trial judge had no notes or memory of the trial.

8 (e) (2) (rule 8 [e] [2]), to correct a portion of the record. At a hearing on the motion, the Commonwealth presented the audio recording of the voir dire, as well as a second transcript of the voir dire created by a second transcriptionist. Following the hearing, the First Justice declined to reach the merits of the Commonwealth's motion because he was not the trial judge, and he denied the motion. The Commonwealth filed a motion for reconsideration, which was also denied, and then filed an appeal, which was consolidated with the defendant's appeals.⁵

Discussion. 1. Motions to correct the record. We first address the Commonwealth's appeal from the District Court order denying its motion to correct the record, then we address the motion to correct the record that was filed in this court. The purported error in the record lies in an answer given by a prospective juror to a voir dire question asked by the trial judge during jury empanelment.

Because the defendant required the assistance of a Spanish interpreter during the trial, the judge asked each prospective juror whether the defendant's use of an interpreter would have any effect on the prospective juror's ability to decide the case. The judge asked this question to juror no. 12, and the

⁵ The Commonwealth also sought relief from a single justice of the Appeals Court and a single justice of the Supreme Judicial Court, which was denied in both instances.

original transcript reflects that the juror answered "Yes" to this question, indicating that she would in fact be affected by the defendant's use of an interpreter. Due to the juror's transcribed response, the defendant asserted in his appellate brief that the juror was biased and should not have been seated on the jury.

As noted, the Commonwealth believed that the juror's transcribed response was the result of a scrivener's error, so it sought a stay of appellate proceedings and obtained the District Court's audio recording of the voir dire of juror no. 12. The Commonwealth requested that the original transcriptionist listen to the audio recording and review the transcript, but because she had retired, she declined to do so. The Commonwealth then submitted the audio recording to the Office of Transcription Services to be transcribed by a second transcriptionist. In the second transcript, the juror's response to whether she would be affected by the defendant's use of the interpreter was transcribed as "No, sir."

Under rule 8 (e) (2), "[i]f any part of the record on appeal fails to accord with what occurred in the lower court," and the parties are unable to agree on what the appropriate correction is, "the lower court on motion shall settle any disputes and conform the record to the truth." Here, however, the First Justice of the Lynn District Court declined to reach

the merits of the Commonwealth's motion because he "was not the trial judge and ha[d] no more idea of what the tape [said] than the parties." The Commonwealth filed a motion for reconsideration and the First Justice stated,

"If I were, in fact, the trial judge I would of course listen to the transcript and make a determination as to what I had said. But I wasn't. I am a co-equal with the trial judge. Given that the trial judge is retired and no longer able to make any determination I find that the appeals court should make that determination not a judge who is essentially co-equal of the original trial judge."

Notwithstanding the First Justice's reasoning, the proper course for him to have taken would have been to correct the record on the Commonwealth's motion. See Mass. R. A. P. 8 (e) (2) ("If the parties are unable to agree, the lower court on motion shall settle any disputes and conform the record to the truth" [emphasis added]). Our Rules of Appellate Procedure also provide an avenue for the Appeals Court to correct the record. Rule 8 (e) (2) states that "[o]n motion of the parties or on its own motion, the appellate court or a single justice may direct that any part of the record be corrected." Although we believe that the best place to correct a lower court record is in the lower court, because numerous attempts by the Commonwealth to correct the record in the District Court have been unsuccessful, we exercise our discretion to correct the record in this case.

We have listened to the recording of the judge's voir dire of juror no. 12, and we are confident the juror responded, "No,

sir," rather than "Yes" when the judge asked her whether her ability to decide the case would be affected by the defendant using the assistance of a Spanish interpreter. We are further convinced by the circumstances surrounding this answer. After the juror responded, all parties involved acted as if the answer was proper and did not raise an issue of partiality. The judge, who had already excused several jurors for cause sua sponte, did not ask the juror any follow-up questions and did not excuse juror no. 12. Neither defense counsel nor the Commonwealth requested that additional questions be asked, and the juror was not challenged for cause. Additionally, it is of note that no objection was leveled when the juror was seated. Further, the defendant had one peremptory challenge remaining at the conclusion of the empanelment process and expressed his contentment with the seated jurors, including juror no. 12 at that time.

Accordingly, we allow the Commonwealth's motion to correct the record to reflect that juror no. 12 responded, "No, sir," when the judge inquired as to whether the defendant's use of the interpreter would affect her ability to decide the case. We therefore do not address the Commonwealth's appeal from the District Court order.

2. Juror bias. We turn next to the defendant's claim of juror bias. The defendant argues that, as a result of juror no.

12's indication that her deliberations would be affected by the defendant's use of a Spanish interpreter, juror no. 12 was biased against him and therefore should not have been permitted to sit on the jury. Given our disposition of the Commonwealth's motion to correct the record, and passing on whether this claim is now moot, we disagree.

"A criminal defendant is entitled to a trial by an impartial jury pursuant to the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights." Commonwealth v. Williams, 481 Mass. 443, 447 (2019). The defendant's right to a trial by an impartial jury is violated by "[t]he presence of even one juror who is not impartial." Commonwealth v. Long, 419 Mass. 798, 802 (1995). However, "[a] judge has broad discretion in deciding whether a prospective juror is impartial, and [a judge's] decision will be reversed only for an abuse of discretion." Commonwealth v. Ruell, 459 Mass. 126, 136, cert. denied, 565 U.S. 841 (2011).

We discern no abuse of the trial judge's discretion. The juror indicated that her ability to decide the case impartially would not be affected by the defendant using the assistance of a Spanish interpreter. There was no request for follow-up questions and no challenge for cause by the defendant. The judge was not required to excuse the juror or conduct a further

voir dire because there was no reason to believe that the juror did not stand indifferent. See Williams, 481 Mass. at 448.

3. Reconstruction of the record. Finally, we address the defendant's appeal from the order on his motion to reconstruct the record and his claim that a new trial is required because the trial transcript cannot be adequately reconstructed for proper appellate review. As previously mentioned, the defendant and the Commonwealth were able to agree and to stipulate to many inaudible portions of the transcript, and the First Justice approved those stipulations. However, four inaudible parts of the transcript remain unsettled.

These inaudible portions could not be reconstructed because neither defense counsel nor the prosecutor recalled their substance, and the trial judge, who had since retired, had no memory of the case and retained no notes from the trial. Nevertheless, the defendant argues that the First Justice, who did not preside over the trial, clearly erred in failing to make findings as to what was said in these inaudible portions. We disagree.

While the "defendant is entitled to a 'record of sufficient completeness to permit proper consideration of his claims,' . . . this does not 'translate automatically into a complete verbatim transcript.'" Commonwealth v. Imbert, 479 Mass. 575, 577-578 (2018), quoting Mayer v. Chicago, 404 U.S. 189, 194

(1971). Rather, in circumstances where the trial transcript is incomplete or portions of it are missing, "'rough accommodations' in the method in which an appeal is presented are constitutionally permissible." Imbert, supra at 578, quoting Commonwealth v. Harris, 376 Mass. 74, 77 (1978). "A new trial will not be granted 'unless the trial proceedings cannot be reconstructed sufficiently to present the defendant's claims.'" Imbert, supra, quoting Harris, supra at 78.

Of the four inaudible portions in the transcript, the defendant raises claims with respect to two of them. It is important to note that these sections in the transcript are not entirely indecipherable, but rather in these particular sections, a word or a phrase is missing and listed as inaudible. The defendant, nonetheless, asserts that his claims cannot be properly considered without an adequate reconstruction of these sections. We, however, are satisfied that the existing transcript is sufficient to permit appellate review and disposition of these claims, as "[t]here is 'enough in the record pertinent to the point to enable us to decide [these claims] without resort to speculation.'" Matter of M.C., 481 Mass. 336, 345 (2019), quoting Commonwealth v. Bottiglio, 357 Mass. 593, 597 (1970).

The first of the defendant's claims concerns the impartiality of juror no. 12. Prior to questioning the juror

about the defendant's use of an interpreter, the judge asked the juror a question relating to the testimony of law enforcement officers. The question was partially inaudible, and the juror's answer to the question was completely inaudible. The Commonwealth and the defendant stipulated that the question asked by the judge was whether the juror would tend to believe the testimony of a State trooper over the testimony of a civilian witness, but after reviewing their notes and conferring, the parties could not recall the juror's specific response. The defendant contends that the inability to reconstruct the particular response given by the juror entitles him to a new trial. The defendant, however, has not demonstrated any prejudice arising from the absence of this response. See Commonwealth v. Flint, 81 Mass. App. Ct. 794, 801 (2012) ("to demonstrate denial of a fair appeal, an appellant must show prejudice resulting from the absence of the transcripts at issue" [citation omitted]).

In fact, the transcript strongly indicates that there was no prejudice, and we will not disturb a trial judge's determination that a juror is impartial "except where juror prejudice is manifest." Commonwealth v. Clark, 446 Mass. 620, 630 (2006). The trial judge showed no hesitation in excusing jurors who indicated that they would tend to believe the testimony of a police officer over that of a civilian witness,

and prior to the voir dire of juror no. 12, the judge excused two jurors for that reason. Yet when juror no. 12 responded to the judge's question, the trial judge did not pose any follow-up questions to the juror and did not excuse her. It is particularly telling that the defendant did not object, challenge the juror for cause, or exercise his remaining peremptory challenge after hearing the juror's response.

The defendant also asserts that an issue of a sleeping juror cannot be decided on appeal without an adequate reconstruction of the transcript. On two occasions during trial, it was discovered that a different juror, juror no. 1, was sleeping. Each time, the judge called defense counsel and the prosecutor to sidebar and conducted a voir dire of juror no. 1. Several portions of statements made at sidebar by the judge, the prosecutor, defense counsel, and juror no. 1 were deemed inaudible in the transcript, but a majority of these statements were able to be reconstructed by stipulation of the parties. As a result, the reconstructed transcript is more than sufficient to properly consider the defendant's claim. See Imbert, 479 Mass. at 577-578.

"[A] judicial observation that a juror is asleep, or a judge's receipt of reliable information to that effect, requires prompt judicial intervention." Commonwealth v. Villalobos, 478 Mass. 1007, 1007 (2017), quoting Commonwealth v. McGhee, 470

Mass. 638, 643-644 (2015). "Typically, the next step is to conduct a voir dire of the potentially inattentive juror, in an attempt to investigate whether that juror 'remains capable of fulfilling his or her obligation to render a verdict based on all of the evidence.'" Villalobos, supra at 1008, quoting McGhee, supra at 644. "The burden is on the defendant to show that the judge's response to information about a sleeping juror was 'arbitrary or unreasonable.'" McGhee, supra, quoting Commonwealth v. Beneche, 458 Mass. 61, 78 (2010).

The judge first noticed that juror no. 1 appeared to be sleeping during the Commonwealth's direct examination of a State trooper in the ballistics unit. The judge conducted a voir dire of juror no. 1, and she admitted to having fallen asleep "a little bit."⁶ The judge then informed defense counsel and the prosecutor that he could either excuse the juror, or retain the juror and have the prosecutor repeat any questions on direct that the juror may have missed. Defense counsel expressly requested that the judge go with the latter option, and as a result, the juror was not excused.

On the second occasion, the prosecutor observed juror no. 1 sleeping during the defendant's direct examination of his

⁶ However, in a portion of the reconstructed transcript, defense counsel and the Commonwealth agreed that, during the same voir dire, juror no. 1 also told the judge that she had not fallen asleep.

private investigator. At this time, the private investigator was testifying about the procedure he followed in order to photograph the arresting officer's vehicle. Upon being notified of the sleeping juror, the judge called defense counsel and the prosecutor to sidebar. The prosecutor stated that she was not sure how long the juror had been sleeping, and the judge indicated that he intended to excuse the juror. The defendant promptly objected to excusing the juror and suggested that the judge conduct a voir dire.

Per the defendant's request, the judge conducted a voir dire of juror no. 1 instead of excusing her, and asked her what she recalled about the most recent testimony. The juror's response was deemed partially inaudible, but in the reconstructed transcript, the parties jointly agreed that the juror responded, "He was just telling what he did . . . [t]rying to obtain photographs of the police car."⁷ After hearing this

⁷ After conducting the voir dire of juror no. 1, the judge asked the prosecutor and defense counsel how they wished to proceed. In response, defense counsel stated, "My position is that Your Honor asked her what the previous witness had testified to, and she generally stated that the lab and what was related to the gun." At this point, the prosecutor commented, "I thought I heard her say take photographs of the cruiser," to which the judge replied "Oh, maybe." The defendant argues that, due to the parties' divergent recollections of the juror's response, it cannot be determined on this record whether juror no. 1 was sufficiently able to fulfill her obligation to render a verdict based on all the evidence. This argument is belied by the fact that the parties agreed and jointly stipulated to what

response, the judge permitted the juror to remain seated on the jury without objection from defense counsel.

On both occasions, when the judge observed or was notified that juror no. 1 was sleeping, he conducted a voir dire and satisfied himself that the juror "could fairly participate in deliberations." Commonwealth v. Ray, 467 Mass. 115, 139 (2014). On the first occasion, the juror had only been sleeping for a brief period of time, and any evidence that she missed was repeated by the prosecutor. On the second occasion, the judge did not personally observe the sleeping juror himself, and when he inquired about her recollection of the evidence, the juror accurately stated the most recent testimony. Notably, on both occasions, the defendant did not object to the judge retaining the juror, but instead expressed a desire for the juror to remain on the jury. All involved seemed particularly impressed with the juror's attentiveness on the previous day of trial and did not wish to see her excused. "[W]e afford considerable discretion to the trial judge to determine whether removal of a juror is merited," and we will not disturb this determination unless there is an error or abuse of discretion. Id. at 138-139. We discern no such error or abuse of discretion here.

the juror's true response was, and the agreed upon response in fact reflected the most recent trial testimony.

Conclusion. For the foregoing reasons, we affirm the order of the District Court on the defendant's supplemental motion to reconstruct the record and affirm the defendant's convictions. We also allow the Commonwealth's motion to correct the record.

So ordered.