

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KEISHA JONES,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3317 EDA 2012

Appeal from the Judgment of Sentence entered October 26, 2012,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0001050-2012

BEFORE: ALLEN, MUNDY, and FITZGERALD*, JJ.

MEMORANDUM BY MUNDY, J.:

FILED AUGUST 15, 2014

Appellant, Keisha Jones, appeals from the October 26, 2012 judgment of sentence of life imprisonment imposed after a jury convicted her of first-degree murder and possessing an instrument of crime (PIC).¹ After careful review, we vacate the judgment of sentence and remand for a new trial.

The factual and procedural history of this case, as revealed by the certified record, follows. On November 27, 2011, at approximately 2:00 a.m., Tyrone Taylor sustained fatal injuries after being struck by a sports utility vehicle driven by Appellant, his wife. This incident occurred on the 2400 block of Morris Street in South Philadelphia. Police subsequently

¹ 18 Pa.C.S.A. §§ 2502 and 907(a), respectively.

*Former Justice specially assigned to the Superior Court.

charged Appellant with murder, involuntary manslaughter, homicide by vehicle, and PIC.² Information, 1/31/12.

This matter proceeded to a jury trial on October 23, 2012. At that time, the Commonwealth proceeded on the murder and PIC charges.³ Following three days of testimony, the trial court charged the jury as to first-degree murder, third-degree murder, and PIC. N.T., 10/25/12, at 155-162. Following the trial court's instructions, the jury began its deliberations. ***Id.*** at 167.

During its deliberations, the jury presented the trial court with a number of questions, two of which influence this appeal. Initially, the jury requested to view Appellant's police statement. The jury's request reads as follows. "Can we please see the video[s] and [Appellant]'s statement again?"⁴ N.T., 10/25/12, Court Exhibit 1. In response to this request, the trial court instructed its court reporter to read a portion of Detective

² 18 Pa.C.S.A. §§ 2502, 2504(a), 75 Pa.C.S.A. § 3732(a), and 18 Pa.C.S.A. § 907(a), respectively.

³ The Commonwealth *not* proessed Appellant's remaining charges on October 26, 2012.

⁴ The referenced surveillance camera videos depict Appellant's car hitting the victim. N.T., 10/23/12, at 95-102. Appellant does not contest the replaying of these videos for the jury.

Bamberski's testimony to the jury.⁵ N.T., 10/25/12, at 171-176. During trial, Detective Bamberski read Appellant's police statement, verbatim, into the record. **See** N.T., 10/24/12, at 18-24. Within this statement, Appellant admits to "chasing [the victim] with the car[,] ... stepp[ing] on the gas real hard[,] " and hitting the victim. **Id.** at 173. Detective Bamberski's reviewed testimony consisted of approximately six transcribed pages. Following this reading, the trial court recessed for the evening.

The following morning, the jury requested to rehear Appellant's testimony regarding the incident. The jury's request provides as follows.

[The jury would like the court reporter to read [Appellant]'s testimony starting from when [her counsel] asked her to tell us what happened that night.

And just [Appellant]'s account of the evidence from the police report.

N.T., 10/26/12, Court Exhibits 3 and 3-A (emphasis in original). Within this portion of Appellant's testimony, she claimed that her foot accidentally hit the gas pedal when she was looking for the victim in a vacant lot and that "[she] did everything in [her] power to try to stop th[e vehicle]." N.T., 10/25/12, at 36. Appellant further testified that "[she] didn't even know [the victim] was hit[because she] didn't even see him walk in front of the [vehicle]." **Id.**

⁵ Pennsylvania Rule of Criminal Procedure 646 prohibited providing the jury with Appellant's actual police statement. **See** Pa.R.Crim.P. 646.

Upon receiving this request, the trial court convened a conference with Appellant, defense counsel, and the prosecutor, at which time the following exchange occurred.

THE COURT: Counsel, I'll hear from both of you. So you know, my inclination is to send a note back telling them that their recollection controls. The only reason that I permitted the statement to [be] re[a]d again is because the statement could not go out. But this was not a long trial and they did have the ability to take notes. I don't see any reason to have that - - basically the way I'm interpreting this, this is her entire testimony.

[PROSECUTOR]: That's what it would be.

THE COURT: Because while they put the words "[j]ust her account of the events from the police report," I mean, other than the basic biographical information and her family life and things like that, that's all she testified to, is what happened that night. Then there was cross examination about the police report.

[DEFENSE COUNSEL]: Judge, very respectfully, I feel very strongly about this; that it should be re[a]d.

[Appellant] took the stand because - - the sole reason for her taking the stand was because it was her position and it was our position throughout the trial that the statement was not complete. That the detective put - - did the statement, but did not put everything in it.

Cross examination focused on that [sic] just that. [The prosecutor] took [Appellant] through the statement piece by piece, verifying with her that she had said something. Making indications that this was voluntary. In other words, you said, question was asked, and you gave an answer. Did you answer that question? To which [Appellant] said,

yes, but repeatedly said, there were other things that I said that were not in that statement. And that's why she testified.

Because they heard [Appellant's police] statement, now they only have a piece of the defense. They only have one side of the story. They have the prosecution's side only. They've now asked for both. They want both sides. In fairness to [Appellant], she testified so the jury could hear both sides.

I think it's unfair now during deliberations, the most important phase, that they be given only the prosecution side, when it[']s been our allegation throughout, and I'm not saying this for the first time now, that the statement was not complete.

I have no objection to the cross examination being re[a]d. I understand that and the content, the court may allow that as well. What [the prosecutor] asked in her questions. But I do think [Appellant]'s version, given - - and I won't repeat myself -- - it's extremely important that they do hear it.

THE COURT: I understand your position. What I will do is modify the response to saying, "If they can be more specific." Then I will, you know, send out another question. It may just be the one thing that they want, but I do think the essence of this trial was [Appellant's] testimony and one Commonwealth witness's testimony, and there's no reason why they would be unable to recall it, particularly with the assistance of their notes. So what I'm going to say is, "Your recollection controls."

...

[DEFENSE COUNSEL]: I think they are being very specific. Particularly, if you look at part two of their question. Because they're, again, asking for "[Appellant]'s account of events from the police report." I'm assuming, and I guess we have to clarify, that that's the statement.

THE COURT: Well, except, the way I'm reading this is, this is, in fact, her entire testimony.

[PROSECUTOR]: It is. ...

[DEFENSE COUNSEL]: I'm saying my whole case is her testimony. I think they are being specific. I remember it. I was doing the lawyer thing and trying to humanize her and all that. The [trial c]ourt eventually directed me to get to the incident. At which point, I stepped back and I said, I don't want to be annoying bringing this up, I'm going to ask you to look at the jury and tell them your version of what happened. It was a very specific question. I think those jurors remember that very specific question, and it's that very specific answer they want. That's what they're asking for here. They even mention it. In other words, they don't want all my sympathy stuff, nonsense beforehand. They want to get right to the incident where you directed. They're being really specific. Because we all remember, specifically, when that was.

THE COURT: That's where I disagree. To me they're, basically, like I said, other than the biographical information, they're asking for her entire testimony to be re-re[a]d.

I have added to the note. If there is anything more specific you need, please tell [sic] let the [trial c]ourt know. I have, in the [trial c]ourt's experience[], then received notes from jurors that tell exactly what they need, or they will send something else out. I think this jury does know that if they get at some point stuck and they say that they definitely need it, then we'll revisit that. Thank you.

...

[DEFENSE COUNSEL]: You sent them a written response?

THE COURT: I sent them a written response.

[DEFENSE COUNSEL]: What exactly was that?

THE COURT: That was exactly what I just re[a]d, "Your recollection controls. If there's anything more specific, please let the [trial c]ourt know."

N.T., 10/26/12, at 2-7. Following this written communication by the trial court, the jury did not present a subsequent request to review Appellant's testimony. However, the jury did request to be recharged on "the legal definitions of malice for both [first] and [third] degree murder[.]" N.T., 10/26/12, Court Exhibit 4.

Later that day, the jury convicted Appellant of first-degree murder and PIC. The trial court immediately imposed a sentence of mandatory life imprisonment upon Appellant for the first-degree murder conviction.⁶ On November 1, 2012, Appellant filed a timely post sentence motion, which was denied by the trial court on November 6, 2012. Appellant subsequently filed a timely notice of appeal on November 14, 2012.⁷

On appeal, Appellant raises the following issue for our review.

⁶ The trial court imposed no further penalty for Appellant's PIC conviction. Sentencing Order, 10/26/12.

⁷ Appellant and the trial court have complied with Pennsylvania Rule of Appellate Procedure 1925. Appellant chose to proceed with her appeal as to only one of the errors raised within her Rule 1925(b) statement, to wit, her fifth error. As the remaining errors raised within Appellant's Rule 1925(b) statement were not presented to this Court within her appellate brief, we deem those issues waived.

Whether the trial court abused its discretion and deprived [Appellant] of her due process right to a fair trial by its refusal to grant the jury's request for a relevant portion of [Appellant]'s testimony to be read to the jury after the [trial] court earlier had acceded to its request to have [Appellant]'s statement to police read to the jury, which statement [Appellant] contradicted in her testimony?

Appellant's Brief at 2.

It is within the trial court's discretion to grant or deny a jury's request to rehear recorded testimony during deliberations. **Commonwealth v. Manley**, 985 A.2d 256, 273 (Pa. Super. 2009), *appeal denied*, 996 A.2d 491 (Pa. 2010), *citing Commonwealth v. Gladden*, 665 A.2d 1201, 1205 (Pa. Super. 1995) (*en banc*), *appeal denied*, 675 A.2d 1243 (Pa. 1996); **accord Commonwealth v. Arrington**, 86 A.3d 831, 848 (Pa. 2014); **Commonwealth v. Peterman**, 244 A.2d 723, 726 (Pa. 1968). "As long as there is not a flagrant abuse of discretion, th[e trial court's] decision should not be overturned on appeal." **Manley, supra**, *quoting Gladden, supra*. Yet, if a granted review places undue emphasis on the testimony of a witness, a reversible error occurs. **Arrington, supra**.

Appellant claims the trial court abused its discretion when it denied the jury's request to rehear her testimony in light of the prior review of her police statement, which was presented through Detective Bamperski's testimony. Appellant's Brief at 11-15. Appellant avows "[t]he overriding issue of fact for the jury's consideration ... was [her] state of mind[.]" **Id.** at 11. Appellant claims the questions posed by the jury during its deliberations

illustrate that “[it] [] was grappling with [the] question of [her] state of mind at the time of the incident[.]” **Id.** at 11, 12. By granting only the request to rehear the Commonwealth’s testimony, Appellant posits the trial court placed undue emphasis on Detective Bamberski’s testimony. **Id.** at 14-15.

Within its Rule 1925(a) opinion, the trial court asserts that its ruling was multifaceted.⁸ Primarily, the trial court reasons Appellant’s testimony was too voluminous to read back to the jury. Trial Court Opinion, 1/25/13, at 15. Moreover, the trial court claims a dry recantation of Appellant’s testimony by the court reporter would not recreate Appellant’s demeanor for the jury to evaluate in conjunction with her testimony. **Id.** at 16. The trial court also provides that the jurors “could [have] use[d] [their] notes to refresh their recollection of the desired testimony.” **Id.** at 15. Lastly, the trial court explains it did not deny the jury’s request; it merely invited the jury to clarify its request. **Id.** at 14.

Upon our review of the certified record, specifically, the testimony provided and withheld during the jury’s deliberations, we conclude the trial court flagrantly abused its discretion in denying the jury’s request to rehear a portion of Appellant’s testimony. Throughout trial, Appellant argued that her police statement, as presented by the Commonwealth, was incorrect. Appellant testified as to her recollection of the incident during trial. N.T.,

⁸ We note the trial court permitted the review of the Commonwealth’s testimony without question. **See** N.T., 10/25/12, at 169-176.

10/25/12, at 31-37. Appellant's police statement and testimony each illustrates a different criminal intent. When conflicting testimony is presented during trial, it is the duty of the fact finder to decide which testimony to believe. **Commonwealth v. Kerrigan**, 920 A.2d 190, 198 (Pa. Super. 2007), *appeal denied*, 932 A.2d 1286 (Pa. 2007); **see also** N.T., 10/25/12, at 147-149. Accordingly, it was for the jury to decide whether to believe Appellant or Detective Bamberski. **See id.** The trial court frustrated this duty by permitting the rehearing of only one version of the underlying incident. This decision placed an undue emphasis on Detective Bamberski's testimony and prejudiced Appellant. **See Arrington, supra; cf. Commonwealth v. Antidormi**, 84 A.3d 736, 754-755 (Pa. Super. 2014) (concluding Antidormi's undeveloped claim was insufficient to prove that he was prejudiced when the trial court allowed the jury to rehear the entirety of a Commonwealth witness's testimony).

Within its request to rehear Appellant's testimony, the jury sought to review approximately six pages of transcribed testimony.⁹ N.T., 10/25/12,

⁹ As Appellant argued during the deliberations, this six-page passage begins with the trial court directing her counsel to "get to the incident." **Id.** at 31. Appellant then discusses "[her] account of the evidence from the police report[.]" N.T., 10/26/12, Court Exhibit 3-A; **see also** N.T., 10/25/12, at 31-37. We agree with the Commonwealth that the bulk of Appellant's cross-examination consisted of references to her police statement. **See** Commonwealth's Brief at 6. However, the jury did not request to rehear that portion of Appellant's testimony. If the trial court granted the jury's (*Footnote Continued Next Page*)

at 31-37. Coincidentally, Detective Bamberski's reviewed testimony also consisted of approximately six transcribed pages. **See** N.T., 10/25/12, at 171-176. Yet, rather than permitting the rehearing of Appellant's testimony, the trial court summarily concluded that the jury wished to hear the entirety of her testimony and denied the request as burdensome. **See** N.T., 10/26/12, at 7. The trial court did not reconvene court to ask the jury for clarification or provide the jury with an explanation. **See e.g., Arrington, supra** (where the trial court instructed the jury that it would not permit the rehearing of a witness's testimony *in toto*, as initially requested, and that "it would only permit review [of Appellant's testimony] if the jury formulated 'a precise question ... about [Appellant's] testimony[']"). Instead, it sent a written response to the jury stating that, "[their] recollection controls[and i]f there's anything more specific, please let the [trial c]ourt know." **See** N.T., 10/26/12, Court Exhibit 3-A. As said response did not include a directive to the jury to provide a specific question regarding Appellant's testimony, it had the effect of denying the jury's request.

Regarding the trial court's comment as to the jurors' use of their notes during deliberations, it is well settled that jurors' notes are not evidence. **See** Pa.R.Crim.P. 644(B)(3) (providing that jurors' notes are "not evidence or the official record"). As such, these notes are not an adequate substitute
(Footnote Continued) _____

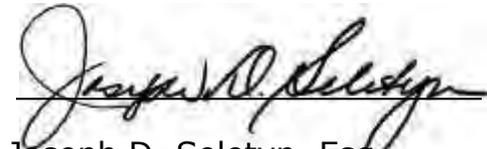
request, it would have been within the trial court's discretion to permit a review of the cross-examination testimony as well.

for Appellant's testimony as reread by the trial court. **See id.** Thus, when reviewing the entirety of the trial court's actions, it is clear that the trial court flagrantly abused its discretion when it denied the jury's request to rehear a portion of Appellant's testimony. **See Manley, supra.** Therefore, we vacate the October 26, 2012 judgment of sentence and order a new trial.

Judgment of sentence vacated. Case remanded for a new trial.
Jurisdiction relinquished.

Judge Allen files a dissenting statement.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/15/2014