NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JACQUE WARREN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3332 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-0012339-2007

BEFORE: BENDER, P.J.E., SHOGAN, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J.E.: **FILED MAY 22, 2014**

Appellant, Jacque Warren, appeals from the judgment of sentence of an aggregate term of 12½ - 25 years' incarceration following his conviction for third degree murder, criminal conspiracy, aggravated assault, and related offenses. Appellant alleges that the trial court erred when it denied his motion for a mistrial after an incident where a juror was removed following her complaint that someone in the trial audience had been staring at her. Appellant also contends that his conviction for criminal conspiracy to commit third degree murder is a legal nullity. After careful review, we affirm.

The trial court summarized the facts adduced at trial as follows:

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* Former Justice specially assigned to the Superior Court.

> On March 9, 2007, victim, Gary Autry Bigelow, an automobile mechanic, was working on a car parked in the street near a car repair shop located in the area of 53rd and Willows Streets. The car was owned by eighteen year-old Darrell Cobb, a Southwest Philadelphia resident, who had a "beef" with defendant and his friends. A little before 3:00 p.m., that day, one of defendant's friends, Eric Cooper, also known as "Coop," received a phone call advising him that Cobb was at 53rd and Willows Street. Coop rounded up defendant as well as Nutta Verdier, and Caliph Douglas, also known as "GoGo," and defendant drove himself and the other three in Coop's grandmother's van to the location where Cobb was reportedly observed.
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> Once defendant arrived at 53rd and Willows Streets, two of the individuals exited the car, and opened fire in the direction of Cobb. Over the next several minutes at least 27 shots were fired from three different guns. Defendant, who did not exit the van, drove the others from the scene at the conclusion of the incident.
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> Gary Bigelow was caught in the crossfire and suffered gunshot wounds to his back and left knee. The projectile that struck him in his back fatally penetrated his lungs, pancreas, and liver. Another victim, Derrick Seals, was also shot but was able to drive himself to the hospital. Seals suffered a gunshot wound to his shoulder that caused permanent injury to his rotator cuff. Cobb was able to escape uninjured. Ballistic evidence showed that Cobb had a gun and returned fire during the incident.

Trial Court Opinion (TCO), 4/3/13, at 2.

Appellant's first jury trial, held in May of 2009, resulted in his acquittal for first degree murder, but the jury was hung with respect to the remaining charges of aggravated assault, third degree murder, and conspiracy. Appellant's second jury trial, the subject of the instant appeal, resulted in his convictions for conspiracy, third degree murder, and two counts of aggravated assault. Appellant was initially sentenced on April 23, 2012. After successfully motioning for reconsideration of his sentence, Appellant

was resentenced on October 26, 2012, to 12½ - 25 years' incarceration and a consecutive term of 10 years' probation.

Appellant filed a timely notice of appeal and a timely Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal. He now presents the following questions for our review:

> [1] Did the trial court commit an abuse of discretion by denying Appellant's motion for a new trial proffered after a juror apparently felt threatened by a spectator in the courtroom and conveyed that fear to other jurors? [Should a] mistrial ... have been granted because the jury was fatally tainted by the incident and was rendered incapable of deliberating objectively?
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> [2] Must Appellant's conviction and sentence for conspiracy to commit third-degree murder be vacated because the crime of conspiracy to commit third-degree murder is a legal nullity insofar as one cannot conspire to commit an unintentional act?

Appellant's Brief at 3.

Appellant's first claim concerns the trial court's denying of his motion for mistrial. The general standard we apply to the review of such claims is as follows:

> A motion for a mistrial is within the discretion of the trial court. ***Commonwealth v. Stafford***, 749 A.2d 489, 500 (Pa. Super. 2000) (citations omitted). "[A] mistrial [upon motion of one of the parties] is required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial trial." ***Commonwealth v. Lease***, 703 A.2d 506, 508 (Pa. Super. 1997). It is within the trial court's discretion to determine whether a defendant was prejudiced by the incident that is the basis of a motion for a mistrial. ***Id.*** On appeal, our standard of review is whether the trial court abused that discretion. ***Stafford***, 749 A.2d at 500.

> An abuse of discretion is more than an error in judgment. ***Commonwealth v. Griffin***, 804 A.2d 1, 7 (Pa. Super. 2002). On appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised by the trial court was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. ***Id.***
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> > When the discretion exercised by the trial court is challenged on appeal, the party bringing the challenge bears a heavy burden.... [I]t is not sufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, [it was] charged with the duty imposed on the court below; it is necessary to go further and show an abuse of discretionary power. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will as shown by the evidence of record, discretion is abused. We emphasize that an abuse of discretion may not be found merely because the appellate court might have reached a different conclusion....
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> ***Commonwealth v. Garcia***, 443 Pa.Super. 414, 661 A.2d 1388, 1394–95 (1995) (quoting ***Paden v. Baker Concrete Construction, Inc.***, 540 Pa. 409, 658 A.2d 341, 343 (1995) (citations and quotation marks omitted)).

Commonwealth v. Tejeda, 834 A.2d 619, 623-24 (Pa. Super. 2003) (footnote omitted).

On September 8, 2011, after Appellant's trial began, a juror indicated to the court that she was uncomfortable with a member of the trial audience staring at her. N.T., 9/8/11, at 4. When the trial court removed the juror and replaced her with an alternate, Appellant's counsel motioned for a mistrial, as there was some indication that the dismissed juror had discussed her concerns with other members of the jury. ***Id.*** The trial court denied the motion for mistrial, but indicated that it would instruct the jury to disregard

any comments made by the dismissed juror. ***Id.*** at 5-6. Appellant's counsel did not object to the proposed instruction. Instead, he replied, "That's the best of a bad situation is my position." ***Id.*** at 6.

Subsequently, the trial court issued the following instruction to the jury:

> Ladies and gentlemen, you will notice we don't have anybody here. I wanted to speak to you. Juror one, as you will see, juror two is now juror one. I know that she spoke to some of you folks and that she had a feeling she felt uncomfortable because there w[ere] members of the audience. I spoke to her myself and she felt uncomfortable because she was in the school district, taught in all types of places, taught at Martin Luther King High School there as a pastor, as some [of] you might know, and she went around the city so she had a recognition factor and it made her uncomfortable. She said she didn't really feel threatened, but she felt uncomfortable is the word.
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> The lawyers have spoken to the family of the defendant. The families of the defendant, families of the decedent are welcome in the courtroom, as most people are, but what we are going to do is have the family of the defendant here, and there may be a family member of the decedent. We have criers who are pretty scrupulous about checking people out, and we do this every day. I sit as a one person jury all the time where lawyers decide they want to what they call waive a jury trial and proceed just with a judge trial. And people come in a public courtroom, and, you know, other than [because] I'm dashing, they will stare at me. Sometimes the family of the victim or the decedent's family, family of the defendant, there is a tendency, especially in jury trials, to come and look at the jury, "Wow, it's a jury." So I don't want anyone to feel uncomfortable. If for some reason you feel extremely uncomfortable, let us know.
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> People are related to law enforcement people, and that's never been a problem if you are related to law enforcement people, as many of our jurors here. I've been doing this going on nine years, six years in homicide, and I did it for almost 11 years as a prosecutor, for almost 12 or 13 years as a defense attorney, and I never have had a problem. I just wanted to give

> you those words and put you at ease. If you did have a discussion with juror one, I would just sort of disregard it, because that was her individual situation.

Id. at 9-11.

Appellant argues that by conveying her discomfort to other jurors, the dismissed juror "taint[ed] the juror[s'] ability to be fair and impartial." Appellant's Brief at 9. He contends that the trial court abused its discretion in failing to grant his motion for a mistrial because, "[a]bsent individual questioning of each of the jurors, it remained uncertain whether the jurors had been unduly influenced and more importantly, whether [A]pellant was judged by a fair and impartial jury." ***Id.*** at 11. Appellant also contends that the instruction given to the jury was insufficient "to assure that any of the jurors had not been influenced by the remarks of the juror who spoke to them." ***Id.***

First, as to Appellant's assertions that the trial court should have polled the jury, and that trial court's instruction was insufficient to counteract any prejudice that resulted, we deem these arguments waived. Appellant never asked for the jury to be polled nor did he object to the instructions given. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal"); ***Commonwealth v. Jones***, 668 A.2d 491, 504 (Pa. 1995) (stating that a jury "is presumed to follow cautionary instructions and [the] appellant's failure to object to the instruction indicated his satisfaction with the instruction").

Nevertheless, we conclude that the trial court did not err in denying Appellant's request for a mistrial. The trial court did, in fact, excuse the juror who expressed her discomfort. The trial court also instructed the jury to disregard any comments that the excused juror made, and solicited the remaining jurors to inform the court if those comments had caused them to question their impartiality. The trial court's instructions were specifically tailored to assuage any prejudice that may have resulted from the excused juror's comments to other members of the jury.

Our Supreme Court has stated that "[a]lthough a perfectly conducted trial is indeed the ideal objective of our judicial process, the defendant is not necessarily entitled to relief simply because of some imperfections in the trial, so long as he has been accorded a fair trial. 'A defendant is entitled to a fair trial but not a perfect one.'" ***Commonwealth v. Wright***, 961 A.2d 119, 135 (Pa. 2008) (quoting ***Commonwealth v. Martinolich***, 318 A.2d 680, 995 (Pa. 1974)). In ***Commonwealth v. Bruno***, 352 A.2d 40 (Pa. 1976), our Supreme Court considered whether the trial court took adequate precautions when highly prejudicial publicity occurred during Bruno's trial, and where the jury had not been sequestered. The Court stated that "[w]hen there is a possibility of highly prejudicial materials reaching the jury, the trial court must take appropriate protective action. Although the proper precautions are inevitably dictated by the circumstances of each case, they must reasonably ensure that no prejudice will occur." ***Id.*** at 51.

The Court provided some general guidelines for determining the appropriate response as follows:

> The preferred procedure when highly prejudicial material is publicized during the trial and the jury is not sequestered is to question the jurors individually, out of the presence of other jurors. However, questioning jurors as a group or giving special precautionary instructions may be a sufficient precaution depending on the facts of the particular case.

Id. at 52 (internal citations and footnote omitted).

Here, the dismissed juror expressed discomfort, not fear, as a result of being stared at by a person in the trial audience. Her discomfort was expressed in relation to her special circumstance of being a visible member of the community. We do not find such information to be so prejudicial as to have required individual polling of the jury. Appellant suggests that the dismissed juror felt threatened; however, that version of events is not supported by the record. Appellant's further suggestion that the dismissed juror told the other members of the jury that she had been threatened is speculation with no foundation in the record.

It is reasonable to speculate that the dismissed juror conveyed the same information to other jurors that she conveyed to the trial court. If so, we conclude that any resulting taint was adequately addressed by the trial court's specifically tailored cautionary instruction, and that polling of the jury was unnecessary because what was shared was not highly prejudicial. Accordingly, we conclude that the trial court did not abuse its discretion when it denied Appellant's motion for a mistrial.

Next, Appellant claims that his conviction and sentence should be overturned because conspiracy to commit third degree murder is not a cognizable offense. He bases his argument on the semantic truism that one cannot intend to commit an unintentional act. As our Supreme Court recently rejected this very same argument in ***Commonwealth v. Fisher***, 80 A.3d 1186 (Pa. 2013), Appellant is not entitled to relief.

In ***Fisher***, our Supreme Court held that "conspiracy to commit third degree murder is a cognizable offense[.]" ***Id.*** at 1187. The Supreme Court specifically confronted the following argument:

> [The a]ppellees' arguments mirror the rationale of the [dissent in ***Commonwealth v. Weimer***, 977 A.2d 1103 (Pa. 2009)]: because conspiracy is a specific intent crime, and a key element of third degree murder is the absence of specific intent, it is a logical impossibility to agree to commit an unintended killing. [The a]ppellees also rely on cases holding attempted third degree murder is not a cognizable offense, analogizing these decisions' reasoning that because attempt is a specific intent crime, one cannot attempt to do something unintentionally.

Fisher, 80 A.3d at 1190.

Appellant's argument in this case is indistinguishable from the one rejected in ***Fisher***. In ***Fisher***, our Supreme Court determined that:

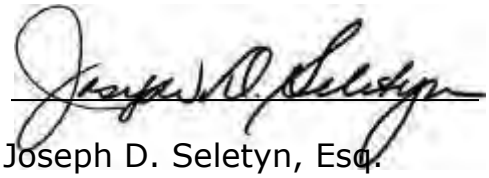
> [O]ne does not conspire to commit a denominated offense; one conspires to engage in certain conduct. The fact the actors do not mention which crime such conduct will constitute does not make conspiracy to commit the offense non-cognizable. The conspiracy is to commit the beating, which, being carried out with the mental state of malice, supports a charge of third degree murder. Accordingly, we hold conspiracy to commit third degree murder is a cognizable offense.

Id. at 1195.

Here, the evidence demonstrated that Appellant conspired with his co-conspirators to shoot the victim, and he facilitated the shooting by acting as a getaway driver for the principals. His conviction for conspiracy to commit third degree murder is not a legal nullity, as was expressly held in ***Fisher***.[1] Accordingly, Appellant's second claim does not entitle him to relief.

Judgment of sentence ***affirmed***.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/22/2014

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[1] Similarly, Appellant's reliance on ***Commonwealth v. Clinger***, 833 A.2d 792 (Pa. Super. 2003), does not entitle him to relief. The definition of third degree murder provided by the Superior Court in ***Clinger***, and that panel's conclusion that conspiracy to commit third degree murder is not a cognizable offense, because "it is impossible for one to intend to commit an unintentional act," were positions specifically rejected by our Supreme Court in ***Fisher***. ***Clinger***, 833 A.2d at 796; ***see Fisher***, 80 A.3d 1193-96 (discussing and ultimately rejecting ***Clinger***'s rationale).