NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. NADIR K K. PETTAWAY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 935 EDA 2013

Appeal from the Judgment of Sentence October 25, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012479-2011

COMMONWEALTH OF PENNSYLVANIA Appellee v. NADIR K K. PETTAWAY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 937 EDA 2013

Appeal from the Judgment of Sentence October 25, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012480-2011

BEFORE: BOWES, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.: **FILED AUGUST 19, 2014**

Appellant, Nadir K K. Pettaway, appeals from the October 25, 2012 aggregate judgment of sentence of 30 to 60 years' incarceration, imposed after a jury found Appellant guilty of two counts of criminal attempt-murder of the first degree, two counts of aggravated assault, and one count each of

possession of firearm prohibited, firearms not to be carried without a license, carrying firearms in public in Philadelphia, and possessing an instrument of crime with intent to employ it criminally.[1] After careful review, we affirm.

We summarize the procedural history of the case as follows. After an investigation into the related shootings of two victims that occurred on October 9, 2011, the police arrested Appellant and charged him in two complaints with the afore-listed offenses. The matters were tried together and proceeded to a three-day jury trial, which commenced on August 29, 2012, immediately following jury selection. The trial court has summarized the evidence presented at trial in the light most favorable to the Commonwealth as the verdict winner.

> At the jury trial, the Commonwealth presented the testimony of Police Officers Christopher Egan and Michael Tritz; Complainants David Leis and Jessica Clark; Witness Henry Brown; and Detectives Rudolph Valentine, John Dougherty, and Robert Daly. [Appellant] offered the testimony of [Appellant's] sister-in-law and mother - LaKeya Belton and Ruby Pettaway. [T]heir testimony established the following:
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> On Saturday, October 8, 2011, complainants, David Leis and Jessica Clark were in North Philadelphia using controlled substances from 4:00 p.m. until 10:00 p.m., at which time they discontinued their drug use and remained free from intoxication for the rest of the evening into the morning. The next morning, around 5:30 a.m., the complainants headed towards West Philadelphia, to

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[1] 18 Pa.C.S.A. §§ 901(a), 2702 (a), 6105(a)(1), 6106 (a)(1), 6108, and 907(a), respectively.

the area of 63rd and Market Street, intending to meet with an acquaintance. When the complainants arrived at the acquaintances [sic] house, around 6:30 a.m., no one answered the door. At that point [Appellant], who later introduced himself to the complainants as "Shizz," pulled up in a car and asked them if they wanted to purchase crack cocaine. The complainants answered in the affirmative, and then got into [Appellant's] car to begin a drug transaction. [Appellant] drove the three of them around West Philadelphia and while in the car, the complainants smoked crack cocaine and purchased more from [Appellant], who had the drugs on his person, until they ran out of money.

In an effort to continue with their drug use, the complainants and [Appellant] reached an agreement where Complainant Jessica Clark would perform oral sex on [Appellant] in exchange for more crack cocaine. [Appellant] then drove to a house located on 63rd Street, which the three entered after [Appellant] unlocked and opened the door. Once inside, [Appellant] and Complainant Clark went into a separate room for a few minutes, after which the complainants and [Appellant] exited the house and reentered [Appellant's] car. While riding in the car, Complainant David Leis asked [Appellant] if he and Complainant Clark "could have the drugs now?" [Appellant] first ignored the question and then he made an excuse for delaying delivery of the drugs. [Appellant] next pulled the car into a gas station; and while he was pumping gas, Complainant Leis got out of the car and punched [Appellant] in the back of the head. [Appellant] then looked at Complainant Leis and told him that he was going to "air him out," later explained to mean kill/shoot him. [Appellant] then got back into his car and drove off, leaving the complainants at the gas station.

A short time later, at about 9:54 or 9:55 a.m., while walking towards 63rd and Market Street, the complainants clearly saw [Appellant] walking towards them with his hood up. When the complainants observed [Appellant] reach for his

> waistband, they started running. As Complainant Leis ran, he lost sight of Complainant Clark, heard gunshots and felt something in his side and back. Realizing that he was shot[,] Complainant Leis ran across the street covered in blood, where bystanders came to his aid. Within minutes, police officers responded to the incident and found Complainant Clark lying in the middle of the street in a puddle of blood suffering from multiple gunshots. Due to the severity of their wounds, Officers immediately transported both complainants to the University of Pennsylvania Hospital. Complainant Leis was shot three times — once in his back, arm and shoulder - and underwent two surgeries. Complainant Clark was shot several times in her upper body, underwent several extensive surgeries and temporally[sic] required the assistance of a walker.
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> Because both complainants sustained life threatening wounds, they were unable to speak to Southwest Detectives upon their initial arrival to the hospital. After surgery, both complainants spoke briefly with detectives and were subsequently shown a photo array, where they immediately identified [Appellant] as the shooter. Complainant Leis also directed Detectives to Complainant Clark's purse which contained a piece of paper where the [Appellant] had written his phone number (215-301-1244) and where Complainant Clark had written, Shizz, the name given to them by [Appellant]. After properly obtaining a warrant, Detectives contacted the phone company and discovered that the phone number was subscribed to Ruby M. Pettaway, [Appellant's] mother. Detectives were also able to retrieve the incoming and outgoing call log and geographical location where the calls were placed in order to locate [Appellant]. [Appellant] turned himself into the police on October 15, 2011. Both complainants, while testifying, identified [Appellant] in court as the person who shot them.

Trial Court Opinion, 1/10/14, at 2-5 (internal citations omitted).

On August 31, 2012, after the completion of testimony, closings and the trial judge's instructions, the jury retired to deliberate. Later that day the jury informed tipstaff that they had reached a unanimous verdict. Later, as a court officer was explaining the logistics of returning to the courtroom, one juror asked if they would be escorted out of the building after the verdict was entered and if Appellant's family would be present. N.T., 8/31/12, at 153-154. Another juror mentioned that the day before, one of the witnesses, Appellant's sister-in-law, made a comment to another of the jurors while they were filing out of the courtroom. ***Id.*** The court officer then informed the trial court of what he had been told. Upon being advised of the encounter, Appellant's counsel made an oral motion for a mistrial. ***Id.*** at 154-155. The trial court agreed to conduct an examination of each juror individually, prior to the verdict being revealed, to ascertain what occurred and what, if any, impact the encounter had on any individual juror or the jury's deliberations. ***Id.*** at 157-159.

The responses of the several jurors were largely consistent with one another and recounted the following. Sometime on the second day of trial, August 30, 2012, while the jury was filing out of the courtroom through an area where people with business from several courtrooms were waiting, a woman spoke to Juror 4. ***Id.*** at 161, 167, 174, 176. She uttered words that were variously reported as, "I don't know why you're staring … take a picture it will last longer," "if you're going to keep staring, take a picture" or

"are you just going to stare or are you going to say something." ***Id.*** Juror 6 characterized the tone of the comment as aggressive. ***Id.*** at 161. Only Jurors 4, 6, 10, and 11 heard the statement and only Jurors 4, 6, and 11 saw the woman who made it. ***Id.*** at 161, 167, 174, 176. None of those Jurors knew who the woman was at the time the statement was made. ***Id.*** The next day, when Appellant's sister-in-law was called to testify, Jurors 4, 6 and 11 recognized her as the same woman who had made the comments to Juror 4 the day before. ***Id.*** None of the jurors mentioned or discussed the incident prior to or during deliberations and nothing was reported to court staff. ***Id.*** The matter was only brought up during incidental conversation among the jurors after they reported they reached a verdict, and while they waited for the court to reconvene. ***Id.*** 161-177. It was shortly thereafter that the incident was relayed to the court officer. ***Id.*** at 153-154.

During the trial court's questioning, the unambiguous answers from each juror indicated that they were either unaware of the incident until after a unanimous verdict was reached, or that the incident did not in any way affect their ability to be "fair and impartial in rendering a verdict." ***Id.*** at 161-177. Based on these responses and the facts related, the trial court denied Appellant's motion for mistrial and proceeded to receive the jury's verdict. The jury found Appellant guilty of the aforementioned crimes. On October 25, 2012, the trial court sentenced Appellant to an aggregate term

of incarceration of 30 to 60 years.[2] Appellant filed a timely post-sentence motion on November 1, 2012. The trial court denied Appellant's post sentence motion on February 25, 2013. Appellant filed timely notices of appeal at each docket below on March 26, 2013.[3]

On appeal, Appellant raises a single issue for our review.

> Did trial court err in failing to grant a mistrial folowing [sic] a witness' statements and threateneing [sic] demeanor to jury members?

Appellant's Brief at 7.[4]

> Our standard of review of a court's denial of a motion for mistrial is as follows:
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> > A motion for a mistrial is within the discretion of the trial court. 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. It is within the trial court's discretion to determine whether a

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[2] Specifically, the trial court imposed a sentence of 15-30 years on each count of criminal attempt-murder of the first degree to run consecutively with the two counts of aggravated assault merging. Additionally, Appellant received concurrent sentences of 2½-5 years' incarceration for possession of firearm prohibited, 3-6 years' incarceration for firearms not to be carried without a license, 2½-5 years' incarceration for carrying firearms in public in Philadelphia, and 1-2 years' incarceration for possessing an instrument of crime with intent to employ it criminally.

[3] Appellant and the trial court have complied with Pennsylvania Rule of Appellate Procedure 1925. By *per curiam* order entered August 6, 2013, this Court consolidated these appeals.

[4] Although Appellant included challenges to the sufficiency and weight of the evidence underpinning his convictions in his Rule 1925(b) statement, he has not pursued those issues in his appellate brief.

> defendant was prejudiced by the incident that is the basis of a motion for a mistrial. On appeal, our standard of review is whether the trial court abused that discretion.

Commonwealth v. Akbar, 91 A.3d 227, 236 (Pa. Super. 2014), *quoting* ***Commonwealth v. Tejeda***, 834 A.2d 619, 623 (Pa. Super. 2003) (internal citations and footnote omitted).

We recognize that "[a]n extraneous influence may compromise the impartiality and integrity of the jury, raising the specter of prejudice." ***Commonwealth v. Sneed***, 45 A.3d 1096, 1115 (Pa. 2012) (citation omitted). It is axiomatic that "[a] defendant has the right to have his or her case heard by a fair, impartial, and unbiased jury and *ex parte* contact between jurors and witnesses is viewed with disfavor." ***Commonwealth v. Tharp***, 830 A.2d 519, 532 (Pa. 2003) (citation omitted), *cert. denied*, 541 U.S. 1045 (2004).

> There is, however, no *per se* rule in this Commonwealth requiring a mistrial anytime there is improper or inadvertent contact between a juror and a witness. Whether such contact warrants a mistrial is a matter addressed primarily to the discretion of the trial court. A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to have deprived the moving party of a fair and impartial trial.

Id. at 532-533.

> The relevant inquiry is whether the extraneous influence caused a reasonable likelihood of prejudice. In making the reasonable likelihood of prejudice determination, the court must consider: (1) whether the extraneous influence relates to a central issue in

> the case or merely involves a collateral issue; (2) whether the extraneous influence provided the jury with information they did not have before them at trial; and (3) whether the extraneous influence was emotional or inflammatory in nature. The burden is on the party claiming prejudice.

Sneed, ***supra*** at 1115 (Internal quotations and citations omitted).

Appellant first argues that the trial court employed the wrong standard when it denied his motion for mistrial. Appellant's Brief at 18. "In reading the trial judge's opinion she used the standard of actual prejudice to the jury caused by the statement of [A]ppellant's sister-in-law when she should have used the standard of a reasonable likelihood of prejudice." ***Id.*** at 18 (citation omitted). We disagree. In its Rule 1925(a) opinion the trial court cited the appropriate standard, including acknowledgement that juror contact with a witness about the subject matter of the case may "automatically create[] a 'reasonable likelihood of prejudice.'" Trial Court Opinion, 1/10/14, at 14, *citing* ***Commonwealth v. Syre***, 501 A.2d 671, 673 (Pa. Super. 1985), *rev'd on other grounds*, 518 A.2d 535 (Pa. 1986). Although the trial court couched its conclusion in the context of its factual finding that "no prejudice resulted" from the incident, such a finding does not imply the trial court required Appellant to establish actual prejudice rather than a reasonable likelihood of prejudice. ***Id.*** at 15. Rather, its finding of no prejudice subsumes the conclusion that Appellant did not establish a reasonable likelihood of prejudice. ***See Sneed***, ***supra***.

Appellant next argues the trial court's factual conclusions, resulting from the jury questioning, are not sufficiently supported to eliminate a reasonable likelihood of prejudice. Appellant's Brief at 19. Specifically, Appellant surmises that some jurors demonstrated a penchant for not following the trial court's instructions by virtue of their failure to timely report the incident as they had been instructed to do. ***Id.*** Further, Appellant suggests the credibility of the jurors relative to their responses to the trial court is suspect and that the incident must have been disseminated and discussed during deliberations. ***Id.*** "It is human nature that the jury would discuss the incident after it happened and prior to or during jury deliberations." ***Id.*** at 19. Appellant concludes, "[t]here is a reasonable likelihood that the sister-in-law's statement and aggressive demeanor prejudiced the jury which prevented jury from rendering a fair and impartial verdict." ***Id.*** at 19, *citing*, ***Commonwealth v. Russell***, 665 A.2d 1239 (Pa. Super. 1995).

Our close review of the record compels us to disagree. We must defer to the trial court's credibility determinations. ***See Bruckshaw v. Frankford Hosp. of City of Phila.***, 58 A.3d 102, 114-115 (Pa. 2012) (holding a reviewing court defers "to the trial court's discretionary finding of no prejudice based on competent record evidence in situations where there was unauthorized contact with the jury," including credibility determinations). Instantly the trial court's findings are supported by the record. The contact

between Jurors 4, 6, 10, and 11, did not relate to any issue in the case, did not provide the jury with any information that was not before them in the trial, and was not unduly emotional or inflammatory in nature. ***See Sneed***, ***supra***.

In ***Commonwealth v. Szakal***, 50 A.3d 210, 220 (Pa. Super. 2012), this Court held that the trial court did not abuse its discretion in denying appellant's motion for mistrial as a result of improper contact between jurors and a Commonwealth witness. Therein we reasoned as follows.

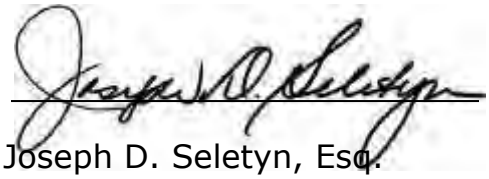
> [T]he trial court conducted a colloquy of the jury to determine what, if anything, each juror heard and whether the incident affected his or her ability to be fair and impartial. The colloquy revealed that only Juror No. 715 heard [the witness's] comments. Each juror, including No. 715, indicated that his or her impartiality was not affected by the outburst. The trial court found the jury's assurances credible. [] Moreover, []the comments of [Hawkins], while improper, did not constitute non-testimonial information.

Id.

We reach the same conclusion in the instant case. For all the reasons expressed above, we discern no abuse of discretion by the trial court in denying Appellant's motion for mistrial. Accordingly, we affirm Appellant's October 25, 2012 judgments of sentence.

Judgments of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/19/2014