

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RITA K. OLIVER,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2024 WDA 2012

Appeal from the Judgment of Sentence November 19, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0006748-2012

BEFORE: BOWES, ALLEN, and LAZARUS, JJ.

MEMORANDUM BY BOWES, J.:

FILED DECEMBER 30, 2013

Rita K. Oliver appeals from the judgment of sentence of two years probation that was imposed after the trial court convicted her of simple assault, reckless endangerment, accidents involving death or injury, driving with a suspended license, and careless driving. We affirm.

The trial court carefully delineated the evidence presented in support of its adjudication:

On May 1, 2012, Aaron Richards, an employee with Citation Management, was working in the City of Pittsburgh. Citation Management is a company that contracts with the City of Pittsburgh to monitor the streets of the City of Pittsburgh and to locate scofflaw parkers. As part of his duties, Mr. Richards locates vehicles that have received at least five parking citations within 30 days and he will install a "boot" on such vehicles to immobilize them. On May 1, 2012, Mr. Richards and another employee, Chuck Hesselman, were working in the City of Pittsburgh driving a "booting enforcement" van. The van had specific markings on the side advising the public that its purpose was booting enforcement. Both men were in uniform. They

came across a Dodge Durango SUV and after scanning the license plate, they determined the vehicle was eligible for a boot. Mr. Hesselman parked the van beside the Durango with the nose of the van facing the sidewalk and the rear of the van slightly into the street. According to Mr. Richards, they park this way to protect them from oncoming traffic while they are installing the boot and to keep the driver of the vehicle to be booted from driving away.

As he approached the Durango, Mr. Richards noticed a person in the driver's side of the vehicle. Mr. Richards was carrying the boot at this time. He made eye contact with the person, whom he identified as the defendant, and motioned to her to let her know he was going to apply the boot. He then went toward the passenger side front wheel to apply the boot. He heard the defendant then make some sounds, as though she knew she was in trouble. He knelt down and started to install the boot. At this point, he heard the ignition start. The defendant shifted the vehicle into "reverse" and accelerated quickly. The motion of the vehicle caused the boot to release from the vehicle and fly through the air toward Mr. Hesselman. The defendant's vehicle travelled in reverse for approximately 10-15 feet. The defendant then shifted into "drive" and accelerated forward. As the defendant drove off, the front passenger side fender of her vehicle clipped Mr. Richardson's right hip. He suffered bruising and contusions as a result of the incident.

Mr. Hesselman confirmed Mr. Richards' version of the events. He positively identified the defendant as the person who was in the Durango at the time they attempted to install the boot. He testified that he had activated the van's lights after they had parked the van to install the boot. He confirmed Mr. Richard[s'] testimony that the defendant accelerated in reverse and that part of the boot flew by him when she first accelerated. He also confirmed that she fled the scene and he had to flatten himself against the van to avoid being hit by the defendant's vehicle. After Mr. Hesselman's testimony, the Commonwealth rested.

The defendant presented the testimony of her sister, Deanna Oliver. Deanna Oliver testified that she was driving the Durango on the date of the incident. She did not, however, acknowledge that she had any interaction with Mr. Richard[s] or Mr. Hesselman or that anything out of the ordinary occurred on

that date. During closing arguments, defense counsel argued that this evidence proved that Deanna Oliver was accepting responsibility for the incident in question. However, at trial, Deanna Oliver did not admit to driving off and striking Mr. Richard[s].

Trial Court Opinion, 4/25/13, at 1-3.

Based on this proof, the trial court convicted Appellant of the above-delineated offenses but acquitted her of aggravated assault. This appeal followed imposition of a probationary sentence. Appellant raises one contention for our review:

- I. Where Ms. Oliver's defense at the non-jury trial was that her niece, Rayna Oliver, was the driver of the car at the time of the incident, and therefore, the perpetrator of the crimes, whether Judge Mariani impermissibly relieved the Commonwealth of its never-shifting burden of proving Ms. Oliver's guilt beyond a reasonable doubt, and violated Ms. Oliver's constitutional rights to due process, the presumption of innocence, and a fair trial when, as justification for the verdicts of guilty, he emphasized and specifically relied on the fact that Ms. Oliver did not call Rayna as a witness; "as another support for the court's finding is we didn't hear from Rayna, the supposed purchaser, the supposed owner of the car...."?

Appellant's brief at 4.

Appellant's position is that, when the trial court rendered its adjudication, it improperly shifted the burden of proof to her. She maintains that this impropriety occurred because the trial court observed, during its deliberations, that Appellant's niece, Rayna Oliver, was not presented as a witness by the defense. The following facts are pertinent to our review of Appellant's averment. At trial, Deanna testified as follows. Her daughter, Rayna, owned a Dodge Durango SUV, and bought it from Appellant about

two years prior to Appellant's November 19, 2012 trial. N.T. Non-Jury Trial, 11/19/12, at 55-56. Since the sale, Appellant had not driven that vehicle, and, on May 1, 2012, Deanna, not Appellant, was driving the Durango. Deanna said at 11:00 a.m., she drove the vehicle in Pittsburgh, nothing happened, and she did not strike anyone with it. **Id.** at 57. Deanna represented that Appellant told her that Rayna had admitted to striking someone with the Durango.

After both parties rested, the trial court stated that it found Mr. Richards to be "very credible." **Id.** at 82. It also observed that "Miss Deanna Oliver did not necessarily take responsibility for anything in this case" in that "she didn't take responsibility for the conduct at issue, in this case hitting [Mr. Richards] with the vehicle, fleeing from the boot truck. She never said she saw the boot truck." **Id.** at 82, 83. The trial court noted that Deanna merely represented that she had driven the Durango on May 1, 2012 without incident. The trial court concluded that Deanna was not credible. **Id.** at 84. After delineating why it found Deanna's testimony unconvincing, the court announced its verdict, stating that it found Appellant "guilty as charged on the careless driving, on driving while privileges were suspended, on the accident charge." **Id.** at 88.

After reaching its verdict, the trial court then made the observation that, as additional "support for the court's finding is we didn't hear from Rayna, the supposed purchaser, supposed owner of the car[.]" **Id.** It proceeded to sentencing.

On appeal, Appellant claims entitlement to a new trial by focusing on this remark and maintaining that it improperly shifted the burden of proof to her. She observes that the Constitution mandates that the Commonwealth bear the burden of proving a defendant's guilt and that a defendant has absolutely no obligation to present witnesses in his defense. **See, e.g., Commonwealth v. Smith**, 17 A.3d 873, 908 (Pa. 2011) (Under **In re Winship**, 397 U.S. 358 (1970), the due process clause requires prosecution to prove the defendant's guilty beyond a reasonable doubt; a "defendant has no duty to present evidence and may instead rely on the presumption of innocence and the Commonwealth's burden of proof"). Initially, we outline our standard of review. "Our standard for reviewing the trial court's denial of a motion for new trial is whether the trial court abused its discretion. Unless there are facts and inferences of record that disclose a palpable abuse of discretion, the trial judge's reasoning should govern." **Commonwealth v. Shotwell**, 717 A.2d 1039, 1042 (Pa.Super. 1998) (citations and quotation marks omitted). In the present case, the trial court stressed that it did not re-allocate the burden of proof, that its verdict was entered before it made the comment, and that the statement was merely a harmless remark that it made during its deliberative process. We concur with these observations and thus conclude that an abuse of discretion did not occur.

We first delineate how Appellant is incorrect when she accuses the trial court of misconstruing her evidence. The trial court stated that Appellant's

defense was that Deanna was driving when Mr. Richards was struck. On appeal, Appellant maintains that the trial court is mistaken and that her defense was that either Deanna **or** Rayna was the guilty party. Appellant notes that Deanna said that she was in the SUV with Rayna on May 1, 2012, and that Deanna also stated that Appellant said that Rayna admitted to Appellant that Rayna struck someone. If Appellant did defend this case by attempting to shift the blame for the accident to Rayna, then the trial court's observation that Rayna did not testify becomes more significant.

Appellant's position as to her trial defense cannot be sustained based upon the record. Deanna, who waived her Fifth Amendment right prior to testifying and was warned about the consequences, emphatically maintained that she was driving the SUV when Mr. Richards was struck, as follows. Mr. Richards stated that the incident occurred at approximately 11:00 a.m. on May 1, 2012, on Fourth Avenue in downtown Pittsburgh. Deanna testified unequivocally that she was driving the SUV Durango registered to Appellant but sold to Rayna when Mr. Richards was struck.

Q Were you driving [Rayna's Durango SUV] on May 1st of this year?

A Yes, I was.

Q Where were you driving that vehicle?

A **I was driving the vehicle** in the East Liberty area and **downtown.**

Q Do you know specifically downtown where you were?

A We was just driving around town because we was waiting on a friend.

Q You said that we were driving, who were you with?

A Me and my daughter Rayna.

Q And do you know approximately around what time of day that was?

A About 11:30

Q You were driving the Dodge Durango?

A Yes, I was.

N.T. Non-Jury Trial, 11/19/12, at 56-57 (emphases added); **see also id.** at 75 (In closing, counsel stated: "Your Honor, I will begin with Miss Deanna Oliver who came to court today to claim responsibility for being the driver of the car on that day. . . . [I]t is a far stretch to say sisterly motivations would extend **to accepting criminal responsibility** . . . for an incident . . .") (emphasis added).

Deanna also said that, while she pulled the vehicle over downtown several times, she did not remember striking anyone. **Id.** at 57. Essentially, then, Deanna denied committing the crime even while she admitted that she was driving the Durgano exactly when Mr. Richards was struck and in the area where the accident occurred. During a statement that is rank hearsay, Deanna testified that Appellant told her that Rayna told Appellant that Rayna struck someone with her car. While Appellant attempts to raise this inadmissible hearsay into evidentiary proof that Rayna struck Mr. Richards, Deanna's testimony at trial was that she was driving the

Durango at the time of the crime. Thus, under Appellant's evidence, it was physically impossible for Rayna to have hit Mr. Richards, and Rayna's alleged admission was not pertinent to this crime.

In light of Deanna's testimony that she was driving the Durango at 11:00 a.m. on May 1, 2012, in the area where Mr. Richards was struck and given counsel's unequivocal statements that Deanna was accepting criminal responsibility for the crimes herein, the trial court was entirely correct in concluding that Appellant's position at trial was that Deanna was the culprit who deliberately sped off and hit Mr. Richards. We therefore reject Appellant's suggestion that the trial court mischaracterized her defense. Accordingly, in light of Appellant's actual defense that Deanna hit Mr. Richards, the fact that Rayna did not testify was not critical in any respect. This fact dissipates the impact of the trial court's comment that Rayna did not testify.

Furthermore, the trial court's remarks about Appellant's failure to present Rayna as a witness did not improperly shift the burden of proof. The trial court explicitly rendered its verdict prior to commenting on Rayna's absence. It specifically found Mr. Richards, who identified Appellant as the driver of the SUV that struck him, credible and concluded that Deanna was unworthy of belief. Its ensuing offhand remark did not violate Appellant's due process rights. As the Court observed,

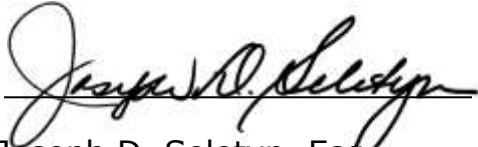
This Court did not base its verdict on the absence of any defense testimony. The defendant attempted to persuade this Court that the Durango was owned by Rayna Oliver and that her mother,

Deanna Oliver, was driving it at the time of the incident in question. Rayna Oliver did not testify in this case. As the trial court record clearly reflects, this Court found the testimony of Mr. Richardson and Mr. Hesselman credible and their testimony established all of the elements of the offenses of conviction. As it rendered its verdict, this Court made the comments challenged by the defendant. This Court made these statements to comment on the lack of corroborating evidence supplied by the defendant in support of her defense, a defense that did not portray Rayna Oliver as the true culprit in this case. These comments had no bearing on the Court's view of the Commonwealth's evidence and the burden it bore in proving the defendant's guilt. Accordingly, this claim fails.

Trial Court Opinion, 4/25/13, at 4. Thus, the trial court did not shift the burden of proof, and we reject Appellant's allegation on appeal.

Judgment of sentence affirmed.

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: 12/30/2013