

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellee | : | |
| | : | |
| v. | : | |
| | : | |
| YOLANDA M. WATSON, | : | |
| | : | |
| Appellant | : | No. 2292 EDA 2011 |

Appeal from the Judgment of Sentence March 25, 2011,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0005833-2010

BEFORE: GANTMAN, DONOHUE and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: January 8, 2013

Appellant, Yolanda M. Watson (“Watson”), appeals from the judgment of sentence following her convictions of aggravated jury tampering, 42 Pa.C.S.A. § 4583.1, obstructing the administration of law or other governmental function, 18 Pa.C.S.A. § 5101, and tampering with jurors, 42 Pa.C.S.A. § 4583. For the reasons that follow, we affirm the judgment of sentence.

The trial court summarized the relevant factual background as follows:

[Watson] was present in courtroom 802 of the Criminal Justice Center throughout the attempted murder trial of her former fiancé, Rico Lofton (“Lofton”). (N.T., 1/20/11 p. 47). Lofton’s first trial having ended with a hung jury, he was being retried on charges that he opened fire from a vehicle into a crowd of people gathered on the sidewalk, in the street, and on the porch of his target’s home. Lofton’s bullets struck the intended target, as well as a two (2) year old child, and narrowly missed the

*Retired Senior Judge assigned to the Superior Court.

head of the child's grandmother. As a result of her fear of Lofton, the child's grandmother returned to Portugal and had to be flown back to Philadelphia to testify against Lofton at his retrial. Throughout his retrial, [Watson] was seated behind Lofton's table every day. As was later developed, [Watson], who has a prior felony conviction for aggravated assault, repeatedly glared at the prosecutor, Assistant District Attorney Lorraine Donnelly ("Ms. Donnelly") throughout the trial. (N.T., 1/20/11 p. 112, 115). On March 4, 2010, before the deliberating jurors were dismissed for the day, and pursuant to a request by the prosecutor, this court gave specific instructions to the jurors that they were not to discuss the case with anyone. (N.T., 1/20/11 p. 116; 03/04/10 pp. 184-85; 03/05/10 pp. 8-9).

After the jurors were dismissed, [Watson] gathered with Lofton and his family at 13th and Filbert Streets outside the Criminal Justice Center. (N.T., 1/20/11 p. 50). A juror in Lofton's case, complainant Vladimir Gulko, was walking down Filbert Street, and had just ended a cell phone conversation when he was approached by [Watson]. (N.T., 1/20/11 p. 55). Complainant recognized [Watson] as the woman who had just been talking to Lofton and who had been present in the courtroom the preceding days. [*Id.*] [Watson] approached complainant, telling him she needed to talk to him about a few things. [*Id.*] Complainant told [Watson] that he was a juror and could not talk to her because of the judge's instructions. [*Id.*] Despite being rebuffed by complainant, [Watson] continued talking to complainant as he proceeded down Filbert Street to the Market East train station located approximately one (1) block away. (N.T., 1/20/11 p. 55-56). Complainant repeatedly told [Watson] that he could not and would not talk to her, but [Watson] continued her explanation of matters otherwise unknown to the jury. (N.T., 1/20/11 p. 62).

During the one block walk, [Watson] told complainant that Lofton's victim and his family were heavily involved in drug dealing and gang-related activities in their neighborhood. (N.T., 1/20/11 p. 80; 03/05/10 pp. 18-19). [Watson] further stated that she wanted to testify in Lofton's trial but was prohibited from doing so by his attorney. (N.T., 1/20/11 p. 56). [Watson] informed complainant that the prosecution of Lofton had gone on over the past four (4) years, and she attempted to have complainant read a document but he refused. (N.T., 1/20/11 p. 74, 80). Complainant attempted to ignore [Watson] by putting in headphones, but she continued to talk to him about matters regarding Lofton's case. (N.T., 1/20/11 p. 55). At some point during this one-sided conversation [Watson] mentioned the sum of \$38,000 in an attempt to influence complainant's deliberations. (N.T., 1/20/11 p. 56). Complainant continued to ignore [Watson], who followed him until he entered the train station. (N.T., 1/20/11 p. 64).

When complainant returned to the courthouse the next morning to resume deliberations he immediately alerted courtroom staff that he had been inappropriately contacted the previous evening. (N.T., 1/20/11 p. 65). This court then conducted a colloquy on the record with complainant, in the presence of counsel but outside the hearing of other jurors, and questioned him about what happened, whether he shared this information with other jurors and whether he could continue to deliberate without bias toward either the Commonwealth or Lofton. (N.T., 03/05/10, pp. 13-20). Satisfied that he had not shared the foregoing encounter with the other jurors, and with his unequivocal ability to resume unbiased deliberations, this court reintegrated complainant into the deliberating jury. (N.T., 03/05/10 p. 21). Following complainant's disclosure, this court made an on the record request for the name of every person seated in the courtroom, and his or her relationship to Lofton, including [Watson]. (N.T., 03/05/10 p. 24, 27-28). Additionally,

following the foregoing disclosures, this court prohibited members of Lofton's family from the courtroom during times when the jury was present, with the exception of the pronouncement of the verdict. (N.T., 1/20/11 p. 124). However, although permitted to return to the courtroom, [Watson] remained outside in the hallway. (N.T., 1/20/11 p. 126). Thereafter, the jury returned a partial verdict of guilty against Lofton and the Commonwealth began its investigation into the specific allegations against [Watson].

Assistant District Attorney Donnelly approached complainant after the jurors were discharged and requested an interview with him at a later time. (N.T., 1/20/11 p. 128-29). Simultaneously, [Watson] was briefly detained by sheriff's deputies outside of the courtroom but was quickly released because her contact information had already been obtained by the court on the record. (N.T., 1/20/11 p. 129). Approximately one week later, on March 12, 2010, complainant was interviewed by Detective Tollier of the Philadelphia Police Department in the presence of Ms. Donnelly. (N.T., 1/20/11 p. 130, 157). Complainant explained that the woman who approached him was with Lofton and present in the courtroom during the trial. (N.T., 1/20/11 p. 131). Accordingly, complainant was shown pictures of [Watson] and Lofton's mother, the only two (2) women present in the courtroom from Lofton's family throughout the trial. (N.T., 1/20/11 p. 130, 158). From those pictures, complainant identified [Watson] as the woman who approached him on the street the week before. [*Id.*]

Trial Court Opinion, 3/21/2012, at 1-4.

On January 21, 2011, a jury convicted Watson of the above-referenced crimes. The trial court sentenced her to an aggregate term of incarceration of seven and one half years to fifteen years. Watson filed a timely notice of

appeal, and the trial court then ordered her to file a concise statement of matters complained of on appeal pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure. Watson complied on November 22, 2011. On appeal, Watson raises four issues for our consideration and determination:

1. Was not the evidence legally insufficient to establish beyond a reasonable doubt that [Watson] was not [sic] guilty of the crimes of [a]ggravated jury tampering, [o]bstruction, and [t]ampering with [j]urors.
2. Did the [trial] court not violate [Watson's] constitutional rights to a fair trial and due process of law when it failed to recuse itself despite a conflict of interest and the appearance of bias.
3. Was not [Watson] denied fair judicial proceedings in violation of the Pennsylvania Constitution and the due process clause of the 14th Amendment when the District Attorney labored under an actual conflict of interest.
4. Did not the prosecutor commit misconduct and deny [Watson] due process of law when the prosecutor made material misstatements of fact and misleading arguments.

Watson's Brief at 3.

For her first issue on appeal, Watson argues that the evidence introduced at trial was not sufficient as a matter of law to establish her guilt beyond a reasonable doubt. Before considering this claim on its merits, we must first determine whether it has been preserved for appellate review. This Court has repeatedly indicated that to preserve a claim challenging the

sufficiency of the evidence, that claim must be set forth in the Pa.R.A.P. 1925(b) statement with a specific identification of the precise element or elements of the crime(s) for which the appellant contends the evidence at trial was insufficient. *See, e.g., Commonwealth v. Manley*, 985 A.2d 256, 261-62 (Pa. Super. 2009), *appeal denied*, 606 Pa. 671, 996 A.2d 491 (2010); *Commonwealth v. Williams*, 959 A.2d 1252, 1257 (Pa. Super. 2008). This level of specificity is particularly important in cases where the appellant “was convicted of multiple crimes each of which contains numerous elements that the Commonwealth must prove beyond a reasonable doubt.” *Commonwealth v. Garang*, 9 A.3d 237, 244 (Pa. Super. 2010).

In her Pa.R.A.P. 1925(b) statement, Watson states that, “[t]he trial court erred when it found that the evidence was sufficient to support the conviction for [a]ggravated jury tampering, obstruction, harassment, tampering with jurors, and contempt.”¹ Concise Statement of Matters Complained of on Appeal, 11/22/2011, at ¶1. Despite Watson’s conviction on multiple crimes each having multiple elements, in her Pa.R.A.P. 1925(b) statement Watson does not state which elements (of which crimes) she now contends on appeal the Commonwealth failed to prove. For this reason, Watson’s first issue on appeal is waived. *Commonwealth v. Gibbs*, 981 A.2d 274, 281 (Pa. Super. 2009).

¹ The certified record on appeal indicates that the jury did not convict Watson of harassment or contempt.

For her second and third issues on appeal, Watson contends that her constitutional rights were violated because the trial court and one of the prosecutors (Assistant District Attorney Donnelly) participated in the trial despite conflicts of interest. Again, we are constrained to conclude that these issues have been waived. Rule 2117(c) of the Pennsylvania Rules of Appellate Procedure requires the appellant to state in her "Statement of the Case" the location in the record where issue was raised and preserved for appellate review. Watson did not comply with this requirement in her appellate brief. More importantly, we have reviewed the record on appeal and cannot locate any instance where Watson raised (either by formal motion or otherwise) any issue regarding conflicts of interest (with the trial court or Assistant District Attorney Donnelly). Watson did not file a motion asking the trial court to recuse itself, and never sought the disqualification of Assistant District Attorney Donnelly (either as a witness or as a prosecutor). Issues not raised in the trial court are waived and may not be presented for the first time on appeal. Pa.R.A.P. 302(a).

For her fourth and final issue on appeal, Watson argues that counsel for the Commonwealth committed acts of prosecutorial misconduct. Specifically, Watson claims that counsel made a reference to Watson's mental health problems despite a pre-trial order forbidding such references.

Not every instance of prosecutorial misconduct mandates the granting of a new trial. *Commonwealth v. Montalvo*, 604 Pa. 386, 426, 986 A.2d

84, 108 (2009) (quoting *Commonwealth v. Cooper*, 596 Pa. 119, 141, 941 A.2d 655, 668 (2007)), *cert. denied*, 131 S.Ct. 127 (2010). Reversible error occurs when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict. *Commonwealth v. Miller*, 572 Pa. 623, 643, 819 A.2d 504, 515 (2002) (quoting *Commonwealth v. Simmons*, 541 Pa. 211, 662 A.2d 621, 638-639 (1995), *cert. denied*, 516 U.S. 1128 (1996)), *cert. denied*, 540 U.S. 827 (2003). We review the trial court's determination of prejudicial effect on an abuse of discretion standard. *See, e.g., Commonwealth v. Faulkner*, 528 Pa. 57, 77, 595 A.2d 28, 39 (1991) (quoting *Commonwealth v. Van Cliff*, 483 Pa. 576, 582, 397 A.2d 1173, 1176 (1979)), *cert. denied*, 503 U.S. 989 (1992).

Watson was initially ruled incompetent to stand trial, but after a second evaluation the trial court found her competent and trial was scheduled. Prior to *voir dire* on January 19, 2011, the Commonwealth made an oral motion *in limine* "to preclude any and all mention of [Watson's] mental illness or mental state during any course of these proceedings." N.T., 1/19/2011, at 7. Watson agreed and the trial court granted the motion. *Id.* at 8-9.

On appeal, Watson now complains about certain questions posed to the complainant, Mr. Gulko, on redirect examination,² apparently after an instance of crying by Watson in the courtroom.

Q. Mr. Gulko, was [Watson] carrying on like she just did five minutes ago when she was walking down the street with you talking to you about the case?

A. Can you repeat the question again?

Q. Was [Watson] carrying on like she did a few minutes ago throwing a fit? Did she do that? Was she acting that way? Was –

A. She did not have –

Q. Let me finish the question.

[Counsel for Watson]: Objection

Q. Was she acting that way, making a scene when she was walking with you that whole block trying to talk to you about her boyfriend's case?

A. Answer is no.

N.T., 1/20/2011, at 101-02.

Based upon this exchange, we must agree with the Commonwealth that these questions do not contain any clear reference to Watson's mental health issues. People without any mental health issues cry, "carry on,"

² Watson also contends that counsel for the Commonwealth made impermissible references to her mental health during closing arguments. Watson asserted no objection to these references, however, and thus these claims are waived for purposes of appeal. *See, e.g., Commonwealth v. May*, 584 Pa. 640, 654, 887 A.2d 750, 758 (2005) ("To the extent the claims would sound in trial court error, they are waived due to the absence of contemporaneous objections."), *cert. denied*, 549 U.S. 832 (2006).

and/or “make scenes” on occasion, and there is no good reason to think that the jury would have understood these questions to connote that Watson’s actions in the courtroom were the result of an unhealthy mental state. To the contrary, it seems clear that counsel for the Commonwealth was merely attempting to draw a comparison between Watson’s calm and deliberate behavior when she approached Mr. Gulko on the street and her more dramatic behavior in the courtroom.

Moreover, to the extent that jurors could have drawn any such inferences, in our view the prejudicial effect would be considerably below the applicable legal standard for relief from prosecutorial misconduct, namely a “fixed bias and hostility” towards Watson that would preclude the jurors from weighing the evidence and rendering a true verdict. **See, e.g., Commonwealth v. Miller**, 572 Pa. at 643, 819 A.2d at 515. Any prejudice to Watson in this regard was minimal. We note that on recross-examination, Watson’s counsel did not attempt to correct any misconceptions in the jurors’ minds regarding Watson’s mental state, but rather only asked Mr. Gulko to reaffirm that Watson never actually mentioned Lofton’s name during her conversation . N.T., 1.20.2011, at 104-05. For these reasons, no relief is due on Watson’s fourth issue on appeal.

Judgment of sentence affirmed.