NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ANTWON CHAMBERS,	:	No. 297 EDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, December 16, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0006634-2010,
CP-51-CR-0006796-2010

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND SHOGAN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 19, 2013

Following a jury trial, appellant was convicted of attempted murder, robbery and related charges. Herein, he appeals the judgment of sentence entered on December 16, 2011. We affirm.

The relevant facts and procedural history of this appeal are as follows. The convictions at hand stem from events that occurred between November 2009 and January 2010 when appellant and his cousin, Derrick Holley ("Holley"), engaged in a violent crime spree, robbing and injuring local marijuana dealers. On November 19, 2009, Officer Daniel Adams responded to a report of a shooting on the 4800 block of Marshall Street. (Notes of testimony, 10/18/11 at 38-39.) Upon arrival, he found Derrick Holland ("Holland"), a local marijuana dealer, lying on his back

in the middle of the street. (***Id.*** at 39.) Holland had been shot in the head, arm and leg. Holland's cell phone was recovered from the scene and telephone records indicated that he had been in contact with appellant 13 times on the night of the shooting. In fact, the last call to Holland's cell phone was from appellant minutes before they located Holland at approximately 8:00 p.m.

Holland was transported to the hospital where he remained in a medically induced coma for a month. After Holland awoke from his coma and his ability to communicate gradually improved, the police regularly started interviewing him. At each interview, Holland identified appellant as the man who shot him. At trial, Holland testified that appellant was the person who shot him while Holley looked on. (***Id.*** at 94-95, 98.) Holland's father also testified that his son told him appellant was the perpetrator of the crimes. (***Id.*** at 66, 71.)

On December 30, 2009, appellant contacted Christopher Johnson, another local marijuana dealer he knew from the neighborhood and arranged for the men to meet. (Notes of testimony, 10/19/11 at 66.) Appellant, accompanied by Holley and another masked man, arrived at the agreed upon location. (***Id.***) Appellant put a silver handgun up against the victim's chest and declared, "You know what it's hitting for," which Johnson understood meant that he was being robbed. (***Id.***) Appellant and Holley

took cash and marijuana from him and fled.[1] In a statement to the police, Johnson explained that Holley had a gun and appellant went through his pockets. (***Id.*** at 73.) Johnson also identified appellant in a photo array. (***Id.*** at 75.)[2]

On January 15, 2010, Jason Rosario, another local marijuana dealer, exited his home on the 2800 block of North Franklin Street. (***Id.*** 25.) Edward Johnson ("Edward"), Rosario's former high school classmate, drove up in a white Chevrolet Monte Carlo with appellant accompanying him. (***Id.***) The men exited the vehicle and physically pinned Rosario up against a wall. Appellant pressed the muzzle of his .45 caliber semi-automatic handgun against Rosario's chin and demanded that he "give [his] shit up" and threated to kill Rosario's mother. (***Id.***) Rosario threw his wallet on the ground; upon discovering that there was no money inside, Edward and appellant left. (***Id.*** at 26.) Johnson, the previous victim, watched the robbery from the window of his nearby row home. (***Id.*** at 134-135.) After the robbery, Rosario called the police and appellant was then arrested a short distance away where he was attempting to dispose of his gun under a

[1] At trial, Johnson averred he did not see appellant during the robbery. (***Id.*** at 66, 68.)

[2] Johnson also reported to police that in early fall of 2009, appellant and his cousin robbed a dealer named "Tito" at gunpoint, shooting him six times and taking a quarter pound of marijuana from him. Tito was shot twice in the leg, twice in his back and twice in the head. (Notes of testimony, 10/19/11 at 129-130.)

car. Rosario then positively identified appellant as the gunman. (***Id.*** at 29.)[3]

Based on the statements to police by Rosario, Johnson and Holland, appellant was charged with the crimes against Johnson and Holland.[4] While in prison awaiting trial, appellant made several phone calls to his mother and girlfriend that were recorded by prison officials. In the calls, appellant urged his girlfriend to "mak[e] sure people in the neighborhood talk to the victims of these crimes" and "make sure you have my boys go talk to him," and he urged his mother to "make sure you go talk to their moms to keep them, from coming to court."

Appellant was charged under two separate docket numbers with attempted murder in the first degree, aggravated assault, criminal conspiracy, possession of an instrument of crime, carrying a firearm without a license, and carrying a firearm on public streets regarding the crimes against Holland and Johnson. The Commonwealth moved to consolidate the cases and the motion was granted. A jury trial was held before the Honorable John J. O'Grady for the shooting of Holland and the robbery of Johnson.[5] The Commonwealth presented, ***inter alia***, the testimony and

[3] Rosario recanted his statement at trial.

[4] Indictments from the crimes against "Tito" and "Rosario" were not included in the joint trial.

[5] Appellant's cohort, Holley, died from a fatal gunshot wound two months before trial.

statements to police of Holland and the statements to the police of Johnson and Rosario, who each disavowed their prior statements while on the stand. Appellant stipulated to the admission of his prison recordings regarding influencing witnesses to stay out of court. Appellant was convicted of all charges in relation to each victim. On December 16, 2011, appellant was sentenced to consecutive terms of imprisonment of 15 to 30 years' for attempted murder, 10 to 20 years' for robbery, and 2½ to 5 years for carrying a firearm without a license; no further penalty was imposed for the remaining counts.

Appellant filed a ***pro se*** notice of appeal on January 17, 2012. Counsel was appointed on January 19, 2012. On March 12, 2012 the trial court filed a "no opinion letter" indicating that the Honorable John J. O'Grady was no longer sitting as a judge in Philadelphia County. Herein, appellant presents the following issues on appeal.

> I. Whether the trial court erred [by] failing to sever the Appellant's two unrelated cases and conduct separate trials[?]
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> II. Whether the trial court erred in denying the Appellant's motion for mistrial[?]
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> III. Whether the trial court erred in denying the Appellant a new trial because the verdict was against the weight of the evidence[?]
>
> IV. Whether the trial court erred by failing to give the Appellant the right to allocution prior to sentencing[?]

Appellant's brief at 4.

Appellant first claims that the trial court erred in granting the Commonwealth's motion to consolidate his cases. On June 22, 2011, the Commonwealth filed a motion to consolidate the separate cases against appellant stemming from the crimes that had occurred on November 19, 2009 (Holland) and December 30, 2009 (Johnson) pursuant to Pa.R.Crim.P. 582. Finding no error, we affirm.

"The determination of whether separate indictments should be consolidated for trial is within the sole discretion of the trial court and such discretion will be reversed only for a manifest abuse of discretion or prejudice and clear injustice to the defendant." ***Commonwealth v. Boyle***, 733 A.2d 633, 635 (Pa.Super. 1999), citing ***Commonwealth v. Newman***, 528 Pa. 393, 398, 598 A.2d 275, 277 (1991).

Pennsylvania Rule of Criminal Procedure 582 allows for joinder of separate offenses.

> **(A) Standards**
>
> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
>
> (b) the offenses charged are based on the same act or transaction.

Pa.R.Crim.P. 582(A)(1)(a)-(b). Additionally, Rule 583 provides:

> **Rule 583. Severance of Offenses or Defendants**
>
> The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

Pa.R.Crim.P. 583.

> Where the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations, the court must therefore determine: whether the evidence of each of the offenses would be admissible in a separate trial for the other; whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, whether the defendant will be unduly prejudiced by the consolidation of offenses.

Commonwealth v. Lark, 518 Pa. 290, 302, 543 A.2d 491, 496-697 (1988). ***See also Commonwealth v. Collins***, 550 Pa. 46, 55, 703 A.2d 418, 422 (1998), ***cert. denied***, 525 U.S. 1015 (1998) (stating same).

In his brief on appeal, appellant concedes that had the trial court ordered separate trials, the evidence of each of the offenses would have been admissible in a separate trial for the other. (Appellant's brief at 14.) Thus, we conclude that appellant has failed to meet the first prong of the ***Lark*** test.

Additionally, the evidence of the two criminal episodes was capable of separation by the jury so that there was no danger of confusion. This trial involved separate and distinct criminal offenses and victims -- the attempted

murder and aggravated assault of Holland and the gunpoint robbery of Johnson. These two crimes occurred a month apart and involved different witnesses and different police officers. ***See Commonwealth v. Cousar***, 593 Pa. 204, 226-227, 928 A.2d 1025, 1038 (2007) (jury was able to separate evidence of the separate homicides as the cases involved different victims, eyewitnesses, and investigating officers), ***cert. denied***, 553 U.S. 1035 (2008). Such were clearly distinguishable in time, space and characters and the evidence was capable of separation by the jury. Moreover, the court's clear instructions to the jury to evaluate each matter separately further diminished any danger of confusion of the evidence. (***See*** notes of testimony, 10/20/11 at 68-69.) It is well-settled that a jury is presumed to follow the instructions of the court. ***Commonwealth v. Natividad***, 595 Pa. 188, 215 n.9, 938 A.2d 310, 326 n.9 (2007).

Therefore, as instructed by ***Lark***, we turn to the "prejudice" prong of the severance inquiry.

> The "prejudice" of which Rule 1128 speaks is not simply prejudice in the sense that appellant will be linked to the crimes for which he is being prosecuted, for that sort of prejudice is ostensibly the purpose of all Commonwealth evidence. The prejudice of which Rule 1128 speaks is, rather, that which would occur if the evidence tended to convict appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.

Lark, ***supra*** at 306, 543 A.2d at 499. This kind of prejudice was clearly not present in the instant case. Here, as discussed above, each case involved distinct facts that permitted the jury to examine each crime individually. The evidence demonstrated a common plan that he and his cousin had developed drawing guns on local marijuana dealers. Based on the foregoing, we conclude the trial court properly granted the Commonwealth's motion.

Next, appellant argues that the trial court erred in denying his motion for a mistrial sought after the prosecutor asked Johnson if threats from people in the neighborhood had compelled him to recant his statements to the police about appellant. (Appellant's brief at 15-17.) The trial court denied appellant's request for a mistrial but essentially sustained the objection and granted his request for a curative instruction. (Notes of testimony, 10/19/11 at 92-100.) No relief is due.

"Whether to grant the extreme remedy of a mistrial is a matter falling into the discretion of the trial court." ***Commonwealth v. Boczkowski***, 577 Pa. 421, 453–455, 846 A.2d 75, 94–95 (2004). "A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial." ***Id.***, quoting ***Commonwealth v. Jones***, 542 Pa. 464, 488, 668 A.2d 491, 502–503 (1995), ***cert. denied*** , 519 U.S. 826 (1996).

Presently, the trial court addressed this issue by concluding that this isolated comment combined with the immediate curative instruction did not sufficiently prejudice appellant so as to deny him a fair trial. The defense had stipulated to the admission of prison recordings of phone calls appellant had made to his girlfriend and mother, urging that they make "sure people in the neighborhood talk to the victims of these crimes," "make sure you have my boys go talk to him," and "make sure you go talk to their moms to keep them from coming out." (Notes of testimony, 10/19/11 at 93-96; 10/20/11 at 9-10.) Again, Johnson recanted his statements to the police regarding appellant's involvement in the gunpoint robbery and Johnson refused to cooperate on the witness stand. Thus, the prosecutor inquired about witness intimidation by referring to the transcripts of Johnson's preliminary hearing testimony. Such did not have the unavoidable effect of depriving appellant of a fair and impartial trial. Any prejudice to appellant was effectively cured by the court's immediate cautionary instructions, which appellant did not object to. (Notes of testimony, 10/19/11 at 101-104.) Again, "the law presumes that the jury will follow the instructions of the court." ***Natividad***, ***supra***; ***see also Commonwealth v. O'Hannon***, 557 Pa. 256, 262, 732 A.2d 1193, 1196 (1999) ("[a]bsent evidence to the contrary, the jury is presumed to have followed the trial court's

instructions."). Therefore, we conclude the trial court properly denied appellant's motion for a mistrial.[6]

The third issue presented is whether the verdict was against the weight of the evidence. (Appellant's brief at 18.) As the Commonwealth observes, appellant failed to present this claim to the trial court and the issue is waived. Pa.R.Crim.P., Rule 607(A), 42 Pa.C.S.A.; ***Commonwealth v. O'Bidos***, 849 A.2d 243, 252 (Pa.Super. 2004), ***appeal denied***, 580 Pa. 696, 860 A.2d 123 (2004) (weight of the evidence claims must be raised via oral, written, or post-sentence motions in the trial court for the issue to be preserved for appeal) (citations omitted). In a footnote, appellant acknowledges that he failed to raise a weight of the evidence claim in the trial court, but argues that we should consider the issue as the trial court failed to properly advise him of his post-sentence rights. (Appellant's brief at 18 n.2). The record belies appellant's argument. Our review of the notes of testimony from the sentencing hearing indicate that the trial court properly advised appellant of his post-sentence and appeal rights. (Notes of testimony, 12/16/11 at 15.) Accordingly, appellant's weight claim is waived.

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[6] Moreover, the prosecutor then proceeded to continue his examination of Johnson by asking him about moving out of the neighborhood, not wanting to testify, and being threatened not to testify, all without an objection by the defense. (Notes of testimony, 10/19/11 at 101-104.) The prosecutor's question do not constitute evidence for the jury to consider; it is the testimony of the witness rather than the prosecutor's questions that the jury was to consider. The court instructed the jury to this effect in its preliminary instruction at the beginning of trial and again in the final charge. (Notes of testimony, 10/18/11 at 14-15; notes of testimony, 10/20/11 at 84.)

In his final issue, appellant alleges the court violated Pa.R.Crim.P., Rule 704(c)(1), 42 Pa.C.S.A. when it denied him an opportunity to speak before sentencing. Appellant concludes we should vacate and remand for resentencing. (Appellant's brief at 23-25.) We disagree.

> The general right to allocution is set forth in Pa.R.Crim.P. 704(C)(1), which states: "at the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing." Similarly, 42 Pa.C.S.A. § 9752(a)(2) provides: "as soon as practicable after the determination of guilt and the examination of any presentence report, a proceeding shall be held at which the court shall ... afford to the defendant the right to make a statement." ***See also Commonwealth v. Thomas***, 520 Pa. 206, 553 A.2d 918 (1989) (right to allocution exists under Pa.R.Crim.P. 1405, now Rule 704).

Commonwealth v. Williams, 900 A.2d 906, 910 (Pa.Super. 2006), ***appeal denied***, 591 Pa. 673, 916 A.2d 1102 (2007). Failure to grant a defendant the right to address the court prior to sentencing requires remand to allow for allocution before resentencing. ***Commonwealth v. Barzyk***, 692 A.2d 211, 215 (Pa.Super. 1997).

Nevertheless, failure to object to the court's denial of the right of allocution can result in waiver. ***Commonwealth v. Jacobs***, 900 A.2d 368 (Pa.Super. 2006) (***en banc***), ***appeal denied***, 591 Pa. 681, 917 A.2d 313 (2007). In ***Jacobs***, an ***en banc*** panel of this court held that the right of allocution does not implicate the legality of a defendant's sentence. ***Id.*** at

377. Instead, the ***Jacobs*** court recognized that, while denying a defendant the right to allocution "undoubtedly constitutes legal error," it is a legal error "nevertheless waivable under Pennsylvania law." ***Id.*** Consequently, failure to object to the court's denial of allocution at sentencing or otherwise preserve the issue before the trial court results in waiver. ***Id.***; Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A.

Instantly, appellant did not preserve his objection either at sentencing or in a motion for reconsideration. Appellant raised the allocution issue for the first time in his Rule 1925(b) statement, which did not revive it. ***Williams***, ***supra*** at 909 (stating generally that including issue in Rule 1925(b) statement does not revive the issue if it was waived in earlier proceedings). As a result, we cannot review its merits. ***See Jacobs***, ***supra***.

As the Commonwealth asserts, this discretionary aspect of sentencing claim is waived as it was not presented to the sentencing court or prefaced on appeal with a statement pursuant to Pa.R.A.P., Rule 2119(f), 42 Pa.C.S.A. Accordingly, we hold that appellant's allocution claim is waived because it was not raised with the trial court.

Judgment of sentence affirmed.