

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JACKSON NJAGA NGARULYA

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 867 MDA 2012

Appeal from the Judgment of Sentence December 14, 2011
In the Court of Common Pleas of Lebanon County
Criminal Division at No(s): CP-38-CR-0000687-2011

BEFORE: BOWES, OLSON and WECHT, JJ.

MEMORANDUM BY OLSON, J.:

Filed: February 8, 2013

Appellant, Jackson Njaga Ngarulya, appeals from the judgment of sentence entered on December 14, 2011, following his jury trial convictions of two counts of indecent assault.¹ We affirm.

We summarize the facts and procedural history of this case as follows. On September 27, 2010, Appellant spent the night at a friend's house in Lebanon County, PA. Appellant approached a 14-year-old girl, who resided in the home, and fondled her breast and crotch over her clothing. The Commonwealth charged Appellant with the aforementioned crimes. On October 6, 2011, a jury convicted Appellant of both charges. On December 14, 2011, the trial court sentenced Appellant to three to 23 months of

¹ One count each of 18 Pa.C.S.A. §§ 3126(a)(1) and (a)(8).

incarceration, followed by a period of house arrest with electronic monitoring. Appellant filed a post-sentence motion on January 30, 2012.² This timely appeal followed.³

On appeal, Appellant presents the following issue⁴ for our review:

[Whether t]he trial court erred in not granting, or declaring, a mistrial, when the jury reported to the court at 7:30 p.m., that it did not believe that the evidence warranted a conviction.

Appellant's Brief at v.

Appellant contends "the verdict of the jury was the result of fatigue, and also the coercive nature by which the jurors were required to listen to the case and thereafter deliberate for what was tantamount to a 13 hour work day." *Id.* at 7-8. Appellant claims that the jury halted deliberations to

² Upon review of the record, it does not appear that the trial court ruled on Appellant's post-sentence motion.

³ Appellant filed a notice of appeal on May 9, 2012. On May 10, 2012, the trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied timely on May 29, 2012. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on July 9, 2012.

⁴ Appellant presents two additional issues, challenging the weight and sufficiency of the evidence to support his convictions, in his statement of the questions involved section of his appellate brief. However, later in the argument section of his brief, Appellant "withdraws [these] issues[s] from consideration and review by the Superior Court" and provides no argument on these claims. Appellant's Brief at 6. Accordingly, we deem them waived. *See* Pa.R.A.P. 2119(b); *see also Commonwealth v. Hernandez*, 39 A.3d 406, 412 (Pa. Super. 2012) (failure to develop argument with citation to and analysis of relevant authority waives issue on appeal).

ask the trial court if there was “a term for a jury that believes a Defendant is guilty but the evidence does not warrant a conviction?” *Id.* at 8. Appellant asserts the trial court then erred by reading a jury instruction that directed the jurors to determine whether Appellant had, or had not, committed the crimes alleged. *Id.* at 8-9. Appellant maintains “the [t]rial [c]ourt’s decision basically conveyed to the jury that they were not leaving the Courthouse until a final decision was made” which “undoubtedly coerced the jury to go back and quickly come up with a decision[.]” *Id.* at 10. Further, Appellant argues that despite failing to request a mistrial, the trial court had the authority to do so *sua sponte* for manifest necessity pursuant to Pa.R.Crim.P. 605. *Id.* at 12.

Our standard of review is well-settled:

It is within a trial judge's discretion to declare a mistrial *sua sponte* upon the showing of manifest necessity, and absent an abuse of that discretion, we will not disturb his or her decision. ***Commonwealth v. Leister***, 712 A.2d 332, 334 (Pa. Super. 1998) (*citing* ***Commonwealth v. Gains***, 556 A.2d 870 (Pa. Super. 1989)); Pa.R.Crim.P. 1118(b) (amended and renumbered as Rule 605, effective April 1, 2001). Where there exists manifest necessity for a trial judge to declare a mistrial *sua sponte*, neither the Fifth Amendment to the United States Constitution, nor Article I, § 10 of the Pennsylvania Constitution will bar retrial. ***Leister***, 712 A.2d at 335 (*citing* ***Commonwealth ex rel. Walton v. Aytch***, 352 A.2d 4 (Pa. 1976)).

In ***Commonwealth v. Diehl***, 615 A.2d 690, 691 (Pa. 1992), our Supreme Court, when considering whether manifest necessity for the trial court's *sua sponte* declaration of a mistrial existed, stated:

Since Justice Story's 1824 opinion in ***United States v. Perez***, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165,

it has been well settled that the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent depends on [whether] there is a manifest necessity for the mistrial, or the ends of public justice would otherwise be defeated. ***Commonwealth v. Bartolomucci***, 362 A.2d 234 (Pa. 1976), citing ***United States v. Dinitz***, 424 U.S. 600 (1976). It is important to note that in determining whether the circumstances surrounding the declaration of a mistrial constitute manifest necessity, we apply the standards established by both Pennsylvania and federal decisions.

Commonwealth v. Mitchell, 410 A.2d 1232 (Pa. 1980).

Pennsylvania Rule of Criminal Procedure 605(B) provides that:

When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity.

In accordance with the scope of our review, we must take into consideration all the circumstances when passing upon the propriety of a declaration of mistrial by the trial court. The determination by a trial court to declare a mistrial after jeopardy has attached is not one to be lightly undertaken, since the defendant has a substantial interest in having his fate determined by the jury first impaneled. ***Commonwealth v. Stewart***, 317 A.2d 616, 619 (Pa. 1974), citing ***United States v. Jorn***, 400 U.S. 470 (1971). Additionally, failure to consider if there are less drastic alternatives to a mistrial creates doubt about the propriety of the exercise of the trial judge's discretion and is grounds for barring retrial because it indicates that the court failed to properly consider the defendant's significant interest in whether or not to take the case from the jury. ***Commonwealth ex rel. Walton v. Aytch***, 352 A.2d 4 (Pa. 1976). Finally, it is well established that any doubt relative to the existence of manifest necessity should be resolved in favor of the defendant. ***Bartolomucci***, 362 A.2d at 234.

Commonwealth v. Walker, 954 A.2d 1249, 1254-1255 (Pa. Super. 2008).

Here, the following transpired at trial:

THE COURT: Ladies and gentlemen of the jury, I did get your question, and for the record, it reads as follows: "What is the term for a jury that believes a Defendant is guilty but the evidence does not warrant a conviction[?]" In the United States there's no term for that. And in this case, since we're here in the United States of America, there are only two possible verdicts that you could reach, either guilty or not guilty. Either one of those verdicts for each of the two charges would have to be a unanimous verdict of the jury.

So, if in your deliberations you deliberate on Count I and you unanimously find that the Commonwealth has proven all of the elements of Count I – and if you remember, there were three elements – if you unanimously believe the Commonwealth proved each of those three elements beyond a reasonable doubt, then your verdict should be guilty. If after you deliberate on that first count and you unanimously find that the Commonwealth did not prove one or more of the three elements beyond a reasonable doubt, then your verdict should be not guilty.

The same applies for Count II. There are four elements on Count II if you recall. If you deliberate and you unanimously find that the Commonwealth proved all four elements beyond a reasonable doubt, your verdict should be guilty. If you deliberate and you unanimously find that the Commonwealth did not prove one or more of those elements beyond a reasonable doubt then your verdict should be not guilty.

Those are the only choices that you have. So, that's the answer to your question. There is no term for the scenario that you propose here.

Any questions, folks? Counsel, any comments?

[THE COMMONWEALTH]: No, sir.

[DEFENSE COUNSEL]: Nothing, your Honor.

N.T., 10/6/2011, at 22-23.

Based upon the foregoing, the trial court determined:

First, we note that [Appellant] made no motion for a mistrial and he cannot now complain that the court erred in failing to grant such relief. Moreover, we do not believe that the question posed by the jury evidenced any circumstances that would warrant a [*sua sponte*] declaration of a mistrial by the [c]ourt. There was no manifest necessity which would justify the [c]ourt's taking such action. The jury made no indication that it was fatigued or that it was unable to reach a unanimous decision. Rather, when it submitted its question to the [c]ourt, the jury indicated that it had already reached a unanimous determination of guilt. Their question appeared to indicate that they had found that [Appellant's] conduct fell within that which was proscribed by the statute but that perhaps they were not certain that this conduct was enough to be considered a crime. [The trial court's] response merely defined the possible verdicts the jury was permitted to return under the law. [The trial court] made it abundantly clear that they were entitled to reach whichever verdict they decided upon, either guilty or not guilty. [The trial court's] instruction was not coercive in any way and [the court] certainly did not tell them which verdict to choose. When they submitted the question to the [c]ourt, the jury indicated that they already found that [Appellant] was guilty and that was the verdict returned after additional time for deliberation.

Trial Court Opinion, 7/9/2012, at 14-15.

Based upon our standard of review and an independent review of the certified record, we agree with the trial court that there was no manifest necessity to declare a mistrial *sua sponte*. The jury's question did not suggest that it could not reach a unanimous decision. The trial court considered a less drastic alternative to a mistrial by reinstructing the jury on reasonable doubt and guilty versus not guilty verdicts. The trial court's answer was a fair response to the question asked, legally accurate, and

clearly proper. Moreover, there was no indication that the trial court coerced the jury to continue deliberations at a time when it could not reach a unanimous decision. The jury initially deliberated for three-and-a-half hours. N.T., 10/6/2011, at 22. Subsequently, after trial court clarification, the jury returned its verdict within an hour. *Id.* at 24. Accordingly, we discern no abuse of discretion in failing to declare a mistrial *sua sponte*.

Judgment of sentence affirmed.