[J-16-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 53 WAP 2002
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered February 12, 2002 at
	:	No1718WDA 2000 affirming the Judgment
v.	:	of Sentence of the Court of Common
	:	Pleas of Allegheny County entered
	:	September 14, 2000 at NoCC9907670.
WILLIAM STRONG,	:	
	:	797 A.2d 1026 (Pa. Super. 2002) (Table)
Appellant	:	
	:	ARGUED: March 4, 2003

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: NOVEMBER 25, 2003**

Although I agree with the majority's conclusion that we should apply a harmless error analysis to the instant case, upon careful review of the record, I respectfully disagree that the trial court's error here was harmless.

Rule 646 of the Pennsylvania Rules of Criminal Procedure provides that:

> (A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (B).
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> (B) During deliberations, the jury shall not be permitted to have:
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> (1) a transcript of any trial testimony;
> (2) a copy of any written or otherwise recorded confession by the defendant;
> (3) a copy of the information;
> (4) written jury instructions.

Pa.R.Crim.P. 646. Here, the trial court erroneously permitted the jury to deliberate with a diagram of the crime scene that purported to document the location of shell casings, even though that diagram was not a trial exhibit and thus, was not explicitly permitted under Rule 646(A). This Court has held that in certain circumstances, permitting a jury to deliberate with a non-exhibit is per se prejudicial, see Commonwealth v. Karaffa, 709 A.2d 887, 889-90 (Pa. 1998) (deliberations with written jury instructions is per se prejudicial), but I agree with the majority that deliberation with the diagram here should be analyzed under a harmless error standard, as the diagram was neither inherently prejudicial nor explicitly prohibited by Rule 646(B).[1] That said, I firmly disagree with the majority that the jury's deliberation with the diagram constituted harmless error, as the record makes clear that there was a reasonable possibility that the error contributed to the conviction. See Commonwealth v. Johnson, 828 A.2d 1009, 1012 n.2 (Pa. 2003).

The primary dispute in this case was over who fired shots at a car containing Jack Smith and three other persons. Throughout the trial, Appellant admitted that he was present at the shooting, but he consistently maintained that a man named "Diddle," who was Appellant's acquaintance, fired the shots. According to Appellant, he was at Frick and Frack's bar on the night of March 6, 1999, when Smith and three friends came into the bar, looking for "Derrick," who worked as a bartender there. N.T., 8/1/2000, at 192-93. Appellant testified that he and Smith got into an argument after he pointed out Derrick and

[1] In this regard, I note that the use of the harmless error standard here aligns with federal case law. See United States v. Santana, 175 F.3d 57, 65 (1st Cir. 1999) (harmless error standard applied where jury erroneously permitted to view defendant's ears during deliberation); United States v. Kupau, 781 F.2d 740,744-45 (9th Cir. 1986) (harmless error standard applied where jury erroneously permitted to deliberate with dictionary); United States v. Hans, 738 F.2d 88, 92 (3d. Cir. 1984) (harmless error standard applied where jury erroneously permitted to view windbreaker allegedly worn by defendant during crime, even though windbreaker had not been admitted into evidence).

told Smith that Derrick was "[his] boy."[2] Id. at 193. Following this confrontation, Appellant left the bar and walked down the street to "cool off," and as he did so, he saw Smith and his friends exit the bar and drive away in a Ford Explorer. Id. at 194-96. According to Appellant, he was walking back to the bar when he saw Smith turn the Explorer around, drive back to the bar and begin shooting towards him from across the street. Id. at 196. Appellant testified that he ducked behind a parked truck in front of the bar and witnessed Diddle, who was also outside in front of the bar, firing shots back at Smith. Id. at 196-97. Significantly for our purposes here, an eyewitness who lived above the bar, Joshua Crankshaw, confirmed Appellant's version of events by testifying that he saw Diddle fire multiple shots at the Explorer from behind the parked truck. Id. at 183.

In contrast, the Commonwealth presented evidence at trial that Jack Smith and three friends went to Frick and Frack's bar to confront the bartender who had been "saying some things about [Smith]," N.T., 7/31/2000, at 41, that Smith "did not appreciate." N.T., 7/28/2000, at 4. One occupant of the vehicle testified that after Smith finished "yelling obscenities" at the bartender, N.T., 7/31/2000, at 43, he and his three friends left the bar and drove away.[3] Shortly thereafter, however, they realized that they were heading in the wrong direction and therefore turned around and stopped across the street from Frick and Frack's bar to permit Smith to change the compact discs in the Explorer's compact disc player. N.T, 7/31/2000, at 44-45; N.T., 7/28/2000, at 53. According to the Commonwealth's evidence, Appellant pulled up in a car behind Smith and his friend, walked up to the Explorer's driver's side window, beat Smith in the head with a gun, then

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[2] Appellant testified that Smith responded, "Oh you want some of this too?" and later threatened "I'll beat your a--." N.T., 8/1/2000, at 193.

[3] Smith himself also admitted at trial that he approached the bartender, said "I'm here now. Talk s--- now," took off his jacket and proceeded to curse and use a lot of obscenities. N.T., 7/28/2000, at 48.

fired multiple shots into the vehicle at close range, in one instance "la[ying] the pistol on [Smith's] head" before shooting. N.T., 7/31/2000, at 48-50, 83; see also N.T., 7/28/2000, at 80-81, 136-37.

As these two versions of events differed not only as to the identity of the shooter, but also as to the location from which the shots at issue were fired, the location of shell casings recovered from the crime scene became extremely important in determining which version of events was correct. In that regard, a detective testified that police recovered a total of eleven shell casings and one live round from the scene. Three of the casings were recovered from inside of the Explorer, N.T., 7/31/2000, at 101-02, 110, and were subsequently determined to have been fired from the gun of another occupant of the Explorer, Charles Vincent. Of the eight remaining shell casings, the detective testified that only one was found in the middle of the street, near where Smith's vehicle was stopped. Id. at 110, 130. In fact, the detective testified that the other seven shell casings were found on the sidewalk in and around the truck that had been parked in front of the bar,[4] id. at 130, and the sole live round was on the sidewalk in front of Frick and Frack's bar, id. at 111, all of which is entirely consistent with Appellant's version of events that Diddle shot at the Explorer from behind that truck and inconsistent with the Commonwealth's version of events that Appellant approached the vehicle from behind and shot into the vehicle from the driver's side window, at close range.[5]

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[4] The parties stipulated that two casings were found in the bed of the truck. N.T., 8/1/200, at 163.

[5] As the detective himself testified, casings are typically found in close proximity to where a gun is fired, see N.T., 7/31/2000, at 129, and therefore one would have expected police to find more than one casing in the middle of the street if Appellant had fired several shots there, as the occupants of the Explorer asserted.

During the detective's direct testimony, however, the Commonwealth used as a visual aid a hand-drawn, not-to-scale diagram of the crime scene, and either the prosecutor or the detective made notations on the diagram to indicate where the detective had supposedly found the shell casings and live round.[6] In stark contrast to the detective's testimony, the notations on the diagram showed four shell casings in the middle of the street, near the Explorer, essentially where the Commonwealth asserted that Appellant had been standing when he shot at Smith.

Under these circumstances, I can only conclude that there was a reasonable possibility that permitting the jury to deliberate with this diagram, which was not an exhibit and did not conform to the evidence at trial, contributed to Appellant's conviction. In fact, while it is impossible to determine exactly what weight the jury put on the diagram, it appears from the circumstances under which the verdict was rendered that the jury gave the diagram at least some weight. In that regard, on the second day of deliberations, the jury sent a note to the trial judge, indicating that they were unable to reach a verdict, see N.T., 8/2/2000, at 287 ("If we have not come close to a unanimous verdict by the end of today what would be your ruling[?]"), and at the same time, requesting that it be permitted to see the diagram. Although the trial judge expressed concern that the jury would mistakenly believe that the diagram was an accurate rendition of the location of the shell casings,[7] he nevertheless permitted the jury to view it for a short time. Later that day, the jury reached a unanimous verdict. This series of events, while not conclusive on the issue

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[6] Although it is clear that the prosecutor himself drew the diagram, there is some disagreement as to whether the prosecutor or the detective inserted the notations indicating the location of the shell casings.

[7] N.T., 8/2/2000, at 281 ("The Court: [The jury] is going to be inclined to think that the diagram is accurate, otherwise they wouldn't be asking for it.").

of harmless error, certainly reinforces my conclusion that there is reasonable doubt as to whether the viewing of the diagram was truly harmless.

The majority, on the other hand, concludes that the error was "patently harmless," Slip op. at 7, finding that the evidence identifying Appellant as the shooter was "overwhelming" essentially because three of the occupants of Smith's Explorer identified Appellant as the shooter. Id. However, in concluding as such, the majority completely ignores the significant evidence that supported Appellant's version of events. Not only did Appellant call the credibility of the Commonwealth's witnesses into question with probing cross-examination,[8] but, as stated above, the testimony of the only arguably neutral eyewitness, Joshua Crankshaw, supported Appellant's assertion that Diddle was the shooter. Moreover, the testimony of defense witnesses regarding Appellant's confrontation with Smith provided a basis on which the jury could have found that Smith and his friends were motivated by revenge in identifying Appellant as the shooter. And finally, as emphasized above, the testimony of the detective regarding the shell casings supported Appellant's assertion that Diddle shot at the Explorer car from behind the truck parked in front of the bar. Thus, contrary to the majority's conclusion, there was more than sufficient evidence from which a jury could have concluded that Appellant was not, in fact, the shooter.

In supporting its holding that the error was harmless, the majority also appears to find relevant that Appellant did not object to the use of the diagram during the trial and purportedly relied upon the diagram on cross-examination. Slip op. at 6. Unlike the majority, however, I see no evidence in the record that Appellant's counsel referred to the

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[8] Among other things, defense counsel effectively questioned the occupants of the car as to how they could have "mistakenly" driven in the wrong direction when they left the bar, and why they chose to stop immediately in front of the bar to change CDs when they had just left that very location because trouble was brewing. See, e.g., N.T., 7/28/2000, 51-55.

diagram at trial, much less relied upon it.[9] In any event, it is clear that Appellant never relied on the diagram for the purpose of showing the location of the shell casings, which he has consistently contested. Moreover, in my view, the fact that Appellant did not object to the diagram during the course of the detective's testimony is simply irrelevant, as the diagram was merely a visual aid and the Commonwealth never attempted to admit it into evidence. Significantly, Appellant did timely object to the trial court's decision to permit the jury to view the diagram during deliberations.

Finally, the majority finds support for its position that the error was harmless in the fact that the diagram was "not left with the jury," but rather "was brought in by court personnel for brief viewing, then removed." Slip op. at 7. However, I take little solace in the fact that the viewing of the diagram was "brief" when the jury really only needed enough time to view what amounted to a simple picture on a single page. Moreover, I note that the single case on which the majority relies in finding the length of the viewing to be relevant, Commonwealth v. Morton, 774 A.2d 750, 753 (Pa. Super. 2001), is clearly distinguishable as the court in that case put significant emphasis on the fact that the jury was only permitted to view the material at issue while sitting in the jury box and unlike the jury here, was not permitted to deliberate while reviewing it.

Under these circumstances, I am unconvinced by the majority's rationale for finding the trial court's error to be harmless. As explained above, the location of the shell casings was an important piece of physical evidence that provided critical support for Appellant's defense in this case. That the trial court nevertheless permitted the jury, during deliberations, to view a diagram that contradicted the evidence on this point and itself was

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[9] Appellant's counsel did refer to a different diagram, a chalk drawing of Smith's vehicle, when posing a hypothetical question to the Commonwealth's expert regarding why no bullets were found inside of Smith's vehicle. See N.T., 8/1/2000, at 177.

never admitted into evidence, surely had the potential to be highly prejudicial. Accordingly, unlike the majority, I would find that there is a reasonable possibility that the error contributed to the conviction and would therefore grant Appellant a new trial.

Messrs. Justice Castille and Saylor join this dissenting opinion.