

[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
	:	No1718WDA2000 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

OPINION

MR. JUSTICE EAKIN

DECIDED: NOVEMBER 25, 2003

Jack Smith and three companions were in a car outside a bar. They testified appellant walked across the street toward them, pulled a pistol, beat Smith about the head, then shot him and another occupant; one of the occupants fired back. Appellant testified the first shots came from the car, and that when he ducked behind another car, a person called "Diddle" returned fire; he had no gun and did no shooting.

At trial, a detective was referred to a poster board diagram of the area of the shooting. The detective testified about eight shell casings and a cartridge found in the area; their locations were marked and numbered on the diagram. The diagram was used during the testimony and closing arguments, but never offered or admitted into evidence. During deliberations, the jury asked to see the diagram again. Over appellant's objection, the court permitted a brief look at it, telling the jury:

You asked to see the chart. I'm going to have [a member of my staff] bring the chart up with you. You take a good look at it. Each of you look it over. I'm not going to leave it in the jury room, because it may cause you to put too much emphasis on that one item. But you have all seen it. It's been shown to you many times. And both the defense and the prosecution have used it to argue to you. So I think it's fair that you take a good look at the chart and then, after you have done so, I will have [a member of my staff] bring it back down.

N.T., 8/2/00, at 286-87.

The jury convicted appellant of aggravated assault and four counts of recklessly endangering another person. On appeal, appellant asserted the trial court erred in allowing the deliberating jurors to view the diagram. The Superior Court found no reversible error, noting the broad use of the diagram during trial by all parties, the brief and temporary viewing during deliberations, and the value of the cautionary instructions given before that viewing.

This Court has not addressed whether the jury may review materials not marked as an exhibit or entered into evidence. In Commonwealth v. Bango, 685 A.2d 564 (Pa. Super. 1996), aff'd on other grounds, 742 A.2d 1070 (Pa. 1999), the Superior Court considered whether transcripts of tapes, where the tapes had been admitted, could be considered by the jury. The Superior Court stated:

The purpose of permitting the jury access to the transcripts was to make their deliberations more informed. With appropriate cautionary instructions, the jury's access to the spoken as well as the written word provided important guidance. We point out that the trial is the forum for finding truth. The jury's deliberations represent the process by which the fact finders establish what they believe to be true. For policy reasons, where materials inform a jury and aid it in the difficult task of determining facts, the jury should be permitted to study those materials during its deliberations. In the instant case armed with proper cautionary instructions relating to the requirement that the tapes rather than the transcripts are to be considered valid, the jury could only benefit by the use of the transcripts as an aid in its assessment of the tapes. Because we find that access to the transcripts during deliberations was not [sic] court did not abuse its discretion in permitting such access.

Id., 685 A.2d at 566 (emphasis added). This Court granted review, but concluded the transcripts had been admitted into evidence; therefore, "the question of whether the trial court abused its discretion in permitting the jury to deliberate with items that have not been admitted into evidence [was] not before this Court." Id., 742 A.2d at 1071 n.5. The issue we did not address in Bango is now before us.

In Commonwealth v. Engle, 73 Pa. Super. 138, 1919 WL 2186 (Pa. Super. 1919), a witness was permitted to illustrate his description of a building floor by drawing a floor plan. Both the prosecution and defense used the diagram during their arguments, and the jury reviewed and passed the diagram around the jury box. During deliberations, the jury requested and received the diagram. The Superior Court, quoting from the trial court's opinion, held: "Standing by itself, it had of course no evidentiary value, but it was part and parcel of [the witness's] testimony and was as much in evidence as anything said by him." Id., at *2.

Traditionally, diagrams have been used to illustrate or explain a witness's testimony without being placed into evidence. See Geist v. Rapp, 55 A. 1063, 1063 (Pa. 1903) (model of scaffolding not in evidence may be used for illustration); Hagan v. Carr, 48 A. 688, 689 (Pa. 1901) (freehand diagram may be used for illustration with caution from trial court and not regarded as evidence). Here, the diagram with the location of the casings helped explain the detective's testimony and the related pictures which were entered into evidence. To this extent, the diagram was no longer merely illustrative, but was demonstrative and could have been offered as an exhibit. See Pa.R.E. 901(a) & Comments (demonstrative evidence such as diagrams must be authenticated), 402

(evidence must be relevant), and 403 (probative value not outweighed by danger of unfair prejudice).

While the policy reasons identified by the Superior Court in Bango to allow non-exhibits to go to the jury are persuasively stated, Pa.R.Crim.P. 646¹ clearly states that only exhibits may go to the jury:

- (A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (B).
- (B) During deliberations, the jury shall not be permitted to have:
 - (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.

There was an error, as the diagram was not offered as an exhibit, counsel for appellant was not asked or obliged to offer objections, and no ruling on admissibility was ever made. Appellant contends this violation of Rule 646 is prejudicial per se, requiring a new trial.

Although this Court has deemed some violations of this Rule to be prejudicial per se, other violations have been evaluated under the harmless error doctrine. See Commonwealth v. Story, 383 A.2d 155, 162 (Pa. 1978). Under this doctrine, "an error may be harmless where the properly admitted evidence of guilt is so overwhelming and the

¹ Former Rule 1114.

prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict." Id., at 166.

In Commonwealth v. Terry, 462 A.2d 676 (Pa. 1983), an inmate beat a guard to death and confessed to a police officer, who transcribed his statement. The officer testified he edited the confession before the inmate signed it, and may have omitted remarks he did not believe were relevant. The inmate's defense was that he suffered from delusions. During deliberations, the jury received the signed confession, which was explicitly prohibited by former Rule 1114. Citing the harmless error standard in Story, this Court granted a new trial, but only after determining the inmate was prejudiced because the confession omitted parts of his statement where he told the officer about his hallucinations.

In Commonwealth v. Oleynik, 568 A.2d 1238 (Pa. 1990), the trial court sent written instructions regarding causation and definitions of third degree murder and involuntary manslaughter with the jury when it began deliberations. Although Rule 1114 did not explicitly prohibit this action, this Court noted the portion of the Rule which states "the jury may take with it such exhibits as the trial judge deems proper," was not applicable because the written instructions were not exhibits. Id., at 1240 n.2. Without specifically calling it a Story analysis, this Court concluded there was likelihood the jury would misinterpret or misapply the written instructions, and not seek further oral instructions from the trial court. The possible prejudice to the defendant from written instructions outweighed any benefit of such instructions, and a cautionary instruction by the trial court was "wholly inadequate to cure any possible prejudice." Oleynik, at 1241. A new trial was granted.

In Commonwealth v. Karaffa, 709 A.2d 887 (Pa. 1998), the defendant was charged with a number of crimes, including two counts of rape and unlawful restraint. The trial court

allowed the jurors to deliberate with written instructions on unlawful restraint and reasonable doubt. This Court reaffirmed Oleynik and concluded the potential adverse influence of the written instructions on the jury's deliberative process created a reasonable possibility the instructions received by the jury contributed to the verdict, citing Story. Karaffa, at 889. The error was reversible, rather than harmless, and a new trial was granted. Following Karaffa, Rule 1114 was amended to specifically prohibit the jury from receiving written jury instructions. See 29 Pa.B. 6102 (effective January 1, 2000).

Terry, Oleynik, and Karaffa demonstrate that a harmless error analysis will be applied to violations of this ilk, and that not every violation is per se prejudicial. The underlying reason for excluding certain items from the jury's deliberations is to prevent placing undue emphasis or credibility on the material, and de-emphasizing or discrediting other items not in the room with the jury. If there is a likelihood the importance of the evidence will be skewed, prejudice may be found; if not, there is no prejudice per se and the error is harmless.

Appellant contends the diagram misrepresented the detective's testimony on cross-examination, that he found one shell casing in the street and the remaining casings in front of the bar by a truck. He argues the diagram depicts casings strewn across the street, which is consistent with the victims' testimony and inconsistent with his version. This, he claims, prejudiced the jurors when they saw it again, and the error was not harmless.

The prosecution's testimony was that appellant fired at least one shot from the middle of the street before retreating toward the front of the bar. Appellant also puts himself in the middle of the street, although he denied firing at all; he stated he hit the ground, then ran toward the bar where he "stuck his head in" to call for his girlfriend. He

testified a third party, "Diddle," did all the shooting at Smith and friends; no prosecution witness identified appellant as firing shots after the first one.

The testimony was that one casing was found in the street, others closer to the front of the bar and truck. The diagram showed some casings further into the street. Even if the diagram showed one casing in the middle of the road with the remaining strewn around the truck and bar, the single casing indicates the shooter fired at least one shot from the middle of the road. The uncontroverted evidence proves that someone shot into the car, wounding two men; the only remaining question is the identity of the shooter and in this regard, one shot was enough to convict.

Appellant did not object to use of the diagram during the trial; in fact, appellant relied upon the diagram during cross-examination. While the dissent properly notes that the record does not always contain explicit statements by counsel when reference is being made to the diagram, a transcript cannot capture counsel's gestures, physical motions, nods and flourishes; that does not mean they did not occur. The trial court explicitly found "[d]efense counsel used the diagram during his cross-examination of the detective." Trial Court Opinion, 5/5/01, at 6. Appellant does not argue to the contrary, nor does he argue he relied on another diagram. There is no reason to disbelieve the word of the trial court that there was use of the diagram. Given this unchallenged finding, we must accept that appellant relied on the prosecution's diagram.

If the diagram was truly prejudicial to appellant, he should have made a timely motion and sought a truer representation; instead, he used it, and compellingly so. The jury viewed the diagram throughout the trial; it was not a surprise or mysterious depiction, but something used by all to aid their comprehension of the testimony. Further, the

diagram was not left with the jury; it was brought in by court personnel for brief viewing, then removed. See Commonwealth v. Morton, 774 A.2d 750, 753 (Pa. Super. 2001) (no violation of Rule 646 if, during deliberations, jury was placed in jury box, permitted to briefly review written confession, not permitted to deliberate while in jury box, and given cautionary instruction).

The prosecution's evidence identifying appellant firing the shot that hit the men is overwhelming. Three of the men identified appellant as the shooter, from a photo array; all of them testified he walked up to the car and pulled a pistol from his pants. Three of the men testified appellant pistol-whipped Smith, stepped back, then fumbled with the safety on the pistol. Two of them testified appellant shot into the car, and one of the victims testified appellant shot Smith in the head and another man in the leg.

The diagram had little value in undermining the multiple eyewitness identifications that it was appellant who shot into the car. Accordingly, the error in letting the jury view the diagram was patently harmless.

Judgment of sentence affirmed.

Mr. Justice Nigro files a dissenting opinion in which Messrs. Justice Castille and Saylor join.