IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-724-2015**
	:	
PHILIP A. SAILOR,	**:**	**Opinion and Order re**
Defendant	**:**	**Defendant's Post-Sentence Motions**

OPINION AND ORDER

On November 1, 2018, following a lengthy jury trial, Defendant was found guilty of aggravated assault by vehicle while driving under the influence; aggravated assault by vehicle; driving under the influence and related charges. On January 8, 2019, Defendant's Rule 704 motion for extraordinary relief was denied, and the court proceeded to sentencing. Defendant was sentenced to an aggregate period of state incarceration, the minimum of which was two years and the maximum of which was five years.

On January 15, 2019, Defendant filed his post sentence motions. The argument on said motions was held on March 19, 2019.

Defendant's first claim relates to the same issue raised in Defendant's Rule 704 motion for extraordinary relief. Specifically, Defendant claims that his conviction should be vacated and that he is entitled to a new trial because the trial court did not timely inform the parties of a conversation with a juror and thus give the parties an opportunity to question the juror with respect to the conversation.

Following the verdict in this matter, the court sent an email to both counsel regarding a conversation with the juror. During the trial, the court would on occasion casually and informally speak with the jurors about innocuous matters such as weather,

national news, and trial logistics such as when they would likely finish that day, how many more witnesses were expected, how long the particular testimony may be, and how long the trial may take in light of the progress to that point. It is difficult for many jurors because Lycoming County does not permit them to have their cell phones. Additionally, Lycoming County is the largest geographic county in the Commonwealth. Some jurors drive at least an hour or more to get to serve as jurors. Some jurors are elderly. Their concerns are many and varied, including driving alone at night, driving in inclement weather, obtaining transportation through others, safety in light of being in the "city," and notifying other family members of their whereabouts.

One day, likely the second or third day of trial, the court was sitting in the juror's lounge eating a sandwich for lunch and having a casual conversation with the bailiff, the tipstaves and the court's intern. The jurors had previously been released for lunch. Jurors have many options available to them. Some don't take lunch at all; others go for a walk, while others may go to a local restaurant. A few of the jurors started returning from lunch.

Not long thereafter, following a question from one juror to the court as to how long the jurors were expected to be there that afternoon, the second alternate juror asked when the sentencing would be scheduled. The court responded immediately that the jury had no part in the sentencing so it would not interfere in any future plans. After hesitating a moment and realizing a possible substantive inference of the question, the court then explained to the juror that sentencing cannot be a consideration in reaching a verdict, that a

verdict and sentencing are two separate issues and that the court would handle sentencing if and only if the defendant was found guilty.

The court then left the jury lounge, advising the jurors that they would resume the trial as soon as possible when all of the parties and witnesses were ready. The court could not recall how many jurors had returned to the lounge by that time, but did recall seeing one juror seated behind alternate two shaking his head apparently in agreement with the court's statement.

The court did not give the question by the second alternate juror too much thought, if any, after that. The juror had previously asked many questions regarding logistics and how long the trial would take. The court considered it to be a question about her being required for sentencing and, if so, taking more of her time. Moreover, and contrary to what Defendant claims in his post-sentence motion, the juror did not remain until the close of the trial. The juror was excused for a different reason either later that day or the next day.

Never having been confronted with this type of issue, the court became concerned once it was brought up after the trial. Apparently, the court's intern had a brief discussion with the assistant district attorney who tried the case who then notified the court, who then responded with the email.

Contrary to what Defendant argued during the hearing on his Rule 704 motion for extraordinary relief, there is no prohibition against judges having ex parte communications with jurors during the trial and before they begin to deliberate. It is not against the Code of Judicial Conduct and does not constitute an ethical violation. In fact,

only ex parte communications between a court and a jury, which are likely to prejudice a party require reversal. *Commonwealth v. Bradley*, 501 Pa. 25, 459 A.2d 733, 734 (1983). Where there is no showing that the court's actions may have influenced the jury or that its directions were erroneous, then the reason for the rule dissolves. *Id*. at 736 (quoting *Kersey Manufacturing v. Rozic*, 422 Pa. 564, 572, 222 A.2d 713, 716 (1966)).

In this case, Defendant argues that he is entitled to a new trial because he lost the opportunity to determine if other jurors were prejudiced by the one juror's alleged bias (Post-Sentence Motion, paragraph 12). The argument rests on the claim that the court should have advised counsel immediately as to what was said, so counsel could *voir dire* the jury as to who, if any, heard the question and, if so, whether any of the juror members were prejudiced by it so as to be unable to render a fair and impartial verdict.

In *Commonwealth v. Richardson*, 476 Pa. 571, 383 A.2d 510 (1978), *cert. denied*, 436 U.S. 910, 98 S.Ct. 2248 (1978), the trial judge unexpectedly, but necessarily, drove three jurors from the courthouse to an adjacent town where they were staying. One juror asked if the judge thought the case would be completed by a certain date because he was expecting a visit from a friend or relative from Liverpool, England. The judge indicated, among other things, that he expected the trial to be completed within a week or ten days.

Counsel's request for removal of the juror was denied. Counsel's request for a mistrial was also denied. The Supreme Court affirmed, noting that a mistrial was not warranted merely because there was an opportunity to influence a juror, and that the decision to grant or deny the mistrial was within the sound discretion of the judge. 383 A.2d at 516.

As well, it was referenced in the concurring opinion that there was no reasonable possibility that the contact between the trial judge and jury could have prejudiced the defendant. *Id*. at 519.

In this case, Defendant's claim fails for several reasons. First, when taken in context, the court cannot conclude that the juror was, as Defendant claims, biased. The question related to how long the services of the juror would be needed.

Secondly, there was no opportunity for another juror to be improperly influenced. The court responded immediately that the sentencing hearing was not a concern for the juror and the issue would not arise unless the defendant was found guilty.

Third, under the circumstances, there was no reasonable opportunity to have prejudiced the defendant. Only a few, if any, jurors were present, and the court immediately responded so that all jurors present would be advised as to the law. As well, this particular juror did not deliberate. The juror was removed either that day or the following day.

Fourth, Defendant has failed to establish any prejudice whatsoever. Indeed, at the post-sentence motion hearing, the court invited Defendant to call all of the jurors to the stand to ask them if they had heard the comment and if it in any way impacted their decision. Defendant chose not to do so. Defendant may not sit idly by, taking the chance on a new trial, without questioning the jurors. Defendant had the opportunity to call the jurors but chose not to.

Lastly, the jury was instructed prior to deliberating that the verdict and sentencing were two different matters and the jury could not consider any potential sentence

in connection with the verdict. The only issue for the jury's consideration was whether the Commonwealth proved Defendant guilty beyond a reasonable doubt. The law is clear that the jury is presumed to have followed the instructions. Thus, any claimed or suspected prejudice by Defendant would have been obviated.

Defendant next claims that the conviction should be vacated because the trial court testified as a witness. Defendant is correct that Rule 605 prohibits the trial judge from testifying as a witness "at the trial." Additionally, it is clear that a trial judge is incompetent to testify at an evidentiary hearing on a defendant's petition for judicial recusal. *Commonwealth v. McCullough*, 201 A.3d 221, 239 (Pa. Super. 2018).

On the other hand, the reason for the alleged recusal cannot be created by a frivolous or fabricated charge. Indeed, where a fabricated charge is raised against the judge during the course of the proceedings, the court may summarily dismiss such without a hearing. *Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County*, 507 Pa. 194, 489 A.2d 1286, 1290 (1985).

This court was not a witness to the facts of the trial; rather, it was a witness to an ex parte communication completely unrelated to the merits of the underlying case. The subject matter to which the court testified was not related to the substance of the case.

Moreover, the court was willing to give Defendant the opportunity to question the jurors to determine if any other jurors actually heard Alternate Juror 2's question. Defendant declined this invitation. Questioning the jurors under these circumstances would not violate the no impeachment rule, which generally prohibits jurors from testifying about

what occurred during deliberations, as there is a narrow exception to the no impeachment rule that allows post trial testimony regarding extraneous influences which might have affected the jury. *Commonwealth v. Neff*, 860 A.2d 1063, 1069 (Pa. Super. 2004). The jurors would not have been questioned about what occurred during deliberations, but rather Alternate Juror 2's question or comment that occurred over a lunch break prior to deliberations. Such testimony would fall within the exception to the no impeachment rule.

Finally, what the court told Alternate Juror 2 was legally correct and not materially different from what the court typically tells every juror in its concluding instructions regarding the role of the jury. The court typically reads Pa.SSJI (Crim) 7.05 regarding the role of the jury, which specifically includes the following:

> In arriving at a verdict, you should not concern yourselves with any possible future consequences of your verdict, including what the penalty might be if you should find the defendant guilty. The question of guilt and the question of penalty are decided separately.

Accordingly, the recusal motion was without basis.

Even if the court erroneously failed to recuse itself from hearing Defendant's claim regarding Alternate Juror 2's comment or question, such would not entitle Defendant to a new trial; it would only entitle Defendant to a new hearing on this claim before another jurist, at which the undersigned could testify as a witness.

Defendant's remaining motions request a judgment of acquittal, alleging insufficient evidence to convict the defendant of the charges of aggravated assault by vehicle while DUI and aggravated assault by vehicle.

"The standard [the courts] apply in reviewing the sufficiency of the evidence

is whether viewing all of the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt." *Commonwealth v. Smith*, 2019 PA Super 83, 2019 WL 1272696, *2 (March 20, 2019) (quoting *Commonwealth v. Davison*, 177 A.3d 955, 957 (Pa. Super. 2018)). In applying this test, the court may not weigh the evidence or substitute its judgment for the fact-finder. The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. *Smith*, at *2 (citing *Davison*, 177 A.3d at 957).

"The Commonwealth may sustain its burden of proof as to every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence." *Smith*, at *2 (citing *Davison*, 177 A.2d at 957).

Defendant was convicted of aggravated assault by vehicle while driving under the influence. In order to prove the defendant guilty, the Commonwealth would need to establish that: the defendant negligently caused serious bodily injury to another person; the defendant violated section 3802 (relating to driving under the influence of alcohol or controlled substances); the violation of section 3802 was the cause of the injury. 75 Pa.

C.S.A. §3735.1; see also Pa.SSJI (Crim) 17.3735.1

Defendant does not dispute that the victim was seriously injured. Instead, Defendant argues that his "impairment" was not the cause of the accident.

In order to be a direct cause of the accident and injuries, the defendant's conduct must be a direct and substantial factor in bringing about the accident and injury. *Commonwealth v. Ketterer*, 725 A.2d 801, 805 (Pa. Super. 1999). In this case, the evidence supported the conclusion that Defendant's intoxication started "an unbroken chain of causation" and directly precipitated the collision. *Commonwealth v. Nicotra*, 425 Pa. Super. 600, 625 A.2d 1259, 1264 (1993).

It was entirely permissible for the fact-finder in this matter to draw the inference that Defendant's speed under the circumstances was a result of his intoxication, which diminished his ability to understand the surrounding circumstances and to drive more safely. *See Ketterer*, 725 A.2d at 803-804

The evidence clearly supported the fact that Defendant had been smoking marijuana prior to or while driving and was under its influence at the time of the accident. The state trooper on the scene smelled a strong odor of marijuana upon approaching the car, and a half-smoked joint was found under Defendant's seat. Defendant was acting as if he was under the influence of marijuana. He was extremely calm, even indifferent. He never really asked about the victim. (Transcript, at 34). He was sluggish and lethargic. (Transcript, at 36). He displayed signs of impairment during the standard field sobriety tests. (Transcript, at 39, 40, 41). It was the opinion of the arresting officer that Defendant was under the

influence of marijuana. (Transcript, at 42). Not only was the half-smoked marijuana cigarette found underneath the floor mat, but a marijuana kit was found in Defendant's vehicle. (Transcript, at 42).

Another trooper testified as to the same observations. Defendant was walking slowly and seemed relaxed. (Transcript, at 16). There was reddening of the conjunctiva in both eyes. (Transcript, at 17). During the field sobriety tests many signs of impairment were observed. (Transcript, at 22, 23, 24). Defendant admitted smoking marijuana the previous evening at 10:30 p.m. (Transcript, at 26, 27). Based on all of the information the trooper had from the crash and his evaluation, he concluded that Defendant was under the influence of marijuana which rendered him incapable of safely operating the vehicle. (Transcript, at 32).

Another Commonwealth expert educated the jury as to the effects that marijuana might have on an individual, which included causing relaxation, impacting judgment and impairing an individual's ability to drive safely (Transcript, at 131, 134).

Combining these facts with the fact that Defendant was speeding, approximately 15-20 miles over the speed limit, did not hit or touch his brakes until he had already impacted the victim, that he related that the victim was crossing the street from one direction while the evidence indicated that the victim was crossing the street from the other direction, that Defendant did not take any evasive action, that the roadway while not entirely light had some light (dusk), that it was in a school zone albeit not active, and that it was in a straight area of the road without any blind spots, the jury could certainly infer that Defendant's intoxication via the marijuana started an unbroken chain of events in causing the

accident.

The collision was a natural and foreseeable consequence of Defendant's actions. The jury was free to infer that Defendant's intoxication caused him to drive in that manner. *See Ketter¸id*; *Commonwealth v. Tucker*, 106 A.3d 796, 799 (Pa. Super. 2014); *Commonwealth v. Spotti*, 94 A.3d 367, 380 (Pa. Super. 2014).

Defendant's next claim relates to the alleged insufficiency of the evidence to convict Defendant of aggravated assault by vehicle. Defendant claims that the evidence was insufficient to support the guilty verdict because it failed to establish that he was able to see the victim in the roadway prior to striking her and that one point the victim crossed into the roadway, how fast she was traveling across the roadway, whether she was traveling in a straight line or at an angle to the roadway. Defendant argues that the Commonwealth could not establish with any degree of certainty how the accident occurred.

This claim as well fails. The evidence was clear that Defendant was speeding. This was confirmed through Defendant's own expert. The jury could certainly infer that no matter how the victim was walking, had Defendant not been speeding the accident would not have occurred.

ORDER

AND NOW, this ___ day of May 2019, following a hearing and argument on Defendant's Post-Sentence Motions, Defendant's Post-Sentence Motions are DENIED.

In accordance with Pa. R. Crim. P. 720(B)(4), Defendant is advised of the following:

1. He has a right to appeal this decision. Any appeal must be filed within thirty (30) days of the date of this Order.

2. He has the right to assistance of counsel in the preparation of the appeal.

3. If he is indigent, he has the right to appeal *in forma pauperis* (without the payments of filing fees and costs) and to proceed with assigned counsel.

4. He has a qualified right to bail under Rule 521(B). When the sentence imposed includes imprisonment of less than 2 years, the defendant shall have the same right to bail as before verdict unless the judge, pursuant to paragraph (D), modifies the bail order. When the sentence includes imprisonment of 2 years or more, the defendant shall not have the same right to bail as before verdict, but bail may be allowed in the discretion of the judge. In either event, however, a condition of Defendant's release on bail is that he perfect an appeal within the time permitted by law.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Brian Manchester, Esquire/Karen Kuebler, Esquire
124 West Bishop Street, Bellefonte PA 16823
Gary Weber, Esquire (Lycoming Reporter)
Work File