STATE OF NEW JERSEY

v.

PETER DREWSON,
Defendant - Appellant

A-12-1234-T3

Superior Court, Appellate Division

Submitted August 1, 2012 - Decided August 31, 2012

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Cr-11-9028.

Joseph Lopez argued the cause for the defendant-appellant (Dewey Cheathem & Howe, L.L.P., attorneys for defendant-appellant; Mr. Lopez of counsel and on the brief)

Kathleen Salvio, First Assistant Prosecutor, argued the cause for the State of New Jersey (James Glasgow, Essex County Prosecutor; Ms. Salvio of counsel and on the brief).

GRIM, J.A.D. joined by **REAPER, J.A.D.**

On March 12, 2012, following a jury trial in Superior Court, Law Division, Essex County, defendant Peter Drewson was convicted of one count of murder, contrary to N.J.S.A. 2C:11-3. Defendant was sentenced thereafter to a term of 30 years imprisonment, during which he is not eligible for parole.

In this appeal, defendant contends that the trial court violated his confrontation rights when it permitted a statement given to police by his then-girlfriend Stacy Forth to be read to the jury following a hearing in which Forth claimed not to remember the words she told police had been spoken by defendant after the crime charged. He also contends that the trial court erred when, during ex parte communications with the deliberating jury, it permitted the jurors to take a written copy of the jury instructions home to review them over a weekend.

We disagree on both counts. We hold that, while the better practice would have been to require Forth to testify before the jury as to her lack of recollection, any error in the trial judge's decision to allow the witness' statement into evidence was clearly harmless. We further hold that the trial judge did not err in meeting briefly, alone, with the deliberating jurors and then permitting them to take a copy of the jury instructions home over a weekend recess. We therefore affirm defendant’s conviction.

The Facts

Evidence at trial established that Drewson, a retired police officer from North Caldwell, married Kathleen Thurd in Newark on May 3, 1999. The couple had two children and divorced on October 10, 2008. Their relationship throughout their marriage and particularly after their divorce was stormy. Just between 2008 and 2011, police were called to Thurd-Drewson's home in Caldwell on 18 different occasions due to domestic disturbance calls, mostly focusing on arguments involving the children and visitation.

On the evening of Friday, July 1, 2011, Drewson and a friend, Michael Rick, arrived at the Thurd house to pick up the children for the Fourth of July weekend. They brought the children to the house Drewson shared with his girlfriend, Stacy Forth, in Newark. The children were put to bed; the adults socialized during the evening.

Thurd's family expected her to join them for a picnic on July 3rd but did not hear from her. On the afternoon of July 4th, Thurd's family obtained police assistance in entering Thurd's home and Thurd's body was found in the bathtub. Investigating officers, who were acquainted with Drewson, concluded that Thurd had died due to an accidental drowning after briefly interviewing Drewson, Rick, Forth and both children as to their whereabouts over the weekend. No autopsy was initially requested, and the death was ruled an accidental drowning with the time of death placed sometime between Friday afternoon and Sunday morning.

Thurd's family was not satisfied with the police investigation and objected to the decision not to conduct an autopsy. After appealing to the county prosecutor and to the state Attorney General, by the end of August 2011, they were able to secure permission for an autopsy at their expense. As a result, the finding of accidental death was set aside in September 2011 after additional forensic evidence from the autopsy requested by Thurd's family produced evidence suggesting that the death was a homicide staged to look like an accident.

The investigation into Thurd's death was reopened with the State Police in charge. State Troopers reinterviewed Rick, Forth and both children.* Rick, who died of a heart attack on September 30, 2011, stated that he accompanied Drewson to Thurd's home and waited in the car while Drewson went inside to get the children. He said the children came out first and, some time later, Drewson came out. He said he did not see anything out of the ordinary and that Drewson's behavior then and throughout the evening was unremarkable.

The older child, 10-year-old T.D., told the Troopers and later testified at trial that his mother yelled at his father about being late when his father came to pick them up. His father then sent him and his sister to the car where they waited until Drewson came out and they drove away. The younger child, nine-year-old S.D., told the Troopers and later testified at trial that Drewson and Rick came inside the house to pick them up and both stayed in the house when she and her brother were sent to wait in the car.

*. On advice of counsel, defendant declined to be interviewed at this stage of the investigation.

The interview of Forth, however, produced very different results. She had originally told the Caldwell police that nothing out of the ordinary occurred on the night of July 1st. In her statement to the Troopers, however, she said both Rick and Drewson were agitated when they arrived at the house and that Drewson had ordered her to put the children right to bed. When she came back downstairs, both men had changed from shorts into pants. Drewson told her they had gotten wet when getting a drink of water while picking up the children.

She said that after Rick left sometime later on the night of July 1, Drewson continued to act agitated. She said she asked him repeatedly what had happened and, several times, he told her that nothing happened, or to shut up, or to stop asking. Finally, she said, Drewson stood up and angrily told her he would “break [her] neck” if she said a word about the whole night. Then, she said, he shook his head, sat back down heavily, and made one statement. The Trooper's report of her account of the statement was: “He said he hoped he hadn't killed the bitch.” She said she did not ask anything more and had not mentioned the statement to the Caldwell police because she was afraid.

The Prosecution

Defendant was indicted on October 5, 2011 on one count of murder, contrary to N.J.S.A. 2C:11-3. Trial began with the selection of the jury on March 1, 2012. The State presented the testimony of numerous witnesses, including the Thurd family pathologist and investigating police. The children, neighbors and others testified to the stormy relationship between Drewson and Thurd and the children testified about the events of July 1, 2011, consistent with their statements to the police. Evidence that there were no fingerprints, including Thurd's, in or around the bathtub and that the bathtub was dry when the body was found was presented as well.

On the morning when the prosecutor was expected to call Forth to the stand, however, the prosecutor said there was a problem and asked the court to hold a hearing pursuant to N.J.R.E. 104 to determine the admissibility of Forth's statement to the State Troopers.

In the hearing, Forth repeatedly insisted that she did not remember what, if anything, Drewson had said to her on the night of July 1, 2011. She said she remembered being interviewed, remembered giving a statement to the Troopers, and remembered being asked to sign a written statement afterwards. She identified the signature at the bottom of the one-page statement as her own. However, she said even reading the statement she could not remember what Drewson had said:

> Q. You read this statement right?
> A. Yes.
> Q. That's your signature on the bottom?
> A. Yes.
> Q. So you signed this statement?
> A. I must have.
> Q. You must have or you did?
> A. I guess I did. I don't remember much. I was so shaken by everything.

Q. And the statement quotes you as saying what the defendant said to you, doesn't it?

A. It's got the words there, but I just don't remember what he said to me that night.

Q. You remember talking to the defendant when he and Rick got there with the kids?

A. Yes.

Q. But not what he said to you?

A. No. I just don't.

At that point, the trial judge interrupted and questioned Forth:

Q. . . . And do you recall . . . [defendant] saying to you that he said he hoped he didn't kill that person?

A. No.

Q. You don't remember that. Wouldn't that be a pretty --

A. I don't remember him --

Q. -- dramatic thing?

A. Yeah.

Q. That would be pretty important, right?

A. Yeah.

Q. And you told the police that's what he said?

A. That's what they wrote, I just don't remember.

Q. You don't remember anything about that now?

A. No.

State Police Sergeant John Schmidt then testified that, before taking the statement on September 15, 2011, he read Forth her rights, which she waived, and explained to her that it was very important for her to be complete and accurate. He identified the written statement, and identified his signature as a witness when Forth signed it.

At the conclusion of the hearing, the trial judge ruled that Forth's claim of lack of memory was not credible and ruled that the statement would be admissible as evidence as a prior inconsistent statement. See N.J.R.E. 803(a)(1). The jury was recalled, and the prosecutor called Sergeant Schmidt to the stand. He testified to the circumstances of the taking of the statement and then the prosecutor asked him to read it to the jury.

Defense counsel objected, stating that Forth should be called to testify before the jury before the statement could be offered. The trial court overruled the objection on the grounds that no purpose would be served by having Forth testify again that she did not remember the content of any July 1 conversation with the defendant. The statement was then read to the jury.

At the end of the State’s case, defendant moved for the entry of a judgment of acquittal which was denied. Defendant then presented his case. Forensic witnesses disputed the State’s theory as to the murder, and blamed the death on a head wound that might have been suffered by Thurd having slipped in the tub. Character witnesses

testified for defendant, and defendant testified in his own defense that Thurd was alive when he left her house and that he had left before Rick did.

In rebuttal, the State called one pathologist who testified that the head wound Thurd had suffered could not have been caused by falling in the bathtub. Both sides made closing statements, the jury was charged and began deliberating late in the day on Thursday, March 8, 2012. The jury dispersed that evening and began deliberating again on Friday, March 9. The judge told counsel the jury would be dismissed at 3:30 p.m. because the judge had a dental appointment at 4 p.m. At 3:25 p.m., with neither attorney present, the judge called the jurors into the courtroom, explained about the dental appointment and told the jurors they should return on Monday morning. The judge asked if the jurors had any concerns about the procedure and the following ensued:

> FOREPERSON: Could we take a copy of the information you read us about the law home with us this weekend to read, or is that something that we can't have?
>
> THE COURT: No jury has ever asked to do that.
>
> FOREPERSON: It's a lot to digest and we'd like the extra time to think.
>
> THE COURT: You know what, let me just check with ... No, well, I don't see any problem with it. I'll have the bailiff bring you copies in a moment. You can go ahead and take them home to read but bring them back on Monday.
>
> FOREPERSON: That's perfect, thanks.
>
> THE COURT: Okay, enjoy the weekend. And remember, don't read anything else, don't listen to anybody or anything, don't discuss the case at all until all of you are back Monday morning at 9:00. Okay.

The judge's secretary then made 12 copies of the jury instructions as they had been read to the jury in open court and the bailiff distributed them to the jurors. All 12 copies were returned to the courthouse when deliberations resumed on Monday, March 12, 2012.

Deliberations resumed at 9 a.m. on March 12th. The jury returned its verdict that day, finding the defendant guilty of murder. Defendant renewed his motion for a judgment of acquittal and moved, in the alternative, for a new trial; the motion was denied. On April 13, 2012, defendant was sentenced to a term of 30 years imprisonment without the possibility of parole. The defendant was committed to the custody of the Department of Corrections; bail pending appeal was denied.

Defendant filed his notice of appeal to this Court from the judgment of conviction on May 29, 2012.

Discussion

We conclude, first, that the trial did not commit reversible error in permitting the State to introduce the statement of the witness Forth without requiring her to testify in front of the jury to the same lapse of memory that she had described at length and in detail and under lengthy and complete cross-examination in the N.J.R.E. 104 hearing.

First and foremost, there is no question in this case as to the propriety of the determination that the witness' claim of memory lapse was false. It is important to note that the trial judge found as a fact that the witness' claim that she did not remember was feigned. Factual findings of a court are accorded considerable deference and affirmed "when supported by adequate, substantial and credible evidence" considering the record as a whole. *Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974). The judicial finding here that this witness was feigning memory lapse is supported by such evidence and will not be disturbed.

Second, no facts were elicited during the 104 hearing that in any way bore on the credibility of the witness at the time the statement was given. There was not the slightest hint of any inability to see, hear or perceive the events on the evening of July 1, 2011. To the contrary, the witness testified that that she had not used drugs or alcohol at all that day, was fully alert and conscious throughout the events reported in the statement and was able to hear clearly everything that was said.

Defendant was certainly given full latitude to try to impeach the credibility to the declarant as to the statement during the hearing. This is not a case in which a defendant was not given the fullest opportunity to test a witness' claim of a lapse of memory in cross-examination. To the contrary, every leeway was extended by the trial judge to defense counsel. Objections by the State even on grounds of repetitiveness were consistently overruled. At the end, however, there simply was nothing there to impeach with and, therefore, no harm in the court's decision.

Moreover, defendant was able to use the witness' statement affirmatively as part of his defense that the murder, if there was one, was committed by Rick. Counsel emphasized to the jury the inherent ambiguity in what defendant was supposed to have said to Forth -- that "he hoped he hadn't killed the bitch." The argument to the jury was that he (defendant) hoped he (Rick) had not killed Thurd.

We do not condone any action on the part of our trial courts that has the effect of diminishing a defendant's confrontation rights. Nevertheless, not all errors have such an effect. Indeed, our rules require us to disregard any error complained of on appeal "unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. This is not a case in which a witness testified on direct to incriminate a defendant before the jury and then was not cross-examined before the jury. This is not even a case where the defense can suggest a single colorable line of cross-examination it would have pursued in front of the jury if given the chance.

In the unique factual scenario presented by this case, we conclude that the admission of this witness' statement without requiring her to testify in front of the jury about her claim of memory lapse did not violate the defendant's right to a fair trial.

Turning to the question of the trial judge's decision to permit the jury to take home written jury instructions, we begin with the fact that it has long been part of our ordinary practice for a judge to provide written instructions to a deliberating jury. See e.g. *State v. Harris*, 141 N.J. 525, 555 (1995); *State v. Scherzer*, 301 N.J. Super. 363, 477 (App. Div.),

certif. den. 151 N.J. 466 (1997). Our court rules expressly permit a judge to provide instructions in writing.

How those instructions are provided and under what conditions are decisions that are within the discretion of the court pursuant to R. 1:8-8 as explained by our Supreme Court in *State v. O'Brien*, 200 N.J. 520, 541 (2009):

> The purpose underlying Rule 1:8-8 is to authorize the judge to provide the jury with written instructions where it would be helpful. Deciding what to do requires an exercise of discretion based on the particular facts of the case. That does not include the adoption of a blanket rule regarding the provision of written instructions that the judge applies in every case. Thus, at trial, a judge should make an individualized decision regarding the submission of written instructions to the jury on the basis of what is before him and not on any preconceived policy rationale.

As this was a discretionary determination, we affirm unless the decision is "so wide of the mark that a manifest denial of justice resulted." *State v. Kelly*, 97 N.J. 178, 216 (1984). We are at a loss to see how giving the jurors permission to take home unobjectionable jury instructions could even theoretically have resulted in a manifest denial of justice. The copy given to the jurors was word for word the charge read to them in open court without a single objection from the defense.

While it certainly would have been better practice for the trial court to consult with counsel before agreeing to the jury's request, our law and the law of our sister states demonstrates that any error is certainly harmless. See e.g. *Doster v. State*, 72 So. 3d 50, 100-101 (Ala. Crim. App. 2010), cert. den. 132 S. Ct. 760, 181 L. Ed. 2d 490 (2011); *People v. Gonzalez*, 157 A.D.2d 625, 627 (N.Y. App. Div. 1st Dep't. 1990); *Coleman v. State*, 465 N.E.2d 1130, 1134 (Ind. 1984).

In sum, the trial court's rulings did not violate the defendant's right to a fair trial. Accordingly, the decision of the trial court is hereby ***affirmed***.

MERCY, J.A.D., dissenting

I find the majority's conclusions to be irreconcilable with a proper reading of the law and the Constitution and, therefore, I respectfully dissent.

First, it is clear to me that the decision of the trial court to admit the statement of Stacy Forth without requiring Forth to testify and to be subject to cross-examination in front of the jury was a violation of the defendant's fundamental right to confront witnesses against him.

It simply cannot be overemphasized that our jurisprudence requires that witnesses deliver testimony in person and in open court. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The common-law tradition is one of live testimony in court subject to adversarial testing"). We have long considered cross-examination to be "'the greatest

legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970). We insist that the factfinders themselves see and hear the witnesses because of their critical role in observing the demeanor and evaluating the credibility of each witness that comes before the court. See *State v. Locurto*, 157 N.J. 463, 474 (1999); *State v. Johnson*, 42 N.J. 146, 161 (1964).

When a defendant is denied any opportunity at all to examine a witness in front of the jury, it is error of constitutional dimension, and cannot be blithely written off as harmless error. It is the obligation of the State to establish not merely that this was harmless but that it was harmless beyond a reasonable doubt. *State ex rel. J.A.*, 195 N.J. 324, 351 (2008); *State v. Castagna*, 187 N.J. 293, 312 (2006). This burden cannot be met in this case as to this very critical evidence.

This was not a case where there was overwhelming evidence of guilt. At best, the evidence was purely circumstantial and the jury had to choose between several equally colorable theories: that of the prosecution that Drewson, or Drewson and Rick together, murdered Thurd; and those of the defense that Rick alone killed Thurd when he sought to use the bathroom at the Thurd house after Drewson had gone to the car or, indeed, that there was no murder at all, and that Thurd had simply slipped and fallen in her own bath.

The defense evidence was at least as strong in this case as the prosecution's evidence. Defendant presented two forensic witnesses, both medical doctors, who testified that the State's pathologist's account of how Thurd had died was flawed. The witnesses asserted that the autopsy established that Thurd had suffered a blow to the head before she drowned and that the blow to the head was fully consistent with a slip in the tub. Several character witnesses testified to defendant's peaceful, law-abiding character. Defendant then took the stand and testified that Thurd was alive and well when he and the children left her house on Friday, July 1st. He said Rick had said he needed to use the bathroom just as he and Rick were leaving the house, and that Rick and Thurd had begun to argue about that as he went out and sat in the car. He said as much as 10 minutes passed before Rick came out, that Rick was very angry, complained that Thurd had thrown water at him and made a comment that he "wished that bitch was dead." Drewson said he told Rick not to make such comments in front of the children.

In this regard, it is important to remember that the boy T.D. did not recall whether Rick had been in the car or in the house and could not say if his father or Rick had come back to the car first. The younger child, the girl S.D., did not remember which of the two men had come back to the car first or if both had arrived at the car together. Neither child was able to estimate precisely how much time passed between the time when they were sent to the car and the time when they drove away. Both said it was "a little while ... not very long." In sum, this was not a strong prosecution case.

The difference in this case was Forth's statement -- a statement the defendant had no opportunity to explore in the presence of the jury. Whether he was able to salvage some benefit to his defense from the situation is not the test. On this record, I am unable to find the refusal of the trial court to require the witness to testify in front of the jury to be harmless beyond a reasonable doubt, and I would reverse on that basis.

I also cannot agree with the majority as to the trial judge's *ex parte* communications with the jury and the decision to permit the jurors to take home a copy of the court's jury instructions over a weekend without even consulting with counsel. The potential for mischief in a system wherein critical information is handed to a deliberating jury without any opportunity for participation by a defendant and in utter disregard of the defendant's right to be present at all critical stages of the trial is so vast that the procedure utilized in this case cannot be countenanced.

I begin with a deep and abiding conviction that we cannot countenance the trial court's failure to advise counsel of the jury's request or seek their input before acting on the jury's request.This was clearly improper. Counsel must be consulted before the court responds to a question from the jury. *State v. Whittaker*, 326 N.J. Super. 252, 262 (App. Div. 1999). Communications with a deliberating jury without the presence of the defendant and counsel are simply improper. *State v. Auld*, 2 N.J. 426 (1949). If the jury has need for any direction, it must be in open court in the presence of counsel and the defendant. *Leonard's of Plainfield, Inc. v. Dybas*, 130 N.J.L. 135, 137 (Sup. Ct. 1943). See also *State v. Gray*, 67 N.J. 144 (1975); *State v. Brown*, 275 N.J. Super. 329, 331 (App. Div. 1994); *Guzzi v. Jersey Central Power & Light Co.*, 36 N.J. Super. 255, 264-265 (App. Div. 1955). And see *United States v. United States Gypsum Co.*, 438 U.S. 422, 460-461 (1978).

The record makes it clear that defense counsel objected as soon as he learned that the jurors had had the instructions over the weekend. The trial court took no steps to ensure that a divergence in literacy and reading comprehension did not leave some jurors confused nor misdirect others into overemphasizing some portion of the instructions as opposed to others. Nor were any steps taken to ensure that a juror confused by some portion of the written materials did not act to clarify the confusion as, for example, by looking up a word in a dictionary.

The copy of the instructions provided to the jurors had handwritten markings by the trial judge and it cannot be known whether those insertions, deletions and underscores impacted the jurors. And it cannot be ignored, as my colleagues of the majority do, that the verdict was not merely returned on Monday after deliberations resumed. It was returned within 15 minutes after the jury reassembled. The impact of having had the instructions over the weekend on the speed of the Monday verdict cannot be gainsaid.

Because we cannot be certain that there was no impropriety by the jury in this case, the conviction should be set aside.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

No. 69,804

STATE OF NEW JERSEY	:	
	:	
v.	:	**ORDER**
PETER DREWSON,	:	
	:	
Defendant-Appellant.	:	
_____	:	

This matter having been brought before the Court on September 6, 2012, by the defendant-appellant, it is, on this 10th day of September 2012, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with the Court on or before November 26, 2012.

Jonus Pettifogger, Deputy Clerk
For the Court