STATE OF NEW JERSEY

v.

JORGE ZIMMER,
Defendant - Appellant

A-13-1234-T3

Superior Court, Appellate Division

Submitted August 1, 2013 - Decided August 30, 2013

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Cr-12-9028.

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

Angela Scory, First Assistant Prosecutor, argued the cause for the State of New Jersey (, Essex County Prosecutor; Ms. Scory of counsel and on the brief).

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

On March 15, 2013, following a jury trial in Superior Court, Law Division, Essex County, defendant Jorge Zimmer was convicted of one count of aggravated manslaughter. Defendant was sentenced thereafter to a term of 20 years in state prison.

In this appeal, defendant contends that the trial court violated his confrontation rights when it permitted a supervisor of the State Police Toxicology Laboratory to testify to his expert opinion as to the results of drug and alcohol screening tests when the laboratory supervisor reviewed and approved the final reports of those tests. He also contends that the trial court erred when, after excusing a sick juror during deliberations, it permitted jury deliberations to resume after an alternate juror was substituted.

We disagree on both counts. We hold that, while the better practice would have been to have the specific technicians who performed the laboratory tests to testify, the trial judge's decision to allow the witness to testify to his expert opinion was at worst harmless error. We further hold that the trial judge did not err in the particular circumstances of this case when it substituted an alternate juror during deliberations.

The Facts

Evidence at trial established that Jorge Zimmer was a Neighborhood Watch member in the neighborhood of the City of Newark known as the Ironbound when he encountered the decedent, Martin Trayvon, in a darkened schoolyard off Chestnut Street in Newark in the early morning hours of September 22, 2012.

The Ironbound is located to the east of Route 21, McCarter Highway, between Raymond Boulevard on the north and the city line on the south. Known for its shops and restaurants, the Ironbound welcomes visitors but is home to close-knit families as well. Because of residents' concerns that some of those drawn to its business district would overstay their welcome for purposes not conducive to public safety, the Neighborhood Watch was formed more than a decade ago as an auxiliary police force. Watch members must be residents of the Ironbound, between 21 and 40 years of age, in good health, and legally capable of obtaining a permit to carry a handgun. They receive training in weapons handling and in street surveillance and generally operate in teams of two or three. Their on-duty hours are scheduled by a Watch Commander.

Just before 1 a.m. on September 22, 2012, 16-year-old Martin Trayvon was walking on Chestnut Street in the Ironbound. Trayvon, who was on his way to the home of his uncle David Trayvon on Elm Street, was a high school sophomore from East Orange, six feet in height and 180 pounds, when he encountered Zimmer, 32 years old, 5'11" in height and 200 pounds, in the schoolyard of School No. 42. At the end of the encounter, Trayvon was dead of a single bullet wound to the abdomen.

According to witness testimony at trial, defendant was not scheduled to be on duty in the early morning hours of September 22, but rather was driving through the neighborhood on a personal errand. At approximately 12:50 a.m., defendant called the Watch Commander hotline number to report what he considered a suspicious person walking on Chestnut Street.

A tape recording of the report indicates that the following was, in part, what was said between Zimmer and the Watch Commander on duty:

Zimmer: There's a real suspicious guy. He's on Chestnut at Jefferson and he sure don't belong.
Watch Commander: Do you have a description?
Zimmer: Big. Black kid I think. This guy looks like he is up to no good or he is on drugs or something. Has his hand in his waistband.
Watch Commander: Okay, we'll notify the police.
Zimmer: I can keep an eye on him.
Watch Commander: No need. We're on it.
Zimmer: [slurring] I'm doing it. Assholes, they always get away.
Watch Commander: You're off duty. We're on it. Back off. [*10 second silence*]
Watch Commander: Are you following him?
Zimmer: Yeah.

Watch Commander: We don't need you to do that.
Zimmer: Okay. [*call discontinued*]

After the call ended, witnesses said defendant continued to follow Trayvon on Chestnut Street. Witness accounts were inconsistent as to defendant's exact route, but all witnesses testified that, at some point, defendant exited his vehicle and followed Trayvon on foot. No witness was in a position to see how it happened that Trayvon and defendant came face to face. Several heard words exchanged between the two, but no witness could testify as to exactly what was said. All witnesses agreed, however, that the final words they heard, spoken in a shrill high tenor voice, were "Back off!" – perhaps repeated more than once. Those words were followed by the sound of a single gunshot.

Police arriving on the scene testified that the victim lay face down in the schoolyard of School No. 42 just off Chestnut Street, a broken cellphone near his hand, and that he had no signs of life. An ambulance was called and one officer stayed with the body. Two other officers interviewed defendant and still others interviewed witnesses in the area.

The officers testified that defendant appeared shaken and dazed. Both officers said his speech was inconsistent and occasionally slurred although neither smelled any alcohol. Defendant told them he had been on foot attempting to see what Trayvon was doing when Trayvon came out of an alley and confronted him. He initially said he was attacked without warning, without provocation and without any words being spoken. Later he said Trayvon had threatened him and that he had stood his ground. He told police that Trayvon attempted to reach for his Neighborhood Watch weapon which he wore in a holster in plain sight, that the two struggled for control of the weapon and that he fired solely in self-defense.

Defendant told the officers he thought he had been hurt when he struggled with Trayvon so he was taken to St. Michael's Hospital for examination. No injuries were found. Because of his slurred speech, the officers asked for a blood sample to be taken. That blood sample was sent to the State Police Toxicology Laboratory for analysis. Defendant was held overnight for observation.

At the same time, the police investigation was continuing and the evidence began to suggest that it was defendant who had instigated the confrontation with the younger smaller Trayvon, and not the other way around. Trayvon's uncle told police he had been talking to the boy by cellphone and that Trayvon had told him he was being followed and was afraid. He told police that the boy's voice was shrill when they were speaking, that he heard a clattering sound and the yelling before the connection was broken.

Based on witness statements and inconsistencies between various accounts given by defendant, the case was presented to the Essex County Grand Jury in early October 2012.

The Prosecution

Defendant was indicted on October 5, 2012 on one count of murder, contrary to N.J.S.A. 2C:11-3. Prior to trial defense counsel notified the State that defendant would be interposing a defense of self-defense and invoking the then-newly enacted "Stand Your Ground" act. The State responded that it would contest defendant's invocation of the statute. It provided full discovery in advance of trial including the results of defendant's blood tests and a report by its proposed expert witness as to the blood results.

Trial began with the selection of the jury on February 18, 2013. The State presented the testimony of numerous witnesses, including the investigating officers, the Essex County medical examiner, residents of the area around School No. 42 in Newark, and witnesses to the events of September 22, 2012. Neighborhood Watch commander Jon Deaux testified defendant was not on duty on that morning and further testified to the tape recorded conversation he had had with defendant. David Trayvon and other members of the Trayvon family testified that the teenager had a high tenor voice, and David Trayvon testified to his telephone conversation with his nephew.

The State also presented the expert testimony of forensic toxicologist Dr. Anthony Casey, supervisor of the State Police Toxicology Laboratory's hematology unit. Over defendant's objection, Dr. Casey testified at length regarding defendant's blood sample, referencing his expert report that was later entered into evidence as a business record. He explained the general process by which the sample was submitted and tested and the specific tests which were run on defendant's blood. He testified that the results of the tests revealed that defendant's blood contained 270 ng/mL of alprazolam, a highly-addictive habit-forming prescription drug often prescribed for anxiety or panic disorder. He further testified that the blood level was nearly three times as high as would be expected at the highest dosage that might be prescribed for an individual of defendant's height and weight. He testified that, in his expert opinion, within a reasonable degree of scientific certainty, defendant was "clearly impaired" and "under the influence of drugs."

On cross-examination, Dr. Casey admitted he did not personally conduct the tests that were run on defendant's blood. He explained that the tests were performed by members of the lab's staff, and that he then reviewed and evaluated the data to produce the final report. He explained he had been trained on all of the tests performed and reviewed all testing done, and that "all of the tests were done appropriately, according to standard operating procedures, including quality controls and required calibrations."

The defense then presented its case, including the testimony of defendant himself. He testified that that Trayvon had been the aggressor, that he himself had been the one to yell "Back off!" during the encounter, that Trayvon had attempted to take his Neighborhood Watch weapon from his holster and that he had fired the fatal shot only in self-defense. He admitted that he had not attempted to retreat from the encounter and explained that he felt he had the right under the law to stand his ground. He further testified that he had been taking alprazolam for anxiety for several weeks at the time.

The jury was charged as to the law on the morning of March 6th. Just before 3 p.m. on March 8th, the foreperson sent out a note stating that the jury was having difficulty reaching a decision on the issues and that one juror was feeling extremely ill. With the consent of counsel, the trial judge called the jurors into the courtroom and dismissed them for the weekend, with instructions to clear their minds of the case during the recess and with special instructions to the ailing juror to keep the court posted as to her condition.

On Sunday afternoon, the ailing juror was admitted to the hospital near her home in Livingston with a diagnosis of pneumonia. The court was notified and brought counsel in at 8:30 a.m. on Monday, March 11, to consider the options. With the consent of counsel for the State and for the defense, one of the remaining alternates was substituted for the ailing jurors. The jurors were carefully and thoroughly charged as follows:

> You are in effect going to have to start over from the very beginning as if you were just getting the case for the very first time. Your new colleague has not had the benefit of your thinking, but more importantly you have not had the benefit of his thinking. So I am telling you that it is your duty and your obligation to wipe the slate clean and begin deliberations anew. Each and every one of you must start from the same place today.

The judge then asked the jurors to indicate if they believed they "might have any difficulty at all in following these instructions and starting all over again." No member of the jury offered any response.

Deliberations resumed at 10 a.m. on March 11th. The jury returned its verdict just before 4 p.m. on March 15th, finding the defendant guilty of the lesser included offense of aggravated manslaughter in violation of N.J.S.A. 2C:11-4(a)(1). It was then that the defense moved for a new trial on the ground that the substitution of the alternate jury violated his rights; the motion was denied. On April 12, 2013, defendant was sentenced to a term of 30 years imprisonment. 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 28, 2013.

Discussion

We begin our discussion by noting that, although this case arises in the context of New Jersey's recently enacted "Stand Your Ground" statute, there is no challenge to the statute or its application in this case. Both the State and the defense agree that the statute was validly enacted and is facially constitutional.

As amended in 2012, N.J.S.A. 2C: 2:3-4(b) provides, in relevant part:

> (2) The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm. ...
> (b) Unless he was the initial aggressor, an actor is not obliged to retreat:
> (i) from his dwelling, or
> (ii) from a public place, except that
> The provisions of this subsection (b) do not apply to any actor armed with a handgun who is under the influence of intoxicating liquor or any narcotic, hallucinogenic or habit-producing drug.

Thus, the single question posed in the case that arises because of the statute is the question of whether defendant – who was armed with a handgun – was entitled to stand his ground rather than being obliged to retreat from the encounter, if it was safe to do so, before using deadly force. Any other question about the statute itself will have to wait for another day.

We conclude, first, that the trial did not commit reversible error in permitting the State to introduce the expert opinion of Dr. Anthony Casey that defendant was in fact under the influence of a habit-forming drug at the time of the encounter between defendant and Martin Trayvon that resulted in Trayvon's death.

We are fully aware that the Confrontation Clause bars the admission of "[t]estimonial statements of witnesses absent from trial" except "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004). See also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). We do not regard the testimony of Dr. Casey as inadmissible testimonial hearsay and hold, therefore, that defendant's Confrontation Rights were not violated.

This is not a case where a laboratory certificate was prepared specifically for use at trial, and someone entirely independent of the testing system is produced in court to testify to the test results. In this case, the State did not call "just anyone" to testify about the analysis of defendant's blood sample. Dr. Casey was qualified to offer his independent opinion as an expert, and could thus rely on inadmissible hearsay to reach that opinion under N.J.R.E. 703. The data relied upon here were "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." N.J.R.E. 703. See also *State v. Torres*, 183 N.J. 554, 576 (2005); *State v. Dishon*, 297 N.J. Super. 254, 280-81 (App. Div.), certif. denied, 149 N.J. 144 (1997).

Although he did not personally perform the tests, he did not, as defendant contends, only "put his name on a report that represented the work product of others." Rather, he made an independent assessment of the data collected by the analysts he supervised; testified at length about both the general process by which blood samples are submitted and tested and the specific tests on defendant's blood sample; and explained the results of each test. He also testified he was trained in regards to all of the

testing, knew how to perform all of the tests, and noted they were "done appropriately, according to standard operating procedures, including quality controls."

Dr. Casey did not testify regarding a report authored by someone else but authored the report himself based on data that he reviewed. The jurors therefore based their decision on Dr. Casey's testimony and his expert opinion reflecting his independent analysis and assessment of the degree to which defendant was under the influence at the time. We are satisfied defendant's ability to meaningfully cross-examine him was not compromised as a result of his not personally performing these tests. There were no questions asked on cross-examination regarding the specifics of the testing procedures or results that Dr. Casey could not thoroughly answer. Here as in *State v. Rehmann*, 419 N.J. Super. 451, 457 (App. Div. 2011), there was no error in permitting the testimony.

Turning to the jury substitution question, we conclude first that we need not reach this issue at all since, if it was error at all, it was invited error. Even if we were to reach the merits, we would conclude that the trial court did not abuse its discretion under R. 1:8-2(d)(1) to substitute an alternate for the juror whose illness made it impossible for her to continue to deliberate.

The defendant in this case did not merely acquiesce in the substitution of the alternate. Both defendant and defense counsel expressly consented to the substitution. It is elementary that we do not reversed a trial court for an error committed at the instance of a party alleging it. See *State v. Kemp*, 195 N.J. 136, 155 (2008); *State v. Loftin*, 146 N.J. 295, 364-365 (1996); *State v. Baluch*, 341 N.J. Super. 141, 194-195 (App. Div.), certif. den. 170 N.J. 89 (2001).

Even if we were to reach the merits, this clearly was a case under *State v. Jenkins*, 182 N.J. 112, 125-130 (2004), where a juror's excusal resulted from a personal issue unrelated to the content or dynamics of the deliberations. The fact that the jury had deliberated for some time is not cause by itself for a mistrial. We will not countenance a per se rule requiring a mistrial any time a juror must be excused after a jury has deliberated more than briefly. We regard that as inconsistent with *State v. Corsaro*, 107 N.J. 339 (1987). There is no "bright line" rule that replacement cannot occur after a certain number of hours of deliberation. *State v. Williams*, 171 N.J. 151, 169 (2002).

This jury did not ask to be discharged on the grounds that it was deadlocked. No charge was given under *State v. Czachor*, 82 N.J. 392 (1980). Where a deadlock has not been announced, the length of post-substitution deliberations is a fair indication the jury did follow the court's instructions to begin deliberations anew. See *United States v. Virgen-Moreno*, 265 F.3d 276, 289 (5th Cir. 2001). Here deliberations continued for nearly five full days after the substitution of the alternate – longer by far than the jurors had deliberated before the substitution. There is no reason to believe that the jurors did not follow instructions and deliberate entirely anew once the alternate was substituted.

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 testimony of the laboratory supervisor as to the results of the blood testing 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).

The majority here uses the expert witness rule to circumvent the Constitution. It fails to recognize that the fundamental question of what the lab test showed – what if any substance was in the defendant's blood and in what quantities – required live testimony of the analyst or analysts who actually conducted the tests. See *Williams v. Illinois*, 567 U.S. ___, 183 L. Ed. 2d 89 (2012). Cloaking the hearsay in the mantle of expert opinion does not save it from being testimonial hearsay. The jury was not merely asked in this case to believe or disbelieve Dr. Casey; it was being asked to decide if defendant had or had not ingested one of the substances that would bar him from invoking the protections of the "Stand Your Ground" law. Dr. Casey did not conduct the tests that would have allowed him to answer that critical question. Thus defendant was denied the right to have the witness who did conduct the tests examined before the jury. This error was then exacerbated when the trial court admitted the expert report into evidence.

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.

The State's proofs here were not as damning as the majority makes them out to be. Defendant's case was wide-ranging, with testimony of members of his family including his mother Mary Zimmer that his voice became shrill and rose into the high tenor range when he was afraid. The decedent's uncle admitted that he could not identify who yelled "Back off!" during the encounter. Numerous witnesses spoke to the defendant's peaceable nature and good character and to his experience and training as a member of

the Neighborhood Watch. Defendant's treating physician testified that he had prescribed alprazolam for the defendant and that, in his opinion, defendant was taking it only as prescribed and would not have been considered under the influence at that dosage. Defendant confirmed in his testimony that he had taken never taken more than the prescribed dose and that he was in no way impaired at the time of these events.

Even with the inappropriate hearsay, this jury clearly did not view the defendant's actions as murder, finding him guilty only of aggravated manslaughter. There is no way to say that it would not have acquitted him entirely had it concluded that defendant was entitled to stand his ground. The harmless error test thus cannot be met.

I also cannot agree with the majority as to the trial judge's decision to substitute an alternate for the ailing juror and to permit deliberations to resume. First and foremost, it is singularly inappropriate to apply the invited error rule to so essential a question of jury composition. We have never applied the rule in such circumstances. See generally *State v. Simon*, 79 N.J. 191, 205 (1979); *State v. Berardi*, 369 N.J. Super. 445, 449-450 (App. Div. 2004), app. dism'd. 185 N.J. 250 (2005) ("if the error had prejudiced the integrity of the trial, we would not hesitate to order a new trial even though defense counsel may have precipitated the error").

Clearly the majority errs in its view of *State v. Jenkins*, 182 N.J. 112 (2004). That case made it clear that in the face of an apparent deadlock, not merely an announced deadlock, juror substitution is inappropriate. Moreover, "[t]he longer the period of time the jury deliberates, the greater is the possibility of prejudice should a juror be substituted or replaced," *State v. Miller*, 76 N.J. 392, 407 (1978), and the jurors here had already deliberated for days. I see no principled basis whatsoever to distinguish between the facts of this case and the facts of *State v. Banks*, 395 N.J. Super. 205 (App. Div.), certif. denied, 192 N.J. 598 (2007), in which we reversed a conviction because an alternate juror was substituted after the jury announced it was unable to reach a unanimous verdict. I would do the same in this case.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

No. 69,804

STATE OF NEW JERSEY	:	
	:	
v.	:	**ORDER**
JORGE ZIMMER,	:	
	:	
Defendant-Appellant.	:	
	:	

This matter having been brought before the Court on September 6, 2013, by the defendant-appellant, it is, on this 10th day of September 2013, 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 25, 2013.

Jonus Pettifogger, Deputy Clerk
For the Court