

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2397-05T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LESTER S. BARNEY,

Defendant-Appellant.

Submitted October 2, 2007 - Decided October 18, 2007

Before Judges Skillman, Winkelstein and
Yannotti.

On appeal from Superior Court of New Jersey,
Law Division, Burlington County, Indictment
No. 04-01-0077.

Yvonne Smith Segars, Public Defender,
attorney for appellant (Shara Saget,
Assistant Deputy Public Defender, of counsel
and on the brief).

Robert D. Bernardi, Burlington County
Prosecutor, attorney for respondent (Alexis
R. Agre, Assistant Prosecutor, of counsel
and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant was indicted for the purposeful or knowing murder of his wife, in violation of N.J.S.A. 2C:11-3a(1), (2); second-degree interference with his wife's custody of their child, in violation of N.J.S.A. 2C:13-4a(4); and contempt of a domestic violence restraining order, in violation of N.J.S.A. 2C:29-9b. The trial court severed the contempt charge before trial and amended the interference with custody charge to the third-degree offense during trial. Following a seven-day trial, a jury found defendant guilty of both purposeful or knowing murder and interference with custody.

The trial court sentenced defendant to life imprisonment, with the 85% period of parole ineligibility mandated by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2,¹ and a consecutive four-year term for interference with custody. The court dismissed the contempt charge.

Defendant killed his wife Alla in the late afternoon of September 29, 2003, following a court appearance in which Alla obtained a final domestic violence restraining order against him. That order enjoined defendant from having any contact with

¹ For the purposes of NERA, "a sentence of life imprisonment shall be deemed to be 75 years." N.J.S.A. 2C:43-7.2b. Therefore, defendant's minimum period of parole ineligibility is 85% of 75 years, or 63 years and 9 months.

Alla. In addition, it awarded temporary custody of their child, Danny, to Alla but allowed defendant parenting time.

Around 5 p.m., defendant went to visit with Danny at his daycare facility in Mount Laurel. Defendant regularly went to the daycare facility for this purpose but he would leave before Alla arrived to pick up Danny.

Defendant parked his car at the adjacent church parking lot and walked to the playground to play with Danny. After playing with Danny for about twenty minutes, defendant went inside to talk with the daycare facility's director, Virginia Eberling. Defendant told Eberling he had lost custody of Danny and then abruptly left when his cell phone rang.

At approximately 5:40 p.m., Alla arrived to pick up Danny and parked in the daycare parking lot. Upon entering the daycare center, Alla asked Eberling about a bag of Danny's clothes but Eberling did not know where the clothes were. Alla left with Danny at approximately 5:45 p.m.

Although defendant left the daycare center before Alla arrived, numerous witnesses testified that they saw defendant or his car in the area around the time Alla picked up Danny. For example, Jamie Brooks, an assistant teacher, testified that she saw defendant talking on the telephone and pacing back and forth on the sidewalk near the day care facility around the time of

Alla's arrival, and Danny's teacher, Christina Vorres, testified that she observed defendant in his car driving back to the daycare center while Alla was there.

Eberling testified that she left the daycare center around 6:05 p.m. As she was leaving the parking lot, she noticed that Alla's car was still there. This made Eberling "uneasy," so she stopped her car, got out and walked over to Alla's car. She peeked in the window and saw Alla lying inside the car with a long red hole in her neck and a slice across her throat. Eberling screamed, ran back to her car and drove to the police station where she reported Alla's apparent death. The police responded to the scene and found Alla's dead body in the car.

Around 7 p.m., defendant called Judith Hanney and told her he wanted to come to her home and "talk to [her] about something." Judith and her husband Tom had met defendant at their church and, at the request of their priest, Father Bohush, had invited defendant and Danny to their home several times. Judith told defendant that she had to take her daughter to band practice, so it would be inconvenient for him to come to her home at that time. When defendant insisted on seeing her, she told him to come later.

Defendant arrived at the Hanney home with Danny around 8 p.m. Shortly thereafter, defendant told Judith that "he did a

dumb thing today." When Judith asked what he meant, defendant said that he went to the daycare center to talk to Alla, that they got into an argument, and that "there was a knife." Defendant also said that he "grabbed [Alla] by the wrists and [he] cut her[.]" Judith then asked defendant where Alla was, and defendant responded that she was in the hospital. Judith persuaded defendant to speak with Father Bohush. She reached the priest by telephone and gave defendant the telephone. At this point, Judith's husband Tom came home, and she told him what defendant had said about inflicting a knife wound upon his wife.

Tom then spoke to defendant while Judith sat with Danny. According to Tom, defendant gave him the following account of the murder:

Q. Did he say what happened when he went to the daycare center?

A. He said that he waited for Alla outside and when she came out he and she sat in her car, I believe it was, and that he was trying to talk to her and then kind of in a rush he said there was, you know, an argument and a struggle and there was a knife and they struggled with the knife and basically he said ["I cut her"] and he made this motion.

THE COURT: Motion that the witness just made is a motion moving from left to right with his right hand, the witness's right hand across the neck area, is that an accurate description --

THE WITNESS: That is correct.

THE COURT: -- of what you just did, sir?

THE WITNESS: Did exactly this and he said we struggled and if she's alive it's a miracle.

[THE PROSECUTOR]:

Q. Did he tell you that Alla had the knife?

A. No.

Q. He just said there was a knife?

A. Yes.

Q. Okay. Did he tell you that Alla attacked him?

A. No.

Q. He just said there was a struggle?

A. Yes.

Defendant also told Tom that Father Bohush's advice to him was to leave the Hanney home right away and turn himself in to the police. Defendant then drove away from the Hanneys' home, leaving Danny with them. Shortly thereafter, Judith called the police to tell them that they had Danny.

At around 9:45 p.m., the police found defendant inside his car in a residential development in Cherry Hill. Defendant was sitting in the car by himself, holding a knife to his chest.

Following a one hour stand-off with the police, defendant exited his car, and the police arrested him. During the stand-off, defendant apparently inflicted minor cuts and scratches to his chest with the knife.

At trial, defendant took the stand in his own defense and presented a version of the killing of his wife that could have supported a defense of self-defense or accident. According to defendant, he stayed at the daycare facility because he had Danny's shopping bag of clothing and wanted to give it to Alla. He also hoped to persuade her to allow him to take Danny to his home for the night. He approached Alla's car with the bag of clothing and asked if he could take Danny for the night.

Defendant gave the following version of what occurred next:

She turned around and looked at me and gave me a rather disgusted and nasty look and said ["fuck you["] and then she turned around and reached into her car and I thought she was going to call and use her cell phone so I came over to her, said ["please don't.["] I didn't want her to call the police right away. She turned around and she had a steak knife in her left hand and as she wield[ed] around in front of me, she cut the nail off my left hand but I grabbed her hand, her left hand with my right hand and yelled ["what the hell are you doing?["] And we struggled for a moment. She grabbed the knife with her right hand and the knife was losing -- the knife was moving because we were struggling and I know that's how she cut her finger on her right hand. At this point I'm saying stop it and she raised her right knee I

think to probably knee me in the groin and we both fell backwards into the car. The knife was in both of our hands and I tried to turn so my back was to Daniel, then the knife went right into her throat. It was an accident. And there was pulsing blood everywhere. I got back out and I grabbed Daniel and I put him into my car and I went back to holler and shouted her name and looked at her and it was clear that the wound was mortal and I took her hand and I just cried and I backed up, shut the door to the car and I went back to my car. The only thing I was thinking [was that] I had to get Daniel away, get him to safety. I did some not so smart things at that point but I wasn't thinking rationally. I'd just seen the most horrible thing in my life. You saw the images. If you saw it when I saw it, it was even terrible. I'm sorry.

Defendant then left the scene with Danny without calling for help and threw the knife used to inflict the fatal wounds upon Alla out the window of his car.

On cross-examination, defendant initially claimed he had inflicted only a single knife wound upon Alla during their struggle. However, after being confronted with photographs and the medical examiner's testimony that he had cut not only both of Alla's jugular veins and both of her carotid arteries but also her chin and jaw down to the bone, defendant claimed the knife had also "caught her chin."

Based on this evidence, the jury found defendant guilty of murder and interference with custody.

On appeal, the Public Defender filed a brief on defendant's behalf, which presents the following arguments:

- I. THE ADMISSION OF GRUESOME CRIME SCENE AND AUTOPSY PHOTOGRAPHS AND VIDEOTAPE DEPRIVED BARNEY OF THE RIGHT TO A FAIR TRIAL. U.S. CONST. AMEND. VI, XIV; N.J. CONST. ART. I, PAR. 9, 10. (Partially Raised Below).
- II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, IN LIEU OF AN OFFICIAL READBACK, IT ALLOWED THE JURY TO HAVE A COPY OF THE ENTIRE TESTIMONY OF BARNEY AND DR. RAGASA, DENYING BARNEY OF HIS RIGHT TO A FAIR AND PUBLIC TRIAL. (Not Raised Below).
- III. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED BARNEY'S MOTION TO DISMISS COUNT TWO OF THE INDICTMENT.
- IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO SEVER THE COUNTS OF THE INDICTMENT. (Not Raised Below).
- V. BARNEY'S SENTENCE IS MANIFESTLY EXCESSIVE.

In addition, defendant filed a supplemental pro se brief, which presents the following arguments:

- I. THE TRIAL JUDGE'S RULING WHICH ALLOWED THE STATE TO INTRODUCE IN ITS CASE IN CHIEF THE EVIDENCE OF FINAL RESTRAINING ORDER WAS AN ABUSE OF DISCRETION IN VIOLATION OF THE NEW JERSEY SUPREME COURT'S MANDATE IN STATE V. CHENIQUE-PUHEY, 145 N.J. 334 (1995), DENYING BARNEY DUE PROCESS AND A FAIR TRIAL. (Partially raised below).

- II. THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY WERE INADEQUATE, ERRONEOUS AND MISLEADING TO SUCH AN EXTENT AS TO HAVE LED THE JURY TO A CONCLUSION IT MIGHT NOT HAVE REACHED AND DEPRIVING BARNEY DUE PROCESS AND A FAIR TRIAL IN CONTRAVENTION OF HIS RIGHTS GUARANTEED UNDER THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE 1, PARAGRAPH 10, OF THE NEW JERSEY STATE CONSTITUTION. (Not raised below).
- A. THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY WERE INADEQUATE IN THAT THE JUDGE FAILED TO INSTRUCT THE JURY CONCERNING CAUSATION.
- B. THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY WERE ERRONEOUS AND MISLEADING IN THAT THE TRIAL JUDGE PREJUDICIALLY AMENDED THE MODEL JURY CHARGE AND FAILED TO MOLD THE INSTRUCTIONS TO THE FACTS OF THE CASE.
- C. THE TRIAL JUDGE ERRED IN ADMITTING OTHER-WRONGS EVIDENCE WITHOUT ANY INSTRUCTIONS ON THE LIMITED USE, OR PROHIBITED USE OF SUCH EVIDENCE.
- D. THE TRIAL JUDGE SHOULD HAVE INSTRUCTED THE JURY ON THE STATUTORY AFFIRMATIVE DEFENSE ON THE CHARGE OF INTERFERENCE WITH CUSTODY UNDER N.J.S. 2C:13-4c(1).
- E. THE TRIAL JUDGE ERRED BY GIVING THE JURY A SEQUENTIAL VERDICT SHEET.

Defendant's arguments are clearly without merit. R. 2:11-3(e)(2). However, we comment briefly upon the arguments presented by the Public Defender.

The State sought to introduce into evidence nineteen photographs of the victim and the crime scene. The trial court admitted ten of the photographs but excluded nine others as cumulative and overly gruesome. The court also admitted a videotape of the crime scene. The court concluded that the photographs and videotape were highly relevant to defendant's defense of self-defense or accident and that their probative value was not substantially outweighed by the risk of undue prejudice.

It is well-established that photographs of the victim and scene of a murder are admissible to show that the killings were done knowingly or purposefully. State v. McDougald, 120 N.J. 523, 582-83 (1990). The determination whether to admit such evidence is committed to the sound discretion of the trial court. Id. at 582. To demonstrate an abuse of that discretion, "the potential for prejudicial information must significantly outweigh the photos' probative worth, to the extent that the jurors are diverted 'from a reasonable and fair evaluation of the basic issue of guilt or innocence.'" Ibid. (quoting State v. Sanchez, 224 N.J. Super. 231, 251 (App. Div.), certif. denied, 111 N.J. 653 (1988)).

The trial court did not abuse its discretion in admitting the photographs of the victim and videotape of the crime scene. The defense was self-defense or accident, and defendant was the only eyewitness. The photographs and videotape showed that defendant had viciously assaulted the victim and inflicted multiple serious stab wounds upon her. Although the medical examiner and other witnesses described those wounds and the murder scene, the photographs and videotape provided more direct and compelling evidence that Alla's injuries were inconsistent with defendant's defense of self-defense or accident and that the murder was purposeful or knowing. The crime scene photographs and videotape also showed Alla's position inside the car, which helped rebut defendant's version of Alla attacking him while he was standing outside her car. Therefore, even though some of the photographs are unpleasant to view, they were properly admitted.

II

During deliberations, the jury requested a readback of defendant's testimony regarding his struggle with Alla and of the entire testimony of the medical examiner, Dr. Dante Ragasa. The trial court commented that it would be quite time-consuming to read back all this testimony and asked counsel:

[D]oes it make sense to simply have [the court reporter] certify the record of that testimony in [the] form of a transcript and give that to them in its entirety rather than read it back?

Defense counsel responded, "I would suggest that, Judge, it makes more sense[,]" and the prosecutor had no objection to this proposal. However, defendant now argues that it was reversible error for the court to provide the jury with transcripts of this testimony rather than to have it read back in the courtroom.

A readback of testimony at the request of the jury is discretionary with the trial court. State v. Wilson, 165 N.J. 657, 660 (2000). Although the court rules do not contain specific authorization for the trial court to provide the jury with a transcript of trial testimony rather than to read back that testimony in open court, there is also no prohibition against this procedure. Moreover, defendant specifically consented to the procedure and has not shown how he could have been prejudiced by the court providing the jury with transcripts of trial testimony rather than having it read back in open court. In addition, the court carefully instructed the jury regarding their responsibilities when reading the transcripts. Therefore, we conclude that the use of this procedure did not constitute reversible error.

III

Defendant argues that the trial court erred in denying his motion to dismiss the interference with custody charge because a dead parent cannot be deprived of custody of his or her child and the State failed to prove Alla was still alive when defendant removed Danny from her car. However, the fatal assault upon Alla and the removal of Danny from Alla's custody occurred almost simultaneously. Indeed, the removal of Danny may have been a motive for the murder. Furthermore, the jury could reasonably have found that the interference with custody started when defendant entered Alla's car and assaulted her, before removing Danny from the car; that is, that defendant "detain[ed]" Danny within the intent of N.J.S.A. 2C:13-4a(4) while he was committing the fatal attack upon Alla. Therefore, the evidence was sufficient to support this charge.

IV

Defendant argues that the trial court committed reversible error in failing to sever the interference with custody charge from the murder charge. Defendant did not move for such a severance before trial, and we are satisfied that, if such a motion had been made, it would have been denied because there was no basis for severance of these intertwined charges. The

murder of his wife was the means by which defendant accomplished the interference with custody. Therefore, the murder was part of the res gestae of the interference charge, and for that reason evidence of the murder would have been admissible even if the interference charge had been tried separately.

V

Finally, defendant argues that his sentence was excessive and that the trial court erred in imposing a consecutive sentence for the interference with custody conviction. We find no abuse of discretion in the sentence. The trial court acted within its discretion in giving little weight to defendant's lack of prior criminal record, which the court identified as an applicable mitigating sentencing factor, in light of defendant's history of domestic violence incidents. The removal of Danny from the car after Alla's murder posed a discrete risk of serious harm to another victim, which provided an adequate foundation for imposition of a consecutive sentence for the interference with custody conviction.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION