NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RICHARD A. MCANULTY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1915 WDA 2011

Appeal from the Judgment of Sentence August 9, 2011
In the Court of Common Pleas of Westmoreland County
Criminal Division at No(s): CP-65-CR-0003147-2010

*****

COMMONWEALTH OF PENNSYLVANIA Appellee v. RICHARD A. MCANULTY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1916 WDA 2011

Appeal from the Judgment of Sentence August 9, 2011
In the Court of Common Pleas of Westmoreland County
Criminal Division at No(s): CP-65-CR-0003108-2010

BEFORE: BOWES, J., LAZARUS, J., and COLVILLE, J.*
MEMORANDUM BY LAZARUS, J. FILED: May 23, 2013

Richard A. McAnulty ("McAnulty") appeals from the judgment of sentence imposed in the Court of Common Pleas of Westmoreland County

---

* Retired Senior Judge assigned to the Superior Court.

following a jury trial and convictions for murder of the first degree;[1] burglary;[2] persons not to possess, use, manufacture, control, sell or transfer firearms (two counts; F2);[3] and firearms not to be carried without a license (F3).[4] Upon review, we affirm.

The facts of this case are as follows. On July 11, 2010, McAnulty was at his residence in Homer City, Indiana County, where he lived with his wife, Carolyn Diane McAnulty ("Diane"), and his ailing mother, Patricia. Kimberly Ann Gray ("Gray"), Patricia's caregiver and a Resta Home Health employee, was also at McAnulty's home on that day. At about 11:00 a.m., Tony Reid ("Reid"), a friend of McAnulty's, briefly stopped by the house, and he and McAnulty spent some time in the garage inspecting a broken lawnmower. Reid testified that McAnulty did not appear angry and that he "didn't smell any alcohol on his breath." N.T. Trial, 07/18/2011, at 639.

After Reid left, McAnulty "stepped out on the front porch" with Diane, and got into an argument with her. N.T. Trial, 07/12/2011, at 228. The argument related to the e-mails Diane received from Harry Mears ("Mears"), the victim, during their extramarital affair in 2009. McAnulty also learned

---

[1] 18 Pa.C.S. § 2502(a).

[2] 18 Pa.C.S. § 3502(a).

[3] 18 Pa.C.S. § 6105(a)(1).

[4] 18 Pa.C.S. § 6106(a)(1).

about Mears' recent e-mail "recontact" with Diane. N.T. Trial, 07/14/2011, at 568. The argument got "loud," McAnulty sounded "angry," and there was a sound "like somebody was pushed into the front door." N.T. Trial, 07/12/2011, at 230-31.

When McAnulty walked back into the house, he started listening to the music from his father's funeral and "looking at papers." ***Id.*** at 233. He then got up, came over to Gray, "threw the e-mails" at her and told her to read them. ***Id.*** at 233.

At trial, Diane authenticated the e-mails as "correspondence e-mails from [Mears]" to her. N.T. Trial, 07/18/2011, at 654. She testified that McAnulty had access to her e-mails, and that he kept copies of the three e-mails from Mears to her "in a drawer of a piece of furniture" in one of the rooms in their home. ***Id.*** at 654. She also testified that the relationship ended approximately one year before Mears' death, and that Mears recently recontacted her by sending his "last e-mail" to her on June 21, 2010, a few weeks before McAnulty shot him. ***Id.*** at 656. She stated that she deleted that e-mail from her inbox, and that she was unaware whether McAnulty had read it.

Gray testified that McAnulty informed her "there was a job that needed to be done." N.T. Trial, 07/12/2011, at 237. McAnulty picked up his rifle and "went out the front door." ***Id.*** at 244. Gray tried to stop him but he "got into his burgundy truck" and drove off. ***Id.*** at 245. Gray then called her supervisor and reported that "there was a problem in the home" and

that she understood that McAnulty was "going to Greensburg," where Mears lived, to "take care of something." ***Id.*** at 256-57.

At approximately 2:30 p.m., McAnulty picked up Jevon Scott Little ("Little"), a hitchhiker, who was standing on Route 119, on his way back to Greensburg where he lived. McAnulty mentioned to Little that he was trying to locate his former employer who resided in Greensburg. He said that "they had a disagreement in the past" but that was over now and he "was just going to pick up some money from the guy." ***Id.*** at 317. McAnulty asked if Little could assist him with locating his house in Greensburg. He showed Little a piece of paper on which the victim's name, e-mail address, telephone number and home address were written. ***Id.*** at 320. Little testified that he and McAnulty were talking during the entire twenty-five to thirty-minute trip to Greensburg and that McAnulty did not appear to be angry, did not show any signs of intoxication, and seemed "level-headed" and "in control." ***Id.*** at 322.

Upon arrival in Greensburg, McAnulty and Little stopped at a Volunteer Fire Department to get directions. Little noticed, as they exited the truck, that McAnulty was wearing a "large camouflage holster. . . over his left shoulder." ***Id.*** at 325. As there was no one present at the firehouse, McAnulty and Little then stopped at a bar to get directions. Ann Jones, a waitress at the bar, testified that McAnulty's demeanor at the bar did not strike her as unusual in any way, and that he was "[j]ust a normal customer." N.T. Trial, 07/13/2011, at 443. She also stated that, upon

getting directions from two bar patrons, McAnulty left without finishing his drink.

After McAnulty and Little located Mears' residence at 615 Oakland Avenue, Little told McAnulty that he could walk to his home from there. McAnulty said that he would "take him to [his] house" first and then return. N.T. Trial, 07/12/2011, at 333. When Little was exiting McAnulty's truck, he noted a "pistol" with a "wooden grip" laying on the back seat. ***Id.*** at 334. The weapon was later identified as the firearm used in the shooting.

At about 3:15 pm, McAnulty arrived at Mears' home. Gray testified that McAnulty told her that when Mears' opened the door, McAnulty stuck his pistol inside. Mears started screaming and shut the door but McAnulty kicked the door in, and chased him upstairs. As Mears exited the window and climbed onto the roof, McAnulty shot him in the leg. Mears fell from the roof onto the ground. McAnulty went outside and stood over Mears who was crying, "Help me, please somebody help me . . . . God, please help me." N.T. Trial, 07/11/2011, at 73. When Mears told McAnulty "how bad it hurt," McAnulty replied, "[N]ot as bad as my heart. You'll never sleep with another man's wife." N.T. Trial, 07/12/2011, at 271. He then shot Mears twice in the chest.

Peggy Mars ("Mars"), who residing at 613 Oakland Avenue, adjacent to Mears' home, heard a loud noise followed by a plea for help. Peggy recognized Mears' voice. She exited her house and saw Mears lying between

their homes, "a fountain of red blood coming out of his shoulder." N.T. Trial, 07/11/2011, at 79.

Another neighbor, Joanne Fetter ("Fetter"), who resided at 618 Oakland Avenue, across the street from Mears, heard a loud noise, looked out her front door and saw Mears come out from his second-floor window, get onto the roof above the porch and roll off the roof onto the ground. From her home, Fetter saw Mears lying between the Mears' and Mars' homes. She immediately called 911. Joanne also observed McAnulty cross Oakland Avenue "with a gun in his hand," get into his truck, and drive away. ***Id.*** at 98.

Jeffrey Donati ("Donati"), another neighbor, saw Mears "falling from the air and landing on the ground" at the side of his residence. ***Id.*** at 138. Within seconds, he "saw a man exit the residence and [go] between the houses." ***Id.*** at 142. Donati heard "another bang-like sound, like a gunshot." ***Id.*** After that, he saw a man, McAnulty, "casually walk from the area" and get into his truck. ***Id.***

Dave Thomas ("Thomas"), another neighbor, identified McAnulty as carrying "a large frame revolver" and leaving the area in a "maroon F150" truck. ***Id.*** at 161-62. Thomas stated that McAnulty "seemed pretty calm." ***Id.*** at 164.

At 4:30 p.m., McAnulty called his home, spoke with Gray and told her that he had killed Mears. She testified that "he didn't sound angry." N.T. Trial, 07/12/2011, at 263. At 4:41 p.m., McAnulty called Reid on his cell

phone, and said to him, "I shot him." N.T. Trial, 07/18/2011, at 641. When Reid asked him who he shot, McAnulty answered, without explaining more, "I shot him in his leg as he fell out the window." ***Id.***

After arriving at his home, McAnulty started crying; he was "very nervous" and "very upset." N.T. Trial, 07/12/2011, at 267. He placed his pistol and a camouflage holster on a lawn chair on the porch. He then related to Gray the events that had occurred after he left the house that day. Shortly afterwards, McAnulty summoned police.

Officer Richard Stepinsky executed a search warrant and collected an "AR-15 Scope Rifle," the camouflage holster, multiple rounds of ammunition, and a "Ruger Super Redhawk 44 magnum revolver." ***Id.*** at 351, 355. He also seized a computer from McAnulty's home.

An autopsy conducted upon Mears by Cyril H. Wecht, M.D., revealed that Mears had sustained three gunshot wounds. Dr. Wecht testified that the principal cause of death was the bullet that entered Mears' back, traversed his chest, and "produced all the damage internally." N.T. Trial, 07/13/2011, at 407.

Corporal David Burlingame, a Forensic Firearm Toolmark Examiner at the Erie Regional Crime Laboratory, testified that the bullets test-fired from the AR-15 scope rifle seized from McAnulty's home were compared with the discharged bullets taken from Mears' body and were a match to a "reasonable degree of scientific certainty." ***Id.*** at 423.

Detective Terry Kuhns presented evidence that McAnulty "did not possess a permit to carry a firearm." ***Id.*** at 517. In a separate proceeding it was established that McAnulty had been convicted of rape and kidnapping in Indiana County in 1976.

The officers who observed McAnulty that evening testified that there were no "indicators" that he was intoxicated. ***Id.*** at 451, 537.

McAnulty waived his right to testify. He presented the testimony of Lawson Frederick Bernstein, M.D., a clinical and forensic psychiatrist. Dr. Bernstein stated that McAnulty "had a history of depression," and that he "abruptly" stopped taking his antidepressant one week before the date of the shooting. N.T. Trial, 07/14/2011, at 565. Dr. Bernstein testified that McAnulty was on a substantial dose of an antidepressant, which it was dangerous to stop taking abruptly, because withdrawal results in "very typical behavioral changes, agitation, irritability, rage events, [and] suicidal thoughts." ***Id.*** at 566. He also noted that McAnulty had certain physical disabilities at that time, and was mourning the "recent death of his father." ***Id.*** at 567. Further, Dr. Bernstein stated that McAnulty was "a prodigious user of alcohol," and that on the date of the offense, he consumed multiple alcoholic drinks. ***Id.*** at 570. Dr. Bernstein also testified that, according to McAnulty, on the date of the offense, he reviewed the e-mails of "fairly graphic" content that Mears sent his wife the year before, and that upon rereading those e-mails, he felt "physically ill, heartbroken, [and] humiliated." ***Id.*** at 576.

Dr. Bernstein stated that he did not believe that McAnulty "would meet the criteria for legal insanity, based on any psychiatric disorder he might have." ***Id.*** at 578. He also opined that he did not think "the level of psychiatric disability that [McAnulty] was suffering from" would have prevented him from forming the specific intent to kill. ***Id.*** at 579.

On July 18, 2011, following a five-day jury trial before the Honorable Debra A. Pezze, McAnulty was convicted of the aforementioned offenses. On August 9, 2011, Judge Pezze sentenced him to life in prison without parole for murder of the first degree. The court also imposed a consecutive sentence of five to ten years' incarceration on the possession of firearms prohibited conviction. No further sentence was imposed for the remaining convictions.

Following sentencing, McAnulty filed post-sentence motions, which the court denied by opinion and order dated on November 10, 2011. McAnulty filed a timely notice of appeal on December 7, 2011. On December 9, 2011, the court ordered McAnulty to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), which McAnulty filed on February 21, 2012, after the court granted his motions for extension of time. On March 26, 2012, the court issued a decree pursuant to Rule 1925(a), referencing its November 10, 2011 opinion and setting forth the place in the record where the reasons for the decision of the court may be found.

On appeal, McAnulty raises the following issues for our review:

> 1. Whether the trial court erred in permitting the admission of autopsy photographs[,] which were [inflammatory] in nature, of little evidentiary value[,] and served only to prejudice the jury.
>
> 2. Whether the trial court erred in failing to give an instruction to the jury regarding a missing expert witness.
>
> 3. Whether the Commonwealth deliberately misled defense counsel into believing that a witness was to be called as a prosecution witness and subsequently failing to call said witness, thereby denying the defense time to locate, subpoena and call said witness as a defense witness.
>
> 4. Whether the trial court erred in not reversing the jury verdict as against the weight of the evidence.

Brief of Appellant, at 5.

McAnulty argues that the trial court abused its discretion by allowing admission of "inflammatory" autopsy photographs. Brief of Appellant, at 10. He concedes that he shot and killed Mears and that Mears died from gunshot wounds, and asserts that the there was no need to present autopsy photographs to the jury. He argues that the photographs had little evidentiary value and only served to prejudice the jury against him.

Our Supreme Court's standard of review when considering the admissibility of photographs is well established:

> The admission of photographs is a matter vested within the sound discretion of the trial court whose ruling thereon will not be overturned absent an abuse of that discretion. . . . [P]hotographic images of the injuries inflicted in a homicide case, although naturally unpleasant, are nevertheless oftentimes particularly pertinent to the inquiry into the intent element of the crime of murder. In determining whether the photographs are admissible, we employ a two-step analysis. First, we consider whether the photograph is inflammatory. If it is, we then consider whether the evidentiary value of the photograph outweighs the likelihood that the photograph will inflame the minds and passions of the jury. Even gruesome or potentially

> inflammatory photographs are admissible when the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Commonwealth v. Solano, 906 A.2d 1180, 1191-92 (Pa. 2006) (citations omitted).

To be deemed inflammatory, the photograph "must be of such a gruesome nature or be cast in such an unfair light that it would tend to cloud an objective assessment of the guilt or innocence of the defendant." ***Commonwealth v. Dotter***, 589 A.2d 726, 729 (Pa. Super. 1991) (citation and quotation omitted).

Here, the Commonwealth introduced only the photographs taken in Dr. Wecht's autopsy room to establish McAnulty's intent to kill Mears, and to corroborate Dr. Wecht's testimony. ***See Commonwealth v. Jacobs***, 639 A.2d 786, 789) (Pa. 1994) (stating that "even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs"). The Commonwealth minimized the possibility of prejudice to McAnulty by choosing not to exhibit "any photographs of [Mears] lying dying or dead next to the house." N.T. Trial, 07/07/2011, at 17. There was no indication in the record that the exhibited autopsy photographs were gruesome or particularly inflammatory.

Although McAnulty admitted that he shot Mears because of his anger over Mears' affair with his wife, the photographs had independent evidentiary value by allowing the jury to evaluate whether McAnulty acted

with deliberation. ***See Jacobs***, ***supra*** ("a jury can often best perform its function if it has not been unduly insulated from gaining a full understanding of the crime itself"). By enhancing the jurors' awareness of the extent of the inflicted harm, the autopsy photographs supported the Commonwealth's theory that McAnulty purposely fired shots at Mears in places where they were designed to cause his death and that, therefore, the killing of Mears was "willful, deliberate, and premeditated." 18 Pa.C.S. § 2502(d). ***See also Commonwealth v. Mitchell***, 902 A.2d 430, 444 (2006) (stating that repeated use of a deadly weapon upon vital parts of victim's body demonstrates a specific intent to kill beyond a reasonable doubt); ***Commonwealth v. McCutchen***, 454 A.2d 547, 549 (Pa. 1982) ("There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt.").

After careful review, we conclude that the trial court did not abuse its discretion in determining that the probative value of the autopsy photographs outweighed any potential prejudicial effect.

McAnulty next argues that the trial court should have given a missing witness jury instruction as to a computer forensics expert who, he claims, the Commonwealth failed to call as a witness. McAnulty asserts that the Commonwealth knew the whereabouts of the expert witness and his contact information, but provided him with only his business telephone number.

Our Supreme Court has articulated the following "missing witness" inference rule:

> [W]hen a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference that it would have been unfavorable.

Commonwealth v. Manigault, 462 A.2d 239, 241 (Pa. 1983) (quotation, citations and emphasis omitted).

Here, the Commonwealth utilized the services of Glenn K. Bard, who forensically analyzed Mears' computer in connection with the investigation. Bard was able to access Mears' e-mail to Diane. As part of discovery, the Commonwealth provided McAnulty with the e-mail that supported his claim that it contributed to his "hours long period of rage." N.T. Trial, 07/14/2011, at 569. McAnulty tried to locate Bard so that he could authenticate the e-mail but was unable to do so.

There is no indication in the record that Bard was available only to the Commonwealth. The record demonstrates that the Commonwealth supplied McAnulty with Bard's business telephone number but that Bard "did not want to cooperate," and did not return the phone call of McAnulty's counsel. N.T. Trial, 07/18/2011, at 629. In addition, McAnulty could have subpoenaed Bard to secure his appearance by court order but failed to do so.

Furthermore, Bard's absence did not cause any prejudice to McAnulty as Diane authenticated the e-mail in question, which was material to the

issue, and the court subsequently admitted it into evidence. Bard's testimony, therefore, would have been "merely cumulative," of Diane's testimony. ***Manigault***, ***supra***.

We conclude that the trial court did not err in denying a missing witness jury instruction.

McAnulty further claims that the Commonwealth deliberately misled him into believing that it would call Bard as a prosecution witness and subsequently failed to do so. He argues that, as a result, the Commonwealth denied him time to locate, subpoena, and call Bard as a defense witness.

Our Supreme Court has "long recognized that in criminal trials the prosecution is not absolutely bound to call to the stand all available and material eyewitnesses." ***Commonwealth v. Gray***, 271 A.2d 486, 490 (Pa. 1970) (citations and quotation omitted).

The Commonwealth provides the following explanation regarding its practices with respect to prospective witness lists:

> It is customary in Westmoreland County for the Commonwealth to provide the court and trial counsel with a Prospective Witness List. The Prospective Witness List is then read to potential jurors in order to identify any relationships between potential jurors and witnesses.

Brief of Commonwealth, at 9.

Here, McAnulty's counsel and the court received the Commonwealth's Prospective Witness List. The fact that the list contained no names for computer experts demonstrated that "the Commonwealth did not intend to

call Glenn Bard as a witness." ***Id.*** ***See also Commonwealth v. Vorhauer***, 331 A.2d 815, 819 (Pa. Super. 1974) (noting that when someone is not on witness list, prosecution has no duty to notify appellant that that person would not testify).

Moreover, McAnulty was aware of Bard's identity, and the Commonwealth provided Bard's business phone number to him. Nevertheless, his attorney failed to subpoena Bard. Regardless, Bard's absence at trial did not prejudice McAnulty because Diane authenticated the e-mail.

Based on the foregoing, we find that the record does not support McAnulty's claim that the Commonwealth misled him into believing that it would call Bard as a prosecution witness.

Next, McAnulty argues that the trial court erred in not reversing the jury verdicts as against the weight of the evidence.

Our Supreme Court has set forth the following standard of review for claims that the verdict is against the weight of the evidence:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witness. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003) (citations omitted).

A homicide constitutes first-degree murder when it is the result of an intentional killing, defined as "willful, deliberate, and premeditated." 18 Pa.C.S. § 2502(a), (d).

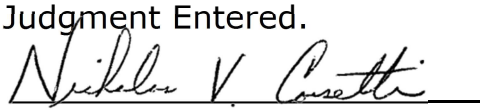
Here, on July 11, 2010, McAnulty became enraged upon rereading the e-mails that Mears sent his wife the year before, when they were having an affair. He took an AR-15 rifle and a .44 caliber revolver with him and drove from Homer City to Greensburg, where Mears resided. Aided by a hitchhiker, Jevon Little, and patrons of a local bar, he located Mears' home at 615 Oakland Avenue in Greensburg. Mears opened the door and immediately locked it upon seeing McAnulty. McAnulty then broke through the door and followed the terrified Mears upstairs. When Mears walked out of a second-floor window onto the roof above the porch, McAnulty shot him in the leg. Mears rolled off the side of the roof onto the ground. McAnulty then exited the house, and walked up to Mears who was lying in pain between his house and his neighbor's house. When Mears begged for help, McAnulty told him that his own heart was hurting more, and that Mears would "never sleep with another man's wife." N.T. Trial, 07/12/2011, at 271. He then shot Mears twice more, in the chest, causing Mears' death.

In light of the evidence presented by the Commonwealth, the trial court did not palpably abuse its discretion when it held that the convictions

for first-degree murder, burglary and the firearms offenses did not shock the conscience and were not against the weight of the evidence.

Judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/23/2013