

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

GREGORY ALAN SMITH

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 451 WDA 2014

Appeal from the Judgment of Sentence January 15, 2014
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015978-2012

BEFORE: PANELLA, J., SHOGAN, J., and OTT, J.

MEMORANDUM BY OTT, J.:

FILED AUGUST 21, 2015

Gregory Alan Smith appeals from the judgment of sentence imposed on January 15, 2014, in the Court of Common Pleas of Allegheny County, made final by the denial of post-sentence motions on February 20, 2014.¹ On January 15, 2014, a jury convicted Smith of first-degree murder.² The court sentenced Smith to a mandatory term of life imprisonment without parole. On appeal, Smith raises the following four issues: (1) the court erred by failing to grant his motion to suppress; (2) the court erred by allowing a police witness to improperly reference Smith's assertion of his

¹ The order denying the post-sentence motion was filed and time-stamped on February 26, 2014.

² 18 Pa.C.S. § 2502(a).

right against self-incrimination; (3) the court erred by excluding certain testimony from a witness, the victim's girlfriend, which would have supported his defense that someone else committed the murder; and (4) the verdict was against the weight of the evidence. After a thorough review of the submissions by the parties, the certified record, and relevant law, we affirm the judgment of sentence.

The trial court set forth the factual history as follows:

The evidence adduced at trial was based heavily on the testimony of James Upshaw. Mr. Upshaw testified that ... he was a friend of the victim, Jacquae Pascal. Mr. Upshaw testified that, on July 6, 2012, he had made plans to meet Mr. Pascal at the Team Mozzi barbershop in the Hill District area of the City of Pittsburgh to get haircuts together. Mr. Upshaw explained that July 6th was Mr. Pascal's birthday and they were going to hang out for a period of time on that day. Mr. Upshaw testified that [he] brought his four year-old son along to get a haircut. Mr. Upshaw, his son and Mr. Pascal met at the barbershop to get haircuts. When Mr. Upshaw arrived at the barbershop, there were others in the barbershop waiting to get a haircut. Most of the customers were discussing basketball. [Smith] was in the barber's chair. Mr. Upshaw testified that he had known [Smith] for a number of years.

Mr. Upshaw testified that [Smith] got his haircut and left the barbershop. Mr. Upshaw was under the impression that [Smith] left to go to his girlfriend's house. [Smith] shortly returned and remained outside the barbershop. While Mr. Upshaw and his son were waiting their turn for a haircut, Mr. Upshaw's son advised Mr. Upshaw that he was thir[s]ty and asked if he could get some water due to the hot temperatures inside the barbershop. Mr. Upshaw agreed to purchase a bottle of water for his son. Mr. Pascal indicated he would go with Mr. Upshaw and his son to get something to drink. The three of them left the barbershop and crossed the street on their way to "Juan's", a local convenience store. As they crossed the street, Mr. Upshaw saw [Smith] come up behind the victim and shoot him multiple times with a chrome revolver. Mr. Upshaw testified

he screamed at [Smith] and asked him "why would you do this, what is wrong with you?"

Immediately after the shooting, Mr. Upshaw saw [Smith] run into [his] girlfriend's residence. At that point, Mr. Upshaw left the scene with his son and went to his mother's house. He called ... Mr. Pascal's girlfriend and told her what happened. He did not, however, inform the police what happened at that time. Because [Smith] was not in custody, Mr. Upshaw feared for his safety and kept what he knew to himself. For some time, he did not contact the police about what occurred. He later agreed to provide details of the shooting but only after his family was placed into the witness protection program.

City of Pittsburgh Police Officer Matthew O'Brien responded to the scene. The shooting occurred near the intersection of Center Avenue and Kirkpatrick Street at ... approximately 2:00 p.m. Upon arriving at the scene, he canvassed the area attempting to locate any witnesses to the shooting. Despite the presence of many people at the scene, nobody was willing to discuss the shooting with him. There were no bullet casings found at the scene. The absence of casings was consistent with use of a revolver to commit the shooting.

Homicide detectives were dispatched to the scene. Through the course of their investigation, they were informed that a person known on the street as "Pretty" may have been responsible for the shooting. It was learned that [Smith]'s nickname was "Pretty". Detectives then sent out word within the police department that they were looking for [Smith].

Later in the evening, on the night of the shooting, Pittsburgh Police Officers pulled over a vehicle in the South Side section of the City of Pittsburgh that was involved in a hit and run. [Smith] was inside the vehicle when the responding officers stopped the vehicle. When the officers identified [Smith], they contacted homicide detectives to advise that they had [Smith] in custody.

Homicide detective Thomas Leheny interviewed [Smith] on the night of the shooting. Detective Leheny informed [Smith] that he did not have to speak with the detectives. Detective Leheny did advise [Smith] that he was not under arrest. [Smith] agreed to speak with Detective Leheny. [Smith] told Detective

Leheny that prior to the shooting he was with a girl in the West End of Pittsburgh at the time of the shooting. [Smith], however, could not provide a name or phone number for the girl nor could he provide an address for the girl.

[Smith] then told Detective Leheny that he was driving through the Hill District talking on his cell phone when the murder occurred. Detective Leheny had not advised [Smith] where the murder occurred. [Smith] verbally consented to a gunshot residue test of his clothing. Detectives obtained [Smith]'s t-shirt for processing. Testing confirmed that gunshot residue was present on the front of the t-shirt. After this was done, Detective Leheny continued to speak with [Smith]. At this point, [Smith] put his head down and told Detective Leheny that he "wasn't right in the head" and he was prone to sudden bursts of anger since he was a kid. [Smith] told Detective Leheny that he didn't want to talk anymore and asked if he was free to leave. [Smith] then left the police station.

An arrest warrant was issued for [Smith] on August 30, 2012. [Smith] could not be located. Officer Matthew McCarthy testified that he was on patrol on November 7, 2013 when he conducted a traffic stop of a vehicle driven by Johnny Rutherford for speeding. Once the vehicle was pulled over, the front seat passenger, [Smith]'s brother, quickly exited the vehicle. [Smith], who was the back seat passenger, attempted to get out of the vehicle by climbing over the front passenger seat. Officers quickly secured the vehicle. Upon being asked for identification, [Smith] gave a false name and date of birth. He provided an age that was not possible based on the date of birth he provided. Because of his false answers, he was placed into custody. [Smith] was subsequently identified and arrested for the homicide of Mr. Pascal.

Amber Traylor testified that she was driving in the area. As she was driving on Kirkpatrick Street, she heard loud noises. She observed the shooting in her rearview mirror. She saw three people standing outside the barbershop and she saw another person shooting at a person lying on the street. She was not able to provide detailed descriptions of any of the persons she observed at the scene of the shooting.

The medical examiner testified in this case that the cause of Mr. Pascal's death was multiple gunshot wounds to his trunk

and extremities. The manner of death was homicide. Mr. Pascal suffered six total gunshot wounds. Three of the gunshot wounds were to his back. The first wound entered the middle of his back and pierced his pulmonary vein and the heart. Mr. Pascal sustained other gunshot wounds to his buttocks, his right shoulder, his right upper arm and to the back of his hand.

Trial Court Opinion, 7/19/2014, at 1-5.

Following his arrest, on February 11, 2013, Smith filed a motion to suppress physical evidence and statements, arguing, *inter alia*, that the police conducted a custodial interrogation in the absence of **Miranda**³ warnings and he did not consent to speak with the officers or to submit to a gun-shot residue test. A suppression hearing was held on April 29, 2013. On August 20, 2013, the court denied Smith's motion to suppress with respect to the physical evidence, and granted in part and denied in part his motion as to his statements.⁴

Smith's first jury trial was held September 30, 2013 to October 3, 2013, but ended in a mistrial.⁵ His second jury trial began on January 13, 2014. Two days later, the jury convicted Smith of first-degree murder. The court then sentenced Smith to life imprisonment without the possibility of

³ **Miranda v. Arizona**, 384 U.S. 436 (1966).

⁴ Specifically, the court ordered: "The motion to suppress statements is granted as to [Smith]'s alleged statements made in response to a detective's comments is granted. The motion to suppress statements is otherwise denied." Order of Court, 8/20/2013.

⁵ The jury was "decidedly deadlocked" in its decision. **See** N.T., 9/30/2013-10/3/2013, at 508-520.

parole for the murder conviction. On January 27, 2014, Smith filed a post-sentence motion challenging the weight of the evidence and requesting a new trial.⁶ The court denied his motion on February 20, 2014.⁷ This timely appeal followed.⁸

In his first issue, Smith contends the trial court erred by failing to suppress statements and evidence because he was subjected to custodial interrogation without first being provided with **Miranda** warnings. Smith's Brief at 17. Specifically, Smith asserts the court should have suppressed: (1) his statements about being with a girlfriend at the time of the shootings; (2) his statement about driving near the area of the murder at the time of the incident; (3) his statements about his mental and anger issues; and (4) the results of the gunshot residue tests. **Id.** at 18.

Smith first points to what he terms as "a traffic stop," in which six officers were involved, four vehicles were present with emergency lights activated, he was subjected to a pat-down, and he was seated on the ground by Police Officer Michael Slatcoff. **Id.** at 18-19. Furthermore, he

⁶ The 10-day period to file a post-sentence motion fell on a Saturday. Therefore, Smith had until Monday, January 27th, to file his motion.

⁷ The order was not time-stamped and filed until February 26, 2014.

⁸ On March 21, 2014, the trial court ordered Smith to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Smith filed a concise statement on April 11, 2014. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on July 18, 2014.

states that while he was asked questions by officers about his whereabouts and officers wanted to question him, he was never advised that he could leave the scene. **Id.** at 20.⁹ Smith claims no reasonable person would feel free to leave under these circumstances. Second, Smith contends it was problematic when the police handcuffed him and placed him in the police vehicle to transport him to the police station because any reasonable person in his position would feel that their freedom is being restricted. **Id.** at 22. Third, he argues he was in custody at the police headquarters where the investigating detective held his personal effects, he was placed in a room and the door was closed, and he was shackled. **Id.** at 23. Smith also states he expressed confusion as to why he was at the police station, which demonstrates that he did not voluntarily go there. **Id.** at 22. He again alleges he was never told that he was free to leave. **Id.** at 23. As such, Smith states that because he “was subjected to a ‘custodial interrogation’ conducted without **Miranda** warnings, the statements which stemmed from that interrogation should have been suppressed by the Trial Court.” **Id.** at 29.¹⁰

⁹ Smith acknowledges that officers are not required to inform an individual they are free to leave, but it has been suggested as good practice. **Id.** at 20-21, citing **Commonwealth v. Strickler**, 757 A.2d 884, 899 (Pa. 2000).

¹⁰ To the extent that Smith argues the results of the gunshot residue tests should be suppressed because Article I, Section 9 of the Pennsylvania Constitution provides greater protections than the Fifth Amendment of the (Footnote Continued Next Page)

When reviewing an order denying a pre-trial motion to suppress evidence, we are guided by the following:

We are limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. We may consider the evidence of the witnesses offered by the prosecution, as verdict winner, and only so much of the defense evidence that remains uncontradicted as a whole. We are bound by facts supported by the record and may reverse only if the legal conclusions reached by the court below were erroneous.

Commonwealth v. Borovichka, 18 A.3d 1242, 1248-1249 (Pa. Super. 2011). Additionally,

[a]ssuming that there is support in the record for the suppression court's factual findings -- and there is no dispute here on the governing facts -- we are bound by those facts and we may reverse only if the legal conclusions drawn from those facts are in error. If there is sufficient evidence of record to support the suppression court's ruling and the court has not misapplied the law, we will not substitute our credibility determinations for those of the suppression court judge. However, if the court has misapplied the law, we must reverse that court's determination.

(Footnote Continued) _____

United States Constitution and therefore, the failure to give ***Miranda*** warnings to a suspect subjected to a custodial interrogation requires the suppression of physical evidence obtained from consent given during that interrogation, **see** Smith's Brief at 29-39, we find Smith did not assert before the trial court that the Pennsylvania Constitution provided an independent basis for relief, other than a bald statement in his suppression motion, **See Commonwealth v. Chamberlain**, 30 A.3d 381, 405 (Pa. 2011), *cert. denied*, 132 S.Ct. 2377, (U.S. 2012); **see also Commonwealth v. Colavita**, 993 A.2d 874, 891 (Pa. 2010) ("[C]ourts should not reach claims that were not raised below."); Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Accordingly, his constitutional claim is waived. Furthermore, as we will discuss *infra*, despite Smith's contentions, we agree with the trial court that he was not subject to custodial interrogation.

Commonwealth v. Johnson, 86 A.3d 182, 187 (Pa. 2014) (citations omitted).

Moreover, “[t]he law is clear that **Miranda** is not implicated unless the individual is in custody and subjected to interrogation.” **Commonwealth v. Snyder**, 60 A.3d 165, 170 (Pa. Super. 2013) (citations and emphasis omitted), *appeal denied*, 70 A.3d 811 (Pa. 2013). “The test for custody is an objective one that focuses on the reasonable impression conveyed by the actions of the police to the person being questioned.” **Commonwealth v. Sherwood**, 982 A.2d 483, 499 (Pa. 2009) (citations and internal quotation marks omitted), *cert. denied*, 559 U.S. 1111 (2010). Furthermore, a panel of this Court has previously explained:

The warnings articulated by **Miranda v. Arizona**, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, [] (1966), become mandatory whenever one is subjected to custodial interrogation. The United States Supreme Court has defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” **Id.**

Police detentions only become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of formal arrest.

Whether a person is in custody for **Miranda** purposes depends on whether the person is physically [deprived] of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation. Moreover, the test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. Rather, the

test focuses on whether the individual being interrogated reasonably believes his freedom of action is being restricted.

The factors a court utilizes to determine, under the totality of the circumstances, whether a detention has become so coercive as to constitute the functional equivalent of arrest include: the basis for the detention; its length; its location; whether the suspect was transported against his or her will, how far, and why; whether restraints were used; whether the law enforcement officer showed, threatened or used force; and the investigative methods employed to confirm or dispel suspicions. The fact that a police investigation has focused on a particular individual does not automatically trigger "custody," thus requiring **Miranda** warnings.

Commonwealth v. Baker, 963 A.2d 495, 500-501 (Pa. Super. 2008)

(some citations and internal quotation marks omitted), *appeal denied*, 992 A.2d 885 (Pa. 2010).

Here, the trial court found the following:

On the evening of July 7, 2012, [Smith] was a passenger in a vehicle that was stopped by law enforcement after the vehicle had been involved in a hit and run. After the officer stopped the vehicle, [Smith] was removed from the vehicle and temporarily detained. He was patted down for officer safety. Once [Smith]'s identity was known, officers advised [Smith] that homicide detectives were interested in speaking with him. [Smith] indicated that he would speak with the homicide detectives. Sergeant Stephen Matakovich, who was the ranking officer on the scene, advised [Smith] that he was not obligated to meet with the detectives, that there was no arrest warrant and that he was not under arrest. [Smith] agreed to be transported to the police station in a police cruiser. Pursuant to standard police protocol, [Smith] was handcuffed during transport.

[Smith] arrived at the police station where he was met by Detective Leheny. When [Smith] arrived at the station, he was handcuffed. Detective Leheny removed the handcuffs as [Smith] entered into an interview room. Detective Leheny immediately advised [Smith] that he was not under arrest. [Smith] kept

asking about his cell phone and Detective Leheny advised that he had it and would give it back to [Smith]. Detective Leheny asked if he could look at the cell phone to see if he could pull up some phone numbers that might help [Smith] remember who he spoke to or where he was during the day. [Smith] gave him permission to check the cell phone.

Detective Leheny advised [Smith] that he wanted to discuss a homicide that occurred that day. He did not pressure [Smith] to speak with him. [Smith] began voluntarily speaking with Detective Leheny. [Smith] advised Detective Leheny that he was at his girlfriend's house all day in the West End of Pittsburgh. When asked for her name, address or phone number, [Smith] could not provide any of the requested information. [Smith] then asked Detective Leheny what would happen if [Smith] had been in the area of the murder and just happened to drive by it.

During the interview, [Smith] also gave Detective Leheny verbal permission to perform a gunshot residue test on his hands and he also provided his t-shirt to Detective Leheny to perform a gunshot residue test on it.

Just prior to the end of the interview, [Smith] informed Detective Leheny that he had anger issues, that sometimes his mind is not in the right place and that he is sometimes prone to outbursts of anger. [Smith] advised that he did not want to speak anymore to Detective Leheny. At that point, Detective Leheny terminated the interview and advised [Smith] he was free to leave. Detective Leheny offered [Smith] a ride home. [Smith] declined and left the police station.

The facts of this case demonstrate that [Smith] was not in custody at the time he made statements to Detective Leheny. The record further reflects that [Smith]'s statements were voluntary. In addition, [Smith] voluntarily provided his t-shirt to Detective Leheny for testing and he voluntarily consented to the swab of his hands for gunshot residue testing. During the interview, [Smith] was not handcuffed. He was advised that he was free to leave at any time and he was advised that he did not have to speak to Detective Leheny. He was not pressured into the interview. Throughout the interview, [Smith] was cooperative, and, despite being free to leave, did not express a desire to leave the room for 30 to 40 minutes. When [Smith]

expressed a desire to stop the interview and leave the police station, Detective Leheny stopped the interview and permitted [Smith] to leave. This Court does not believe that [Smith] was subjected to a custodial interrogation and it believes that [he] voluntarily consented to the hand swabs and to providing his t-shirt for testing. Accordingly, [this] claim is without merit.

Trial Court Opinion, 7/19/2014, at 8-10.

Applying the standards set forth above, we agree with the determination of the trial court that Smith's July 7, 2012, interview did not constitute custodial interrogation. Under the totality of these circumstances, Smith did not reasonably believe that his freedom of action or movement was restricted. Smith had not been arrested following the "hit and run" investigation. Of import, Detective Leheny requested Officer Matokovich to ask Smith if he would be willing to come over and speak with him but did not demand that he talk with the homicide detective. N.T., 4/29/2013, at 13. Moreover, Officer Matokovich told Smith he was not under arrest and they did not have a warrant for him. **Id.** The fact that police were investigating a report that Smith may have been present at the shooting does not automatically trigger "custody," and require **Miranda** warnings. **See Baker**, 963 A.2d at 501.

Furthermore, contrary to Smith's allegation that he was shackled during the interview, the court was free to believe Detective Leheny's testimony that at no time during the interview was Smith placed in restraints. **Id.** at 45-47. We are bound by the court's credibility determinations. **See Johnson**, 86 A.3d at 187. Detective Leheny advised

Smith that he was not under arrest, he did not have to speak with him and that he was free to leave. N.T., 4/29/2013, at 58. The interview was not unjustly long. Smith was permitted to leave after he indicated to the detective that he did not wish to talk anymore. *Id.* at 53. Lastly, the fact that a warrant was not issued for Smith for nearly two months after the interview supports the finding that this was non-custodial interrogation and therefore, **Miranda** warnings were not required. Likewise, the record supports the court's finding that Smith was not coerced, but voluntarily consented to speak with the investigating detective as well as allow him to take the hand swabs and test his t-shirt. Accordingly, Smith was not entitled to the suppression of his statements and physical evidence.

Next, Smith claims that the court erred by allowing Detective Leheny to reference Smith's assertion of his right against self-incrimination by testifying that during the July 7, 2012, interview, Smith told the detective that he did not want to talk anymore and asked to end the interview, and no curative instruction was given. Smith's Brief at 41; **see also** N.T., 1/13/2014-1/15/2015, at 144. Smith states, "Under established precedent, a reference to a defendant's assertion of his right against self-incrimination constitutes a violation of both the Fifth Amendment to the [United States] Constitution and Article I[, Section 9] of the Pennsylvania Constitution." Smith's Brief at 41.

Smith contends the trial court “was mistaken when it analyzed the admissibility of Detective Leheny’s testimony under case law dealing with ‘pre-arrest silence.’” *Id.* at 42. Moreover, he avers that the proper standard under which this testimony should be evaluated is set forth in ***Commonwealth v. Turner***, 454 A.2d 537 (Pa. 1982), in which in the absence of an assertion by the defendant, a reference by the prosecutor to previous silence is impermissible. Moreover, Smith states the reference to his assertion of his right to remain silent was intentionally elicited by the Commonwealth. Smith’s Brief at 44. Lastly, Smith argues, “Even the standard for analyzing the admissibility of pre-arrest silence, erroneously applied by the Trial Court, would not permit the reference to Mr. Smith’s silence under these circumstances,” and the court’s reliance on ***Commonwealth v. DiNicola***, 866 A.2d 329 (Pa. 2005), is misplaced. Smith’s Brief at 45. He notes there are two specific types of situations where pre-arrest silence is admissible: (1) to impeach a testifying defendant; and (2) as a “fair response” to suggestions by the defense that a police investigation was “shoddy or unthorough [sic].” *Id.* Smith asserts neither of those situations are applicable to the present case. *Id.*

With respect to this claim, we are guided by the following:

Our standard of review regarding evidentiary issues is well settled. “The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error.” ***Commonwealth v. Sanchez***, 614 Pa. 1, 36 A.3d 24, 48 (Pa. 2011) (citations omitted), *cert. denied*, 133 S. Ct. 122, 184 L.

Ed. 2d 58 (2012). “An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.” **Commonwealth v. Hanford**, 2007 PA Super 345, 937 A.2d 1094, 1098 (Pa. Super. 2007) (citation omitted), *appeal denied*, 598 Pa. 763, 956 A.2d 432 (Pa. 2008). Furthermore, “if in reaching a conclusion the trial court overrides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error.” **Commonwealth v. Weakley**, 2009 PA Super 74, 972 A.2d 1182, 1188 (Pa. Super. 2009) (citation omitted), *appeal denied*, 604 Pa. 696, 986 A.2d 150 (Pa. 2009).

We begin by noting, “[b]oth the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution protect an individual’s right not to be compelled to be a witness against himself.” **Commonwealth v. Lettau**, 604 Pa. 437, 986 A.2d 114, 117 (Pa. 2009) (citation omitted). The right to remain silent is grounded in the United States Supreme Court’s decision in **Miranda v. Arizona**, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Fifth Amendment also protects a defendant’s decision to not testify at trial from being commented on by the prosecution to the jury. **Griffin v. California**, 380 U.S. 609, 612, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

However, the Supreme Court has recognized that it does not violate the Fifth and Fourteenth Amendments when the prosecution uses a defendant’s pre-arrest silence if he or she testifies in his or her own defense. **Jenkins v. Anderson**, 447 U.S. 231, 238, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

Commonwealth v. Fischere, 70 A.3d 1270, 1275-1276 (Pa. Super. 2013)

(footnote omitted), *appeal denied*, 83 A.3d 167 (Pa. 2013).¹¹

¹¹ Moreover, the **Fischere** Court noted there are circumstances where “an appellant can open the door to the Commonwealth using his or her pre- (Footnote Continued Next Page)

Nevertheless, when a defendant does not testify, the Commonwealth's use of his or her pre-arrest silence is more restricted. **Id.** In **Commonwealth v. Molina**, 33 A.3d 51 (Pa. Super. 2011), *aff'd*, 104 A.3d 430 (Pa. 2014), a panel of this Court held "the Commonwealth cannot use a non-testifying defendant's pre-arrest silence to support its contention that the defendant is guilty of the crime charged as such use infringes on a defendant's right to be free from self-incrimination." **Id.** at 62. Moreover, the **Molina** Court stated:

We find it of no moment whether the silence occurred before or after the arrest or before or after **Miranda** warnings were administered. The Fifth Amendment was enacted to protect against self-incrimination, whether they are in custody or not, charged with a crime, or merely being questioned during the investigation of a crime. We clarify that our finding does not impose a *prima facie* bar against any mention of a defendant's silence; rather, we guard against the exploitation of appellant's right to remain silent by the prosecution. We conclude that the government may not use such silence as substantive evidence of guilt when a defendant chooses not to testify, and such use should not be limited to "persons in custody or charged with a crime"; rather, it may also not be used against a defendant who remained silent during the investigation of a crime.

Id. at 63 (citations and footnote omitted).

We also find **Commonwealth v. Adams**, 39 A.3d 310, 319 (Pa. Super. 2012), *aff'd*, 104 A.3d 511 (Pa. 2014), instructive. In **Adams**, the defendant contested the following reference to his pre-arrest silence, which

(Footnote Continued) _____

arrest silence under the 'fair-response doctrine' even when the appellant does not testify." **Id.** at 1278.

was offered during the Commonwealth's case-in-chief by the detective who had investigated the murder for which the defendant was being tried:

[Q]: During your investigation, did you have the occasion to locate [the defendant]?

[A]: Yes.

...

[Q]: And did you attempt to interview [the defendant]?

[A]: Yes we did; however, he didn't want to speak to us at that time.

[Q]: Did you identify yourselves as law enforcement?

[A]: Yes. We identified ourselves and told him that we'd like to interview him in reference to the [victim's] homicide and that his name came up in the matter.

[Q]: And in response to that what did he say?

[A]: He said he had nothing to say.

[Q]: What then—did you have a further conversation with him?

[A]: Yes. We also asked him to consent to provide us with a DNA sample with the use of a DNA collector at which time he agreed.

Id. at 315.

On appeal, a panel of this Court determined the references to the defendant's pre-arrest silence did not violate his constitutional rights. The panel concluded the testimony at issue "was offered for a narrow purpose, namely to demonstrate the nature and focus of the investigation, and as foundational evidence demonstrating how the police came to obtain [the

defendant's] DNA sample, which was later admitted into evidence at trial." **Id.** at 319. Furthermore, the officer's references "were limited in context, and neither [the officer] nor the Commonwealth implied that [Adams'] silence constituted a tacit admission of guilt." **Id.**

Turning to the present matter, Smith challenges the following testimony elicited by the Commonwealth during its case-in-chief:

[Detective Leheny]: As I previously explained, while the night felony detective was doing that test and collecting the shirt, I went back outside. When that was completed I went back inside, and I continued to talk to Mr. Smith.

At that point Mr. Smith put his head down, said that he wasn't right in his head, that he wasn't right in his head, that he was prone to sudden bursts of anger since he was young; and at the conclusion of that statement told me that he didn't want to talk anymore, and if he was free to leave. I said, in fact, you are.

N.T., 1/13/2014-1/15/2015, at 143-144. A review of the record indicates that defense counsel made a preemptory objection to this testimony, which the trial court overruled. Defense counsel did not ask for a cautionary instruction. **See** N.T., 1/13/2014-1/15/2015, at 140-143.

In admitting the testimony, the court explained:

[Y]our objection is overruled because it is responsive to the officer's question, the officer's questioning is based on [Smith]'s saying he will talk. The jury is going to want to know why he stopped asking questions.

...

The explanation is [Smith] says he doesn't want to talk anymore. Not that "I don't want to say any more. There is a lot

to say but I am not going to say it. I just don't want to talk to you anymore." It is a fair interpretation.

Id. at 141, 142-143. Furthermore, in its Rule 1925(a) opinion, the court opined:

Detective Leheny's testimony did not create any perception that [Smith]'s statements about ending the interview constituted an admission of guilt. Instead, the statement simply provided a context as to how the interview ended. The statement made by [Smith] demonstrated that he was not in custody as he was permitted to leave the police station as soon as he indicated his desire to do so. Nothing about the statement offended the Fifth Amendment.

Trial Court Opinion, 7/19/2014, at 11.

We find Smith's argument is flawed. As the trial court indicated and the record supports, the Commonwealth, *via* Detective Leheny, did not offer evidence of Smith's pre-arrest silence as substantive evidence of his guilt. Rather, the Commonwealth elicited the testimony for the narrow purpose of explaining "the way that the conversation ended." Commonwealth's Brief at 41; **see also Adams, supra**.¹² Furthermore, Smith does not point to any

¹² We find that Smith's reliance on **Turner, supra**, for some higher burden regarding pre-arrest silence is misplaced as that case is factually distinguishable from the present matter. In **Turner**, the defendant, for the first time at trial, stated that the shooting he was implicated in had been in self-defense. The prosecutor then questioned him as to why he had never told the police this version of events. **Turner**, 454 A.2d at 538. The Pennsylvania Supreme Court reversed his conviction, concluding it was impermissible for the prosecution to impeach the accused with his previous silence; rather, defendants may be impeached "only to inconsistencies as they factually exist, not to the purported inconsistency between silence at arrest and testimony at trial." **Id.** at 539. Here, Smith did not testify at
(Footnote Continued Next Page)

place in the trial testimony that the Commonwealth ever referenced Smith's refusal to further talk to authorities as implicit evidence of his guilt.¹³ Accordingly, we conclude Smith's constitutional rights were not violated, and the trial court did not abuse its discretion in admitting the testimony at issue.

In his third argument, Smith asserts the court erred by excluding testimony from the victim's girlfriend, Sonia Burden, that she had been previously threatened by three men looking for the victim at her home. Smith's Brief at 48. Smith states this evidence was dispositive to demonstrate that other individuals had a motive to shoot the victim and that someone else was responsible for the murder. **Id.** Moreover, he avers that by denying him "the ability to offer evidence which was fundamental to his defense, the Trial Court abused its discretion and denied Mr. Smith his rights to a fair trial and due process." **Id.**

By way of background, defense counsel proffered evidence that a year prior to the shooting, the victim had been involved in a prior homicide and
(Footnote Continued) _____

trial and therefore, the prosecution was not trying to impeach him with his previous silence like in **Turner**.

¹³ Additionally, we note the reference to Smith's silence was brief in context. The Pennsylvania Supreme Court has previously held that "the mere revelation of silence does not establish innate prejudice." **DiNicola**, 866 A.2d at 336-337. **See also Commonwealth v. Whitney**, 708 A.2d 471, 478 (Pa. 1998) ("Even an explicit reference to silence is not reversible error where it occurs in a context not likely to suggest to the jury that silence is the equivalent of a tacit admission of guilt.").

three men with guns came to Burden's home, threatened her, said they were looking for the victim. N.T., 1/13/2014-1/15/2015, at 153-159, 317-322. The court did not admit this evidence because it determined the Commonwealth was not attempting to offer evidence of a motive in the matter, and there was no corroborating evidence that these men threatened the victim's life. *Id.* at 321-322.

Keeping our standard of review regarding the admissibility of evidence in mind, we also note the following:

Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. Evidence, even if relevant, may be excluded if its probative value is outweighed by the potential prejudice.

Commonwealth v. Fransen, 42 A.3d 1100, 1106 (Pa. Super. 2012) (*en banc*) (internal citations omitted), *appeal denied*, 76 A.3d 538 (Pa. 2013); ***see also*** Pa.R.E. 401. "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402. "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403.

Here, the trial court explained its rationale to exclude the evidence as follows:

The record reveals that the interaction between the three men and Ms. Burden occurred approximately one year before the shooting in this case. Although there were statements made by at least one of the men that suggested that [he] may want to kill Ms. Burden, there were no statements made indicating that they wanted to kill [the victim]. Because the incident occurred almost a year prior to the shooting and because there was no direct evidence that the men issued a threat to kill [the victim], this Court did not permit the admission of the evidence. In this Court's view, there was no actual threat on [the victim]'s life. Additionally, the passage of almost one year between the time of the threat and [the victim]'s death diminished any probative value of the incident. This Court believed the information was not relevant and, even if it had any relevance, the prejudicial value of the evidence substantially outweighs any probative value of the evidence.

Trial Court Opinion, 7/19/2014, at 14-15.

We agree with the trial court's sound reasoning and find no abuse of discretion in excluding this evidence. Moreover, Smith has failed to present a persuasive argument that the relevance and remoteness in time between the two events should be overlooked. Accordingly, Smith's third argument also fails.

In his final argument, Smith contends the verdict was against the weight of the evidence.¹⁴ Smith's Brief at 54. Specifically, he states "the following issues collectively rendered the Commonwealth's case

¹⁴ Smith properly preserved his challenge to the weight of the evidence by raising it in his January 27, 2014, post-sentence motion. **See** Pa.R.Crim.P. 607(A).

contradictory, tenuous, and incredible:"¹⁵ (1) only one of the 16 Commonwealth witnesses claimed to be able to name and identify the shooter; (2) the shooting took place in broad daylight outside of a barbershop, and not a single person from the shop, besides the eyewitness, was called to testify; (3) the eyewitness, Upshaw, was potentially an alternate suspect with a corresponding motive to lie because he was the last person to be with the victim and he waited six weeks before going to the police; (4) Upshaw's testimony was called into serious question by another witness, Eunice McGill, who said that she did not see Smith that day at all; (5) Upshaw's testimony that the shooter wore all black was contradicted by another witness, Amber Traylor, who said the shooter wore white; (6) the gunshot residue was recovered on a white shirt, and not a black shirt like Upshaw had indicated; (7) the gunshot residue analyst testified gunshot residue can end up on a clothing in a number of different ways and no time was determined on the shirt tested; (8) no gunshot residue was found on Smith's hands; (9) no motive, justification, or explanation was provided for the murder; (10) no gun was ever recovered from or connected to Smith; and (11) no DNA evidence implicating Smith was ever found. ***Id.*** at 55-57.

Appellate review of a weight of the evidence claim is well-established:

A weight of the evidence claim concedes that the evidence is sufficient to sustain the verdict, but seeks a new trial on the

¹⁵ ***Id.*** at 55.

ground that the evidence was so one-sided or so weighted in favor of acquittal that a guilty verdict shocks one's sense of justice. **Commonwealth v. Widmer**, 560 Pa. 308, 318–20, 744 A.2d 745, 751–52 (2000); **Commonwealth v. Champney**, 574 Pa. 435, 443–44, 832 A.2d 403, 408–09 (2003). On review, an appellate court does not substitute its judgment for the finder of fact and consider the underlying question of whether the verdict is against the weight of the evidence, but, rather, determines only whether the trial court abused its discretion in making its determination. **Widmer**, 560 Pa. at 321–22, 744 A.2d at 753; **Champney**, 574 Pa. at 444, 832 A.2d at 408.

Commonwealth v. Lyons, 79 A.3d 1053, 1067 (Pa. 2013), *cert. denied*, 134 S.Ct. 1792 (U.S. 2014).

Here, the trial court found the following:

[Smith] alleges a number of reasons that the weight of the evidence mandates that the verdict should be overturned. Essentially, [Smith] challenges this jury's assessment of the credibility of trial witnesses and evidence. The allegations made by [Smith] are simply a recitation of the closing argument made by defense counsel. [Smith] argues that of the sixteen Commonwealth witnesses, only one identified [him]. That fact is not surprising because detectives were only able to find one witness who observed the shooting. That witness, Mr. Upshaw, provided very credible testimony about the shooting. Contrary to the allegations made by [Smith], Mr. Upshaw had no motive to lie. The Commonwealth's evidence supported the verdict. This Court has reviewed the trial record and believes that the verdict does not shock any rational sense of justice and that it was based on competent evidence. The verdict was not against the weight of the evidence.

Trial Court Opinion, 7/19/2014, at 16.

We again agree with the court's well-reasoned analysis. Smith fails to explain in what manner the trial court abused its discretion in denying his weight claim. Rather, his argument consists primarily of attacks on the credibility of the eyewitness, Upshaw. As such, he asks this Court to

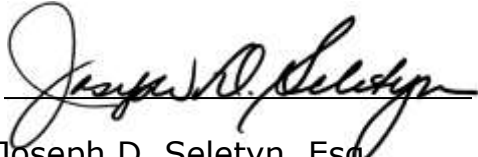
reweigh the evidence; however, we decline to do so. As our Supreme Court has made clear, we may not reweigh the evidence and substitute our judgment for the trial court's decision. **See Lyons, supra.** The evidence presented at trial demonstrated the following: Burden confirmed that she heard the victim talking to Upshaw about meeting at the barbershop on the day of the shooting. **Id.** at 183. Upshaw saw Smith come up from behind the victim and shoot him multiple times in the back. N.T., 1/13/2014-1/15/2015, at 214.¹⁶ The medical examiner's testimony regarding the victim's wounds matched Upshaw's description of the shooting. **Id.** at 31-46. Furthermore, Smith's statement to Detective Leheny was that he was driving through the area on the day of the shooting, and was found to have gunshot residue on the shirt he was wearing, which was taken and tested on the same day as the shooting. **Id.** at 133, 284-296. Therefore, we find the court did not abuse its discretion and Smith's weight claim fails.

Judgment of sentence affirmed.

¹⁶ Moreover, contrary to Smith's argument, Upshaw testified that he was not one hundred percent sure what Smith was wearing, stating that Smith "often wore black," but "he could have had a T-shirt under his shirt[.]" **Id.** at 228. Additionally, Upshaw explained that he waited six weeks before going to authorities because people in his neighborhood are reluctant to speak with police but for the sake of his son, he decided to go to the police. **Id.** at 218-220.

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Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/21/2015