J-A16006-14

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CHARLES CABINESS,	:	
	:	
Appellant	:	No. 1044 WDA 2012

Appeal from the Judgment of Sentence January 19, 2012,
Court of Common Pleas, Allegheny County,
Criminal Division at No. CP-02-CR-0016743-2009

BEFORE: DONOHUE, OTT and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED JULY 23, 2014**

Charles Cabiness ("Cabiness") appeals from the judgment of sentence entered following his conviction of murder of the first degree, 18 Pa.C.S.A. § 2502(a). For the following reasons, we affirm.

The relevant facts may be summarized as follows. In May 2009, Luzay Watson ("Watson") shot and killed Davon Young. Two months later, Young's sister, Monnica Gay ("Nikki"), testified at Watson's preliminary hearing, following which Watson was held for trial.

After the preliminary hearing, Watson remained in the Allegheny County Jail. He made a number of phone calls to Kevin Watson ("Kevin"), his brother, and his girlfriend, Chrissy Stubbs ("Stubbs"), from jail. In these phone calls, the parties discussed eliminating the witnesses against Watson.

In one particular phone call, Stubbs told Watson that Cabiness (who is also his brother) was "posted up", or waiting around, Nikki's sister's house.

In the late morning of August 22, 2009, Cabiness shot Nikki in the back of the head while she was outside her sister Donneika's house, in the company of multiple neighbors and her sister's young children. Nikki's younger sister, Shanneika Gay ("Shanneika") was also present, as she had spent the night at Donneika's house. Shanneika was on the second floor of the residence when she heard a gunshot. She ran outside and saw Cabiness running away with a gun in his hand. Shanneika, who was familiar with Cabiness because they had lived in the same neighborhood for a time, said, "Is that Chuckie?" In response, Cabiness turned and made eye contact with Shanneika as he continued to flee. Nikki died shortly thereafter.

On the same day as the shooting, Shanneika gave the police a detailed statement about what she observed and picked Cabiness' picture out of a photo array. She also identified Cabiness as her sister's murderer at trial and testified to what she observed on the morning of August 22, 2009. The jury found Cabiness guilty of first-degree murder,[1] and the trial court subsequently sentenced him to life imprisonment without the possibility of

[1] We note for completeness that Cabiness was tried twice. The first trial occurred in 2010 and resulted in a mistrial because the jury could not reach a unanimous verdict. The judgment of sentence at issue here is the product of his retrial in 2011.

parole. Cabiness filed a *pro se* post-sentence motion, which was denied as a matter of law. This timely appeal follows.

Cabiness presents the following three issues for our review:

> 1. Whether the trial court abused its discretion in permitting the Commonwealth to present a videotape with audio of [Cabiness] being escorted by the police after [Cabiness'] arrest?
>
> 2. Whether the trial court abused its discretion in permitting the Commonwealth to present a mug shot of [Cabiness] that was taken in 2003?
>
> 3. Whether the trial court abused its discretion in denying the motion for mistrial when Detective Boose testified that telephone calls from Luzay Watson indicate that he is trying to locate and kill witnesses?

Appellant's Brief at 6.[2]

The first two issues presented challenge the trial court's rulings regarding the admission of evidence. "The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion." ***Commonwealth v. Antidormi***, 84 A.3d 736, 749 (Pa. Super. 2014).

Cabiness first argues that the trial court abused its discretion by allowing the Commonwealth to show a videotape to the jury in which he

[2] We have reordered Cabiness' issues for ease of disposition.

states that he is innocent and a political prisoner and then laughs. Cabiness argues, as he did in his motion *in limine* seeking to exclude the videotape from evidence, that the video is mildly relevant if at all, and that any possible probative value of this video is outweighed by the possibility of prejudice against him. Appellant's Brief at 25-29.

> The threshold inquiry with admission of evidence is whether the evidence is relevant. 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 the existence of a material fact. In addition, evidence is only admissible where the probative value of the evidence outweighs its prejudicial impact.
>
> Otherwise relevant evidence may be excluded if its probative value is outweighed by its potential for prejudice. The probative value of the evidence might be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, pointlessness of presentation, or unnecessary presentation of cumulative evidence. The comment to [Pennsylvania Rule of Evidence] 403 instructs that[] '[u]nfair prejudice' means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially. However, evidence will not be prohibited merely because it is harmful to the defendant. Exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.

Antidormi, 84 A.3d at 750 (citations omitted).

The video at issue here came from a news broadcast and is four seconds long. In it, Cabiness is wearing a black hooded sweatshirt with

white lining inside of the hood. The video was cropped so that Cabiness' hands, which were handcuffed, are not visible. Cabiness is walking out of a building with two homicide detectives. The only voice on the video is Cabiness'. As he is walking, Cabiness turns to the camera and says, "I've been framed. I'm a political prisoner," and then laughs. ***See*** Commonwealth's Exhibit 28. The trial court explained it reasoning for admitting this video as follows:

> The [t]rial [c]ourt weighed the potential inflammatory nature of the evidence against its evidentiary value, and concluded that the video and voluntary statements by [Cabiness] on the tape were 'probative and admissible and not highly prejudicial.' Specifically, since the video depicted [Cabiness] wearing the same or similar dark hooded sweatshirt as Shanneika Gay described to detectives at the time of her initial interview, the [t]rial [c]ourt found the video admissible to corroborate her testimony regarding what the shooter was wearing at the time of the incident. The [t]rial [c]ourt also determined that [Cabiness'] statement, 'I'm being framed. I'm a political prisoner,[*sic*] non[-]prejudicial and probative of his consciousness of guilt. Furthermore, the [c]ourt removed any possibility of prejudice by editing the video to remove the images of [Cabiness] in cuffs, and the [t]rial [c]ourt issued a cautionary instruction prior to the jury viewing the tape. Thus, the [t]rial [c]ourt properly admitted the edited videotape with audio, and the [t]rial [c]ourt did not abuse its discretion in so doing. ***See*** [***Commonwealth v.***]***Weaver***, 768 A.2d at 334 (videotape of defendant performing field sobriety tests properly admitted to corroborate officer's testimony and any possibility of prejudice was cured by defense's opportunity to cross examine the officer and the judge's cautionary instruction); ***Commonwealth v. Rishel***, 582 A.2d 662, 665-666

> (Pa. Super. 1990) (audio portion of tape properly admitted where statements by defendant were voluntarily made and were not in response to any police conduct designed to elicit a response). [Cabiness'] claim is without merit.

Trial Court Opinion, 10/2/13, at 13-14 (citations to notes of testimony omitted).

Having thoroughly reviewed the record, we cannot agree with the trial court's conclusions. First, Shanneika testified at trial that the shooter was wearing an all-black hooded sweatshirt, with the hood down. ***See*** N.T., 10/17/11, at 473. The hooded sweatshirt that Cabiness wears in the video – which, we note, was taken two months after the shooting – has a white lining in the hood. Thus, contrary to the trial court's conclusion, the sweatshirt Cabiness wears in the video is not the same or similar to the sweatshirt Shanneika testified she observed on the shooter. Second, the trial court does not explain how it arrived at its conclusion that Cabiness' statement evidences his consciousness of guilt. It was, in fact, a complete denial of involvement in the crime, and we hesitate to conclude that a declaration of innocence made to assembled news media, as was the case here, is indicative of a consciousness of guilt.

Rather, the record reflects a substantial probability of prejudice from the video. Police Officer Brian Weismantle testified that the video was taken as he and another homicide officer were escorting Cabiness to jail, and Cabiness "blurted out" the statement captured on the video to the news

media present at the jail, apparently apropos of nothing. N.T., 10/18/11, at 48. It is undisputed that Cabiness made this statement with a cavalier attitude, laughing and seeming to make light of the murder charges that had just been filed against him. This video portrayed a very damaging image of Cabiness' character, and in that regard created a significant chance that the video would prejudice the jury against Cabiness. ***See Antidormi***, 84 A.3d at 750 ("'[U]nfair prejudice' means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially."); ***see also*** Pa.R.E. 403, Comment.

However, our review of the record has revealed ample properly admitted evidence of Cabiness' guilt. ***See, e.g.*** N.T., 10/17/11, at 467-96, 610-621; N.T., 10/18/11, at 60-65, 209-226; N.T., 10/19/11, at 270-336. Thus, the trial court's abuse of discretion in permitting the Commonwealth to show this video to the jury is harmless error. ***See Commonwealth v. Kuder***, 62 A.3d 1038, 1053 (Pa. Super. 2013) (holding that erroneously admitted evidence is harmless where there is overwhelming properly admitted and uncontradicted evidence of guilt). For that reason, Cabiness is not entitled to relief on this claim.

Cabiness next argues that the trial court abused its discretion by allowing the Commonwealth to use a photograph of him from 2003 to illustrate what hairstyle he wore at the time of the crime in 2009. The record reflects that Officer Mayburn stopped Cabiness in another man's car

within minutes of the murder as part of a traffic stop. Officer Mayburn testified that at that time, Cabiness wore his hair in cornrows. The Commonwealth sought to show Officer Mayburn a photograph of Cabiness from 2003, in which Cabiness is wearing cornrows, to illustrate what Cabiness' hair looked like at the time of the murder.[3] The photograph was a mug shot from 2003, and Cabiness objected, arguing that the use of a mug shot was prejudicial. N.T., 10/14/11, at 171-72. The trial court disagreed and permitted the Commonwealth to use the photograph.

On appeal, Cabiness reiterates his claim, arguing that the mug shot "had limited, if any probative value" and that it created the "danger of unfair prejudice, undue delay, and [the presenting of] cumulative evidence." Appellant's Brief at 39. The trial court explained its ruling as follows:

> Here, the photograph of [Cabiness] was used to aid the jury in understanding what [his] hair looked like on the day of the shooting, as opposed to his hairstyle at the time of trial, and it was the same photograph utilized in the photo array shown to Shanneika Gay. Moreover, the [t]rial [c]ourt found, with respect to the photograph, that "[i]t doesn't show any sort of numbers. It is from the neck up. There is no indication it was taken during the period of incarceration or anything." (T.T. (I) 171). No juror could reasonably infer that based on the photograph [Cabiness] had engaged in prior criminal activity, and thus the [t]rial [c]ourt properly admitted the photograph for the aforementioned reasons.

Trial Court Opinion, 10/2/13, at 15.

[3] Cabiness had changed his hairstyle by the time of trial. N.T., 10/14/11, at 182.

We find no abuse of discretion in the trial court's ruling. The admission of photographs that were already in the possession of the police, as is the case when a photograph is part of a photo array, does not constitute prejudicial error unless the references or statements imply prior criminal conduct. ***See Akbar***, 91 A.3d at 236-37. In this instance, the image gave no indication that it was taken in connection with prior criminal activity, and there was no testimony to suggest that it was taken in connection with prior criminal conduct. The testimony regarding the photograph was limited to illustrating what Officer Mayburn claimed Cabiness' hair looked like on the day of the murder. N.T., 10/14/11, at 180-82; 203-06. The references and statements made about this photograph did not in any way imply prior criminal conduct. As such, there is no merit to this claim.

Finally, Cabiness argues that the trial court erred when it denied his motion for a mistrial following a statement by Detective Vonzale Boose that in certain telephone calls, Watson was seeking to have witnesses against him killed. Our standard of review with regard to the denial of a motion for mistrial is as follows:

> In criminal trials, the declaration of a mistrial serves to eliminate the negative effect wrought upon a defendant when prejudicial elements are injected into the case or otherwise discovered at trial. By nullifying the tainted process of the former trial and allowing a new trial to convene, declaration of a mistrial serves not only the defendant's interests

> but, equally important, the public's interest in fair trials designed to end in just judgments. Accordingly, the trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. In making its determination, the court must discern whether misconduct or prejudicial error actually occurred, and if so ... assess the degree of any resulting prejudice. Our review of the resulting order is constrained to determining whether the court abused its discretion.

Commonwealth v. Hogentogler, 53 A.3d 866, 877-78 (Pa. Super. 2012) (citation omitted). Furthermore,"[t]he remedy of a mistrial is an extreme remedy required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial tribunal." ***Id.*** at 878. "When the trial court gives adequate cautionary instructions, declaration of a mistrial is not necessary." ***Commonwealth v. Bryant***, 67 A.3d 716, 728 (Pa. 2013).

At trial, the Commonwealth intended to introduce recordings of calls made by Watson to Stubbs and Kevin in which they discuss, according to the Commonwealth's theory, locating and killing witnesses against Watson. To that end, the Commonwealth called Detective Boose, who was an investigator in the murder of Davon Young. Detective Boose testified that in the course of his investigation, he listened to recorded calls made by Watson from prison. N.T., 10/19/11, at 259. He testified that Watson made numerous calls under the PIN of another prisoner, and that in many calls to Stubbs and Kevin, Watson discussed locating and killing witnesses against

him. ***Id.*** at 261-66. Cabiness immediately objected to Detective Boose's characterization of the content of the calls. The trial court sustained the objection "since [the Commonwealth] intends to play these calls" and gave a brief following curative instruction. ***Id.*** at 266.[4] Cabiness then moved for a mistrial, arguing that the statement was "inflammatory and outrageous[.]" ***Id.*** at 267. The trial court then gave the following instruction to the jury:

> Ladies and gentlemen of the jury, again, the evidence on the tape and what the contents means [*sic*] is up to you to draw any conclusion. The conclusion the [D]etective drew about locating or killing persons, in this regard that conclusion is to be disregarded. Again, the evidence is the actual recording, your perception of what is said on the tape, on the recording, and any conclusion that you draw by virtue of your common sense.

Id. at 267-68.

On appeal, Cabiness argues that Detective Boose's statement was "highly improper and its unavoidable effect deprived [] Cabiness of a fair and impartial tribunal." Appellant's Brief at 34. Cabiness cites three cases in support of this assertion. All of these cases involve the grant of a new trial because of statements made by a prosecutor characterizing actions by the accused or a witness. ***Id.*** (citing ***Commonwealth v. Bricker***, 487 A.2d 346 (Pa. 1985); ***Commonwealth v. Shain***, 426 A.2d 589 (Pa. 1981);

[4] The trial court's instruction was as follows: "Ladies and gentlemen of the jury, the evidence are [*sic*] the calls themselves, not Detective Boose's interpretation. So in terms of the general overview your perception was it was Luzay Watson talking about his case with those persons." N.T., 10/19/11, at 266.

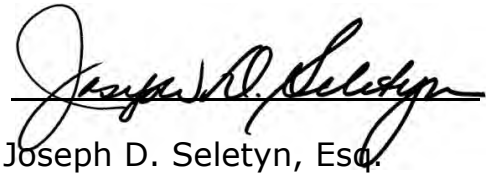
Commonwealth v. Adkins, 364 A.2d 287 (Pa. 1976)). The critical distinction, however, is that in all three of these cases, there was no evidence to support the prosecutor's characterization, and it was that lack of evidence that required the granting of new trials.[5] That is not this case here, where the Commonwealth introduced the calls at issue into evidence. Furthermore, the instruction given by the trial court following Cabiness' motion for a mistrial explicitly instructed the jury members that they were to disregard Detective Boose's statement and that they were to draw their own opinions as to the subject of the discussions by listening to the tapes. It is well established that "[t]he jury is presumed to have followed the [trial] court's instructions." ***Commonwealth. v. Akbar***, 91 A.3d 227, 233-34 (Pa. Super. 2014). Accordingly, we conclude that this instruction was sufficient to cure any prejudice that might have been caused by Detective Boose's characterization regarding the subject matter of the recorded calls. Thus, the trial court did not abuse its discretion in denying the request for a mistrial. ***Bryant***, 67 A.3d at 728.

Having found no merit to the issues raised by Cabiness on appeal, we affirm the judgment of sentence.

Judgment of sentence affirmed.

[5] Cabiness acknowledges this difference in his "discussion" of each case, which was limited to a parenthetical phrase following the citation to each case. Appellant's Brief at 34.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014