J-S21010-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
THOMAS WHITE,	:	
	:	
Appellant	:	No. 212 EDA 2013

Appeal from the Judgment of Sentence Entered August 14, 2012,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0004847-2011.

BEFORE: SHOGAN, ALLEN and OTT, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 28, 2014**

Appellant, Thomas White, appeals from the judgment of sentence entered August 14, 2012, following his conviction by a jury of first-degree murder, carrying a firearm without a license, carrying a firearm on public streets or public property in Philadelphia, and possessing an instrument of crime ("PIC"). We affirm.

The trial court summarized the facts of the case as follows:

> On November 9, 2009, one year prior to the homicide, [Appellant] shot and wounded Garrick Sanders (Sanders, or the victim) on the 200 block of Chelten Avenue in Philadelphia. At that time, while [Appellant] was selling drugs, Sanders had snatched money from [Appellant's] hand, which angered [Appellant] to the point that he opened fire on Sanders with a revolver. Ronald Murphy (Murphy) was a witness to this shooting; he saw [Appellant] fire and hit Sanders in the shoulder.

* * *

At some point after the 2009 shooting, Sanders and his friend Shron Linder (Linder) approached [Appellant] and threatened him for having sold drugs in their territory.

* * *

Exactly one year after shooting Sanders in the shoulder, having been threatened by Sanders [and] Linder. . . [Appellant] went out in search of Linder. [Appellant] looked for Linder in different alleyways on Norwood Street in Philadelphia, but was unable to find him. [Referencing Appellant's statement, Philadelphia Detective Joseph Bamberski testified that Appellant stated:]

> What saved [Linder] was that he wasn't where I thought he would be. [Sanders] was in the alley. I came up on him [Sanders] from the alley and shot him with one of them police jawns [*sic*]. I fired nine shots. He was running and I got him in the back. When the police stopped using the .38s, they started using these guns.

In this attack, Sanders suffered five gunshot wounds, which ultimately caused his death.

On November 12, 2010, three days after the victim was killed, Murphy was shot nine times on the 6300 block of Lambert Street in Philadelphia. Detective Mark Williford, a ballistician, compared fired cartridge casings (FCCs) retrieved from the scene of the November 9, 2010 shooting of Sanders with the FCCs recovered from the scene of the November 12, 2010 shooting of Murphy. Detective Williford concluded, to a reasonable degree of scientific certainty, that the FCCs recovered from the two scenes were discharged from the same firearm.

While being transported to the hospital, Murphy gave a statement in which he identified his shooter as the same person who shot Sanders. Murphy survived the shooting and testified at trial that [Appellant] shot Sanders in 2009 and shot him (Murphy) on November 12, 2010.

> On December 4, 2010, after [Appellant] was arrested, [he] gave a statement to Detectives Kenneth Rossiter and Joseph Bamberski in which he confessed to shooting the victim in 2009 and again in 2010. [Appellant] also confessed to having shot Murphy on November 12, 2010.

Trial Court Opinion, 6/28/13, at 1–3 (internal citations to the record and footnotes omitted).

Following a week-long trial, Appellant was convicted of first-degree murder (of Garrick Sanders), carrying a firearm without a license, carrying a firearm on the streets of Philadelphia, and PIC on August 14, 2012.[1] The same day, the trial court sentenced Appellant to a mandatory term of life imprisonment for first-degree murder, a concurrent term of three and one-half to seven years of imprisonment for carrying a firearm without a license, a concurrent term of one and one-half to five years of imprisonment for carrying a firearm in public, and a concurrent term of one and one-half to five years of imprisonment for PIC.

Appellant filed a post-sentence motion on August 23, 2012, asserting, *inter alia*, that the verdict was against the weight of the evidence, which the trial court denied on December 20, 2012. On January 16, 2013, Appellant filed a timely notice of appeal. Both the trial court and Appellant complied with Pa.R.A.P. 1925.

Appellant raises the following issues on appeal:

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[1] Appellant was also charged in the other two shootings, but a motion to consolidate the cases was denied. N.T., 8/6/12, at 3–12.

1. Whether the trial court erred in admitting crime scene photographs that were not produced by the Commonwealth to [d]efense [c]ounsel in discovery?

2. Whether the trial court erred in admitting evidence of Appellant's prior bad acts of shooting the decedent a year prior (in 2009) to the incident for which he was on trial (2010 shooting death of Garrick Sanders) and also for shooting Ronald Murphy, an alleged eyewitness to Appellant shooting of Garrick Sanders in 2009, after Appellant allegedly shot and killed Garrick Sanders in 2010?

3. Whether the trial court erred in failing to give a cautionary instruction on the prior bad acts at the time testimony was given as requested by defense counsel?

4. Whether the trial court erred in allowing hearsay statements of Ronald Murphy as [a] dying declaration?

5. Whether the trial court erred in admitting evidence of Appellant's prior convictions for kidnapping by deception which occurred in 1991 for which Appellant was sentenced to 7 ½ to 15 years imprisonment? N.T., 8/13/12, at 182–183.

6. Whether the verdict was against the weight of the evidence?

Appellant's Brief at 4.

In his first issue, Appellant asserts that the trial court erred in admitting into evidence crime scene photographs that allegedly were never presented to defense counsel. Appellant's Brief at 9. This issue was not preserved for review. Pennsylvania Rule of Appellate Procedure 1925(b)(4)(vii) provides, "Issues not included in the Statement [of Errors Complained of on Appeal] and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived." ***See also Commonwealth***

v. Lord, 719 A.2d 306, 309 (Pa. 1998) ("Any issues not raised in a 1925(b) statement will be deemed waived."). Our review of Appellant's Rule 1925(b) statement reveals that Appellant failed to include any claim pertaining to crime scene photographs. Therefore, this issue is waived.

Appellant next argues that the trial court erred in permitting evidence of Appellant's other bad acts, specifically, the November 2009 shooting of Sanders and the November 2010 shooting of Murphy. Appellant's Brief at 10. Prior to trial, Appellant had objected to the admission of such evidence on grounds of lack of notice. N.T., 8/6/12, at 7. However, the trial court denied Appellant's motion *in limine* on August 7, 2010, and ruled that evidence of the shootings was admissible. N.T., 8/7/12, at 52–54.

In reviewing the admissibility of evidence, our standard of review is limited to determining whether the trial court committed an abuse of discretion. ***Commonwealth v. Johnson***, 42 A.3d 1017, 1027 (Pa. 2012). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Id***.

The Pennsylvania Rules of Evidence allow evidence of a crime, wrong, or other act in the following limited circumstances:

Rule 404. Character Evidence; Crimes or Other Acts

* * *

(b) Crimes, Wrongs or Other Acts.

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

(3) *Notice in a Criminal Case*. In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.

Pa.R.E. 404(b). Evidence of other acts is admissible when offered for a relevant purpose other than to show that a defendant acted in conformity with those acts or to show a defendant's criminal propensity. ***Commonwealth v. Sherwood***, 982 A.2d 483, 497 (Pa. 2009). In determining whether evidence of other acts is admissible, the trial court must balance the probative value of such evidence against its prejudicial effect. ***Johnson***, 42 A.3d at 1027.

Appellant asserts that he was not given adequate notice of the Commonwealth's intention to introduce evidence of the November 2009 shooting of Sanders and the November 2010 shooting of Murphy.

Appellant's Brief at 11; Pa.R.E. 404(b)(3). The purpose of Rule 404(b)(3) is to prevent unfair surprise and allow the defendant to prepare an objection or rebuttal to such evidence. ***Commonwealth v. Lynch***, 57 A.3d 120, 125–126 (Pa. Super. 2012). "However, there is no requirement that the 'notice' must be formally given or be in writing in order for the evidence to be admissible." ***Id***. at 126.

Our review of the record compels the conclusion that the Commonwealth provided ample notice. First, the Commonwealth initially sought to consolidate the case *sub judice* with Appellant's pending cases involving the prior shooting of Sanders in 2009 and the shooting of Ronald Murphy in 2010. N.T., 8/6/12, at 3–4. Second, the Commonwealth presented multiple items of evidence to the defense during discovery including, *inter alia*, Appellant's confession to all three shootings. Finally, the day before trial, the Commonwealth specifically sought permission from the trial court to introduce Appellant's other crimes as evidence of motive, identity, and *res gestae*. For these reasons, we conclude that Appellant has not demonstrated unfair surprise and further, he clearly had sufficient notice of the proffered evidence. ***See Lynch***, 57 A.3d at 126 (holding that Appellant had sufficient notice from discovery, which contained evidence of Appellant's other acts). Therefore, the trial court was within its discretion when it permitted evidence of Appellant's prior bad acts. ***Johnson***, 42 A.3d

at 1027 (admissibility of evidence is a matter for the discretion of the trial court).

Appellant's third claim is related to the above issue and avers that the trial court erred when it failed to give a cautionary instruction to the jury regarding the 2009 shooting of Sanders and the 2010 shooting of Murphy at the time the testimony was given. Appellant's Brief at 11. While evidence of a defendant's other acts may be admissible under Pa.R.E. 404(b)(2), this evidence must "be accompanied by a cautionary instruction which fully and carefully explains to the jury the limited purpose for which that evidence has been admitted." ***Commonwealth v. Weiss***, 81 A.3d 767, 798 (Pa. 2013).

In the instant case, Appellant requested that the trial court issue a cautionary instruction to the jury to explain the purpose of the admissibility of the other acts. The trial court agreed but stated, "I will explain it to them, but I don't think I'm going to do it right this second." N.T., 8/7/13, at 147. As promised, the trial court subsequently presented the following cautionary instruction to the jury regarding the shootings:

> You have heard evidence in this case that the defendant shot Garrick Sanders on a prior occasion and that he allegedly shot Ronald Murphy two days after the decedent was killed. In general, evidence of other acts is not admissible to merely show bad character or a propensity to commit crime. Exceptions to the general rule exist in those circumstances where the evidence is relevant for some other legitimate purpose. Evidence of other crimes, wrongs or acts is admissible for other purposes such as to show motive, opportunity, preparation, intent or to show the identity of the perpetrator. However, you, the jury, must make

> that determination whether such evidence is relevant as to any of those purposes.

N.T., 8/13/12, 243–244.

Appellant presents no authority in support of his position that a contemporaneous instruction is mandatory. Moreover, in reviewing a jury charge, "we must view the charge as a whole." ***Commonwealth v. Scott***, 73 A.3d 599, 602 (Pa. Super. 2013). Given that the jury was ultimately informed of the limited purpose for which the evidence had been admitted, we reject Appellant's claim.

Appellant's fourth issue maintains that the trial court erred in permitting hearsay statements of Murphy as a dying declaration. Specifically, Appellant objects to the statements Murphy made to police after being shot. Appellant's Brief at 12. On the day Murphy was shot, which was three days after Sanders's murder, Philadelphia Police Officer Jason Reid responded to the scene where he observed that Murphy had several bullet wounds, including a shot near the center of his chest. N.T., 8/13/12, at 59–60. Officer Reid determined that Murphy's condition was so critical that he could not wait for an ambulance, and Officer Reid transported Murphy to the hospital. ***Id***. at 60. Officer Reid appeared as a witness for the Commonwealth and testified that when he took Murphy to the hospital, Murphy identified Appellant both as his shooter and the shooter of Sanders. ***Id***. at 64–65.

The rule against hearsay permits evidence of dying declarations when the declarant is unavailable. Pa.R.E. 804. Prior to Officer Reid's testimony, however, Murphy appeared as a witness for the Commonwealth. Murphy, himself, testified that Appellant was the man who shot him nine times, and that he saw Appellant shoot Sanders in 2009. ***Id***. at 15–17.

Appellant's Pa.R.A.P. 1925(b) statement set forth this allegation in terms of a claim that Officer Reid's testimony regarding Murphy's dying declaration violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. Appellant's Statement of Errors Complained of on Appeal, 2/7/13, at 1. The trial court, therefore, limited its review of this issue to the applicability of the Confrontation Clause. Trial Court Opinion, 6/28/13, at 10–11. Appellant, however, abandoned this contention in his brief and insisted that the dying declaration was impermissible because the declarant was not "unavailable" as required by Pa.R.E. 804.

We conclude that Appellant did not properly preserve this claim. ***Commonwealth v. Castillo***, 888 A.2d 775, 780 (Pa. Super. 2012) ("Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived."). Here, Appellant's Rule 1925(b) statement confined the presentation of this issue to his contention that Officer's Reid's testimony violated the Confrontation Clause. Thus, Appellant waived his claim that the dying declaration was impermissible because the declarant was available. In

addition, we note that Appellant's failure to cite any case law in his brief to support his proposition also renders the issue waived. ***Commonwealth v. Williams***, 959 A.2d 1252, 1258 (Pa. Super. 2008) ("Appellant's failure to properly develop [a] claim and to set forth applicable case law to advance it renders this issue also waived.").

Even if Appellant presented the issue as it was preserved in his Pa.R.A.P. 1925(b) statement, we would conclude that the trial court's opinion comprehensively disposed of Appellant's issue. The trial court stated:

> [Appellant] challenges the admission of Murphy's statement to Officer Jason Reid on November 12, 2010[,] on the grounds that it violated his Sixth Amendment rights. [Appellant's] objections on these grounds are unfounded.
>
> The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions . . . the accused shall enjoy the right to be confronted by the witness against him." The Supreme Court has held that the Confrontation Clause prohibits the admission of "testimonial" evidence unless the individual who had previously made a "testimonial statement" is unavailable and the defendant had prior opportunity to cross-examine him or her. ***Crawford v. Washington***, 541 U.S. 36, 68 (2004).
>
> Inadmissibility per the Confrontation Clause is premised on the fact that an individual who made a "testimonial" statement is not in court for the defendant to confront.
>
> * * *
>
> In the case at hand, ***Crawford*** does not apply, as Ronald Murphy appeared in court and was subject to cross-examination by [Appellant]. At trial, Murphy both remembered giving the

> statement to Officer Reid and validated its content. N.T., 8/14/12, at 21–22. Accordingly, [Appellant's] claim fails.

Trial Court Opinion, 6/28/13, at 10–11.

In his fifth issue, Appellant argues that the trial court abused its discretion by admitting evidence of Appellant's 1991 kidnapping conviction without adequate notice to Appellant. Appellant's Brief at 14–15. Generally, evidence of prior criminal convictions involving dishonesty or a false statement may be used to impeach a witness. ***Commonwealth v. Buterbaugh***, 91 A.3d 1247, 1263 (Pa. Super. 2014). Pa.R.E. 609, which governs the admissibility of evidence to impeach a witness, provides as follows:

> **Rule 609. Impeachment by Evidence of a Criminal Conviction**
>
> **(a) In General**. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, must be admitted if it involved dishonesty or false statement.
>
> **(b) Limit on Using the Evidence After 10 Years**. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
>
> (1) its probative value substantially outweighs its prejudicial effect; and
>
> (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

In order to preserve a claim for appellate review, the issue must be raised before the trial court. Pa.R.A.P. 302(a); ***Commonwealth v. Maisonet***, 31 A.3d 689, 694 (Pa. 2011) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Herein, Appellant had been convicted of four counts of kidnapping involving deception, and the Commonwealth sought to introduce this evidence as *crimen falsi* crimes for purposes of impeachment.[2] N.T., 8/13/12, at 119–120. Appellant had several opportunities to object to the introduction of his prior convictions as *crimen falsi* crimes, but he failed to make a specific and timely objection at any point during the proceedings. N.T., 8/17/12, at 120–123; 182–184; 198–200. Significantly, both Appellant and the Commonwealth stipulated to the admission of these convictions. N.T., 8/13/12, at 189–190. Our careful examination of the record confirms that Appellant failed to raise any issue at trial pertaining to lack of notice and therefore, did not preserve this claim for appellate review. ***Maisonet***, 31 A.3d at 694. We conclude this issue is waived on appeal.

Finally, Appellant argues that the trial court should have awarded Appellant a new trial because the jury's verdict of first-degree murder was against the weight of the evidence. Appellant's Brief at 15. An allegation that the verdict is against the weight of the evidence is addressed to the

[2] Appellant does not challenge the characterization of the kidnapping convictions as *crimen falsi*.

discretion of the trial court. ***Commonwealth v. Ramtahal***, 33 A.3d 602 (Pa. 2011). "An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence." ***Id***. at 609. A trial judge cannot grant a new trial due to a mere conflict in testimony or because he would have arrived at a different conclusion on the same facts. ***Commonwealth v. Edwards***, 903 A.2d 1139 (Pa. 2006). Instead, a new trial should be granted "only in truly extraordinary circumstances . . . ." ***Id***. at 1149.

The trial court will award a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. ***Commonwealth v. Diggs***, 949 A.2d 873 (Pa. 2008). "In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will be granted only where the facts and inferences of record disclose a palpable abuse of discretion." ***Id***. at 879. Thus, "the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings." ***Commonwealth v. Rivera***, 983 A.2d 1211, 1225 (Pa. 2009).

We find that the trial court adequately and completely addressed this issue in its Pa.R.A.P. 1925(a) opinion, and we rely upon it for disposition of this claim:

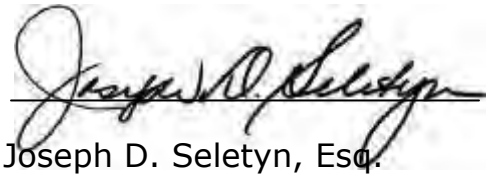
> In the instant case, [Appellant] claims that the verdict shocks the conscience because the result was contrary to the

> weight of the evidence. [Appellant] alleges that the evidence showed the testimony of Ronald Murphy was unreliable, and that the [Appellant's] confession was not the product of free will. In his statement to the police, [Appellant] confessed to shooting Sanders on November 9, 2010 and shooting Murphy on November 12, 2010. [Appellant's] statement was corroborated by Murphy's testimony that identified [Appellant] as the shooter on November 12, 2010. [Appellant's] confession was substantiated further by ballistics evidence that demonstrated the same gun was used in the November 9, 2010 shooting of Sanders and the November 12, 2010 shooting of Murphy. [Appellant's] confession, along with testimony and ballistics evidence supported the verdict and did not shock the conscience.

Trial Court Opinion, 6/28/13, at 11–12. We conclude that the trial court properly exercised its discretion in denying Appellant a new trial.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/28/2014