J-S38002-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DARYL COOK,	:	
	:	
Appellant	:	No. 2712 EDA 2010

Appeal from the Judgment of Sentence Entered August 26, 2010,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0010093-2008.

BEFORE: SHOGAN, ALLEN and FITZGERALD*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED MARCH 21, 2014**

Appellant, Daryl Cook, appeals from the judgment of sentence entered on August 26, 2010, in the Philadelphia County Court of Common Pleas. We affirm.

The trial court set forth the relevant facts of this matter as follows:

> On March [18], 2008, at approximately 8:43 p.m., Philadelphia Police responded to a radio call of a stabbing on the second floor of an apartment building located at 2038 West Tioga Street. Upon arrival,[3] police officers discovered [the] victim, Mr. Daniels, suffering from multiple stab wounds to the chest and arms. The victim was transported to Temple Hospital where he was subsequently pronounced dead at 9:38 p.m. An autopsy revealed that the victim suffered a total of eight wounds, two of which were to his right chest that caused fatal injury to his heart and both lungs. The manner of death was deemed to be homicide.
>
> [3] Police obtained a search warrant prior to entering the premises.

*Former Justice specially assigned to the Superior Court.

Subsequent investigation revealed that the victim made a dying declaration at the apartment and told Officer Clarence Irvine that a male named A.J., who was later identified as Andre Williams (hereinafter "A.J."), from downstairs, stabbed him.[4] On March 18, 200[8], Detective Rodden, the assigned investigator, secured an arrest warrant to apprehend A.J. Three days later, members of the Fugitive Squad arrested A.J. and transported him to the Homicide Unit. DNA swabs were taken from A.J. While detectives were unable to take a formal statement from A.J. because he invoked his right to counsel, he gave the detectives an oral statement.[5] In it, A.J. identified his uncle, [Appellant], as the one who stabbed and killed the decedent. Initially detectives were unable to locate the whereabouts of [Appellant]. On June 6, 200[8], Amir Williams, [Appellant's] uncle and A.J.'s father, flagged down Officer Clarence Irvine around 5th and Olney and told him that [Appellant] was located inside a deli and was wanted for a homicide. Amir Williams led Officer Irvine to the deli at which time the officer asked [Appellant] for his ID. Upon ascertaining that [Appellant] had an open warrant for a summary offense and that he was wanted for questioning in a homicide matter, Officer Irvine arrested defendant.

[4] Testimony from Tiffany Daniels, daughter to the victim, explained that the victim was the building manager at the apartment and also resided on the second floor. Ms. Daniels spoke with her father so he could talk with the landlord to allow A.J. to rent an apartment on the first floor. A.J. resided on the first floor for one to two months before the stabbing. Two weeks prior to the stabbing, someone broke into A.J.'s apartment. During this time, A.J. and the victim had several arguments regarding the break-in, which resulted in the victim telling A.J. three days before the stabbing to vacate the apartment.

[5] Detective Cummins took an oral statement from A.J. He was advised of his rights and recounted his version of the stabbing. A.J. stated he heard a commotion on the second floor and upon entering the victim's room, he observed [Appellant] and the victim fighting. As A.J. broke up the fight, he observed [Appellant] stab the victim several times.

> While placing a call to 9-1-1, A.J. observed [Appellant] fleeing the area. A.J. also fled the area.

[Appellant] was transported to Homicide Unit located at the Roundhouse where, Detective John McNamee tried to speak to [Appellant] about the death of the victim, but he refused to talk about the case. Subsequently, Detective McNamee obtained a search warrant to take DNA from [Appellant] for DNA comparison. Two days later, Detective Rodden again came in contact with [Appellant], who was being held pursuant to the open warrant, and explained to him why he was there and asked if he would like to make a statement. Initially [Appellant] was unwilling to make a statement. Then, after the detective provided [Appellant] with food and beverages, Detective Rodden explained to [Appellant] that A.J. had been arrested and that he denied that he had killed the victim. The detective continued and stated that if [A.J.] had not killed the victim then [Appellant] had to have done so. At first, [Appellant] denied any involvement with the stabbing, but approximately fifteen minutes later, he agreed to give a statement. However, before Miranda [v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] warnings could be administered, [Appellant] volunteered that he had stabbed the victim. [Appellant] then gave a formal statement after he was given and waived the rights protected by the Miranda decision.

In his statement, [Appellant] stated that he went to A.J.'s apartment and A.J. told him to wait downstairs. Upon hearing an argument on the second floor, he proceeded upstairs. As he entered the apartment, he observed A.J. in the front room arguing with the victim. A.J. was upset that [Appellant] had entered the apartment and went into the kitchen, leaving [Appellant] and the victim alone in the front room. After A.J. left, the victim said, "fuck this," walked away, bent down, and grabbed a knife underneath the mattress of his bed. The victim approached [Appellant] and swung the knife at him, at which time both men began to struggle. Both men then fell on the ground, where, according to [Appellant], he was able to gain control of the knife, which he used to stab the victim.

[Appellant] admitted only to stabbing the victim twice in the stomach. At some point, he saw A.J. in the kitchen placing a call for medical attention for the victim so he decided to flee. As

> [Appellant] left the apartment, he threw the knife away, and proceeded to walk toward Broad and Wingohocking. He claimed he suffered a cut on his face and lip and three cuts on his chest. He did not seek medical attention and explained to the detectives that he did not wish to go to jail for stabbing the victim.
>
> [Appellant] indicated that he was aware that A.J. had been arrested and charged for the stabbing but did not come forward because he wanted nothing to do with the matter. He had hoped that once the truth was discovered that A.J. did not stab the man, the case would be thrown out. He claimed he was worried about holding onto his "freedom" as long as he could and that he decided to give the statement because he felt guilty that someone else had been charged with the crime.

Trial Court Opinion, 2/24/12, at 2-4 (footnotes in original).

Following a jury trial, Appellant was found guilty of third-degree murder. On August 26, 2010, the trial court sentenced Appellant to a term of twenty to forty years of incarceration. No post-sentence motions were filed, and on September 14, 2010, Appellant filed a timely notice of appeal to this Court. At this juncture, the procedural history becomes increasingly convoluted.

After Appellant filed his appeal, the trial court directed him to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Order, 10/12/10. Appellant filed a Pa.R.A.P. 1925(b) statement on October 27, 2010. Appellant then filed several *pro se* petitions, and for reasons that are not clear from the record, on January 10, 2011, the trial court directed Appellant to file a Pa.R.A.P. 1925(b) statement on or before January 31, 2011. The record reflects no docket activity until May 4, 2011,

when Attorney Heather Sias entered her appearance for Appellant. Inexplicably, over eight months later, Attorney Sias filed a Pa.R.A.P. 1925(b) statement on January 11, 2012. Then, on January 27, 2012, Attorney Sias filed a petition to withdraw her appearance. During this time, the record was transmitted to this Court. In an order filed on April 4, 2012, this Court granted counsel's petition to withdraw and remanded this matter to the trial court for the appointment of new counsel. On April 20, 2012, Attorney David Rudenstein entered his appearance for Appellant. Thereafter, Appellant filed multiple *pro se* motions that were denied without prejudice to Appellant's right to reapply for relief through counsel. Order, 5/2/12. Appellant filed a counseled appellate brief in this matter on August 6, 2012; however, counsel also filed a petition for remand averring that Attorney Sias failed to raise additional issues deserving of appellate review. Application for Remand, 8/6/12. On August 27, 2012, this Court granted Attorney Rudenstein's application for remand and provided Appellant an opportunity to file a supplemental Pa.R.A.P. 1925(b) statement. In a motion for extraordinary relief filed on December 24, 2012, Appellant's counsel sought additional time in which to file the Pa.R.A.P. 1925(b) statement. In an order filed on January 16, 2013, this Court granted counsel's motion for an extension of time in which to file the supplemental Pa.R.A.P. 1925(b) statement. Appellant filed his supplemental Pa.R.A.P. 1925(b) statement

with the trial court on February 4, 2013. In a supplemental opinion filed on February 6, 2013, the trial court addressed the additional issues raised by Appellant in the supplemental Pa.R.A.P. 1925(b) statement. Due to a breakdown in the operation of the Court, on June 25, 2013, we vacated the briefing schedule to permit Appellant to file a supplemental brief, as that right had not been reinstated following the order granting Appellant's petition to file the supplemental Pa.R.A.P. 1925(b) statement. Appellant filed his supplemental brief on August 26, 2013. Despite being granted an extension of time in which to do so, the Commonwealth opted not to file a brief in this matter. Thus, following an atypical procedural history, this matter is ripe for disposition.

On appeal, Appellant raises the following issues for this Court's consideration:

> I. Is [Appellant] entitled to an arrest of judgment on the charge of Murder in the Third Degree where the evidence is insufficient to support the verdict and where the Commonwealth did not prove its case beyond a reasonable doubt?
>
> II. Should [Appellant] be awarded a new trial where the verdict is not supported by the greater weight of the evidence and where the verdict is only supported by suspicion, conjecture and surmise?
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> III. Is [Appellant] entitled to a new trial where the Commonwealth did not prove beyond a reasonable doubt that [Appellant] failed to act in self-defense?
>
> IV. Is [Appellant] entitled to a new trial where the Suppression Court erroneously ruled that [Appellant's] Out of Court

> Statement should not be suppressed but where the statement was not given in a knowing, intelligent and voluntary fashion?

Appellant's Brief at 3.

> I. Is [Appellant] entitled to a new trial as the result of Court error in permitting the testimony of Detective Rodden where the Detective testified that [Appellant] refused to speak to another homicide detective at the time that [Appellant] was being questioned?
>
> II. Is [Appellant] entitled to a new trial as the result of Court error where the Court permitted Detective Rodden to testify that when someone gives a statement to the police and is willing to sign it, it shows that he is telling the truth?

Appellant's Supplemental Brief at 3. As noted above, Appellant raised issues in both his initial brief and supplemental brief. We shall address each of those issues in turn.

In his first issue, Appellant claims that there was insufficient evidence to sustain the guilty verdict for third degree murder. We disagree.

Our standard of review is as follows:

> A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge.
>
> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the

> evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hutchinson, 947 A.2d 800, 805-806 (Pa. Super. 2008) (citations and quotation marks omitted).

Third degree murder is defined as an unlawful killing with malice but without the specific intent to kill. ***Commonwealth v. Dunphy***, 20 A.3d 1215, 1219 (Pa. Super. 2011); 18 Pa.C.S.A. § 2502(c). Malice is defined as:

> A wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured.... Malice may be found where the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause serious bodily injury.

Id. (internal citations and quotation marks omitted). "Malice may be inferred from the use of a deadly weapon on a vital part of the victim's body." ***Commonwealth v. Gooding***, 818 A.2d 546, 550 (Pa. Super. 2003).

Upon applying the aforementioned standard of review, we conclude that the evidence was sufficient to prove that Appellant had the requisite malice to support a conviction for third-degree murder. The evidence, when viewed in the light most favorable to the Commonwealth, established that Appellant stabbed the victim six times, and the two stab wounds to the heart

and lungs, vital parts of the victim's body, were fatal. Accordingly, there was sufficient evidence to establish malice and support the conviction for third-degree murder.

In his second issue on appeal, Appellant purports to challenge the weight of the evidence. However, a claim that the verdict was against the weight of the evidence is waived unless it is raised in the trial court in a motion for a new trial, in a written or oral motion before the court prior to sentencing, or in a post-sentence motion. Pa.R.Crim.P. 607(A)(1)-(3). While the record reflects that Appellant filed numerous *pro se* motions in this matter, there was no post-verdict motion for a new trial based on the weight of the evidence. Accordingly, Appellant's challenge to the weight of the evidence is waived. ***Commonwealth v. Griffin***, 65 A.3d 932, 938 (Pa. Super. 2013).

Next, Appellant avers that he is entitled to a new trial because the Commonwealth did not prove beyond a reasonable doubt that Appellant was not acting in self-defense. We disagree.

The trial court cogently addressed this issue as follows:

> [Appellant] claims that the Commonwealth failed to show beyond a reasonable doubt that [he] did not act in self-defense. He contends that he did not introduce the deadly weapon and only took the knife from the decedent and used it to protect himself to put an end to the attack. "When a defendant presents evidence that he committed a killing in self-defense, the Commonwealth must disprove such a defense beyond a reasonable doubt," Commonwealth v. Brown, 648 A.2d 1177,

> 1180 (Pa. 1994). Thus, the Commonwealth must prove beyond a reasonable doubt at least one of the following three elements: "(1) the accused did not reasonably believe that he was in danger of death or serious bodily injury; (2) the accused provoked or continued the use of force; or (3) the accused had a duty to retreat and the retreat was possible with complete safety." Commonwealth v. McClendon, 874 A.2d 1223, 1230 (Pa. Super. 2005) (citations omitted). Even though the Commonwealth must disprove a claim of self-defense, the jury may disregard defendant's claim altogether. Commonwealth v. Miller, 634 A.2d 614, 617 (Pa. 1993)(citations omitted).
>
> Here, the Commonwealth clearly met its burden. Despite [Appellant's] assertions to the contrary, which the fact-finder was free to reject, the record establishes [Appellant] could have retreated once he gained control of the knife from the victim. Instead of dropping the weapon or fleeing, [Appellant] repeatedly stabbed the decedent and then fled. Given the foregoing, it is clear that [Appellant's] claim with respect to this issue should be denied.

Trial Court Opinion, 2/24/12, at 6-7. We agree with the trial court's analysis, and we adopt it as our own. Appellant is entitled to no relief on this issue.

In his fourth issue, Appellant argues that he is entitled to a new trial because the suppression court erroneously ruled that an out of court statement was admissible. We disagree.

In reviewing the denial of a motion to suppress, we must determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. ***Commonwealth v. Harrell***, 65 A.3d 420, 433 (Pa. Super. 2013) (citation omitted). Where the suppression court finds in favor of the prosecution, this

Court shall consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. ***Id***. When the factual findings of the suppression court are supported by the evidence, the appellate court may reverse only if there is an error in the legal conclusions drawn from those factual findings.

In determining the voluntariness of a confession and the waiver of ***Miranda*** rights, a court must consider and evaluate the totality of the circumstances attending the confession and the waiver of the rights. ***Commonwealth v. Gwynn***, 943 A.2d 940, 946 (Pa. 2008).

> A reviewing court is to examine the following in determining the independence of a confession: 1) the voluntariness of the confession, including whether ***Miranda*** warnings were given; 2) the temporal proximity of arrest and confession; 3) the presence of intervening circumstances; and 4) the purpose and flagrancy of the official misconduct.

Id. at 946 (citation omitted). The Commonwealth bears the burden of establishing that the defendant knowingly and voluntarily waived his ***Miranda*** rights. ***Harrell***, 65 A.3d at 433.

In the instant case, the trial court, in reviewing Appellant's motion to suppress, chose to credit the testimony of Detective Gregory Rodden. The trial court addressed this issue as follows:

> Here, [Appellant's] claim that he was interviewed over the course of two and one-half days and that he was physically abused by the interviewing detectives is belied by the record. [The record] demonstrates that [Appellant's] statement was

> voluntary, meeting the criteria set forth in Gwynn. Prior to receiving his Miranda rights, defendant told Detective Rodden that he had stabbed the victim. Detective Rodden then left the room and brought in his partner, Detective Hesser, to advise Mr. Cook of his Miranda rights. Prior thereto, defendant was not interviewed or harassed by police, who left him alone and provided him with food and drink. According to the testimony from Detective Rodden, being held for an extended period of time in the interview room is not uncommon. Those held, including the defendant, are free to knock on the door to ask for an opportunity to eat or drink, place a phone call, or use the bathroom. The record is clear that the two days [Appellant] was kept in custody was due to an active bench warrant for a summary offense. There is simply no evidence to support [Appellant's] assertion that his decision to give a statement was the product of abusive interrogation practices or the result of an extended custodial period. The record reflects that [Appellant] remained calm throughout the entire statement, he did not ask the detectives to stop the interview, and was freely permitted to decline to have his statement videotaped or audiotaped. Regarding [Appellant's] formal statement, the record shows that the interview of defendant lasted approximately two hours following [Appellant's] waiver of the Miranda rights. [Appellant] was not handcuffed during the interview and he did not appear to be under the influence of alcohol or narcotics.

Trial Court Opinion, 2/24/12, at 9. We agree with the trial court's assessment, and we conclude that the record supports the trial court's conclusion. ***See*** N.T., Suppression Hearing, 8/10/09, at 6-26 (testimony of Detective Rodden). Appellant is entitled to no relief on this claim.

We turn now to the issues Appellant raised in his supplemental brief, wherein Appellant claims that he is entitled to a new trial. Appellant first claims that he deserves a new trial because the trial court erred in permitting Detective Rodden's testimony wherein he said that Appellant refused to speak to another homicide detective at the time that he was

being questioned. Appellant's Supplemental Brief at 3. However, before we reach the merits of this issue we must point out that it is not properly before our Court. It is well settled that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). The "[f]ailure to raise a contemporaneous objection to the evidence at trial waives that claim on appeal." ***Commonwealth v. Thoeun Tha***, 64 A.3d 704, 713 (Pa. Super. 2013) (citation omitted). The record reveals that no objection was made to the allegedly improper testimony, and Appellant concedes as much in his supplemental brief. Appellant's Supplemental Brief at 6. Accordingly, this issue is waived.

In his final issue on appeal, Appellant contends the trial court erred in denying his motion for a mistrial. Appellant claims that a mistrial was warranted because of a response Detective Rodden gave at trial regarding a signed statement. Appellant's Supplemental Brief at 3. We disagree.

The standard of review we apply for determining whether the trial court erred in denying a motion for a mistrial is as follows:

> The trial court is in the best position to assess the effect of an allegedly prejudicial statement on the jury, and as such, the grant or denial of a mistrial will not be overturned absent an abuse of discretion. A mistrial may be granted only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. Likewise, a mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice.

Commonwealth v. Parker, 957 A.2d 311, 319 (Pa. Super. 2008) (citation omitted).

Here, the testimony at issue, which concerned a statement Andre Williams, Appellant's nephew, gave to the police regarding the murder, came during the following exchange:

> **[PROSECUTOR] Q:** If there's not a written statement, why is it, Detective Rodden, that you can't use that as a basis for a warrant?
>
> **[APPELLANT'S COUNSEL]:** Note my objection.
>
> **[DETECTIVE RODDEN]:** Because he can't substantiate what the statement is, truth or not. Usually when somebody gives a statement and willing to sign it, it shows that they are telling the truth.
>
> **[APPELLANT'S COUNSEL]:** Your Honor, I'm going to object to that. Move for mistrial.
>
> **THE COURT:** Mistrial denied. Objection is sustained.

N.T., Trial, 7/9/10, at 78.

Appellant claims that this testimony emphasized that all signed statements are credible in general, thereby bolstering the veracity of Appellant's signed statement to police wherein he admitted the killing. Appellant's Supplemental Brief at 3. After review, we conclude that Detective Rodden improperly vouched for the credibility of Mr. Williams'

statement.[1] However, while Detective Rodden's statement was improper, a mistrial was not warranted.

As noted, the trial court immediately sustained the objection. The record also reveals that the trial court instructed the jury that when an objection is sustained, the jury is to disregard the testimony. N.T., Trial, 7/8/10, at 10. It is well settled that the jury is presumed to follow the trial court's instructions. ***Commonwealth v. Teems***, 74 A.3d 142, 148 (Pa. Super. 2013). Ultimately, we cannot agree that the statement's unavoidable effect was to deprive Appellant of a fair trial by preventing the jury from weighing and rendering a true verdict. Moreover, the evidence of Appellant's guilt in this matter was overwhelming. Appellant's defense was not that someone else did the killing; rather, Appellant chose to claim self-defense, and the jury was well within its rights to find Appellant's version of events incredible. Therefore, we conclude that the trial court did not abuse its discretion in denying the motion for a mistrial.

For the reasons set forth above, we conclude that Appellant is entitled to no relief. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

FITZGERALD, J., files a Dissenting Statement.

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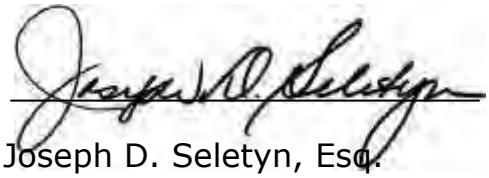
[1] ***See Commonwealth v. Tedford***, 960 A.2d 1, 31-32 (Pa. 2008) (it is improper for the prosecutor or a witness for the prosecution to vouch for the credibility of the Commonwealth's evidence).

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/21/2014