2014 PA Super 78

COMMONWEALTH OF PENNSYLVANIA Appellee v. HECTOR TRINIDAD Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 424 EDA 2013

Appeal from the Judgment of Sentence of September 5, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0001175-2009

BEFORE: GANTMAN, J., OLSON, J., and WECHT, J.

CONCURRING OPINION BY WECHT, J.: **FILED APRIL 21, 2014**

I join the learned Majority's opinion in all respects. I write separately to expound further upon Appellant's hearsay claim.

In this case, Appellant was on trial for the non-fatal shooting of Robert Rosado. Appellant apparently shot Rosado because Appellant believed that Rosado had informed law enforcement authorities that Appellant had shot and killed a man named Keith Bolden. At trial, the Commonwealth sought to introduce two out-of-court statements that implicated Appellant in the shooting of Keith Bolden. One statement was made by an individual named Brian Mejias to police detectives (the "Mejias statement"). The other statement was made by a man named Alvin Santiago (the "Santiago statement"), which was also made to police detectives.

The Mejias statement was a first-hand account of the Bolden shooting, in which Mejias told the detectives that he personally observed Appellant as one of the men who shot Bolden. However, the Santiago statement was not a first-hand account. Rather, Santiago told the detectives that Mejias told him what Mejias had observed regarding the Bolden murder, which, again, included an identification of Appellant as one of the shooters.

Before trial commenced, Appellant purported to object to both statements. However, when the matter was argued before the trial court, Appellant agreed to the admissibility of the Mejias statement, but argued that the Santiago statement constituted inadmissible hearsay. Notes of Testimony ("N.T."), 6/25/2012, at 18. The trial court agreed, and ruled that the Santiago statement was inadmissible. ***Id.*** at. 24.

During trial, the Commonwealth attempted to introduce the Mejias statement by having a detective read the statement to the jury. Appellant objected to the Mejias statement as being inadmissible hearsay. N.T., 6/26/2012, at 73. Apparently, Appellant's initial concession regarding the admissibility of the statement was predicated upon his belief that Mejias himself would testify that he made the statement, or that he would testify directly about what he had observed, because the stated basis for Appellant's objection was that the detective's reading of the statement to the jury rendered the statement inadmissible hearsay. ***Id.*** The Commonwealth responded that it was not offering the statement for its truth, but rather to

show Appellant's motive, and to demonstrate the course of police conduct in this case. ***Id.*** at 74. The trial court overruled Appellant's objection.

Appellant contends that the trial court's ruling in this regard was an abuse of discretion. Notably, throughout the proceedings, the Commonwealth repeatedly asserted that the Mejias statement was not being offered to prove the truth of the statement, but rather to prove Appellant's motive and to demonstrate the course of the police's investigation that ultimately led to Appellant's arrest. The Majority acknowledges both of these stated bases, but addresses only the course of police conduct argument. Upon doing so, the Majority concludes that the statement, in fact, was not offered for the truth of the matter asserted, but to show the steps taken by the police that led to Appellant's arrest. On this point, I agree with the Majority that the statement was admissible for that purpose. However, I believe that the Commonwealth's argument that the statement simultaneously can be offered to show a defendant's motive, but not for the truth of the matter asserted, warrants further discussion.[1]

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[1] I am troubled by the fact that the trial court did not instruct the jury on the limited purpose for which the evidence was being admitted. ***See*** Pa.R.E. 105 ("If the court admits evidence that is admissible . . . for a purpose—but not . . . for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly. The court may also do so on its own initiative.") After ruling on the objection, the judge, prosecutor, and defense understood the limited purpose for which the evidence was admitted, and for which the jury could consider the evidence. However, the jury was never apprised of this critical information. Equally troubling is the fact that Appellant's defense counsel
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Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered [into] evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Hearsay "is not admissible except as provided by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802. Notably, statements that prove, or tend to prove, motive are not one of the well-established exceptions to the general ban on hearsay. ***See*** Pa.R.E. 803 (declarant's availability immaterial), 803.1 (declarant available and necessary), and 804 (declarant unavailable).

Instantly, the Mejias statement was an out-of-court statement that was offered to prove Appellant's motive for shooting Rosado. The Commonwealth's theory at trial was that Appellant shot Rosado in retaliation for, as Appellant believed, Rosado informing the police that Appellant murdered Bolden. The Mejias statement was integral to demonstrating Appellant's motive in that it proved that Appellant, in fact, killed Bolden. The statement had absolutely no value to the Commonwealth if not introduced for the truth of the matter asserted in the statement. The mere fact that Mejias made the statement has no probative value in regard to

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did not request a limited purpose instruction, nor did counsel object to the fact that no instruction was given. Consequently, any argument to this Court that the trial court erred in not providing the jury with a limited purpose instruction would be waived. Nonetheless, although I am troubled the lack of the appropriate instruction, had the issue properly been preserved, I would find the error to be harmless pursuant to my discussion of harmless error below.

motive. Only the contents of the statement, and necessarily the truth of those contents, could establish Appellant's motive. In short, the statement only has value in proving Appellant's motive if it is taken as true. In my view, it is logically inconsistent to argue that the statement was not offered for its truth and to show motive at the same time. Therefore, to the extent that the trial court ruled that the statement was admissible based upon the Commonwealth's motive argument, I would conclude that the trial court did so erroneously.

As I stated above, the Majority properly concludes that the statement was admissible to demonstrate the course of the police investigation in this case. Nevertheless, even if motive was the only stated basis in support of the admissibility of the statement, Appellant still would not be entitled to relief. "Not all errors at trial . . . entitle an appellant to a new trial, and [t]he harmless error doctrine, as adopted in Pennsylvania, reflects the reality that the accused is entitled to a fair trial, not a perfect trial." ***Commonwealth v. West***, 834 A.2d 625, 634 (Pa. Super. 2003), (quoting ***Commonwealth v. Drummond***, 775 A.2d 849, 853 (Pa. Super. 2001), (internal citations and quotations omitted)).

> The Commonwealth bears the burden of establishing the harmlessness of the error. This burden is satisfied when the Commonwealth is able to show that: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the

> prejudicial effect of the error so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Passmore, 857 A.2d 697, 711 (Pa. Super. 2004), (quoting ***Commonwealth v. Laich***, 777 A.2d 1057, 1062-63 (Pa. 2001)).

Having reviewed the trial transcripts, it is clear to me that the evidence presented at trial proving Appellant's guilt was overwhelming . In addition to the trial court's summary of the evidence that is quoted by the Majority, ***see*** Maj. Op. at 1-2, the trial court offered the following additional recitation of the inculpatory evidence presented at trial:

> The victim, Rosado, testified regarding what happened to him on December 27, 2008. Rosado stated that on the day of the incident he saw three (3) individuals, one (1) female and two (2) males, walking down the street as he walked up the steps to his mother's house. As the two (2) males approached him, Rosado recognized Appellant first. The other gentleman with Appellant, Rosado recognized as "Luigi" whose true name is Luis Gonzalez, stood in the street and looked at Rosado as Rosado stood on the porch. Rosado stated that he lifted his shirt and told Luigi that he didn't have anything. He testified [that] Luigi then fired two shots, both missing him, from a silver gun. Rosado stated that he ducked behind the brick wall of the porch to avoid being shot and when the shooting stopped, he ran off the porch and down the steps. After he ran down the steps, Rosado looked down the street towards H Street and saw Appellant. Rosado stated [that] he ran down the street as Appellant fired three to four (3-4) shots from a handgun, one which struck Rosado in the back. Rosado testified that he fell in between parked cars and played dead before getting up and asking a neighbor to call 9-1-1.

Trial Court Opinion, 7/11/2013, at 5-6 (references to notes of testimony omitted).

This evidence, combined with the facts presented in the trial court's initial summary of the trial evidence, overwhelmingly established Appellant's

guilt. As such, to the extent that the trial court ruled on Appellant's objections based upon the Commonwealth's motive argument, I conclude that any such error was harmless. Accordingly, I concur in the result reached by the learned Majority.