NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KEENAN COLEMAN,	:	No. 2607 EDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, August 31, 2012, in the Court of Common Pleas of Philadelphia County Criminal Division at Nos. CP-51-CR-0002793-2011, CP-51-CR-0002794-2011, CP-51-CR-0002820-2011

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND OTT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED APRIL 22, 2014**

Appellant appeals the judgment of sentence entered against him on August 31, 2012. Finding no merit in the issues raised on appeal, we will affirm.

The trial court succinctly stated the facts underlying this appeal:

> At 5:00 a.m[.] on April 12, 2010, Coleman hid from view in an alley on the 700 block of Dekalb Street between Aspen Street and Fairmount Avenue in the City of Philadelphia. As Tobias Berry ("Berry") approached the alley, Coleman shot Berry in the face and Berry fell to the ground. While Berry was lying on the ground, Coleman fired multiple additional shots at him and then ran off into a car, driven by another person. Berry sustained nine gunshot wounds on his face, neck, and torso and was unresponsive when the medics arrived. Berry was transported to the hospital, where he was pronounced dead at 5:35 a.m.

> Over the course of the homicide investigation, police took statements from Wakyeeah [sic] Powell, Hanif Hall, and Rashe Bellmon. Ms. Powell had witnessed the shooting and both Mr. Hall and Mr. Bellmon had each heard Coleman boasting about shooting Tobias Berry. All three of these individuals identified Coleman to police. An arrest warrant was issued for Coleman on May 21, 2010 but police were unable to locate Coleman until July 1, 2010.
>
> On July 21, 2010, Officer Weaver and his partner were traveling on the 4800 block of Haverford Avenue when they saw Coleman, for whom they had an active homicide warrant. The officers made a u-turn, cutting off Coleman's path, and Coleman immediately took off running in the opposite direction. As the officers chased him on foot, Coleman headed through an abandoned lot and threw a black 9 millimeter Ruger into the bushes with his right hand. The officers arrested Coleman and recovered the firearm.
>
> On January 5, 2011, Coleman was awaiting a preliminary hearing at the Criminal Justice Center. Coleman and one of the witnesses for the hearing, Rashe Bellmon, were both held in Cell Room 3. While in the cell, Coleman threatened Bellmon and attacked him, punching him in the face and the ribs. Bellmon was transported to the hospital and received seven stitches.

Trial court opinion, 4/8/13 at 3-4.

The above facts gave rise to three separate bills of information against appellant, all of which were tried together. At No. CP-51-CR-0002793-2011, appellant was charged with homicide and related offenses for his conduct on April 12, 2010. At No. CP-51-CR-0002794-2011, appellant was charged with violations of the Uniform Firearms Act for his conduct on July 21, 2010. Finally, at No. CP-51-CR-0002820-2011, appellant was charged with witness

retaliation/intimidation for his conduct on January 5, 2011. Prior to trial, appellant sought to suppress the identification testimony of Wakeeyah Powell, and also sought to have his witness retaliation trial severed from the homicide trial. He was unsuccessful in both regards. On August 31, 2012, a jury found appellant guilty of first degree murder, possession of an instrument of crime, firearms not to be carried without a license, retaliation against witness, victim or party, and intimidation of witnesses or victims.[1] Immediately following the verdict, the court imposed an aggregate sentence of life plus 7 to 17 years' imprisonment.[2] Appellant now brings this timely appeal.

Appellant raises the following issues on appeal:

> DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE OUT-OF-COURT IDENTIFICATION OF WAKEEYAH POWELL WHEN THE PROCEDURE USED IN ELICITING THIS IDENTIFICATION WAS UNDULY SUGGESTIVE AND CREATED A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION?
>
> DID THE TRIAL COURT ERR IN ALLOWING THE COMMONWEALTH TO ADMIT INTO EVIDENCE THE

[1] 18 Pa.C.S.A. §§ 2502(a), 907(a), 6106(a)(1), 4953(a), and 4952(a)(1), respectively.

[2] Appellant's brief states that he was sentenced to life plus 2 to 7 years' imprisonment with no further penalty, while the trial court's opinion states that he was sentenced to life imprisonment with no further penalty. Appellant's brief at 4; trial court opinion, 4/8/13 at 2. Nonetheless, the notes of testimony clearly reflect the sentence we have stated, as do the sentencing orders contained in the record. (Notes of testimony, 8/31/12 at 54-55.)

> HANDGUN ALLEGEDLY DISCARDED BY APPELLANT AT THE TIME OF HIS ARREST?
>
> DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SEVER THE CHARGES UNDERLYING THE COMMONWEALTH'S RETALIATION CASE FROM HIS HOMICIDE CASE WHEN HE WAS UNDULY PREJUDICED AS A CONSEQUENCE OF THIS RULING?

Appellant's brief at 3. We will address these issues in the order presented.

In his first issue, appellant claims that the trial court erred in failing to suppress the identification testimony of Wakeeyah Powell.

> When reviewing a challenge to a trial court's denial of a suppression motion, our standard of review is:
>
> > limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Delvalle, 74 A.3d 1081, 1084 (Pa.Super. 2013), quoting ***Commonwealth v. Hoppert***, 39 A.3d 358, 361-362 (Pa.Super. 2012), ***appeal denied***, 618 Pa. 684, 57 A.3d 68 (Pa. Nov 28, 2012).

In his first argument, appellant asserts that the procedure used to obtain his identification by Wakeeyah Powell was so unnecessarily suggestive and conducive to irreparable misidentification that he will be denied due process. During Powell's identification procedure, she was shown a photo array of eight men similar in appearance to the defendant. However, appellant has facial tattoos below one of his eyes and his photograph was the only one in the array that depicted an individual with such tattoos. On this basis, appellant contends that his identification was tainted. We find this claim to be specious.

Powell was not identifying a stranger or someone she only briefly witnessed for the first time during the crime and who quickly disappeared thereafter. Powell told police she had known appellant for two years from a certain neighborhood and had "seen him all the time." (Notes of testimony, 8/27/12 at 9-10.) Moreover, Powell informed the police that appellant had tattoos under his right eye. (***Id.*** at 10.) Thus, there was virtually no possibility of mistaken identification because Powell was already well acquainted with appellant when she witnessed him commit the murder.

In his second issue, appellant contends that the trial court improperly allowed into evidence the firearm he was found with when he was arrested.

The evidence at trial demonstrated that this firearm was not used in the murder of the victim because that gun was of a different caliber. Appellant maintains that the weapon was inadmissible because it was not similar to the one used in the murder. Appellant cites case law indicating that a weapon is only admissible if it is similar to the weapon used in the underlying crime:

> A weapon shown to have been in a defendant's possession may properly be admitted into evidence, even though it cannot positively be identified as the weapon used in the commission of a particular crime, if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime.

Commonwealth v. Marshall, 743 A.2d 489, 492 (Pa.Super. 1999), ***appeal denied***, 563 Pa. 613, 757 A.2d 930 (2000), quoting ***Commonwealth v. Williams***, 537 Pa. 1, 20, 640 A.2d 1251, 1260 (1994).

> The admissibility of evidence is a matter directed to the sound discretion of the trial court, and an appellate court may reverse only upon a showing that the trial court abused that discretion. ***Commonwealth v. Wallace***, 522 Pa. 297, 561 A.2d 719 (Pa.1989). 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." ***Commonwealth v. Spiewak***, 533 Pa. 1, 8, 617 A.2d 696, 699 (1992). In addition, evidence is only admissible

> where the probative value of the evidence outweighs its prejudicial impact. ***Commonwealth v. Story***, 476 Pa. 391, 383 A.2d 155 (1978). However, where the evidence is not relevant there is no need to determine whether the probative value of the evidence outweighs its prejudicial impact. ***Id.*** Instead, once it is determined that the trial court erred in admitting the evidence, the inquiry becomes whether the appellate court is convinced beyond a reasonable doubt that such error was harmless. ***Id.*** Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was ***de minimis***; (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 was so insignificant by comparison that the error could not have contributed to the verdict. ***Commonwealth v. Simmons***, 541 Pa. 211, 662 A.2d 621 (1995) citing ***Commonwealth v. Williams***, 524 Pa. 404, 573 A.2d 536 (1990).

Commonwealth v. Robinson, 554 Pa. 293, 304–305, 721 A.2d 344, 350 (1998), ***cert. denied***, 528 U.S. 1082, 120 S.Ct. 804, 145 L.Ed.2d 677 (2000).

> With regard to the admission of weapons evidence, such evidence is clearly admissible where it can be shown that the evidence was used in the crime charged. ***Commonwealth v. Edwards***, 762 A.2d 382, 386 (Pa.Super.2000). Challenges to the admissibility of weapons evidence often occur, however,

> where, as here, the evidence cannot be positively identified as related to the crime. ***Robinson***, 554 Pa. at 306, 721 A.2d at 351 ("The general rule is that where a weapon can not be specifically linked to a crime, such weapon is not admissible as evidence.").
>
> [***Commonwealth v.***] ***Owens***, 929 A.2d [1187] at 1191 [(Pa.Super. 2007), ***appeal denied***, 596 Pa. 705, 940 A.2d 364 (2007)].

Commonwealth v. Stokes, 78 A.3d 644, 654-655 (Pa.Super. 2013).

We agree with appellant that the gun that was entered into evidence was irrelevant to the homicide charge. Although the trial court noted expert testimony to the effect that the gun used in the homicide was definitely not the gun found on appellant, it went on to conclude that the guns were similar and allowed admission of the gun found on appellant. (Trial court opinion, 4/8/13 at 5-6; notes of testimony, 8/30/12 at 54-55.) Moreover, the homicide firearm was .45 caliber, while the weapon found on appellant was .9 millimeter. (***Id.*** at 50, 54-56.) We find that the conclusion that the weapons were similar is not supported by the trial testimony and amounts to an abuse of discretion. Nonetheless, we may still affirm.

Appellant's argument ignores the fact that he was also charged with violations of the Uniform Firearms Act based upon the weapon found on his person when he was arrested. Thus, that gun was wholly relevant to proof of those crimes and, thus, was admissible on that basis. To the extent that the admission of this gun still prejudiced appellant as to the homicide, we

find that this prejudice was dispelled by two factors. First, any prejudice was dispelled by the expert testimony which declared that the gun found on appellant was "definitely not the weapon" used in the homicide. Second, the trial court issued a very strong cautionary instruction to the jury:

> Now, what I am going to say here is that I think that during the course of the trial you have heard evidence that the defendant, Keenan Coleman, may have been in possession of a firearm on the date that he was arrested by police. This weapon was not the murder weapon. This evidence may be considered by you for the purpose of the separate weapons charges and potential evidence of consciousness of guilt. But I want to point out to you, it was not the murder weapon. You have already been instructed on consciousness of guilt. You are not required to consider this evidence as consciousness of guilt, but you may do so; what happened when he was arrested. You may not consider this as evidence of any bad character, however, on the part of defendant, Keenan Coleman, and you may not find him guilty of murder solely because of this.
>
> You may not find the defendant guilty of murder unless the Commonwealth has proven each element of the crimes that I'm about to give you beyond a reasonable doubt, okay.

Notes of testimony, 8/30/12 at 313-314.

Since the firearm was admissible on the weapons offenses, and since any prejudice to appellant as to the homicide charge was largely dispelled, we find no merit to appellant's argument.[3]

[3] We also note in passing, as does the Commonwealth, that if appellant believed that he was going to be unduly prejudiced by this evidence, he

In his third and final issue, appellant argues that the trial court erred in failing to sever his homicide and witness retaliation cases and that he was prejudiced thereby. We find no merit here.

> The decision to grant or deny a motion to sever offenses is vested in the sound discretion of the trial court, whose exercise of such discretion will only be reversed on appeal for manifest abuse. ***Commonwealth v. Lark***, 518 Pa. 290, 543 A.2d 491 (1988). Where the defendant moves to sever offenses not based on the same act or transaction, but which have been consolidated in a single indictment or information, the trial court must determine:
>
> > [W]hether the evidence of each of the offenses would be admissible in a separate trial for the other; whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, whether the defendant will be unduly prejudiced by the consolidation of offenses.
>
> ***Lark***, at 302, 543 A.2d at 497 (1988).

Commonwealth v. Carter, 537 Pa. 233, 255-256, 643 A.2d 61, 72 (1994), ***cert. denied***, ***Carter v. Pennsylvania***, 514 U.S. 1005 (1995).

Clearly, the evidence of each crime would be admissible at a separate trial for the other crime. The evidence of witness retaliation would be admissible at the homicide trial to show consciousness of guilt.

---

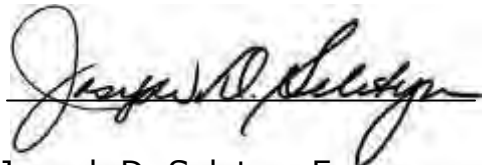
could have moved to sever the trial on the weapons offenses as he did for his trial on the witness retaliation/intimidation offenses.

Commonwealth v. Rega, 593 Pa. 659, 681, 933 A.2d 997, 1009 (2007), ***cert. denied***, ***Rega v. Pennsylvania***, 552 U.S. 1316 (2008) (any attempt by a defendant to interfere with a witness's testimony is admissible to show a defendant's consciousness of guilt). The evidence of homicide would be admissible at the witness retaliation trial to show motive. ***Commonwealth v. Brookins***, 10 A.3d 1251, 1256 (Pa.Super. 2010), ***appeal denied***, 610 Pa. 625, 22 A.3d 1033 (2011) (evidence of other crimes is admissible to demonstrate motive). Furthermore, the evidence would be easy to separate by the jury because each crime involved entirely separate actions and events, places and times of occurrence, and would be proved by entirely different witnesses. Finally, we see little prejudice to appellant, but significant probative value. The trial court did not err in failing to sever these charges.

Accordingly, having found no merit in any of the issues raised on appeal, we will affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014