NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ROBERT WILLIAM URWIN JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 780 WDA 2012

Appeal from the Judgment of Sentence December 20, 2011
In the Court of Common Pleas of Washington County
Criminal Division at No(s): CP-63-CR-0001212-2010

BEFORE: LAZARUS, J., OLSON, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J. **FILED SEPTEMBER 10, 2013**

Robert William Urwin, Jr., appeals from the judgment of sentence imposed by the Court of Common Pleas of Washington County following his conviction for third degree murder.[1] After careful review, we affirm.

Based on the evidence adduced at trial, trial court summarized the facts of the case as follows:

> In February 1977, Ronald Yancec was riding in a vehicle on Gun Club Road in Charleroi, Pennsylvania with his brother. As they were scanning the tree line for deer, Yancec spotted a woman's body, which was later identified as Mary Gency. An autopsy was performed by Dr. Ernest Abernathy. At trial, Dr. Abdulrezak Shakir, an expert in forensic pathology, testified about the autopsy report. The report revealed that Gency was found frozen, wearing only her socks, and had suffered numerous

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. § 2502(c).

fractures and lacerations, including six to the skull. Dr. Shakir opined that Gency died as a result of blunt force trauma to the head, but was unable to establish from the report the exact time of death. However, he determined that Ms. Gency had eaten meat and vegetables within three hours of her death, based on stomach contents. Based on his testimony and that of Doris Gency, who had shared dinner with the victim, it was determined that Gency died on the evening of February 13, 1977.

. . .

The Commonwealth called David Davoli who testified that he knew Gency[,] and would occasionally buy marijuana for her. He stated that while he never dated Gency, they had been intimate on occasions prior to the evening of her death. He also testified that Urwin and Gency had been romantically involved.

On February 13, 1977, Davoli, met up with [Urwin] outside of a pool hall in Charleroi. They decided to drink beer and smoke marijuana in Davoli's vehicle while driving around town. Davoli revealed that they saw Gency in front of the Isaly's [dairy shop] around 7:00 p.m. Davoli suggested that they pick her up, but Urwin disagreed. Davoli decided to pick Gency up on a subsequent pass without asking Urwin. After some discussion between the victim and Davoli, she got into the front seat of the car and saw Urwin for the first time. Davoli testified that Urwin seemed unhappy with Gency being in the car and the two began to fight about another woman Urwin had been dating. The argument continued as Davoli drove to Charleroi High School, even as the two got out of the car. While in the parking lot, the argument became more heated, and Davoli witnessed [Urwin] strike Gency in the head with a closed fist. Urwin and Gency eventually got back into the car, but the fight continued. Gency stated that "if she wouldn't have missed her period, things might have been different." At this point, the argument began to die down and things became quiet, but Davoli testified that Urwin still appeared to be angry.

After this altercation, the three drove to Gun Club Road where Gency and Urwin began to have sex in the back seat. Subsequent thereto, Davoli asked, "what about me?" Gency obliged and afterwards remained in the front passenger seat. Urwin exited the vehicle and dragged Gency from the seat. He then used a fender skirt tool he had retrieved from the trunk of the car to strike Gency in the back of the head. Davoli testified

> that he witnessed Urwin strike the victim at least three times in the back of the head. [Urwin] then walked over an embankment with Gency and returned alone. Davoli stated that Urwin then said, "that fucking bitch has been lying to me the whole time." [Urwin] threw the tool into the field and they drove off while throwing Gency's clothes out of the vehicle. Davoli asked what they would do if Gency called the police. Urwin replied that he did not think they had anything to worry about and Davoli should keep his mouth shut.

Trial Court Opinion, 8/10/12, at 2-3, 5-6.

Gency's body, which was naked except for a pair of socks, was discovered in a field off Gun Club Road on February 19, 1977. An autopsy revealed that Gency, who was sixteen years old, and 5 to 6 weeks pregnant, died from blunt force trauma to the head. Her clothing, which was found scattered in the field and along the road, was sealed as evidence. The police filed charges against Davoli and Urwin, which were dismissed at a preliminary hearing in 1977.

The case remained dormant for several years. However, the trial court explained:

> Certain articles of clothing were submitted for DNA testing in June, 2009. Specifically, a pair of pants identified as belonging to Mary Gency was submitted to the Pennsylvania State Police DNA Lab for testing, and a pair of underpants also identified as belonging to Mary Gency was sent to Orchid Cellmark Laboratories in Texas. Both facilities employed Y-STR (short tandem repeat) DNA testing using samples obtained from the clothing and from [Urwin and Davoli]. The State Police Lab discovered spermatozoa on the pants as well as a blood stain. The blood was identified as belonging to the victim. It also concluded through Y-STR testing that Urwin's paternal blood line contributed to the spermatozoa stain. Orchard Cellmark obtained a profile from a seminal stain in the underpants that contained a mixture of DNA. Using Y-STR testing, it determined

> that the mixture contained the profiles of the paternal bloodlines for [Urwin and Davoli].
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> On May 24, 2010, Davoli was placed in custody and transported to the Pennsylvania State Police barracks in Belle Vernon for interrogation. While sitting in a large room in the barracks, Trooper Frederick Gregg stated to Davoli that he did not believe that he (Davoli) would be there if not for Urwin. Davoli then posed a hypothetical question to Trooper Gregg and indicated he wished to give a statement. Davoli was immediately given his ***Miranda*** warnings and signed a form waiving those rights. He then provided a statement to Trooper Gregg. Based on the information received from Davoli and the DNA test results, [Urwin and Davoli] were arrested and charged with criminal homicide and conspiracy to commit criminal homicide. Following the preliminary hearing of June 9, 2010, the charge of conspiracy was dismissed against [Urwin and Davoli].

Memorandum Opinion in Support of Order, 6/10/2011, at 4-5.

On December 15, 2010, Urwin filed a number of pre-trial motions, the first of which was a petition for a writ of habeas corpus alleging that the Commonwealth failed to offer sufficient evidence to establish each element of criminal homicide. Second, Urwin filed a motion to suppress the testimony of William Smith, a neighbor of Mary Gency, asserting it was not credible. Lastly, Urwin filed a motion to exclude the DNA evidence gathered from Gency's jeans and underwear, arguing that such evidence was unreliable because the Commonwealth had failed to establish a sufficient chain of custody under Pa.R.E. 901.

A hearing was held on April 12, 2011, following which the trial court found: (1) the Commonwealth had satisfied its burden of establishing a prima facie case; (2) William Smith's testimony was admissible as relevant and subject to a credibility determination by the finder of fact at trial; and

(3) the methods employed by the expert DNA witness have been generally accepted by the scientific community according to the ***Frye*** standard.[2] Accordingly, all three pre-trial motions were dismissed on June 10, 2011. Memorandum Opinion in Support of Order, 6/10/2011, at 17-18.

Following a four-day, non-jury trial, the court found Urwin guilty of third-degree murder.[3] Urwin was sentenced to 10-20 years' incarceration on January 18, 2012. On April 3, 2012, the court denied Urwin's post sentence motions. Urwin then filed a timely notice of appeal, and on August 10, 2012, the trial court filed an opinion pursuant to Pa.R.A.P. 1925(a).

On appeal to this Court, Urwin raises the following issues for our review:

> I. Did the court err in failing to grant the defendant's motion for writ of habeas corpus on the charge of criminal homicide?
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> II. Did the court err in permitting the Commonwealth's entry into evidence the testing and results of the Y-STR DNA testing in violation of the ***Frye*** standard?
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> III. Did the court err in denying [Urwin's] motion to suppress the statements of witness William Smith?
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> IV. Did the Commonwealth present sufficient evidence for the count of third-degree murder?

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[2] ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).

[3] Davoli was also charged with homicide. However, he pled guilty to hindering apprehension or prosecution and tampering with or fabricating physical evidence. The homicide charge was nolle prossed, and Davoli cooperated in the Commonwealth's prosecution of Urwin.

> V. Was the verdict entered against the weight of the evidence for the count of third-degree murder?

Appellant's Brief, at 5.

Urwin first claims that the trial court improperly denied his request for habeas corpus relief. This is not an appealable issue. Like a preliminary hearing, the purpose of a pretrial habeas corpus petition is to test the Commonwealth's ability to establish a prima facie case. As this Court held in ***Commonwealth v. Tyler***, 587 A.2d 326 (Pa. Super. 1991):

> The purpose of a preliminary hearing is to avoid the incarceration or trial of a defendant unless there is sufficient evidence to establish a crime was committed and the probability the defendant could be connected with the crime. Its purpose is *not* to prove the defendant's guilt. Once appellant has gone to trial and been found guilty of the crime, any defect in the preliminary hearing is rendered immaterial.

Id. at 328 (emphasis in original).

"An adjudication of guilt renders moot any allegation that the Commonwealth failed to establish a prima facie case." ***Commonwealth v. Lee***, 662 A.2d 645, 650 (Pa. 1995). Accordingly, Urwin is not entitled to relief on this claim.

Urwin next argues that the trial court erred by admitting forensic testimony regarding the results of Y-STR DNA testing that was performed on semen stains found on Gency's clothing.

Under Pennsylvania law, novel scientific evidence is admissible when the methodology underlying the evidence is generally accepted in the relevant scientific community. ***Commonwealth v. Topa***, 369 A.2d 1277

(Pa. 1977) (adopting ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923)). At a pretrial hearing on April 12, 2011, the Commonwealth presented the testimony of Michael Biondi, a forensic scientific supervisor at the State Police DNA Laboratory in Greensburg. In support of its conclusion that the evidence was admissible, the trial court engaged in the following analysis:

> After reviewing the credible testimony by Mr. Biondi at the April 12, 2011 ***Frye*** hearing, this Court is satisfied that Y-STR DNA testing has been met with general acceptance in the relevant scientific community. In addition to testimony that the testing procedure has been employed by the Pennsylvania State Police since 2007, Mr. Biondi testified unequivocally that the principles and methodology of Y-STR testing has gained general acceptance by those in the field of DNA science. This point was not disputed . . . by way of contradictory testimony from other experts within the relevant field.
>
> This Court further notes that, in accordance with Mr. Biondi's testimony, Y-STR DNA testing is similar to STR DNA testing, both of which employ the PCR (polymerase chain reaction) process for amplifying targeted areas of the DNA molecule and both of which are forms of PCR testing. Mr. Biondi testified that PCR testing has gained general acceptance within the scientific community, another point that was in no way contradicted by any expert testimony. This finding is supported by Pennsylvania jurisprudence, specifically ***Commonwealth v. Blasioli***, 713 A.2d 1117, 1122 (Pa. 1988) (recognizing the general acceptance of PCR testing within the scientific community) and ***Commonwealth v. Jones***, 811 A.2d 1057, 1061 (Pa. Super. 2002) (same)).
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> As a final point, the crux of both Defendants'[4] arguments, by way of pleadings and cross-examination, centers on the DNA testing results as opposed to the principles and methodology employed. Neither Defendant has argued that Y-STR testing is "novel" or "junk" science. In fact, neither Defendant has

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[4] Urwin and Davoli both challenged the DNA evidence.

> presented evidence that questions the veracity of the principles and methodology employed in either PCR or Y-STR testing. [***See Folger ex rel. Folger v.***] ***Dugan***, 876 A.2d. [1049, 1058 (Pa. Super. 2005)] (holding that trial court did not err in declining to conduct ***Frye*** hearing where appellant challenged only the accuracy of PCR testing rather than the principles and methodology employed).

Memorandum Opinion in Support of Order, 6/10/2011, at 8-9.

Decisions regarding admission of expert testimony are within the sound discretion of the trial court. ***Weiner v. Fisher***, 871 A.2d 1283, 1285 (Pa. Super. 2005). "An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law." ***Commonwealth v. Hoover***, 16 A.3d 1148, 1150 (Pa. 2011). Based on our review of the testimony of Mr. Biondi, and the analysis of the trial court, we conclude that the trial court did not abuse its discretion by allowing the Commonwealth to introduce evidence of Y-STR DNA testing.

Urwin next argues that the trial court erroneously admitted the testimony of William Smith because it was "wholly incredible" and "did not help to establish a material fact." Appellant's Brief, at 15. It is well settled that rulings on the admissibility of evidence are committed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. ***Commonwealth v. Spotz***, 756 A.2d 1139, 1151 (Pa. 2000). The trial court summarized Smith's testimony as follows:

> William Smith testified that at approximately 7:00 p.m. on February 13, 1977, he and two friends, being Mark Quinn and Mark Kovalchuk, drove past Isaly's. At that time Mr. Smith

> noticed Mary Gency standing in a doorway of the adjacent building. They proceeded to circle the block and as they were stopped at a red light, he observed Davoli's car across the intersection in the opposite lane of travel. Mr. Smith testified that he saw Davoli, Urwin, and George Poskon, sitting in the car. When the light turned green, the two cars passed each other. Upon proceeding past Isaly's again, Mr. Smith testified that he observed Ms. Gency leaning over the driver side door and talking to the occupants of Davoli's car. When they approached Isaly's for the third time, Mr. Smith did not see the car or Ms. Gency in the area. At approximately 8:10 p.m., Mr. Smith noticed Davoli's vehicle parked on the side of Gun Club Road, which was backed into an overflow parking spot facing the side of the street. William Smith's friend flashed his lights at Davoli's car, an indication that they wanted to smoke marijuana. They did not receive a response and decided to leave the area.

Trial Court Opinion, 8/10/12, at 4-5.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Pa.R.E. 401. Here, Smith's testimony, if believed, established that the victim was in a vehicle with Davoli and Urwin shortly before she died. This testimony meets the definition of relevance set forth in Rule 401, and accordingly the court did not abuse its discretion in permitting Smith to testify. ***See Spotz***, ***supra.***

Urwin next challenges the sufficiency of the evidence supporting his conviction for third degree murder. As the trial court recognized, Urwin's Rule 1925(b) statement failed to specify the element or elements of the crime that the Commonwealth had failed to prove, and accordingly the issue was waived. ***See Commonwealth v. Williams***, 959 A.2d 1252, 1257 (Pa. Super. 2008). Despite the waiver, the trial court reviewed the claim and

determined that it had no substantive merit. Trial Court Opinion, 8/10/12, at 7-10. Nevertheless, this Court held in ***Williams*** that even where the trial court files a Rule 1925(a) opinion, we find waiver where the concise statement of error on appeal does not specify the elements upon which the evidence was insufficient. Accordingly, the challenge to the sufficiency of the evidence is waived and we are precluded from engaging in further review of this issue.

Urwin's final issue is that the jury's verdict was against the weight of the evidence.

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the greatest consideration to findings and reasons advanced by the trial judge when receiving a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence.

Commonwealth v. Widmer, 744 A.2d 745, 753 (Pa. 2000) (citations omitted).

Urwin properly raised the weight of the evidence in his pre-sentence motion filed December 19, 2011 and in a post-sentence motion filed December 29, 2011. By order dated April 3, 2012, and by corrected order dated April 10, 2012, the presiding judge denied both motions. Urwin filed a timely notice of appeal and a Rule 1925(b) statement after the resignation of the presiding judge, and the matter was assigned to President Judge Debbie

O'Dell-Seneca for preparation of a Rule 1925(a) opinion. In her opinion, President Judge O'Dell-Seneca noted that the presiding judge ruled on the credibility of the witnesses and evidence at trial when he denied Urwin's motions.[5]

In ***Armbruster v. Horowitz***, 813 A.2d 698, 705 (Pa. 2002), our Supreme Court held "where a properly preserved weight of the evidence claim is raised on appeal and the judge who presided at trial failed to rule on the claim and is now permanently unavailable to do so, the claim must be reviewed by the appellate court in the first instance." The Court found this highly unusual practice to be a sound alternative to either (1) a rule requiring the grant of a new trial where the trial judge is unavailable to rule upon a weight claim, or (2) a rule rendering such claims automatically unavailable on appeal. ***Id.*** at 704.

We have reviewed the trial transcripts with particular attention to the testimony of Davoli, Smith, Aaron Kash, and Vladimir Kash, all of whose credibility Urwin attempts to undermine. The Court heard testimony from Davoli that from the car he witnessed Urwin hit Gency in the head three times with a fender tool before they walked over an embankment. Urwin returned to the car alone. N.T. Trial, 10/20/11, at 182-84. The fact that the trial judge, who observed the witnesses, chose to believe Davoli's account,

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[5] The order denying the pre- and post-sentence motions does not state the basis for the ruling. Order, 4/10/12, at 1.

does not shock the conscience, and accordingly no relief is due. ***See Commonwealth v. Karns***, 50 A.3d 158 (Pa. Super. 2012) (new trial based on weight of evidence claim only warranted where verdict so contrary to evidence that it shocks one's sense of justice).

Judgment of sentence affirmed.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: 9/10/2013