[J-89-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 309 CAP
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Appellee	:	Appeal from the Order dated December 8, 1999 by the Court of Common Pleas of Allegheny County.
	:	
v.	:	
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WAYNE CORDELL MITCHELL,	:	ARGUED: September 12, 2005
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Appellant	:	
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CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: July 19, 2006**

I join the Majority Opinion in its analysis of appellant's guilt phase claims, but I write separately to address one point: the merits of the question of whether the trial court abused its discretion in admitting, under the state-of-mind exception to the hearsay proscription, the murder victim's statements to her mother concerning her relationship with appellant as well as the mother's reading of excerpted portions of her daughter's diary. Furthermore, I respectfully dissent from the Majority's resolution of appellant's sentencing phase claim concerning his proffered mitigating circumstance. I recognize that the Majority follows governing case law in holding that the Commonwealth may rebut the no significant history of prior criminal convictions mitigating circumstance, see 42 Pa.C.S. § 9711(e)(1), with

appellant's convictions arising from crimes committed at the same time as this murder, but I believe that our existing interpretation of the statute departs from its plain and logical meaning and I respectfully suggest that this Court should reconsider its jurisprudence on this point.

Regarding the admissibility of the deceased victim's statements, the Majority suggests that the question of admissibility under the state-of-mind exception is "close," but it chooses to then follow the lead of Commonwealth v. Hutchinson, 811 A.2d 556 (Pa. 2002), by avoiding the substantive question, holding that even if this evidence were deemed improperly admitted, the resulting error was constitutionally harmless. Majority slip op. at 36-39. Assuming the inadmissibility of the disputed evidence, I agree that it constitutes harmless error. However, I would prefer not to avoid the substantive question posed, since we thereby continue to build upon the uncertainty injected into the law by the Hutchinson non-decision. Trial courts look to this Court for guidance, but they do not have the luxury of invoking a harmless error avoidance mechanism when ruling upon admissibility of evidence. I wrote separately in Hutchinson because I believed this Court should have addressed the substance of the state-of-mind exception complaint that was raised in that case. See Hutchinson, 811 A.2d at 563-65 (Castille, J., joined by Newman, J., concurring). I explained at some length the contours of the state-of-mind exception under existing law, an analysis that need not be repeated here. It is enough to note that, in light of this Court's clear authority in this area, the trial court ruling cannot be deemed erroneous and we should say as much, unless we are ready and willing to reconsider that authority.

I would also squarely address, and reject, appellant's argument that since he claimed at trial that he acted under a diminished capacity at the time of the murder, evidence of the victim's state-of-mind was rendered irrelevant under this Court's decision in Commonwealth v. Laich, 777 A.2d 1057 (Pa. 2001). See Appellant's Brief at 30. The

Majority in Laich held that, because the defendant there argued a heat of passion/provocation defense at trial, that particular defense eviscerated the relevancy of a murder victim's statements to a Commonwealth witness concerning her relationship with the defendant. Laich, 777 A.2d at 1062. In dissent, I responded that, "I do not see how evidence otherwise relevant to the Commonwealth's affirmative burden [of proof] suddenly loses its relevance merely because the accused forwards one defense or another." Id. at 1065 (Castille, J., dissenting). I continue to have difficulty understanding how a defense advanced by the accused somehow alters the relevancy of Commonwealth evidence introduced to sustain the Commonwealth's affirmative burden of proof. Thus, I believe that Laich was wrongly decided. Nevertheless, accepting Laich as currently governing law, I also believe that the present case is distinguishable. Here, appellant claims that he did not have the necessary *mens rea* to commit murder, whereas the defendant in Laich admitted his intention to kill his victim, but argued provocation, thus claiming that his intention was partially excusable due to an emotionally traumatic triggering event. The Court in Laich ruled that the victim's state of mind inexplicably lost its relevance once the defendant admitted his intention to kill, leaving it to the jury to decide what degree of murderous intention the defendant held. Id. at 1062. In contrast, the present victim's state of mind, as reflected in her prior relationship with appellant, certainly remained relevant because appellant disputed whether he in fact had the specific intent to kill.

In any event, and consistently with my observations in Laich and Hutchinson, I would find that the victim's statements should be deemed independently admissible, and for their substantive truth, under the forfeiture by wrongdoing exception to the hearsay rule. See Pa.R.E. 804(b)(6). Accord Commonwealth v. Paddy, 800 A.2d 294, 310 n.10 (Pa. 2002) (dicta). This is another case "involv[ing] the increasingly common circumstance of a criminal defendant, on trial for murdering a human being, now complaining about the admission of the now-deceased victim's out-of-court statement upon hearsay grounds."

Hutchinson, 811 A.2d at 563 (collecting cases). Many a murder victim has a prior relationship with his or her attacker and these victims often have made statements to others about that relationship, statements which would be relevant to a fact-finder in determining a defendant's guilt, degree of guilt, etc. In other cases involving this circumstance, I have suggested that, when the defendant's own actions are the only reason for his inability to "confront" a witness about relevant out-of-court statements that an "unavailable" witness made, the forfeiture by wrongdoing exception should allow those statements to be admitted for the truth of the matter asserted. Hutchinson, 811 A.2d at 563-65 (Castille, J., joined by Newman, J., concurring); Laich, 777 A.2d at 1067-69 (Castille, J., dissenting). In my view, it is the height of folly to allow a defendant to profit from his illegal conduct, which directly caused the unavailability of the witness, by sustaining an objection to the victim's statement on hearsay/confrontation clause grounds. Accord Davis v. Washington, ___ U.S. ____,126 S.Ct. 2266, 2280 (2006) ("when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce").

This exception to the hearsay rule is recognized by our Rules of Evidence. See Pa.R.E. 804(b)(6) ("*Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."). Our Rule 804(b)(6) is identical to Rule 804(b)(6) of the Federal Rules of Evidence, see Pa.R.E. 804, cmt. to (b)(6), and, as I explained in Laich, several federal circuit courts have invoked the corresponding federal rule where a defendant has caused a potential prosecution witness's unavailability at trial. Laich, 777 A.2d at 1068.[1] This Court has yet to enforce the exception, although we have

[1] The federal circuits have generally applied the forfeiture by wrongdoing exception in cases where a defendant, either through murder or through some form of coercion, has precluded a witness from testifying against him on some criminal matter distinct from the (continued…)

noted in a majority opinion that, as to trials governed by Rule 804(b)(6) (and this is one such case), "the rule appears to negate the traditional hearsay challenge to statements having the same character and context as [the victim's]." Paddy, 800 A.2d at 310 n.10 (referring to murder victim's statement to police that she had witnessed defendant commit a prior murder, which was the argued motive for his killing her).

Here, there was ample evidence presented at trial, independent of Mrs. King's summary of her daughter's statements to her concerning appellant, to prove that appellant was the cause of his inability to "confront" the victim. Given the breadth of the separate evidence establishing that appellant was the cause of Robin Little's death, Rule 804(b)(6) permits the admission of the relevant statements she made to her mother relating to her tempestuous interactions with appellant. For this additional reason, there was no error in the evidentiary ruling below and I would explicitly so hold.

Turning to the penalty phase question pertinent to the admissibility of Commonwealth evidence and argument offered to rebut appellant's proffered "no prior significant history of criminal convictions" mitigating circumstance, see 42 Pa.C.S. § 9711(e)(1), I take issue with the holdings of this Court's prior cases addressing the subject, and not with the Majority's straightforward interpretation and application of precedent. The Majority finds that the trial court properly permitted appellant's "contemporaneous" convictions for the rape and involuntary deviate sexual intercourse, convictions arising from conduct that was part of the same criminal episode as the murder, to be employed by the Commonwealth to rebut the Section 9711(e)(1) mitigator. Majority slip op. at 47. The

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illegal act that the defendant committed to silence the witness. Although the facts here do not involve that factual paradigm, the plain language of the exception, and the reason for it, see Laich, 777 A.2d at 1067-69 (Castille, J., dissenting), are no less implicated in an instance such as the one *sub judice*.

Majority's decision comports with the relevant precedent, Commonwealth v. Wharton, 665 A.2d 458, 461 (Pa. 1995), which in turn relied upon Commonwealth v. Haag, 562 A.2d 289, 298 (Pa. 1989) ("inquiry [into] whether defendant 'has' a significant history of prior criminal convictions" should be evaluated "as of the time of the sentencing hearing"). Although I joined the decision in Wharton, upon further reflection, I believe that the Wharton/Haag holding is contrary to the plain meaning of the statute.

The Sentencing Code recognizes as a specific mitigating circumstance the fact that, "[t]he defendant has no significant history of prior criminal convictions." 42 Pa.C.S. § 9711(e)(1). While the dictionary provides several definitions for the word "history," most definitions commonly define "history" as what happened in or as an account of "events of the past." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 665-66 (2nd college ed. 1986). With this common, and common sense, definition in mind, a logical interpretation of Section 9711(e)(1) suggests that, when it speaks of "history," it is not intended to capture crimes that occurred as part of the same event as the capital murder itself. Thus, although the conviction arising from appellant's earlier rape and assault of Robin Little on September 1, 1997 may properly qualify as part of appellant's prior criminal history, for purposes of rebutting the Section 9711(e)(1) mitigator, I do not believe that his convictions for the rape and related crimes that occurred along with the murder in question so qualify. Indeed, if contemporaneous crimes truly count as criminal "history," what is there to prevent the Commonwealth from using the actual murder conviction itself to rebut the mitigator during the sentencing phase? I do not believe the General Assembly intended such bootstrapping.

Haag and, by implication, Wharton were not decided based on a different understanding of the logical meaning of the phrase "history of prior criminal convictions," but rather focused simply on the tense of the verb used before that phrase. Thus, the Haag Court noted that the General Assembly employed the word "has" instead of "had," which

suggested that the focus must be upon the defendant's history as it appears at the time of sentencing. Haag, 562 A.2d at 298. That history may even include convictions for crimes that were committed after the murder, but before sentencing. Id. Although the Haag Court's construction may be plausible when it comes to assessing distinct crimes, I do not believe that it is a reasonable interpretation of the statute where, as here, the rebuttal involves contemporaneous convictions arising from the same criminal episode. Accordingly, if left to my own devices, I would favor a reconsideration of this aspect of Haag and Wharton. I would then hold that appellant's convictions for the September 10, 1997 offenses which occurred contemporaneous to the murder of Robin Little are inadmissible to rebut appellant's proffer of the Section 9711(e)(1) mitigating circumstance at sentencing. Because the jury did not find this mitigating circumstance (nor did it find any other, and thus it did not engage in the weighing process), I would hold that the error was not harmless, and here, appellant is entitled to a new penalty hearing.

The Majority responds that my perspective is not "worthy of consideration" for three reasons: (1) *stare decisis*; (2) a principle of statutory construction; and (3) waiver, as appellant does not request to have the Wharton/Haag rule reconsidered. Majority slip op. at 47-48 n.20. In the criminal cases, one does not have to search far or hard in this Court's jurisprudence to find cases where the Court has reached issues *sua sponte*. See, e.g., Commonwealth v. Brown, 872 A.2d 1139, 1153 (Pa. 2005) (*sua sponte* holding that competency claim can never be deemed waived on PCRA review); Commonwealth v. Cruz, 851 A.2d 870, 878 (Pa. 2004) (Castille, J., dissenting) (objecting to Majority addressing and ultimately granting PCRA relief on search and seizure claim not raised by PCRA petitioner); Commonwealth v. Flanagan, 854 A.2d 489 (Pa. 2004), *on reargument*, 861 A.2d 254 (Pa. 2004) (Castille, J., joined by Eakin, J., dissenting) (opposing denial of reargument where Commonwealth objected that Court *sua sponte* raised and awarded relief upon claim that had not been raised or briefed on Commonwealth's appeal). Indeed, the Majority engages

in a version of the practice in electing not to tackle head-on the state of mind/hearsay issue, an issue that is squarely controlled by our existing precedent.

One also does not have to search very far to find cases where this Court has *sua sponte* reconsidered and overruled prior precedent, including very recent precedent. See, e.g., Commonwealth v. Collins, 888 A.2d 564, 568-573 (Pa. 2005) (after *sua sponte* directing parties to brief issue of whether to modify approach to PCRA's previous litigation provision, Court revisited precedent); Cimaszewski v. Bd. of Prob. & Parole, 868 A.2d 416, 427 (Pa. 2005) (*sua sponte* reconsidering and overruling year-old decision in Finnegan v. Pa. Bd. of Prob. & Parole, 838 A.2d 684 (Pa. 2003)); Commonwealth v. Freeman, 827 A.2d 385, 393-403 (Pa. 2003) (*sua sponte* abrogating capital direct appeal relaxed waiver doctrine); Commonwealth v. Grant, 813 A.2d 726, 734-39 (Pa. 2002) (Court *sua sponte* directed parties to brief continuing vitality of precedent concerning propriety of considering ineffective assistance of counsel claims on direct appeal, and then overruled that precedent); Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998) (*sua sponte* abrogating relaxed waiver doctrine in PCRA appeals). In many of these very cases, moreover, statutory interpretation was involved and we acted despite the absence of intervening corrective action by the Pennsylvania General Assembly.

There are a myriad of other circumstances where individual Justices have taken it upon themselves to suggest a need for a closer look at precedent, and particularly in capital case jurisprudence. The indisputable point, as I see it, is that there is no absolute jurisprudential bar against what I propose; indeed, there is ample precedent in favor of it. Moreover, as I have noted in another context, since the affected party is unlikely to be so bold as to squarely ask for reconsideration of apparently-controlling precedent, it oftentimes falls upon this Court, or individual Justices, to notice the issue. See Commonwealth v. Rogers, 849 A.2d 1185, 1193 n.2 (Pa. 2004) (Castille, J, joined by Eakin and Baer, JJ., concurring) (suggesting need to reconsider review paradigm in cases involving canine

searches). Accord Commonwealth v. Garcia, 888 A.2d 633 (Pa. 2005) (Castille, J., joined by Eakin, J., concurring). The need for corrective action in cases such as Albrecht, Grant, Freeman, and Collins became apparent precisely because of this Court's problematic experience with settled doctrine. Ultimately, of course, it is a matter of collective judgment in an individual case whether the issue so recognized is important enough, or meritorious enough, that a Court majority proves willing to engage in the reconsideration or action posed. Thus, I accept that a majority of the Court is not obliged to deem my point worthy of consideration. But that does not make the point any less legitimate a basis for dissent. I respectfully continue to believe that this aspect of the Wharton/Haag rule should be reconsidered, and I believe that the stakes involved in a capital case, and the unlikelihood that any entity but this Court will act to correct a mistake of our own making, warrant acknowledging and addressing a precedent that would permit imposition of an arbitrary sentence of death.

Mr. Justice Eakin joins the concurring portion of this opinion.