

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GREGORY BAKER,	:	
	:	
Appellant	:	No. 1081 WDA 2012

Appeal from the Judgment of Sentence April 1, 2011,  
Court of Common Pleas, Beaver County,  
Criminal Division at No. CP-04-CR-0000197-2010

BEFORE: BOWES, DONOHUE and MUNDY, JJ.

MEMORANDUM BY DONOHUE, J.: FILED: May 13, 2013

Appellant, Gregory Baker (“Baker”), appeals from the judgment of sentence following his convictions for third-degree murder, 18 Pa. C.S.A. § 2502(c), two counts of aggravated assault, 18 Pa. C.S.A. § 2702(a)(1), and recklessly endangering another person, 18 Pa. C.S.A. § 2705. For the reasons that follow, we affirm.

The trial court aptly summarized the relevant factual background of this case as follows:

On December 3, 2009, at approximately 3:19 P.M., [Baker’s] wife, Linda Baker, and a friend, Thomas Dougherty, exited the Brighton Hot Dog Shoppe located in the East Rochester Shopping Plaza along State Route 65 in East Rochester Borough, after having met for coffee. Ms. Baker and Mr. Dougherty had become acquainted while both were patients in the mental health unit of the Heritage Valley Health System—Beaver and had maintained contact after being discharged. They proceeded to their

respective vehicles in the parking lot and Mr. Dougherty pointed out damage to Ms. Baker's automobile. As they conversed near the vehicles, a white car suddenly arrived at their location. [Baker] exited the vehicle and approached them with a firearm in hand. Without warning, he fired two rounds into the chest of Mr. Dougherty while saying, "This is what you get for fucking my wife", and discharged one round into the chest of Ms. Baker. [Baker] withdrew to the white vehicle for a few moments, returned again to the area where Mr. Dougherty was lying on the pavement writhing from the initial two shots, and fired two additional rounds into Mr. Dougherty's chest area. Ms. Baker was also lying on the parking lot but remained motionless and feigned death without being shot again. Mr. Dougherty died and Ms. Baker was seriously wounded. [Baker] immediately telephoned his sister, his two daughters and a friend in Chicago, and informed them that he had just killed his wife and her boyfriend. He then entered the white vehicle and departed the area.

A short time later, [Baker] surrendered at the New Sewickley Township Police Department accompanied by his daughter. The shootings were witnessed at various stages during the incident by 12 people in the area. [Baker] did not deny that he committed the shootings but stated that when he saw his wife and her friend hugging and kissing, he "snapped". He did not remember having a weapon or firing the shots. He recalled seeing them lying on the ground and calling his sister, two daughters and a friend, telling them that he had shot both individuals. [Baker] indicated that he was aware that Dougherty was not the individual with whom his wife was engaged in a meretricious relationship identified as Jason Fady, another person who Ms. Baker met while being treated at the hospital and whose description [Baker] had previously obtained from a police officer. [Baker's] wife denied that Dougherty was kissing and hugging her while standing in the parking lot.

Trial Court Opinion, 9/10/12, at 7-8.

On February 15, 2011, a jury convicted Baker of the above-referenced crimes. Following receipt of a pre-sentence report, the trial court sentenced Baker to, *inter alia*, a term of incarceration of 20 to 40 years on the third-degree murder conviction. On the first count of aggravated assault, the trial court sentenced Baker to a term of incarceration of 10 to 20 years, to run consecutively to the sentence for third-degree murder. On the second count of aggravated assault, the trial court sentenced Baker to a term of incarceration of 5 to 10 years, and on the conviction for recklessly endangering another person, one to two years – both to run concurrently with the sentence for third-degree murder and with each other. Baker's total aggregate sentence is a term of incarceration of 30 to 60 years.

On April 11, 2011, Baker filed post-trial motions, including a request for modification of sentence. The Commonwealth filed an answer and the trial court set September 26, 2011 for oral argument. On July 29, 2011, present counsel entered his appearance on behalf of Baker and moved the trial court for an extension of time to file post-trial motions. The trial court granted the request, permitting Baker until October 20, 2011 to file supplemental post-trial motions. The trial court then granted Baker another extension until October 31, 2011, but no supplemental post-trial motions were ever filed. By order dated November 18, 2011, the trial court ordered Baker to file a brief in support of his original post-trial motions, and set the

date of January 5, 2012 for oral argument. On January 5, 2012, however, counsel failed to appear for oral argument, having also failed to file the required brief. Accordingly, the trial court denied Baker's original post-trial motions. On January 10, 2012, the trial court denied Baker's motion to waive oral argument.

The trial court denied Baker's motion to file a notice of appeal *nunc pro tunc*, based upon lack of jurisdiction. But on July 6, 2012, the trial court granted Baker post-conviction relief, reinstating his direct appeal rights. This timely appeal followed, in which Baker raises the following issues for our consideration and determination:

1. Did the trial court err in failing to sustain defense objection to testimony of Timothy Staub wherein he was asked his opinion as to the firing range of a weapon wherein he was not qualified as a ballistic expert nor was qualified under the rules of evidence to offer an opinion. []
2. Was the sentence unjustifiably excessive and out of line with the guideline sentence range for the conviction of third degree murder, aggravated assault, and [recklessly endangering another person].
3. Did the trial court err when it permitted the Commonwealth to offer testimony about an unrelated gun found in the defendant's truck where such testimony was irrelevant and prejudicial. []

Baker's Brief at 3.

For his first issue on appeal, Baker contends that the trial court erred in permitting Detective David Staub ("Staub") to testify regarding the firing

distance of the weapon used by Baker (a Keckler & Koch Universal Service Pistol .40 caliber S & W). Baker contends that this question required a qualified ballistics expert and that Staub was not so qualified. For the reasons that follow, we agree that the trial court erred in admitting Staub's testimony on this point.

To recap, Staub is a county detective for the Beaver County District Attorney's office. On the day of the shootings, Staub testified that he was responsible for securing the crime scene, photographing it, and instructing police officers on the collection of evidence. N.T., 2/8/11, at 16-40. Staub testified that he examined the handgun that Baker used and testified as to its manufacturer, model, caliber, and operation (including the ejection of shell casings). *Id.* at 40-44. The following exchange then occurred:

Q. Are you aware from your use and study of that handgun, I guess, what kind of distances it can be fired?

[Counsel for Baker]: Your Honor, at this point I am going to object. I don't question that this witness has fired this gun on multiple occasions, but this witness has not been qualified as an expert, and I think the questions that are being posed at this point in time are questions that would be better posed to a ballistics expert, which I understand we have on deck to testify. I think we are just getting a little far afield of the field of expertise that's been laid for purposes of any foundation here, Your Honor, with this particular witness.

The Court: [Counsel for the Commonwealth]?

[Counsel for the Commonwealth]: Your Honor, as a user of this handgun, he's studied the manufacturer information. A lot of this stuff is just common information from the manufacturer that [Staub] is aware of as to his use and study of this handgun. I am going to ask him does it, basically what his knowledge of the manufacturing specs that he is aware of.

The Court: The objection is overruled.

Q. Just getting specifically to that issue, have you – let me ask you this: Have you studied and do you have information regarding the specifications and the manufacturing information on this handgun?

A. This particular handgun is designed to fire a .40 caliber cartridge. I did research into it with the Hornady factory in Nebraska. I called out there. I asked an individual there some particular questions about this handgun firing a .40 caliber bullet and approximately how far would it travel. If you took it and you fired it in the air, how far would this, potentially how far could this bullet travel? That was the question. And the man told me in excess of two miles, in excess of two miles if it was fired in the air.

***Id.*** at 444-46.

Our standard of review with respect to evidentiary rulings is very narrow. The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. ***Ferko-Fox v. Fox***, \_\_ A.3d \_\_, 2013 WL 1645675, at \*9 (Pa. Super. April 17, 2013). To constitute reversible error, an evidentiary ruling must not only be erroneous,

but also harmful or prejudicial to the complaining party. ***McManamon v. Washko***, 906 A.2d 1259, 1268–1269 (Pa. Super. 2006).

Rule 702 of the Pennsylvania Rules of Evidence provides that an expert may testify regarding “scientific, technical or other specialized knowledge beyond that possessed by a layperson.” Pa.R.E. 702. Information about the firing distance of the handgun in question was technical and/or specialized knowledge not commonly known by a layperson, and therefore such questions should have been addressed to a properly qualified expert witness.

The Commonwealth argues that Staub’s “use, knowledge, experience with the weapon, regular certification on the use of the weapon, and the information he received from the manufacturer and from other published material” provided him with sufficient knowledge to answer the question. Commonwealth’s Brief at 6. In support of this argument, the Commonwealth cites to evidentiary Rule 602, which provides that a “witness may not testify to matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Pa.R.E. 602. The Commonwealth argues that, pursuant to Rule 602, Staub’s use and experience with the handgun constituted “personal knowledge” permitting the testimony.

Under Rule 602, however, a person may only testify to firsthand knowledge, and may not testify to the truth of any matter asserted if he or she is merely passing along hearsay gleaned from others. The Comment to

Rule 602 specifically provides that “the witness may not, however, testify to the truth of the statement if the witness has no personal knowledge of the truth of the statement,” and clarifies that the admissibility of such testimony is governed by evidentiary rules regarding hearsay. ***Id.*** Comment. In his above-quoted testimony, Staub testified that his knowledge regarding the firing distance of the handgun came from a representative of the manufacturer -- who provided the information in a telephone call Staub placed during his investigation. The information from the manufacturer’s representative was clearly hearsay, and thus Rule 602 did not, as the Commonwealth now contends, preserve or permit its admission into evidence.

Our inquiry does not end here, however, as we must determine whether the trial court’s error was harmful or prejudicial to Baker. We conclude that it was not. The firing range of the handgun used by Baker had relevance to only one count against him, namely that of recklessly endangering another person. The relevance even in this connection was slim at best. While Baker recklessly endangered every person in the immediate vicinity of the shootings, the charge also applied to his shooting of Linda Baker. Because Linda Baker was shot in the chest *at close range*, the total firing range of the handgun was of minimal relevance. In this regard, we also note that Staub’s testimony regarding the firing range was unnecessary to establish the reckless endangerment charge, since the



Commonwealth also called a ballistics expert, Nicholas Scianna, who testified that a bullet from the handgun in question retained sufficient velocity at 100 yards to do serious harm. N.T., 2/8/11, at 81-82.

In sum, then, while the trial court erred in permitting Staub to testify regarding firing ranges, we nevertheless conclude that little or no prejudice resulted from this error. Accordingly, finding no reversible error, no relief is due on Baker's first issue on appeal.

For his second issue on appeal, Baker challenges the discretionary aspects of his sentence. Prior to reaching the merits of a discretionary sentencing issue, this Court must first conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether appellant's brief contains a separate concise statement pursuant to Pa.R.A.P. 2119(f); and (4) whether appellant has raised a substantial question for our review, 42 Pa.C.S.A. § 9781(b). **See, e.g., Commonwealth v. Glass**, 50 A.3d 720, 726 (Pa. Super. 2012).

In this case, Baker's appellate brief contains a concise statement pursuant to Rule 2119(f) identifying three discretionary sentencing issues:

- (1) The sentencing guidelines used in this case were arbitrary, capricious and violative of due process as well as unconstitutional because the guidelines did not differentiate between a standard or aggravated range sentence. The standard range sentence is the

statutory maximum sentence[, ] which in effect allows for no sentence range at all.

- (2) The sentence was excessive because the sentencing court gave no weight to the mitigating factors to arrive at a manifestly unjust sentence. A person with a maximum prior record score would have gotten the same sentence.
- (3) The sentencing court did not sufficiently state its reasons for imposing the maximum sentence allowed by law for an appellant with no prior criminal behavior.

Baker's Brief at 19.

The first issue has not been preserved for appellate review because it was not raised either at sentencing or in Baker's post-trial motions. In the original post-trial motions (which, as described hereinabove, were not supplemented), Baker alleged as follows:

8. That [Baker] was sentenced to a term of not less than ten (10) nor more than twenty (20) years on Count 5 (Aggravated Assault), a sentence which not only is outside of the standard guideline range but also exceeds the aggravated range. [Baker] avers that there were not adequate reasons cited by the trial court on the record to support such a departure.

Motion for Post-Trial Relief, 4/11/11, at ¶ 8. This issue related solely to the severity of Baker's sentence for the first count of aggravated assault, for which he received the statutory maximum in excess of all sentencing guidelines. The first issue on Baker's Rule 2119(f) statement, in contrast, refers to his sentence for third-degree murder, raising questions regarding the constitutionality of the guidelines for third-degree murder because they

do not differentiate between a standard or aggravated range sentence. Because this issue regarding guideline ranges for third-degree murder was not presented in Baker's post-trial motion, it is not preserved for appellate review.

The second and third issues in Baker's Rule 2119(f) statement, to the extent that they were preserved in the post-trial motions, are waived on appeal because Baker's appellate brief contains no argument or citation to the record or relevant authorities in support of them. ***Commonwealth v. Gould***, 912 A.2d 869, 873 (Pa. Super. 2006); ***Commonwealth v. Miller***, 721 A.2d 1121, 1124 n.2 (Pa. Super. 1998). Baker's appellate brief contains no argument in support of any contention that the trial court failed to consider mitigating factors when sentencing him, and does not identify any mitigating factors that the trial court allegedly ignored. Similarly, Baker's appellate brief provides no discussion or support for the notion that the trial court failed to set forth sufficient reasons for sentencing him outside the guidelines. From our review of the record, during the sentencing hearing, the trial court did set forth various reasons for its sentencing decisions. N.T., 4/1/11, at 86-90. Baker's appellate brief offers no explanation as to why these reasons were insufficient as a matter of law.

For his third issue on appeal, Baker contends that the trial court erred in permitting the Commonwealth to ask Baker during cross-examination about a handgun found in his truck. N.T., 2/10/11, at 188-90. This

handgun was not the one Baker used to commit the crimes at issue here. After his counsel's objection was overruled, Baker testified that the handgun in his truck was unloaded and was a birthday present for his daughter. **Id.** at 191.

In **Commonwealth v. Marshall**, 743 A.2d 489 (Pa. Super. 1999), this Court ruled that a trial court abuses its discretion when it admits into evidence a gun not used to commit the crime in question. **Id.** at 494. In **Commonwealth v. DeJesus**, 584 Pa. 29, 880 A.2d 608 (2005), however, our Supreme Court explained that **Marshall** does not stand for "the hard and fast proposition that 'where it is impossible for a gun to have been the murder weapon, it should not ... be admitted into evidence.'" **Id.** at 40, 880 A.2d 615. Instead, the Supreme Court said,

As with any other evidence, the question of admissibility depends to a large extent upon the purpose for which the evidence was proffered, as well as a balance of probative value and prejudicial effect. If evidence of possession of, or access to, a weapon other than the murder weapon were proffered *for some other relevant purpose*, no hard and fast rule could require its exclusion.

**Id.** at 40-41, 880 A.2d 615 (emphasis added).

In the present case, the Commonwealth introduced sufficient evidence to establish "some other relevant purpose" for admission of testimony relating to the handgun in Baker's truck. During cross-examination, Baker testified that he owned approximately 100 guns, which he kept at his

residence. N.T., 2/10/11, at 197. He further testified that he normally carried a firearm in his vehicle. *Id.* at 187. Finally, Baker testified that he had recently purchased a white car for his daughter, and was driving it on the day in question (rather than his truck) so that he could wash it for her. *Id.* at 147. Based upon this evidence, in its closing the Commonwealth offered the jury the theory that Baker had left his handgun in his truck – requiring him to go back to his house to obtain another handgun to use to shoot his wife and her friend. N.T., 2/14/11, at 104 (“He left the gun in his truck. He wasn’t in his truck. He was in his daughter’s station wagon, what did he do? He went home, and why did he go home? To get a gun.”).

For these reasons, the existence of a handgun in Baker’s truck was relevant to the issue of premeditation in connection with the Commonwealth’s (unsuccessful) attempt to obtain a conviction for first-degree murder. Through Baker’s own testimony, the Commonwealth laid a sufficient foundation to permit the questioning of Baker about the handgun in his truck, even though that handgun was not used to perpetrate the crimes with which he was charged and convicted. Accordingly, we find no basis on which to conclude that the trial court abused its discretion in this regard.

Judgment of sentence affirmed.

J-A09026-13

Judgment Entered.

Nicholas V. Casatti

Deputy Prothonotary

Date: 5/13/2013