NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
DONALD R. HOWARD,	:	
Appellant	:	No. 1230 WDA 2011

Appeal from the Judgment of Sentence entered on April 13, 2011
in the Court of Common Pleas of Erie County,
Criminal Division, No. CP-25-CR-0000530-2010

BEFORE: MUSMANNO, BOWES and WECHT, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: March 4, 2013

Donald R. Howard ("Howard") appeals from the judgment of sentence entered following his conviction of second-degree murder, robbery, theft by unlawful taking and burglary.[1]

On July 5, 2009, Ellen Martin ("Martin") arrived at the home of her paramour, Ray Goodwill ("Goodwill"), which was located on West High Street in Union City, Pennsylvania. On the front door of Goodwill's home, Martin discovered a note stating "When [*sic*] with Jerry. Talk to late." N.T., 2/22/11, at 206, 207. Martin observed that the writing on the note was not in Goodwill's handwriting. When Martin entered the residence, she found Goodwill dead. Goodwill had been bound with yellow rope and covered with blankets on the couch.

[1] 18 Pa.C.S.A. §§ 2502, 3701, 3921, 3502.

Martin told investigators that Goodwill ordinarily kept his wallet in his shirt pocket. Martin also indicated that Goodwill kept a fake million dollar bill in his wallet at all times. The wallet had a chain that Goodwill kept attached to his suspenders. At the crime scene, however, investigators found Goodwill's wallet on a dresser near the television set, with the fake million dollar bill missing. The Erie County Coroner estimated Goodwill's time of death as between 10:00 p.m. on July 3, 2009, and 10:00 a.m. on July 4, 2009.

Investigators questioned Howard regarding his whereabouts at the time of Goodwill's death. Howard provided several contradictory statements to investigators. Investigators also discovered that Howard had used a fake million dollar bill in a drug transaction after Goodwill's death. Subsequently, the Pennsylvania State Police arrested Howard and charged him with, *inter alia*, the above-described offenses. Howard proceeded to a jury trial on November 8, 2010. The trial court declared a mistrial on November 10, 2010, when the jury was unable to reach a verdict.

On February 24, 2011, following Howard's re-trial, the jury convicted Howard of the above offenses. The trial court subsequently sentenced Howard to life in prison for his conviction of second degree murder. For his conviction of burglary, the trial court sentenced Howard to a concurrent prison term of two to ten years. The remaining charges merged at sentencing. Howard filed a direct appeal at 769 WDA 2011. This Court

dismissed Howard's appeal. Thereafter, Howard filed a Petition for relief pursuant to the Post Conviction Relief Act ("PCRA").[2] The PCRA court reinstated Howard's direct appeal rights *nunc pro tunc*. Howard timely filed the instant appeal, followed by a court-ordered Concise Statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

Howard now presents the following claims of error for our review:

> I. The trial court erred in refusing to caution the remaining jury panel and/or refusing to dismiss the panel following an outburst by a prospective juror that [Howard] was guilty.
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> II. The trial court erred in permitting argument by the Commonwealth during the opening statement, over objection by [Howard].
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> III. The trial court erred, during the testimony of [Martin]:
>
> > A. In permitting [Martin] to testify about her affected psychological health after the death of the victim;
> >
> > B. In permitting [Martin] to testify about her relationship with the victim's children;
> >
> > C. In admitting evidence of her relationship with the victim, which was designed to elicit sympathy only and had no relevance.
>
> IV. The trial court erred in permitting a Commonwealth law enforcement witness to vouch for the authenticity and accuracy of handwritten notes of witness [Martin], the paramour of the victim, about her recollection of the events of the day immediately preceding the homicide and also on the day she discovered the victim's body.
>
> V. The trial court erred in permitting hearsay testimony of Trooper Michael Keller about the "million dollar bill" and the source of that information.

[2] 42 Pa.C.S.A. §§ 9541-9546.

> VI. The trial court erred in denying [Howard's] Motion for mistrial during the testimony of Trooper Mark Russo ["Trooper Russo"], who commented on [Howard's] silence during interrogation when [Howard's] spoken and written statements denied any culpability.
>
> VII. The trial court erred in failing to instruct the jury that intoxication can reduce murder from a higher degree to a lower degree pursuant to 18 Pa.C.S.A. § 308.

Brief for Appellant at 4-5.

Howard first claims that the trial court erred when it refused to issue a curative instruction following the outburst of a prospective juror during *voir dire*. ***Id.*** at 17. Howard argues that during jury selection, one of the prospective jurors stated, in front of other prospective jurors, that Howard was guilty. ***Id.*** According to Howard, the trial court improperly refused defense counsel's request for a curative instruction, instead questioning the prospective jurors during individual *voir dire* about the statement. ***Id.*** Howard compares the instant case to two cases in which the Pennsylvania Supreme Court awarded new trials where the jurors had received non-testimonial evidence that the defendant had committed a prior crime. ***Id.*** (citing ***Commonwealth v. Harkins***, 328 A.2d 156 (Pa. 1974); ***Commonwealth v. Santiago***, 318 A.2d 737 (Pa. 1974)).

In ***Harkins***, the appellant claimed that he was prejudiced when a prospective juror, in the presence of other prospective jurors who later served on the jury, accused the appellant of having stolen that juror's vehicle on the same night of the crime at issue (a prison breach). ***Harkins***,

328 A.2d at 157. The trial court dismissed the prospective juror who had made the accusation, but seated jurors who had heard the accusation. ***Id.*** In granting the appellant a new trial, our Supreme Court reasoned as follows:

> Under the Sixth Amendment to the United States Constitution and under Article I, Section 9 of the Pennsylvania Constitution, [] the appellant was entitled to a trial by an impartial jury. Since these rights were violated, the prosecution had the burden of proving that the error was harmless beyond a reasonable doubt. ***Chapman v. California***, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh. den.* 386 U.S. 987, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); ***Commonwealth v. Pearson***, 427 Pa. 45, 233 A.2d 552 (1967); ***cf. Commonwealth v. Padgett***, 428 Pa. 229, 237 A.2d 209 (1968).
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> ...
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> When the jury learns that the person being tried has previously committed another crime, the prejudicial impact cannot be considered insignificant. "The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence." ***Commonwealth v. Groce***, 452 Pa. 15, 19, 303 A.2d 917, 919 (1973). "The fact that a reasonable inference of a prior criminal record is present in the minds of the jurors *in and of itself mandates a new trial.*" (Emphasis added.) ***Commonwealth v. Allen***, 448 Pa. 177, 183, 292 A.2d 373, 376 (1972).

Harkins, 328 A.2d at 157 (emphasis in original).

Similarly, in ***Santiago***, an alternate juror reported an exchange she had with a trial witness to the court's tipstaff. ***Santiago***, 318 A.2d at 738. According to the alternate juror, the witness had stated that the defendant had killed an innocent boy, and this was not the first person that the defendant had killed. ***Id.*** at 739. The alternate juror reported the incident

to the tipstaff after trial had commenced, and in the presence of three other female jurors. ***Id.*** at 738. When the trial court questioned the three jurors, two remembered that the defendant had been accused of killing another person. ***Id.*** at 739. The third juror remembered that the defendant had been accused of being in trouble before. ***Id.*** On appeal, our Supreme Court held that the trial court should have granted a mistrial:

> In this case[,] the remarks heard by the three jurors would not have been admissible during the trial, and their admission, over objection, would have constituted reversible error. The prejudice to the appellant is no less when the remarks are made outside the courtroom.

Id.

Here, unlike in ***Santiago*** and ***Harkins***, the prospective juror did not comment on the evidence, or discuss inadmissible evidence of prior bad acts by Howard. Rather, the prospective juror[3] off-handedly stated "guilty" when called to individual *voir dire*. N.T., 2/17/11, at 120. The trial court questioned the remaining prospective jurors regarding the remark, and the chosen jurors all stated that they could be impartial. N.T., 2/18/11, at 14-86. We cannot conclude that these circumstances are similar to those warranting the grant of a new trial in ***Harkins*** and ***Santiago***. The offending juror's comment was off-hand and did not mention inadmissible evidence or prior bad acts by Howard. Accordingly, we decline to grant Howard relief on this claim.

[3] The prospective juror was not selected for the jury.

Howard next claims that the trial court improperly permitted the prosecutor to present "argument" during his opening statement. Brief for Appellant at 19. Specifically, Howard challenges the prosecutor's argument that Howard's statements during the investigation should not be considered "cooperation," but were "filled with lies." ***Id.*** Howard further points out the prosecutor's argument that Howard did not cooperate "because he was clearly lying during the interrogation." ***Id.*** Although defense counsel objected, the trial court overruled the objection. ***Id.*** (citing N.T., 2/22/11, at 21-22).

"The purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved; but it is not evidence." ***Commonwealth v. Parker***, 919 A.2d 943, 950 (Pa. 2007) (citations omitted).

> "[A]s a practical matter the opening statement can often times be the most critical stage of the trial, because here the jury forms its first and often lasting impression of the case." [***Commonwealth v.***] ***Montgomery***, 533 Pa. [491,] 498, 626 A.2d [109,] 113 [(1993)]. The prosecution, as well as the defense, is afforded reasonable latitude in presenting opening arguments to the jury. ***Commonwealth v. Jones***, 530 Pa. 591, 607, 610 A.2d 931, 938 (1992). Such latitude is not without limits.
>
> "A prosecutor's statements must be based on evidence that he plans to introduce at trial, and must not include mere assertions designed to inflame the jury's emotions." ***Commonwealth v. Begley***, 566 Pa. 239, 274, 780 A.2d 605, 626 (2001) (citing ***Jones***, ***supra***). A prosecutor's opening statements may refer to facts that he reasonably believes will be established at trial. ***Id.***

Parker, 919 A.2d at 950.

A review of the prosecutor's remarks, in context, discloses that her statements were based upon the evidence the Commonwealth sought to introduce at trial:

> [The prosecutor]: And [the investigators] say, can you[, Howard,] tell us what you did on July 3rd into July 4th? And the first word [Howard] writes is when –W-H-E-N—to wherever. Went to Ann Biggers' house. And [the investigators] say, wait a minute. This looks like the note on the door. So [the investigators] ask [Howard] about it and he lies. No, didn't write a note. I didn't write a note. And then eventually[,] three or four interviews in[,] you'll hear [Howard] tells them, oh, yeah[,] I did write that note. Well, who's Jerry? I don't know. I just didn't want to go to the tractor pull with Ray so I went to his house and wrote a note, knowing he gets up at 5:00 a.m., and he went there at 6:00 or 7:00.
>
> So[,] we have this note. We also have the first lie, as well as many other lies [Howard] tells along the way.
>
> Don't mistake these lies with cooperation, ladies and gentlemen, because I anticipate that the defense attorney—or we anticipate the defense attorney will say my client cooperated; he gave hours and hours of interviews.
>
> [Defense counsel]: You Honor, I'm going to object. We're getting into argument in openings, which is clearly inappropriate.
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> THE COURT: I'll allow it. I don't think it's gone too far yet.
>
> [The prosecutor]: Thank you. Which is hours and hours of interviews. As you listen to that testimony[,] you're going to hear about those interviews. You're going to hear from the Pennsylvania State Police that interviewed [Howard], or talked to [Howard] on those days. You'll hear about the lies he told. You'll hear how he lied about the fake million dollar bill, how he got it and gave three different versions. You'll hear about how he lied about the note, and you're going to hear about how he lied about how many trips he made back and forth from Union

> City and who he was with—not who he was with. He stated he was with Ann Biggers.
>
> … [A]s you listen to the testimony you're going to hear as I told you already [that Howard] tried to pay for drugs with the fake million dollar bill…. And [Howard], you'll hear, gave a couple different versions of where the fake million dollar bill went after he tried to pay the drug dealer that didn't take the fake million dollar bill.

N.T., 1/22/11, at 21-23.

Our review of the record discloses that the trial court afforded the prosecutor reasonable latitude in her opening statement. The prosecutor's statements, when read in context, were reasonably based upon the evidence the Commonwealth sought to introduce at trial. We cannot conclude that the prosecutor's statements, in context, were designed to inflame the jury's emotions. Accordingly, we cannot grant Howard relief on this claim.

Howard next challenges the trial court's evidentiary rulings, which allowed Martin to testify regarding (a) her psychological health following Goodwill's death; (b) her relationship with Goodwill's children; and (c) her relationship to the victim. Brief for Appellant at 20. Howard asserts that this evidence was irrelevant and designed solely to elicit sympathy from the jury. ***Id.***

"Questions concerning the admissibility of evidence are committed to the discretion of the trial court, and those rulings will not be disturbed on appeal absent an abuse of discretion." ***Commonwealth v. Mouzon***, 53 A.3d 738, 750 (Pa. 2012).

At trial, the prosecution questioned Martin regarding her psychiatric treatment with Prozac following Goodwill's death. N.T., 2/22/11, at 168-69. When defense counsel objected, the prosecutor explained that during Howard's first trial, defense counsel "painted [Martin] as a cold-blooded killer, and actually[,] in [defense counsel's] closing at the last trial[,] said did you ever see [Martin] show emotion." ***Id.*** at 170. In overruling Howard's objection, the trial court limited the prosecutor's questioning as follows:

> [THE COURT]: Let me be clear. I'm going to give [the Commonwealth] a little room. You get in and out. What you're not allowed to do is build her up into an object of sympathy for the resultant death of her boyfriend. It has some probative value, I agree with you, because there's been an attack. She's in treatment[;] she's been affected.
>
> But again, like almost everything in life, it's a balancing test, and we're not going to make her into an object of sympathy because he's dead or elicit that. So you can ask a couple questions. Don't get into what [Martin's] therapist said and don't turn her into an object of sympathy.

Id. at 171. We discern no abuse of discretion in the trial court's ruling.

Regarding evidence of Martin's relationship with Goodwill's children, we observe that Goodwill's children were listed as witnesses by the defense. ***Id.*** at 184. Further, the trial court permitted the Commonwealth some latitude based upon defense counsel's tactics in the first trial and during opening statements, *i.e.*, that Martin killed Goodwill. ***Id.*** at 185 (wherein the trial court noted defense counsel's theory of the case during the first trial, but advised counsel that the objection could be renewed should the prosecutor go "too far"). We discern no abuse of discretion or error by the

trial court in this regard. The trial court's ruling was reasonably tailored to the circumstances presented in the re-trial of Howard.

Regarding the evidence of Martin's relationship with Goodwill, we find no abuse of discretion in the trial court's ruling. The trial court permitted the Commonwealth to present the evidence as background evidence. ***Id.*** at 181. We cannot discern an abuse of discretion by the trial court in admitting this evidence, or resulting prejudice to Howard as a result of its admission. Accordingly, we cannot grant Howard relief on this claim.

Howard next claims that the trial court improperly permitted Pennsylvania State Trooper Michael Keller ("Trooper Keller") to compare the level of detail in Martin's written statement to that of witnesses in other cases. Brief for Appellant at 23. Howard also challenges the admissibility of Trooper Keller's testimony regarding Martin's demeanor while writing her statement, as compared to when Martin first arrived at the State Police Barracks. ***Id.*** Howard argues that "[t]his type of testimony constitutes improper vouching of witness credibility." ***Id.*** We disagree.

At trial, when defense counsel objected to the prosecutor's line of questioning, the trial court implicitly *sustained* the objection, when the court stated the following:

> THE COURT: I'm concerned that [Trooper Keller is] being asked to vouch for [Martin's] credibility, which is improper. So you [the prosecutor] ask a question and I'll see where we go, but ask another question.

N.T., 1/22/11, at 50. The prosecutor asked another question, and defense counsel lodged no further objections. As the trial court sustained Howard's objection, Howard is not entitled to relief on this claim.

Howard next claims that the trial court improperly permitted Trooper Keller to present hearsay testimony regarding the fake million dollar bill and the source of his information. Brief for Appellant at 24. According to Howard, the Commonwealth sought to elicit testimony that Trooper Keller was told about the million dollar bill by Mary Hoffman. ***Id.*** Howard argues that the testimony was offered to show that more people were aware that Goodwill carried a fake million dollar bill. ***Id.*** at 25.

> At trial, the prosecutor questioned Trooper Keller as follows:
>
> Q. [The prosecutor]: Trooper, about this million dollar bill, how did you find out about a million dollar bill? Do you recall?
>
> A. [Trooper Keller]: It was on Sunday, the 5th, a Mary Hoffman, friend of the deceased, stopped at the scene.

N.T., 2/22/11, at 81. Upon the objection of Howard, the trial court instructed the prosecutor as follows:

> THE COURT: I think you can ask [Trooper Keller] when is the first time you heard about this and from whom. I think what they say, if I understand [defense counsel's] objection, is hearsay, but you can certainly ask when did you hear about the bill and from whom. I think that's it.

Id. at 82. Defense counsel offered no further objection. Thus, our review discloses that the trial court *sustained* defense counsel's objection, prior to

the introduction of any hearsay statement by the witness. As such, we cannot grant Howard relief on this claim.

Next, Howard claims that the trial court erred in denying his Motion for a mistrial during the testimony of Trooper Russo. Brief for Appellant at 25. Howard argues that Trooper Russo improperly commented upon Howard's constitutional protection against self-incrimination when he testified about Howard's post-arrest silence. ***Id.*** Howard does not direct this Court to the place in the record where such testimony is located. ***See*** Pa.R.A.P. 2119(c) (stating that "[i]f reference is made to the … evidence … or any other matter appearing in the record, the argument must set forth … a reference to the place in the record where the matter referred to appears ...."); ***Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa. Super. 2007) (holding that the failure to properly develop an argument in an appellate brief, including proper citation to the record, results in waiver of the issue; this Court will not "scour the record to find evidence to support an argument"). Regardless, our review of the record discloses that in his Concise Statement, Howard referred to the notes of testimony from February 23, 2011, page 191, with regard to this claim.

At trial, Trooper Russo described his interview of Howard following Howard's arrest. N.T., 2/23/11, at 188-91. During that interview, Howard waived his right against self-incrimination by answering several questions regarding Goodwill's death. ***Id.*** Specifically, Howard responded in the

negative when he was asked if he had meant to kill Goodwill, and whether Goodwill had suffered. ***Id.*** at 190. When asked about Howard's demeanor during those last two answers, Trooper Russo stated the following: "He was during those particular statements that I just mentioned, he was—he had tears in his eyes, his eyes were bloodshot, he was crying and his lips were quivering very, very noticeably." ***Id.*** After Trooper Russo acknowledged not asking Howard about Goodwill's wallet at that time, the Commonwealth closed its examination of the Trooper. ***Id.*** at 190-91. At that time, defense counsel moved for a mistrial based upon Howard's constitutional protection against self-incrimination. ***Id.*** at 191-92.

In denying the Motion for a mistrial, the trial court determined that Howard's constitutional protections were not implicated, as there was no post-arrest silence. ***Id.*** at 192. Our review of the record confirms the trial court's determination: (a) Howard did not remain silent; (b) Howard answered Trooper Russo's questions; and (c) Trooper Russo did not comment on Howard's post-arrest silence. As such, Trooper Russo did not improperly comment on Howard's post-arrest silence. Accordingly, Howard is not entitled to relief on this claim.

Finally, Howard claims that the trial court improperly failed to instruct the jury that intoxication can reduce murder from a higher degree to a lower degree, pursuant to 18 Pa.C.S.A. § 308. Brief for Appellant at 27. Howard argues that Commonwealth presented evidence that Howard was under the

influence of crack cocaine during the night of the murder. ***Id.*** at 28. Under these circumstances, Howard argues, he was entitled to an instruction that intoxication could reduce murder from a higher degree to a lower degree. ***Id.***

Our Supreme Court has recognized that

> [e]vidence of intoxication may be offered by a defendant to reduce murder from a higher degree to a lower degree. 18 Pa.C.S. § 308. Intoxication, however, may only reduce murder to a lower degree if the evidence shows that the defendant was "overwhelmed to the point of losing his faculties and sensibilities." ***Commonwealth v. Breakiron***, 524 Pa. 282, 571 A.2d 1035, 1041 (Pa. [1990]) (citation omitted), *cert. denied*, 498 U.S. 881, 111 S. Ct. 224, 112 L. Ed. 2d 179 (1990). The value of such evidence is generally for the finder of fact, who is free to believe or disbelieve any, all, or none of the testimony addressing intoxication. ***Commonwealth v. Fletcher***, 580 Pa. 403, 861 A.2d 898, 908 (Pa. 2004), *cert. denied*, 547 U.S. 1041, 126 S. Ct. 1617, 164 L. Ed. 2d 336 (2006).

Commonwealth v. Blakeney, 946 A.2d 645, 653 (Pa. 2008).

Our review of the record discloses that the evidence did not support Howard's claim that he was entitled to an intoxication instruction. Specifically, the evidence did not reflect that Howard was "overwhelmed to the point of losing his faculties and sensibilities" as a result of ingesting crack cocaine. ***See id.***

At trial, the parties stipulated that surveillance footage would show Howard

> (a) driving his vehicle through an ATM at the Northwest Savings Bank located at 22 North Main Street in Union City at 8:09 p.m. on July 3, 2009, ***see*** N.T., 2/23/11, at 159;

(b) entering a Country Fair store in Erie within one-half hour before or after 9:59 p.m. on July 3, 2009; ***see id.*** at 161;

(c) entering a Circle K store located at 830 South 19 in Waterford at about 12:23 a.m., on July 4, 2009, ***see id.***;

(d) again driving through the ATM at the Northwest Savings Bank in Union City at 3:01 a.m., on July 4, 2009, ***see id.*** at 159; and

(e) entering the Circle K in Waterford at 3:30 a.m., on July 4, 2009, ***see id.*** at 161.

Howard's travels from 8:09 p.m. on July 3, 2009 through 3:30 a.m. on July 4, 2009, as stipulated to by the parties, demonstrated that Howard was capable of driving throughout the night and early morning hours. The stipulated evidence demonstrated that Howard was not "overwhelmed to the point of losing his faculties and sensibilities." ***See Blakenly***, 946 A.2d at 653. So, too, did the evidence that Howard tied his victim and left a note on the door of the victim's house. ***See*** N.T., 2/22/11, at 40 (wherein Trooper Keller testified that the victim had been tied up); 45 (wherein Trooper Keller testified about a note found at the crime scene). Because the evidence did not support an intoxication jury instruction, Howard is not entitled to relief on this claim.

For the foregoing reasons, we affirm Howard's judgment of sentence.

Judgment of sentence affirmed.