NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TYREE M. GATES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1413 MDA 2012

Appeal from the Judgment of Sentence January 24, 2011
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0001775-2009

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY STEVENS, P.J. **FILED MAY 03, 2013**

This is an appeal *nunc pro tunc* from the judgment of sentence entered in the Court of Common Pleas of Lycoming County following Appellant Tyree Gates' conviction by a jury on one count of aggravated assault, two counts of simple assault, and one count of recklessly endangering another person.[1] Appellant contends (1) the trial court erred in limiting his cross-examination of the victim, (2) the trial court erred in failing to grant a mistrial due to an improper comment made by the prosecutor during closing arguments, and (3) the trial court abused its discretion in sentencing Appellant. We affirm.

> On October 11, 2009, members of the Williamsport Bureau of Police were called to 815 Hepburn Street, Williamsport, Pennsylvania, for a shots fired call. Upon arrival at the

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[1] 18 Pa.C.S.A. §§ 2702, 2701, and 2705, respectively.

> residence, the police found the victim, Danielle Barnes (Barnes), shot once in the chest. The shooting took place following an argument between [Appellant] and [Ms.] Barnes. During the argument, [Appellant] had his .45 caliber handgun on his hip in a holster. [Appellant] pulled the handgun out during the argument; the handgun fired and [Ms.] Barnes was shot. [Appellant] then called 911.

Trial Court Opinion filed 7/1/11 at 1.

Appellant was charged in connection with the shooting, and on August 9, 2010, the Commonwealth filed a motion *in limine* seeking to preclude Ms. Barnes from testifying that, when police arrived on the scene, she told the police Appellant shot her but she thought it was an accident. On August 10, 2010, the matter proceeded to a hearing, at which the trial court stated, in relevant part, the following:

> Let's address the motion *in limine* first. In essence, the Commonwealth is requesting that the Court preclude the alleged victim from testifying to the conclusion and/or her opinion, I would guess, that the shooting was an accident. Quite candidly, counsel, in my review of the rules—the applicable rules, I guess, would be Rule 701 of the PA Rules of Evidence. It seems to me that a decision on that, in all likelihood, can't be made until the Court—trial court hears evidence and at least testimony from the witness to some extent as to the factual basis as to why she might testify to that, so I'm going to defer any ruling on that and then give it to Judge Butts to discuss with her, you know, my thinking and she's going to have to make that decision at trial.

N.T. 8/10/10 at 2-3. No party objected to the motion being deferred until the time of trial, and by order entered on August 17, 2010, the trial court confirmed "a decision on the motion *in limine* cannot properly be made until an appropriate evidentiary foundation is set forth at trial, [and therefore] a

decision on said motion will be deferred until the appropriate time at trial." Trial Court's Order filed 8/17/10.

On August 16, Appellant proceeded to a jury trial,[2] at the conclusion of which the jury convicted him of the offenses indicated *supra*. On January 24, 2011, Appellant proceeded to a sentencing hearing, at the conclusion of which the trial court sentenced him to an aggregate of six years to twelve years in prison, to be followed by five years of probation. Appellant filed a timely post-sentence motion, which was denied by operation of law. Thereafter, Appellant did not file a timely direct appeal; however, on September 9, 2011, his appeal rights were reinstated via the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-46, and on October 3, 2011, he filed a notice of appeal. Subsequently, by *per curiam* order entered on April 5, 2012, this Court dismissed Appellant's appeal due to counsel's failure to file a brief. However, on or about June 4, 2012, Appellant filed a *pro se* PCRA petition again seeking the reinstatement of his direct appeal rights. The Commonwealth did not oppose the reinstatement, and by order entered on July 6, 2012, the PCRA court reinstated Appellant's direct appeal rights *nunc pro tunc* due to counsel's failure to file an appellate brief. This

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[2] During the jury trial, the motion *in limine* was further addressed by the trial court, and its rulings with regard thereto are discussed *infra* as it relates to Appellant's first appellate issue.

counseled notice of appeal followed on August 1, 2012, and all Pa.R.A.P. 1925 requirements have been met.

Appellant's first contention is the trial court erred in limiting his cross-examination of the victim, Danielle Barnes. Specifically, Appellant contends the trial court erred in failing to permit Appellant to cross-examine Ms. Barnes regarding her statement to the responding officer that Appellant shot her but she thought it was an accident. We find this issue to be waived.

Preliminary, we note that, during the cross-examination of the Commonwealth's first witness, Police Officer Trent Peacock, defense counsel asked Officer Peacock whether, when he responded to the shooting, the victim said anything to him about the incident. N.T. 8/16/10 at 19. The ADA immediately objected and noted "there's an objection based on what we talked about in chambers the ruling the Court made."[3] N.T. 8/16/10 at 19. The trial court and the attorneys then engaged in the following sidebar discussion:

> **[APPELLANT'S COUNSEL]:** He asked if he spoke to the victim, and basically what the victim said—the victim said three things—basically three things. The defendant shot me.
> **[ADA]:** We were arguing and the defendant shot me. I think it was an accident. That's the part that the Court already ruled on.
> **[APPELLANT'S COUNSEL]:** You said—
> **[ADA]:** It's her statement. Her—if there's—

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[3] We note this Court has not been provided with any transcript from the referenced discussion, which apparently occurred in the trial judge's chamber.

> **[APPELLANT'S COUNSEL]:** She—her story changed several times throughout the last ten minutes.
> **[ADA]:** But she can't say what was in his mind and—
> **THE COURT:** I guess at this point I don't know what she's going to testify to. I'm reluctant to let any of that in. You can probably get two-thirds of it in, but not that comment, but it's going to be kind of hard to—
> **[ADA]:** Unless he's cautioned not to say anything.
> **THE COURT:** That's the problem. I mean, trials—I mean, I can give you a pretrial ruling where I'm headed at this point, but depending upon what her testimony may be, things could change. I mean, I know what Judge Lovecchio ruled. I know what he discussed you all of you, but that's the bind I'm in, okay?
> **[APPELLANT'S COUNSEL]:** She made the statements to the doctors and police officers. None of that's going to come in?
> **THE COURT:** At this point the answer would be no, but I want to hear what she testifies to.

N.T. 8/16/10 at 19-20.

Thereafter, prior to Ms. Barnes testifying, the trial court recessed the jury and the following relevant exchange occurred:

> **THE COURT:** Ma'am, what's your name?
> **MS. BARNES:** Danielle Barnes.
> **THE COURT:** And it's my understanding that you're a Commonwealth witness in this case?
> **MS. BARNES:** Yes.
> **THE COURT:** And you are going to be asked questions about the testimony of what happened on this occasion?
> **MS. BARNES:** Correct.
> **THE COURT:** I would specifically instruct you that you're not allowed to give any opinions unless the Court instructs that you are allowed to do so, so if you have a belief that something happened for a specific reason or you believe you understood what the person may have been doing or thinking at the time and therefore would like to tell the jury that, you are specifically instructed by me that you are not allowed to do that.
> **MS. BARNES:** Okay.
> **THE COURT:** And you understand that if you do, it would be a direct violation of this Court's order and the Court would have a number of opportunities within its power to take advantage of.

> One of them would be having a hearing to determine if you're not in contempt of this Court's order and you could potentially be fined or possibly incarcerated.
> **MS. BARNES:** Okay.
> **THE COURT:** But I would just direct you to be mindful of the questions that are asked of you, and if one is asking you specifically for that information that you've been specifically instructed at least at this point not to provide the jury that you might want to wait for an objection being made by one of the other attorneys, or you can look at me I'll give you specifically an instruction, sure, you can go ahead and answer the question, or don't answer the question, okay? Hopefully, we won't have to go that route because the attorneys understand what their responsibilities are, what they shouldn't be asking you generally, so we shouldn't have to worry about that at all.
> **MS. BARNES:** Okay.
> **THE COURT:** Do you have any questions about anything that I've gone over with you?
> **MS. BARNES:** No.
> **THE COURT:** It's anticipated that you will be the next witness to be called. The jury is out for their break. We're probably going to start back in 15 minutes or so.
> **MS. BARNES:** Okay. I can go back out for now?
> **THE COURT:** Yes, you may. I would specifically also instruct you not to discuss what we talked about right now.
> **[ADA]:** Okay.
> **THE COURT:** Okay. Okay, court's recessed.

N.T. 8/16/10 at 81-84.

Ms. Barnes then took the stand and testified. Neither the Commonwealth nor defense counsel asked Ms. Barnes whether she made any statements to the responding officers indicating Appellant shot her but she believed it was an accident.

Based on the aforementioned, we find waived Appellant's contention the trial court erred in failing to permit Appellant to cross-examine Ms. Barnes regarding her statement to the responding officers that Appellant

accidentally shot her. Initially, the Commonwealth filed a motion *in limine* seeking to prevent such cross-examination, and the certified record does not contain any response from Appellant. Thereafter, without objection, the trial court ruled the matter would be deferred to the time of trial. Apparently, at some point, the issue was discussed in the chambers of the trial court judge, who issued a ruling on the matter. There is no indication from the record this discussion was transcribed, and, in fact, this Court has not been provided with any transcript in this regard. Moreover, whenever the matter was broached on the record during trial, Appellant's counsel lodged no objection. Furthermore, there is no indication from the record Appellant's counsel attempted to ask Ms. Barnes about any particular "accident" statement on cross-examination but was prevented from so doing. Therefore, we find Appellant's issue to be waived. ***See Commonwealth v. Laird***, 605 Pa. 137, 988 A.2d 618 (2010) (failure to lodge timely objection waives evidentiary challenges).

In any event, assuming, *arguendo*, the issue is not waived, we note any error with regard to the trial court prohibiting Ms. Barnes from testifying she told the responding officer Appellant shot her, but she believed such to be an accident, is harmless. It is well-settled that:

> Where an error is deemed to be harmless, a reversal is not warranted. Regarding the erroneous admission [or exclusion] of evidence, harmless error exists where:
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> > (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; 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. Kuder, 2013 WL 657657, *13-14 (Pa.Super. filed 2/25/13) (quotations omitted).

Here, there was no dispute Appellant was in possession of the gun when Ms. Barnes was shot and she suffered serious bodily injury. Appellant admitted as much during his trial testimony. N.T. 8/17/10 at 60-66. Appellant's defense theory was the gun went off with no criminal intent on the part of Appellant and, more specifically, Appellant testified he did not pull the trigger. N.T. 8/17/10 at 61. To this end, Appellant testified the gun went off either when he was taking it out of his holster with the intent of putting in his closet or when he was attempting to put the gun back into its holster. N.T. 8/17/10 at 61, 97-98. He denied the couple was arguing at the time of the shooting, that they had a violent relationship, or that he would ever do anything to intentionally hurt Ms. Barnes. N.T. 8/17/10 at 70.

Ms. Barnes testified on direct-examination that, when she was shot, the couple were not yelling at each other and she was showing Appellant a picture on her cell phone. N.T. 8/16/10 at 90-91, 94-95. Ms. Barnes further testified on direct examination Appellant was licensed to carry a gun, he always carried it in a holster, and she did not see Appellant holding the gun or pulling it out of his holster prior to her being shot. N.T. 8/16/10 at 99-

100, 108. Additionally, on cross-examination, Ms. Barnes confirmed she neither saw Appellant pull his gun out of the holster nor point it at her when she was shot. N.T. 8/16/10 at 112, 118. She further testified on cross-examination that, prior to her being shot, the couple were not arguing and she did not feel threatened. N.T. 8/16/10 at 117. She indicated Appellant carried his gun in a holster "pretty much" everywhere he went, and "the first thing he did" when he came home was remove the gun from his body and put it in a closet or on top of the dresser. N.T. 8/16/10 at 119-120. Thus, she testified it would not have been unusual for Appellant to be removing his gun from its holster with the intent of putting it away at the time she was shot. N.T. 8/16/10 at 120. Thus, while the jury apparently did not credit the testimony establishing Appellant shot Ms. Barnes as he was removing the gun from its holster to put it away or as he was putting it back into its holster, the jury was presented with such evidence.[4] Therefore, we would find any error in the exclusion of Ms. Barnes' statement that Appellant "accidentally" shot her to be harmless as the jury was presented with, but rejected, evidence supporting such a defense theory. ***See Kuder***, ***supra***.

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[4] As the Commonwealth pointed out during Ms. Barnes' direct examination, Ms. Barnes' testimony as indicated *supra* was contrary to the testimony, which she gave during Appellant's preliminary hearing. N.T. 8/16/10 at 100-107. During the preliminary hearing, Ms. Barnes testified she saw Appellant point the gun at her, rack the gun, and fire it at her. N.T. 8/16/10 at 104-107. Ms. Barnes testified her memory was more clear on the day of trial. N.T. 8/16/10 at 114.

Appellant's next contention is the trial court erred in failing to grant a mistrial due to an improper comment made by the prosecutor during closing arguments. Specifically, Appellant challenges the following portion of the prosecutor's closing argument:

> Now I'd ask you to consider, ladies and gentlemen, some of the conversations that the defendant had when he was at the Lycoming County Prison. Some of those conversations are important, and why are they important? Because what's going on with the defendant? What does he want to get back to Miss Barnes? He wants to get back to her, well number one, I really still care about her a lot. That's not inconsistent, ladies and gentlemen, with—unfortunately, and I'm sure many of you know this or have read about it **in domestic incidents, it's not uncommon at all for people, women, men, doesn't matter whether it's a woman or a man to after some significant assaultive behavior on the part of one of the two individuals to get back with them**. Love sometimes does that to people, ladies and gentlemen.

N.T. 8/17/10 at 14 (bold added).

In its opinion, the trial court urges this Court to find Appellant's issue to be waived since Appellant never objected, let alone requested a mistrial, with regard to the prosecutor's closing argument. ***See*** Trial Court Opinion filed 7/1/11 at 4-5. Our review of the record confirms Appellant made no timely objection to the challenged statement and did not request a mistrial with regard thereto. Therefore, we find Appellant's issue to be waived. ***See Commonwealth v. Adams***, 39 A.3d 310 (Pa.Super. 2012), *appeal granted other grounds*, 48 A.3d 1230 (Pa. 7/17/12) (holding challenge to prosecutor's closing argument is waived if no timely objection is made during trial).

Appellant's final contention is the trial court abused its discretion in imposing an excessive sentence for aggravated assault. Specifically, Appellant contends the trial court did not give adequate consideration to the protection of the public, the gravity of the offense, or his rehabilitative needs; but rather, the trial court focused primarily upon its flawed conclusion Appellant did not feel remorse for the shooting.

"A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa.Super 2004).

> To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Cook, 941 A.2d 7, 11 (Pa.Super. 2007) (citation omitted).

In the instant case, Appellant filed a timely notice of appeal, preserved his claim in his post-sentence motion,[5] and included a Rule 2119(f) statement in his brief. Additionally, we conclude Appellant's claim presents

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[5] Appellant also presented the issue in his court-ordered Pa.R.A.P. 1925(b) statement.

a substantial question. ***See Commonwealth v. Riggs***, 2012 WL 3860048 (Pa.Super. filed 9/6/12) (claim trial court failed to consider the factors set forth in 42 Pa.C.S.A. § 9721 raises a substantial question). Accordingly, we will now address the merits of the sentencing issue raised on appeal, pursuant to the following standard:

> [T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. [A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. In more expansive terms, our Court recently offered: An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

Commonwealth v. Provenzano, 50 A.3d 148, 154 (Pa.Super. 2012) (quotation omitted).

As Appellant correctly asserts, "[t]he sentencing code guidelines…require the sentence to be consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." ***Commonwealth v. Riggs***, 2012 WL 3860048, *6 (Pa.Super. filed. 9/6/12) (quotations and quotation marks omitted). However, contrary to Appellant's assertion, we conclude the trial court adequately took these factors into account in sentencing Appellant.

For instance, during the sentencing hearing, the trial court expressly indicated it had in its possession a presentence investigative report, which revealed Appellant is thirty-one years old, born in Philadelphia, completed the tenth grade, and is single. N.T. 1/24/11 at 3. The trial court acknowledged Appellant's parents are listed on the presentence investigative report as "unknown;" Appellant has two siblings, who he was raising prior to the shooting; Appellant has six biological children; the victim was Appellant's paramour for more than eight years; Appellant has no mental health issues; Appellant has never used drugs; and prior to the shooting, Appellant had a recording contract to produce songs for Sprite's television and radio commercials. N.T. 1/24/11 at 4-5. The trial court further acknowledged Appellant testified the shooting was an accident. N.T. 1/24/11 at 3-4.

The trial court indicated in October of 2010 it received a letter, in which Appellant asked for leniency, expressed fear for his family in his absence, stated he "is not a criminal," and indicated he had lost his Sprite endorsement. N.T. 1/23/11 at 5-6. The trial court further indicated in October of 2010 it received a letter, in which Ms. Barnes expressed she believed Appellant was the "real victim." N.T. 1/23/11 at 6. She expressed her belief the shooting was an accident, Appellant's trial attorney was ineffective, and Appellant does not deserve what he has been "going through." N.T. 1/23/11 at 6-7. The trial court acknowledged the applicable

sentencing guideline ranges, and the Commonwealth's request for the mandatory "five years." N.T. 1/23/11 at 8, 11-12.

The trial court permitted Appellant to make a verbal statement in which Appellant sought leniency, indicating "I already feel as though I got a bad end of the stick[.]" N.T. 1/23/11 at 9. In response, the trial court noted it had no discretion to impose a sentence less than the mandatory minimum. N.T. 1/23/11 at 12. Defense counsel requested the trial court impose no prison time in addition to the mandatory minimum, and in response, the Commonwealth stated, in relevant part:

> Your Honor, as indicated there is a mandatory five years so the court is limited in its discretion. It cannot go below the mandatory five years. The Commonwealth submits, however, that under the facts and circumstances of the case the court should sentence him above the five years sentence for a number of reasons, Your Honor. First, in this case, there is---from the outset there was no acknowledgment by [Appellant] of responsibility at all, no real remorse for his actions in causing the incident. If the court recalls at the outset of the incident while [Appellant] does call the police his report indicated basically that he just happened to come home and the stranger must have come in the house and shot his girlfriend. This demonstrates clear absence of responsibility for the incident. It's clear as the Commonwealth submits from the testimony submitted at a minimum [Appellant] was clearly reckless in causing that it was no accident that he clearly---so the jury found deliberately pointed a gun—that's the simple assault physical menace charge—at his girlfriend with the intent of putting her in fear of serious bodily injury. Again, that was denied at the trial by [Appellant].
>
> [Appellant's] version of what occurred, we submit, is incredible, was borne out of many of the statements that the court heard that the Commonwealth played from prison conversations, that showed [Appellant] was clearly not telling the truth as to various matters that he testified to. Under the

> circumstances, Your Honor, we believe that greater than the mandatory five years should be imposed.

N.T. 1/24/11 at 12-13.

After being presented with all of the aforementioned, the trial court noted the Commonwealth had highlighted that Appellant and the victim gave many different versions of what occurred. N.T. 1/24/11 at 15-16. The trial court indicated "something happened that it just doesn't seem like either you or the victim was willing to acknowledge as to what happened between the two of you[.]" N.T. 1/24/11 at 16. The trial court accepted the victim "cares a great deal" for Appellant and she wishes for the court to show Appellant leniency. N.T. 1/24/11 at 16. However, the trial court concluded:

> [B]ecause of the contradictions in the presentation of what happened I have to take that as a lack of remorse, a lack of acceptance of responsibility. So instead of the five year or instead of the five year mandatory I would add another year onto it so that it would be—it would essentially put you up at the top end of the standard range, which would be 72 months[.] I believe that based upon the nature of this offense, how serious the offense is as well as the serious injury that occurred to the victim in this case, that an extended period of supervision is warranted and that a sentence of any less not only depreciates the seriousness of the offense, but enables the Commonwealth generally to be protected to make sure that you're under supervision for an extended period of time because there is a chance, however small; but there is a chance that you could max out on the aggravated assault confinement portion of the sentence and I believe that a sentence of consecutive supervision is appropriate.

N.T. 1/24/11 at 16-17.

Additionally, in its opinion, the trial court explained it sentenced Appellant to an additional year on top of the five-year mandatory minimum

sentence due, in part, to Appellant's lack of remorse and failure to accept responsibility, which was demonstrated, in part, by his inconsistent testimony. Trial Court Opinion filed 7/1/11 at 5.

Inasmuch as the record reveals the trial court reviewed a presentence report, we conclude the trial court appropriately weighed the requisite sentencing factors. ***See Commonwealth v. Naranjo***, 53 A.3d 66 (Pa.Super. 2012). Additionally, contrary to Appellant's assertion, there was ample evidence Appellant was not remorseful for his actions, as demonstrated by his inconsistent trial testimony and the October, 2010 letter he sent to the trial court. In sum, we find since the trial court's sentencing colloquy "shows consideration of [Appellant's] circumstances, prior criminal record, personal characteristics and rehabilitative potential, and the record indicates that the court had the benefit of the presentence report, an adequate statement of the reasons for the sentence imposed has been given." ***Commonwealth v. Brown***, 741 A.2d 726, 735-36 (Pa.Super. 1999) (*en banc*). Therefore, we find no merit to Appellant's contention the trial court abused its discretion in sentencing him.

For all of the foregoing reasons, we affirm.

Affirmed.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 5/3/2013