NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	
v.	
LAWRENCE ROBERT STIEFEL	
Appellant	No. 143 WDA 2012

Appeal from the Judgment of Sentence of July 26, 2011
In the Court of Common Pleas of Butler County
Criminal Division at No.: CP-10-CR-0001519-2010

BEFORE: DONOHUE, J., SHOGAN, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: FILED: August 26, 2013

Lawrence Stiefel ("Appellant") appeals the judgment of sentence entered on July 26, 2011, imposing an aggregate sentence of twenty to forty years' incarceration, following his convictions by a jury of aggravated assault,[1] robbery,[2] unlawful restraint,[3] and simple assault.[4] We vacate and remand for a new trial.

The trial court set forth the facts as follows:

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[1] 18 Pa.C.S. § 2702(a)(1).

[2] 18 Pa.C.S. § 3701(a)(1)(i).

[3] 18 Pa.C.S. § 2902.

[4] 18 Pa.C.S. § 2701(a)(1).

[Appellant] was charged with Aggravated Assault, Robbery, Unlawful Restraint and Simple Assault. On April 14, 2011, following a jury trial, [Appellant] was convicted on all four offenses.

Victim Stephanie Splain suffered several injuries on August 5, 2010 at [Appellant's] mother's apartment at 401 North Washington Street, Butler, Pa. This apartment was rented by [Appellant's] mother and [Appellant] had been staying there after moving to Butler from the Pittsburgh area. Stephanie Splain had been staying at the Gaiser Addiction Center in Butler County, however, she had been removed from the Center as a result of a[n] improper relationship with another resident. Splain was on parole in Allegheny County and her removal from the Gaiser Center was a violation of her county parole. Splain and some other people who had been removed from the Gaiser Center rented a room at the Butler Days Inn. After an altercation at the Days Inn, Splain and another person rented a room at the Super 8 Motel which is directly across the street from the Butler Days Inn. While at the Super 8, Splain met [Appellant] who was an employee of the Super 8 Motel. [Appellant] offered Splain the opportunity to stay at his apartment and Splain and [Appellant] spent the next few days together at the apartment.

On August 5, 2010, an incident occurred at the apartment whereby Splain suffered injuries caused by a knife to her face, neck and hands. At some point in time, [Appellant] and Splain left the apartment and walked to the Rite Aid Drug Store on Main Street in the City of Butler to obtain additional supplies to treat Splain's wounds. Splain and [Appellant] had intended to proceed to a bar at which time the parties separated so that [Appellant] could return to the apartment to obtain money. Meanwhile, Splain went to a Pizza Hut restaurant and called the police. The police responded to the scene and [Appellant] soon appeared and was arrested as a result of what Splain told the police.

At trial, the prosecution presented evidence of a version of events in which [Appellant] caused the injuries to Splain. The injuries are proof beyond a reasonable doubt that [Appellant] committed violent acts against Splain, including striking her face with the butt end of a knife, which caused a laceration, contusion, swelling and bruising, as well as cuts on her neck and

> hands. [Appellant], on the other hand, testified that some of the injuries were caused by Splain deliberately cutting her face and neck and that the other injuries were suffered as a result of [Appellant] attempting to take the knife from Splain so that she could not hurt herself further.
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> [Appellant] was represented at trial by Attorney Charles Nedz of the Butler County Public Defender[']s Office. After [Appellant] had been convicted by a jury, Attorney Nedz requested to the Trial Court that he be permitted to withdraw his appearance as there was a breakdown in the lawyer[-]client relationship which hindered counsel's ability to provide adequate representation. This motion was filed on April 21, 2011 and the Trial Court conducted a hearing on May 9, 2011. On May 12, 2011, the Trial Court appointed Christopher Capozzi, Esq. to represent [Appellant]. [Appellant] was sentenced on July 26, 2011 and on August 1, 2011, Attorney Capozzi filed Post[-]Sentence Motions with the Trial Court. On August 10, 2011, Attorney Capozzi requested the Trial Court continue the matter for 90 days to allow him to supplement his Post[-]Sentence Motion and the Trial Court granted the same request scheduling arguments for November 2, 2011. By order of court dated August 15, 2011, the Trial Court rescheduled said argument for November 22, 2011.
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> On October 14, 2011, defense counsel filed a motion to permit [Appellant] to proceed *pro se* as [Appellant] had requested his attorney to cease representation. The Trial Court issued an order directing that this matter be heard on November 22, 2011 as well. [Appellant] and the Commonwealth filed briefs regarding their position [on] the Post[-]Sentence Motions, the Defense on November 3, 2011 and the Commonwealth on November 16, 2011. The Trial Court heard argument on November 22, 2011 and by order of court dated December 22, 2011 denied [Appellant's] request to proceed *pro se*. On January 6, 2012, the [Appellant's] Post[-]Sentence Motions were denied by operation of law. [Appellant] then filed a timely appeal to this Trial Court.

Trial Court Opinion ("T.C.O."), 5/24/2012, at 1-3.

Appellant was sentenced to 120 to 240 months' incarceration on the aggravated assault charge. He also was sentenced to a consecutive term of

120 to 240 months on the robbery charge, a concurrent term of twelve to twenty-four months on the unlawful restraint charge and no further penalty on the simple assault charge. Thus, in the aggregate, Appellant was sentenced to twenty to forty years' imprisonment.

Appellant raises three issues for our consideration:

> 1. Whether [Appellant] was deprived of his constitutional right to a fair trial when the lower court *sua sponte* entered an order mandating that he be shackled during the jury trial conducted in this case and did so without first providing notice or holding a hearing, as well as without making a record of the reasons and necessity for doing so?
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> 2. Whether [Appellant] was deprived of his right to a fair trial when the lower court permitted the Butler County District Attorney to develop through a City of Butler Police Sergeant the hearsay statements of the Complainant, Stephanie Splain ("Splain"), concerning [Appellant's] alleged criminal conduct?
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> 3. Whether [Appellant] was deprived of his right to a fair trial when the lower [c]ourt permitted the Butler County District Attorney to cross-examine him concerning the facts underlying certain prior criminal convictions and that those convictions were for robbery and burglary in the first degree?

Appellant's Brief at 5.

We consider Appellant's second issue first. Appellant argues that the trial court erred in admitting testimony regarding statements made to police by Ms. Splain because the testimony introduced hearsay statements. The Commonwealth responds that the statements were not hearsay because they were offered only to explain the police officers' course of conduct, not for the truth of Ms. Splain's assertions.

On a challenge to a trial court's evidentiary ruling, our standard of review is deferential:

> The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.

Commonwealth v. Herb, 852 A.2d 356, 363 (Pa. Super 2004) (citations omitted).

At trial, Police Sergeant Adam testified as follows:

> [SERGEANT ADAM:] While we were standing there watching her get treated, she pointed out [Appellant] who was walking acrossed [*sic*] the street on West Cunningham . . . . My other officers took him back to the station. Searched him and held him until I could speak with him, detained him. And then I went back to speak with Miss Splain. Um, when I was speaking with her, she said that he had cut her in the hand. Hit her in the head. I asked why this was done. She said, because she told him that she was leaving. She was going to be going home with her mother. And in fact, she had told me — and I don't know if it was at that time or not — she told me that she had money that her mother had sent her so she could go home. Once [Appellant] found this out, he became enraged, hit her on the head, cut her with the knife. And, you know, when I asked, you know, what happened to her hands — because it was obvious they were just bleeding, I mean they were terrible looking — she said that the one time it was a defense wound. She tried to put her hand up, I believe it was her left hand —
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> MR. NEDZ: I'm going to object, Your Honor, this is Sergeant Adam[] testifying as to hearsay. I understand Miss Splain has testified. But she has been released. She is no longer available as a witness in this case.
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> THE COURT: Overruled. Go ahead.

> A. Okay. She said that she put her left hand up. Blocked the knife with her left hand which is where the puncture wound came. He continued to swing at her. And she said — she said that he was almost mechanical. He was very good with the knife. Knew what he was doing with it. And he kept swinging at her in these — the only way I could describe it is like a martial arts style fighting with the knife. And he come [*sic*] at her another time and she tried to grab at the knife, and that's when he sliced the webbing between her thumb and forefinger. She said that after all this happened, they walked to the Rite Aid and then down to the Pizza Hut.

Notes of Testimony ("N.T."), 4/13/2011, at 139-41.

"Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." ***Commonwealth v. Puksar***, 740 A.2d 219, 225 (Pa. 1999). The rule against admitting hearsay evidence stems from its presumed unreliability, because the declarant cannot be challenged regarding the accuracy of the statement. ***Commonwealth v. Rush***, 605 A.2d 792, 795 (Pa. 1992).

While Appellant does not deny that some out-of-court statements offered to explain the course of police conduct are admissible, Appellant asserts that the statements in question were offered to prove the truth of the matter asserted. Appellant's Brief at 26-27. Appellant maintains that the statements made by Sergeant Adam went far beyond what was necessary to explain the course of the investigation. ***Id.*** The trial court concedes that "[i]n hindsight, a review of the officer's testimony after the objection was made reveals that he provided far more information than would have been needed to explain why certain investigative actions were taken." T.C.O. at 6. We agree and conclude it constitutes reversible error.

It is well established that certain out-of-court statements offered to explain the course of police conduct are admissible. ***Commonwealth v. Cruz***, 414 A.2d 1032, 1035 (Pa. 1980). Our Supreme Court examined the parameters for admitting out-of-court statements offered to explain the "course of police conduct" in ***Commonwealth v. Palsa***, 555 A.2d 808 (Pa. 1989):

> It is, of course, well established that certain out-of-court statements offered to explain a course of police conduct are admissible. Such statements do not constitute hearsay since they are not offered for the truth of the matter asserted: rather, they are offered merely to show the information upon which police acted.
>
> Nevertheless, it cannot be said that *every* out-of-court statement having bearing upon subsequent police conduct is to be admitted, for there is great risk that, despite cautionary jury instructions, certain types of statements will be considered by the jury as substantive evidence of guilt. Further, the police conduct rule does not open the door to unbounded admission of testimony, for such would nullify an accused's right to cross-examine and confront the witnesses against him.

Id. at 810 (citations omitted; emphasis in original).

The Court outlined the inherent dangers when prosecutors use such hearsay statements at trial:

> In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted "upon information received," or words to that effect should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon

> which he acted. The need for the evidence is slight, the likelihood of misuse great.

Id. at 810-11. The Court noted that "there is a need for a balance to be struck between avoiding the dangers of hearsay testimony and the need for evidence that explains why police pursued a given course of action." ***Id.*** at 811. Thus, "[i]t is the prosecutor's duty to avoid introduction of out-of-court statements that go beyond what is reasonably necessary to explain police conduct." ***Id.***

We conclude that the admission of Sergeant Adam's testimony regarding what Ms. Splain told him was prejudicial error, and consequently, an abuse of discretion. This testimony was undoubtedly "of a most highly incriminating sort." ***Id.*** at 811. We discern no compelling reason from the record that necessitated such detailed testimony beyond the minimum required to explain the course of police conduct. Limiting the testimony would have provided "an adequate explanation for police conduct . . . while minimizing the introduction of statements made by a person who was not under oath . . . ." ***Id.***

Furthermore, in ***Palsa***, the trial court gave a cautionary instruction directing the jury to consider the evidence only to explain police action, and not as substantive evidence. ***Id.*** at 809. The Supreme Court nonetheless concluded that the statements made were of such a prejudicial nature that the instructions were insufficient to overcome the danger that the jury would consider the evidence substantively. ***Id.*** at 810-11. In the present case,

unlike ***Palsa***, the trial court did not provide the jury with a cautionary instruction.[5] Without such an instruction, we must conclude that the evidence "[was] likely understood by the jury as providing proof as to necessary elements of the crime for which [Appellant] was being tried." ***Id.*** at 811.

We are cognizant that the ***Palsa*** line of cases does not establish a bright line rule requiring reversal in every case. Our Courts have found out-of-court statements offered to explain the course of police conduct admissible in a number of circumstances. Those circumstances include instances when the contested out-of-court statements are cumulative because the declarant testified at other points in the trial, ***Commonwealth v. Jones***, 658 A.2d 746, 751 (Pa. 1995); ***Commonwealth v. Hardy***, 918 A.2d 766, 777 (Pa. Super. 2007); when defense counsel attacked the adequacy of the police investigation in his opening statement and the Commonwealth was required to explain the police action, offered in conjunction with a limiting instruction, ***Commonwealth v. Chmiel***, 889 A.2d 501, 532-34 (Pa. 2005); and when the statement did not imply that the defendant committed a crime, ***Commonwealth v. Bell***, 706 A.2d 855, 862 (Pa. Super. 1998).

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[5] The record does not reveal that Appellant sought such an instruction in this case. However, the lack of instruction still is important to determining whether Appellant was prejudiced by the introduction of the hearsay statements.

The instant case is distinguishable from these cases. Defense counsel did not attack the quality or adequacy of the police investigation during his opening statement in a manner that necessitated introducing the content of the anonymous tip. ***Compare Chimel,*** *supra*. Moreover, the hearsay evidence in question was not merely cumulative, as the case was essentially a "he said/she said" situation, and Sergeant Adam's testimony added an unjustified layer of credibility that bolstered Ms. Splain's previous testimony, possibly constituting the most crucial element of the Commonwealth's case. ***Compare Jones,*** *supra*. Furthermore, the trial court failed to inform the jury that it could consider the matter only to explain why the police initiated its investigation of Appellant and not as substantive evidence.

As in ***Palsa***, the danger that the jury considered this evidence as substantive evidence was great. We find little reason, and the Commonwealth has proffered none, to conclude that Sergeant Adam's testimony as to what Ms. Splain had said was necessary for the Commonwealth's case, when more limited testimony could have demonstrated why the police initiated an investigation. Therefore, we conclude that the evidence constituted inadmissible hearsay and its admission at trial was error. ***See Palsa,*** *supra*.

Our inquiry does not end here. Rather, having found an error of this type, we must now determine whether the error was harmless. "Even if a court does wrongly admit hearsay, this Court will not disturb a verdict on

that basis alone if the admission constitutes harmless error." ***Hardy***, 918 A.2d at 777. An error will be deemed harmless "if: (1) the prejudice to the appellant was nonexistent or *de minimis*; (2) the erroneously admitted evidence was merely cumulative of other untainted, substantially similar and properly admitted evidence; or (3) the properly admitted and uncontradicted evidence 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." ***Id.*** The Commonwealth has the burden of proving harmless error beyond a reasonable doubt. ***Commonwealth v. Wright***, 961 A.2d 119, 143 (Pa. 2008).

The Commonwealth and the trial court, asserting the second prong of the harmless error test, argue that the evidence was cumulative and, as a result, the error was harmless, as Ms. Splain had already testified and her testimony was similar to that of Sergeant Adam. Commonwealth's Brief at 11; T.C.O. at 9. We disagree. "Our cases support the proposition that in deciding whether an error is harmless because there is properly admitted overwhelming evidence of guilt, the untainted evidence relied upon must be uncontradicted." ***Commonwealth v. Story***, 383 A.2d 155, 166 (Pa. 1978). While Ms. Splain's testimony was untainted evidence for purposes of admissibility, it was not uncontradicted. Since there were no witnesses to the alleged attack beyond Ms. Splain and Appellant, the jury was left with the responsibility of determining whether to believe Ms. Splain's or

Appellant's version of the events. In fact, even with the possible bolstering of Mr. Splain's testimony by Sergeant Adam, the jury struggled to reach a verdict after deliberating for seven hours, and the trial court was required to provide a ***Spencer*** instruction to the jury, as it was deadlocked. ***See Commonwealth v. Spencer*** 275 A.2d 299 (Pa. 1971). We cannot conclude that Sergeant Adam's testimony clearly did not contribute to the jury's verdict. ***See Hardy***, **supra**. Therefore the error cannot be deemed harmless.

Sergeant Adam's testimony introduced hearsay statements, which were improperly admitted. That error was not harmless. Thus, a new trial is warranted.

Because we are ordering a new trial and Appellant may choose to testify again, we briefly address Appellant's third issue to provide guidance to the trial court. Appellant argues that the Commonwealth posed questions regarding Appellant's prior convictions that were not permissible. Appellant acknowledges that the Commonwealth is permitted to question him about prior convictions when Appellant testified to his good character and reputation. See 42 Pa.C.S.A. § 5918(1). However, Appellant maintains that the Commonwealth's questions went beyond what is permitted in those circumstances. Appellant's Brief at 31-32.

The Commonwealth responds that Appellant put his character at issue during his direct examination, and that it properly introduced evidence of his

prior convictions. The Commonwealth maintains that its questions about those convictions were appropriately limited in scope. Commonwealth's Brief at 12-15.

Appellant does not dispute the Commonwealth's ability to question him about his prior conviction. The issue is whether the scope of the questions was beyond what is permissible. We have held that "[w]hen a defendant is impeached through introduction of prior convictions, only the name, time, and place of the crime and the punishment received may be entered." ***Commonwealth v. Oglesby***, 418 A.2d 561, 564 (Pa. Super. 1980). We have also said that "it [i]s improper for [the Commonwealth] to go beyond the name or title of [the defendant's prior] crime and to embellish the underlying circumstances. . . . [S]uch cross-examination should be limited to the name, time and place, and punishment received in the prior offense, in order to minimize the potential prejudice and distraction of issues already inherent in the mention of prior offenses." ***Commonwealth v. Albright***, 313 A.2d 284, 286 (Pa. Super. 1973) (opinion in support of reversal).

Here, the cross-examination was limited to the following:

> [COMMONWEALTH]: You've been convicted in Allegheny County of a first degree felony robbery, infliction of serious bodily injury, five counts of that offense, correct?
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> [APPELLANT]: Yes.
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> [COMMONWEALTH]: You have also been convicted of, in Allegheny at that same case of burglary, felony of the first degree, haven't you?
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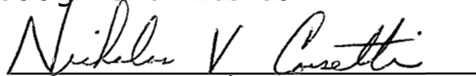
> [APPELLANT]: Yes.

N.T., 4/14/2011, at 108.

While the cross-examination was not extensive, the Commonwealth included the grading of the offenses and information that one offense involved serious bodily injury. Arguably, that information is part of the name of the offense and it is not clear that the inclusion of that limited information was prejudicial or a distraction. The trial court did provide an instruction to the jury that Appellant's prior convictions were not substantive evidence and were only to be considered as rebuttal evidence to Appellant's assertions of non-violence. N.T., 4/14/2011, at 165-66. Given the limited scope of the questions and the court's instruction, we are not inclined to find error.

Judgment of sentence vacated. Case remanded for a new trial. Jurisdiction relinquished.

Judgment Entered.



Deputy Prothonotary

Date: 8/26/2013