NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEREMIE MICHAEL WINTER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1715 MDA 2013

Appeal from the Judgment of Sentence August 23, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0001295-2012

BEFORE: DONOHUE, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.: **FILED JUNE 18, 2014**

Jeremie Michael Winter (Appellant) appeals from the judgment of sentence entered August 23, 2013, after he was found guilty of statutory sexual assault, corruption of minors, and furnishing liquor to a minor.[1] We affirm.

Appellant was charged with the aforementioned offenses after he was accused of giving a minor female fruit punch mixed with vodka, and then engaging in sexual intercourse with her after she blacked out. While in Lancaster County Prison awaiting trial, Appellant provided a statement to police in which he admitted to giving the victim an alcoholic beverage and

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 3122.1(a)(1), 6301(a)(1), and 6310.1(a), respectively.

having intercourse with her. He, however, denied that the victim was unconscious at the time.

On May 23, 2013, Appellant filed an omnibus pre-trial motion, in which he argued that his statement should be suppressed because it was obtained in violation of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966). A suppression hearing was held immediately prior to Appellant's trial on June 10, 2013. At the hearing, Officer Michael Kimes testified that he neglected to bring a written ***Miranda*** waiver form with him for Appellant to sign on the day in question. N.T., 6/10/2013, at 9. However, Officer Kimes stated that he provided Appellant with ***Miranda*** warnings verbally, and that Appellant agreed to waive his rights before giving the statement. ***Id.*** Appellant denied the account of Officer Kimes, and testified that he was never provided with his ***Miranda*** warnings. ***Id.*** at 44-51. Appellant further testified that he denied having intercourse with the victim while speaking to police, but that the officers ignored his claims of innocence and created a false statement. ***Id.*** at 51-53. The trial court ultimately denied Appellant's motion, and Appellant proceeded to a jury trial. ***Id.*** at 61.

At the start of trial, defense counsel argued that Appellant's statement should be discredited by the jury because it was obtained by police coercion. Counsel suggested that Appellant's low intelligence hindered his ability to resist the officers and supported his claim that the statement was involuntary. At the start of the second day of trial, defense counsel informed

the trial court that he intended to call Ms. Dawn Boltz to the stand. N.T., 6/11/2013, at 135. Defense counsel explained that Ms. Boltz "works for the Behavioral Health/Behavioral Services Department," and that she would be called "to speak regarding [Appellant's] mental capacity." ***Id.*** The trial court asked for an offer of proof, and defense counsel stated that "she would be testifying to [Appellant's] intelligence, his IQ, his ability to understand the events around him." ***Id.*** Defense counsel admitted that he did not provide the Commonwealth with an expert report, and the Commonwealth objected to the admission of Ms. Boltz's testimony on that basis. ***Id.*** at 135-36. The trial court inquired as to whether the testimony would "establish that [Appellant] was mentally ill at the time or somehow in such a diminished capacity that he was unable to understand the circumstances of either the alleged offense or any other aspect of this case?" ***Id.*** at 136. Defense counsel replied "I can't say that it would…. I think it would just go to my client's ability to understand the interaction with the police." ***Id.*** The trial court concluded that the evidence would not be admitted. ***Id.*** at 136-37.

Later that same day, Appellant took the stand in his defense. Defense counsel asked Appellant if he had a "mental disability," and Appellant replied that he did. ***Id.*** at 165. Appellant then stated that he was "mentally retarded." ***Id.*** at 166. The Commonwealth objected, and a discussion was held at sidebar. ***Id.*** The trial court informed defense counsel that Appellant's testimony was "not appropriate." ***Id.*** However, the trial court stated that it

would let defense counsel "explore it." ***Id.*** The trial court proceeded to instruct that jury that "you are to disregard that last answer. There is no evidence that will be introduced into evidence that [Appellant] is legally or medically mentally retarded." ***Id.*** Defense counsel then asked Appellant about his mental capacity. ***Id.*** at 167. Appellant agreed that he is "slow," and sometimes has a difficult time reading, writing, and processing information. ***Id.*** Appellant then testified that he did not have intercourse with the victim; that he was not read his ***Miranda*** rights; and that he provided a false confession to police because he was scared, and because the police refused to believe that he was innocent. ***Id.*** at 167-70.

At the conclusion of trial, Appellant was found guilty of all charges. On August 23, 2013, Appellant received an aggregate sentence of 14 months to 6 years of incarceration. Appellant timely filed a notice of appeal. The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925, and Appellant timely complied.

Appellant now raises the following issues on appeal.

> I. Did the trial court err in refusing to permit Dawn Boltz, Lancaster County Behavior Health and Developmental Services, to testify regarding [Appellant's] IQ and mental capacity, where this testimony was admissible and relevant to question of the voluntariness of [Appellant's] statement?
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> II. Did the trial court err in refusing to allow [Appellant] to testify that he is mentally retarded, and in instructing the jury that it must disregard [Appellant's] testimony that he is mentally retarded and that "there is no evidence that will be introduced into evidence that [Appellant] is legally or medically mentally retarded?"

Appellant's Brief at 5 (trial court answers omitted).

Appellant first argues that the trial court erred by precluding him from calling Ms. Boltz as a witness. We emphasize that the "'[a]dmission of evidence is a matter within the sound discretion of the trial court, and will not be reversed absent a showing that the trial court clearly abused its discretion.'" ***Commonwealth v. Akbar***, 3451 EDA 2010, 2014 WL 1697016 at *6 (Pa. Super. filed April 30, 2014) (quoting ***Commonwealth v. Montalvo***, 986 A.2d 84, 94 (Pa. 2009)). An abuse of discretion is not a mere error in judgment. ***Id.*** Rather, "'an abuse of discretion occurs when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence on record.'" ***Id.*** (quoting ***Montalvo***, 986 A.2d at 94). Additionally, when a trial judge requests an offer of proof, that offer "must be sufficient to alert the trial judge to the purpose for which the evidence is being offered, and a trial court's exclusion of evidence must be evaluated on appeal by a review of the contents of the offer at the time it was made." ***Commonwealth v. Newman***, 555 A.2d 151, 156 (Pa. Super. 1989) (citing ***Commonwealth v. Gibson***, 400 A.2d 221 (Pa. Super. 1979); ***Commonwealth v. Cain***, 369 A.2d 1234 (Pa. 1977)).

Here, Appellant attempted to call Ms. Boltz midway through his trial. The record does not reflect that the Commonwealth or the trial court was ever made aware of the existence of Ms. Boltz or the possible contents of

her testimony prior to June 11, 2013. When asked for an offer of proof, the response of Appellant's counsel was vague and undeveloped. Counsel explained with only minimal specificity to what Ms. Boltz would testify, and how this was relevant to Appellant's case. Counsel failed to make apparent whether Ms. Boltz was being offered as an expert witness, a lay witness, or both. Counsel also failed to make clear what Ms. Boltz's relationship to Appellant was that would render her testimony relevant. Counsel simply indicated that Ms. Boltz "works for the Behavioral Health/Behavioral Services Department." N.T., 6/11/2013, at 135. Given so weak a proffer, we cannot conclude that the trial court abused its discretion by disallowing Ms. Boltz' testimony.[2]

Appellant next contends that the trial court erred by preventing him from testifying that he is "mentally retarded," by instructing the jury to disregard Appellant's claim that he is "mentally retarded," and by instructing the jury that there was no evidence that Appellant was "mentally retarded."

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[2] The trial court concluded that the testimony of Ms. Boltz was properly excluded pursuant to Pa.R.Crim.P. 568. Trial Court Opinion, 10/18/2013, at 3-5. Rule 568 requires that a defendant seeking to admit expert testimony in support of a defense based on insanity, mental infirmity, or other mental disease, defect, or condition must provide notice "not later than the time required for filing an omnibus pretrial motion." Pa.R.Crim.P. 568(A)(1), (2). This Court is "'not bound by the rationale of the trial court, and may affirm on any basis.'" ***Commonwealth v. Doty***, 48 A.3d 451, 456 (Pa. Super. 2012) (quoting ***In re Jacobs***, 15 A.3d 509 n.1 (Pa. Super. 2011)). However, as Appellant's counsel indicated that Ms. Boltz was being called solely to challenge the voluntariness of his confession, and not to establish a defense to the crimes for which he was being tried, we agree with Appellant that Rule 568 is inapplicable.

Appellant's Brief at 20-22. The trial court explained that Appellant was given a sufficient opportunity to testify regarding his alleged mental infirmity, and that expert testimony was required to "substantiate [Appellant's] claim of mental retardation." Trial Court Opinion, 10/18/2013, at 6-7. We agree with the trial court.

"Pennsylvania Rule of Evidence 702 allows for the admission of expert testimony where scientific, technical, or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue." ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1140 (Pa. 2011). This Court has explained that, while a lay witness may testify as to the medical condition of a person, that witness "may not testify to matters involving the existence or nonexistence of a disease, which is discoverable only through the training and expertise of a medical expert." ***In re Mampe***, 932 A.2d 954, 960 (Pa. Super. 2007). By extension, while a lay witness may testify generally about a person's mental condition, that witness should not be permitted to provide a specific mental diagnosis.

We find instructive our Supreme Court's decisions dealing with "mental retardation" in the context of the death penalty. Our Supreme Court has held that a defendant seeking to avoid the death penalty by proving "mental retardation" must do so pursuant to the standards adopted by the American Psychiatric Association, or by those adopted by American Association on

Intellectual and Developmental Disabilities. ***Commonwealth v. Williams***, 61 A.3d 979, 981-82, 982 n.8 (Pa. 2013).[3] In doing so, the Court has acknowledged that "mental retardation" is a specific medical condition, and that a "question involving whether a petitioner fits the definition of mental retardation is fact intensive as it will primarily be based upon the testimony of experts and involve multiple credibility determinations." ***Id.*** at 981 (quoting ***Commonwealth v. Crawley***, 924 A.2d 612, 616 (Pa. 2007)).

Here, Appellant was permitted to testify about his mental limitations. The trial court simply prevented him from using the term "mentally retarded," and instructed the jury accordingly. Given that expert testimony was necessary to establish that Appellant met the definition of "mentally retarded," and considering that Appellant failed to offer proper expert

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[3] These standards are as follows.

> The [American Association on Intellectual and Developmental Disabilities] defines mental retardation as a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in the conceptual, social, and practical adaptive skills. The American Psychiatric Association defines mental retardation as significantly subaverage intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning. Thus, ... both definitions of mental retardation incorporate three concepts: 1) limited intellectual functioning; 2) significant adaptive limitations; and 3) age of onset.

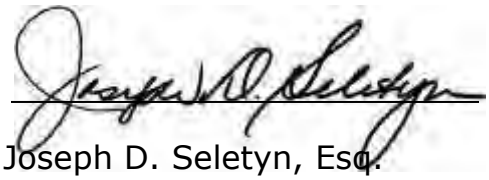
Williams, 61 A.3d at 982 (quoting ***Commonwealth v. Miller***, 888 A.2d 624, 629-30 (Pa. 2005)) (italics, quotation marks, and citations omitted).

testimony, we conclude that the trial court did not abuse its discretion.[4] No relief is due.

Accordingly, because we conclude that none of Appellant's claims entitles him to relief, we affirm his judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/18/2014

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[4] In support of his argument, Appellant directs us to ***Commonwealth v. Shain***, 471 A.2d 1246 (Pa. Super. 1984). In that case, a murder victim's relative testified that the victim's mental condition "was retarded." ***Id.*** at 1248. The relative then described why he considered the victim to be "retarded." ***Id.*** ("Well, he could neither read nor write. He had no formal education. He spent eight years from (sic) the State Mental Hospital, upstate New York."). Shain argued that the relative should not have been permitted to describe the victim as "retarded" without expert testimony. ***Id.*** at 1250. This Court disagreed, and held that the relative "was competent to express his opinion as to the mental capabilities and limitations of the victim." ***Id.*** (citing ***Commonwealth v. Knight***, 364 A.2d 902 (Pa. 1976), and ***Commonwealth v. Young***, 419 A.2d 523 (Pa. Super. 1980)). Thus, ***Shain*** stands for the proposition that it is not an abuse of discretion to permit a fleeting reference to someone's alleged "retardation" in the absence of expert testimony, where that reference is amply explained by a testifying witness. ***Shain*** does not mandate that a trial court must always allow a defendant to testify that he or she is "mentally retarded" without the support of expert testimony.