

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

SHAQUILE DESHIELDS

Appellant

No. 522 EDA 2013

Appeal from the Judgment of Sentence of January 31, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0015567-2010

BEFORE: BENDER, P.J.E., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED JULY 09, 2014

Shaquile DeShields (“DeShields”) appeals his January 31, 2013 judgment of sentence. We affirm.

The trial court provided the following summary of the factual and procedural history:

On September 28, 2012, following a jury trial before [the trial court, DeShields] was convicted of one count of murder of the first degree (18 Pa.C.S. § 2502(a)), one count of conspiracy to commit murder (18 Pa.C.S. §§ 903, 2502), and one count of possessing an instrument of crime (18 Pa.C.S. § 907(a)) (“PIC”). The Court immediately imposed the mandatory sentence of life in prison for the murder charge (18 Pa.C.S. § 1102(a)(1)), 15 to 30 years for the conspiracy charge, and one month to two years for the PIC charge. The conspiracy and PIC sentences were run concurrent to the murder sentence. [DeShields] did not file post-sentence motions.

* Retired Senior Judge assigned to the Superior Court.

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At trial, the Commonwealth presented the testimony of Dr. Gary Collins, William Whitehouse, Reinaldo Torres, Philadelphia Police Officers Patrick Biles, Christopher Lewis, Jesus Cruz, Christopher Rommel, and Stan Galiczynski, Philadelphia Police Detective Philip Nordo, and Philadelphia Police Sergeant Dennis Johnson. [DeShields] presented the testimony of Marsha Anthony and Felicia Murray. Viewed in the light most favorable to the Commonwealth as the verdict winner, their testimony established the following.

On September 21, 2010, Seth Johnson and Jamar Sturgis got into an argument with Donte Everage, a competing drug dealer, over drug money. The argument escalated, and Mr. Johnson and Mr. Sturgis beat up Mr. Everage.

On September 22, 2010, Mr. Everage obtained a .45 caliber handgun from a friend, Rasual Galloway. Mr. Everage approached [DeShields] and another man, Ronald Bazely, both of whom worked for Mr. Everage selling drugs, and told them that he needed them to "handle something for him." Mr. Everage gave Mr. Bazely the gun that Mr. Everage had gotten from Mr. Galloway. Mr. Bazely hid the gun in the home of a friend, Rashiek Austin.

Later that day, at the corner of Penn Street and Church Street, [DeShields], Mr. Bazely, Mr. Austin, Mr. Galloway, and Mr. Everage got into an argument with Mr. Johnson and Mr. Sturgis over the prior beating of Mr. Everage and over drug territory. Mr. Johnson denied beating up Mr. Everage. [DeShields] and the four other men with him told Mr. Johnson that he should stay out of Mr. Everage's territory. After the argument broke up, Mr. Bazely went to Mr. Austin's house and retrieved the gun he had hidden there.

Later that evening, on the corner of Griscom Street and Church Street, [DeShields] and Mr. Bazely ran into Mr. Johnson again and confronted him about the beating of Mr. Everage. Mr. Johnson again denied that he beat up Mr. Everage. Mr. Bazely then said, "fuck it, I'm not arguing no more," pulled out the gun, and shot at Mr. Johnson. Mr. Johnson was not hit by any of the bullets, and fled. Mr. Bazely then said to [DeShields]: "[C]ome on. We're going to sit and wait for [Mr. Johnson] to come back around." Mr. Bazely told [DeShields] that when Mr. Johnson walked by, Mr. Bazely "just needed [DeShields] to hold him

there and then [Mr. Bazely] was going to ride down on the bike and [Mr. Bazely was] going to merk `em.”

[DeShields] and Mr. Bazely were certain that Mr. Johnson would walk by again, because that corner was on his way home. They waited between 30 minutes to an hour for Mr. Johnson to walk by the corner. When Mr. Johnson did walk back by the corner, [DeShields] stepped out of the bushes he had been hiding in and said to Mr. Johnson, “you Mar, right?” in an attempt to distract him. Mr. Bazely then pulled up on his bicycle and shot Mr. Johnson.

When the police arrived at approximately 11:50 p.m., Mr. Bazely and [DeShields] were gone and Mr. Johnson was attempting to crawl up the street. An ambulance arrived and Mr. Johnson was taken to Temple Hospital, where he died at 12:44 a.m. He had been shot once in the lower back and died from internal bleeding. Police recovered one .45 caliber fired cartridge casing from the scene of the murder.

On November 26, 2010, at approximately 11:20 p.m., [DeShields] was brought into the Homicide Unit for questioning regarding Mr. Johnson’s murder. The following morning, at 11:00 a.m., Homicide Detective Philip Nordo gave [DeShields] his **Miranda**^[1] warnings. At approximately 2:00 p.m., [DeShields] gave a statement to Detective Nordo in which he gave the details of the murder and confessed to his role. [DeShields] was arrested.

Trial Court Opinion (“T.C.O.”), 5/3/2013, at 1-4 (citations to notes of testimony omitted).

DeShields filed a timely notice of appeal on February 14, 2013. The court ordered, and DeShields filed, a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court then filed its Rule 1925(a) opinion.

¹ **See *Miranda v. Arizona***, 384 U.S. 436 (1966).

DeShields raises four issues for our review:

1. Was the verdict against the weight of the evidence because the testimony of the Commonwealth's [witnesses] in court under oath testimony outweighed the lack of physical, forensic/DNA or medical evidence therefore, rendering an inconsistent verdict?
2. Did the trial court err by ruling that [DeShields'] statement was knowing and voluntary, while [DeShields] was only 18 years old, and had been detained at the police station for over 13 hours before the statement was taken?
3. Was the evidence insufficient to support a conviction in this case because there was no in[-]court identification by the Commonwealth's witnesses of [DeShields] being involved in a conspiracy?
4. Did the Assistant District Attorney commit prosecutorial misconduct by making prejudicial inflammatory statements to the jury?

DeShields' Brief at 1-2 (re-ordered for ease of disposition).

DeShields first raises a weight of the evidence claim.

"[A] weight of the evidence claim must be preserved either in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing. Pa.R.Crim.P. 607; **Commonwealth v. Priest**, 18 A.3d 1235, 1239 (Pa. Super. 2011). Failure to properly preserve the claim will result in waiver, even if the trial court addresses the issue in its opinion." **Commonwealth v. Sherwood**, 982 A.2d 483, 494 (Pa. 2009).

Commonwealth v. Griffin, 65 A.3d 932, 938 (Pa. Super. 2013) (citations modified). DeShields did not raise the issue prior to sentencing or orally at sentencing. DeShields did not file any post-sentence motions. Consequently, the weight of the evidence claim has not been preserved, and it is waived.

We next address DeShields' contention that the trial court erred in failing to suppress his confession. DeShields argues that his statement was not knowing and voluntary, despite his **Miranda** waiver, because DeShields was only eighteen years old at this time of the interrogation, had only a high school education, and was in custody for thirteen hours prior to his statement. Therefore, DeShields contends that the trial court should have granted his motion to suppress. DeShields' Brief at 9.

Our legal standards in this context are well-defined:

In reviewing the denial of a motion to suppress, our responsibility is to determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. If the suppression court held for the prosecution, we consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. When the factual findings of the suppression court are supported by the evidence, the appellate court may reverse if there is an error in the legal conclusions drawn from those factual findings.

A confession obtained during a custodial interrogation is admissible where the accused's right to remain silent and right to counsel have been explained and the accused has knowingly and voluntarily waived those rights. The test for determining the voluntariness of a confession and whether an accused knowingly waived his or her rights looks to the totality of the circumstances surrounding the giving of the confession.

* * *

When deciding a motion to suppress a confession, the touchstone inquiry is whether the confession was voluntary. Voluntariness is determined from the totality of the circumstances surrounding the confession. The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of

his ability to make a free and unconstrained decision to confess. The Commonwealth has the burden of proving by a preponderance of the evidence that the defendant confessed voluntarily.

When assessing voluntariness pursuant to the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion.

Commonwealth v. Harrell, 65 A.3d 420, 433-34 (Pa. Super. 2013) (citations omitted).

At the suppression hearing, Philadelphia Police Sergeant Dennis Johnson testified that he had been notified that homicide detectives wanted to interview DeShields. Notes of Testimony ("N.T."), 1/28/2013, at 196-97. Around 10:25 p.m. on November 26, 2010, Sergeant Johnson stopped DeShields after observing him walking down the street. Sergeant Johnson told DeShields that detectives wanted to speak with him. DeShields agreed to go to the homicide unit. ***Id.*** at 199. After obtaining basic information from DeShields and filling out paperwork, Sergeant Johnson escorted DeShields to the homicide unit around 11:20 p.m. ***Id.*** at 199-201. Sergeant Johnson testified that DeShields was cooperative throughout the stop and transport. ***Id.*** at 202. Sergeant Johnson frisked DeShields prior to transporting him and handcuffed DeShields during the trip because the marked police vehicle Sergeant Johnson was driving did not have a barrier

separating the back seat from the front. The handcuffs were removed upon DeShields' arrival at the police station. **Id.** at 206-07.

Detective Nordo testified that, through interviews with Ronald Brown and Rashiek Austin, he learned that DeShields was involved in Johnson's murder. **Id.** at 219-24. Around 11 a.m. on November 27, 2010, Detective Nordo saw DeShields for the first time. He introduced himself and issued **Miranda** warnings to DeShields. **Id.** at 225-27. Detective Nordo went through the warnings and DeShields signed the waiver form at 11:20 a.m. **Id.** at 228-29. Shortly after DeShields signed the form, Detective Nordo was called away to handle a different case; the interview resumed at 2:15 p.m. **Id.** at 232-33. While DeShields was in the homicide unit, he was able to use the bathroom, had something to drink, and was offered food. **Id.** at 235. DeShields provided a statement consistent with the facts as summarized by the trial court. **Id.** at 235-38. DeShields admitted that he knew Bazely was going to shoot Johnson and that his job was to delay Johnson until Bazely could shoot him. **Id.** at 239, 214. DeShields signed the statement at 4:20 p.m.

The trial court found Sergeant Johnson and Detective Nordo to be credible. **Id.** at 283-84. The court determined that DeShields was not arrested when Sergeant Johnson escorted him to the homicide unit, but that DeShields agreed to be interviewed. **Id.** at 283. The court further found that, while there was "an extended delay" between DeShields' arrival at the homicide unit and his interview, the delay was unintentional, and there was

no coercive behavior by the police. *Id.* at 284. Therefore, the trial court found that, based upon the totality of the circumstances, DeShields voluntarily waived his **Miranda** rights and provided his statement. *Id.* at 286.

The record supports the trial court's factual findings. DeShields voluntarily agreed to be interviewed. He was read the **Miranda** warnings, understood them, and decided to sign the waiver form. There was nothing to suggest his age or education level affected his ability to understand the warnings explained by Detective Nordo. While DeShields' time at the police station prior to his interview was longer than desirable, the actual interview lasted approximately two hours, a duration we have found non-coercive in other cases. *See Harrell*, 65 A.3d at 435 (finding that interrogation longer than two hours after eight hours in custody "not unduly burdensome"); *accord Commonwealth v. Watkins*, 750 A.2d 308, 314 (Pa. Super. 2000) ("Although appellant was in police custody for nearly nine hours, appellant was subjected to only three hours and twenty-nine minutes of actual interrogation."). DeShields was permitted to use the bathroom and was offered beverages and food during the interim time periods. There was no evidence that Detective Nordo used coercive tactics. Detective Nordo was not confrontational. DeShields was not under arrest until after he confessed and he was never told that he could not leave. There is nothing in the record to suggest that DeShields did not "make a free and unconstrained

decision to confess.” **See Harrell**, *supra*. Thus, the trial court did not err in denying DeShields’ motion to suppress.

DeShields next challenges the sufficiency of the evidence to support his conviction. DeShields argues that the only evidence against him was his confession, that the confession should not have been admitted, and that, without it, there was no additional evidence that would suffice to establish the elements of his convictions. DeShields’ Brief at 7.

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. . . . Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered.

Commonwealth v. Brown, 23 A.3d 544, 559-60 (Pa. Super. 2011). As we concluded earlier, DeShields’ confession was properly admitted. Further, the content of the statement that DeShields provided to the police was sufficient to establish a basis for his convictions. As his sufficiency argument relies solely upon the assertion that the confession should have been suppressed, it must fail.

Lastly, DeShields argues that the prosecutor engaged in misconduct during closing argument by making derogatory comments about DeShields while standing over DeShields and pointing at him. Specifically, DeShields challenges the prosecutor’s statement that “[w]e have [DeShields’] words

that can tell us what was in his mind when a co-defendant took a life.” DeShields asserts that his counsel objected to this conduct, and that the objection was sustained by the trial court. DeShields’ Brief at 8.

Upon a claim of prosecutorial misconduct, the trial court must determine whether there was misconduct and, if so, determine what, if any, prejudice resulted. **Commonwealth v. Culver**, 51 A.3d 866, 871 (Pa. Super. 2012). We review that determination for an abuse of discretion. **Id.** “Our review of prosecutorial remarks and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial.” **Commonwealth v. Judy**, 978 A.2d 1015, 1019 (Pa. Super. 2009) (citing **Commonwealth v. Rios**, 721 A.2d 1049, 1054 (Pa. 1998)). Moreover, we are mindful of the following precepts:

[P]rosecutorial misconduct does not take place unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict. Prosecutorial misconduct is evaluated under a harmless error standard.

Commonwealth v. Holley, 945 A.2d 241, 250 (Pa. Super. 2008) (internal citations and quotations omitted).

A review of the record demonstrates that counsel did not object to the prosecutor’s statement. His only objection was that the prosecutor “has come over too close to [DeShields].” N.T., 1/30/2013, at 149. The trial court told the prosecutor “[d]on’t go too close to [DeShields].” **Id.** Because DeShields’ counsel did not object to the statement in the trial court,

DeShields' challenge to the content of the statement is waived. **See** Pa.R.A.P. 302; **Commonwealth v. Melendez-Rodriguez**, 856 A.2d 1278, 1287 (Pa. Super. 2004) (holding failure to raise contemporaneous objection in trial court is waiver). This leaves the question whether the prosecutor's physical behavior toward and in proximity to DeShields was improper and prejudicial. We hold that it was not.

We have determined that a prosecutor's invasion of a defendant's personal space can rise to the level of misconduct. **See Culver**, 51 A.3d at 872. In **Culver**, during opening and closing arguments, the prosecutor invaded the defendant's personal space by pointing his finger in the face of the defendant and his counsel. The prosecutor physically intimidated the defendant and was "yelling and menacing" as he did this. In addition, the prosecutor asserted his personal beliefs repeatedly in his closing argument and made statements in his opening about evidence that did not exist. **Id.** Despite several objections that were sustained by the trial court and the court's provision of cautionary instructions to the jury, the trial court determined that the cumulative effect of the misconduct prejudiced the defendant and was sufficient to deny the defendant a fair trial. **Id.** at 872-73.

In reviewing the case, we agreed that the prosecutor's physical menacing of the defendant was misconduct, making the following observations:

It might be excused that, during the course of the presentation of an opening or closing argument, a prosecutor points his finger at a defendant or defense counsel to emphasize a particular point. It might also be excused that, while lost in the heat of argument, a prosecutor made such a gesture in close proximity to the defense table, unaware that he had inadvertently invaded the personal space of the target. Here, however, such actions were observed on multiple occasions during both the opening and closing statements. The trial court reported that these physically menacing actions were accompanied by yelling and other animated displays, and that the prosecutor continued to engage in these behaviors despite repeated warnings from the trial court.

Id. at 875. We concluded that the trial court did not abuse its discretion in determining that this behavior contributed to the prejudice that denied the defendant a fair trial. We also held that “such misconduct could alone serve to justify the granting of a new trial, because the offensive behavior in question was not an isolated event.” *Id.* at 876.

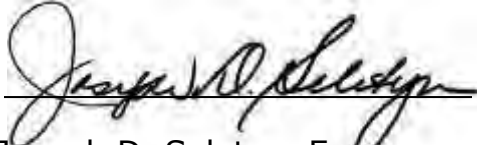
Here, however, we observe a much different situation. DeShields only alleged one occasion during the Commonwealth’s closing argument when the prosecutor came too close to DeShields. Neither DeShields nor the trial court characterize the incident as menacing, nor does either allege that the prosecutor was yelling or animated at the time. The record does not support a conclusion that there were repeated incursions into DeShields’ personal space. The trial court did not issue a curative or cautionary instruction and DeShields did not request one. There was no evidence of other prosecutorial misconduct that would support an argument of a cumulative prejudicial effect. This was more like the inadvertent, excusable invasion of personal space posited in *Culver* than the repeated behaviors from which prejudice

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was found in that case. Therefore, we find no abuse of discretion in the trial court's conclusion that there was no prejudice to DeShields.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014