NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
JAHMIR HARRIS,	
Appellant	No. 320 EDA 2015

Appeal from the Judgment of Sentence January 12, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007962-2013

BEFORE: BOWES, OLSON AND STRASSBURGER,* JJ.

MEMORANDUM BY BOWES, J.: **FILED AUGUST 16, 2016**

Jahmir Harris appeals from the judgment of sentence of life imprisonment without parole that was imposed after he was convicted of, *inter alia*, first-degree murder, conspiracy to commit murder, and carrying a firearm without a license. We affirm.

We adopt the factual history from the trial court's Pa.R.A.P. 1925(a) opinion.

> On December 23, 2012, at 8:15 p.m., [Appellant] shot and killed Louis Porter in the Walgreens parking lot at 23rd Street and Oregon Avenue in South Philadelphia. Video surveillance shows the decedent pulling into a parking space with his five-year-old son in the passenger seat. The decedent exits his vehicle. Less than a minute later, [Appellant] drives his vehicle into the center of the parking lot, exits his vehicle, and walks towards the decedent.

* Retired Senior Judge assigned to the Superior Court.

[Appellant] fires multiple shots at the decedent, gets back into his vehicle, and reverses out of the parking lot. . . .

Yvonne Porter (also known as "Fee") testified that the decedent was her brother and that she knew [Appellant] because he is a close friend of the family and grew up in her neighborhood. She testified that she had a conversation with the decedent about [Appellant] the night before the shooting. The decedent told her that he had done a favor for [Appellant] - [Appellant] had given him some pills; the pills turned out to be fake; and money was involved. Ms. Porter further testified that [Appellant]'s mother was the first person that she called after she saw the video of the shooting on the news. [Appellant]'s mother, Tammy Harris, testified that the decedent and she were friends and grew up in the same neighborhood in South Philadelphia. She also grew up with the decedent's sister, Fee.

Ms. Harris stated to homicide detectives and testified at trial that the decedent left word at her aunt's house asking to speak with [Appellant]'s father or her the day before the shooting. She went to see the decedent around 12 p.m. at the barbershop where he worked the next day. The decedent told Ms. Harris that he had been looking for her; that he stopped by her house; that [Appellant] owed him $3900.00; and that "he needed his money because his life was threatened because he owed someone else some money." Ms. Harris told the decedent that she did not have $3900.00, but that she would try to help pay back her son's debt. In a statement to police, Ms. Harris stated that the decedent told her that [Appellant] owed him money for pills.

Ms. Harris testified that she called [Appellant] after she met with the decedent at the barbershop, and that based on her phone records, she knows that she spoke to [Appellant] at some point prior to the shooting. [Appellant] told her that he did not owe the decedent any money.

Ms. Harris also testified that she called [Appellant] after she found out that the decedent had been shot, but he did not answer his phone. Ms. Harris did not see or speak to [Appellant] until sometime after Christmas. When she did speak to him, [Appellant] stated that he did not know anything about the shooting. She also asked [Appellant] about the money situation

> with the decedent, but he was vague in his response; he told her not to worry about it and that he did not owe the decedent any money.
>
> Later in her testimony and in a statement to police, Ms. Harris stated that she did not speak to [Appellant] at any time during the day or night that the decedent was shot and killed.
>
> Ms. Harris testified that she tried to call the decedent later that evening after meeting with him at the barbershop, but he did not answer his phone. Approximately two hours after she tried to call the decedent, she found out that the decedent had been shot. The decedent's sister called her as she was *en route* to the hospital to see her brother. Ms. Harris testified that Ms. Porter asked her what happened because the decedent had told her that he had contacted Ms. Harris earlier in the day. Ms. Harris testified that she spoke to [Appellant]'s father after the shooting. Mr. Harris stated to Ms. Harris that he was aware of the money situation between [Appellant] and the decedent. He also stated that he had spoken to [Appellant] after the shooting.
>
> Michele Markey testified that she was exiting her vehicle in the parking lot of the Walgreens when she heard gunshots directly behind her. She immediately got back into her vehicle and called 911. Ms. Markey testified that she relayed to police that [Appellant] exited a small, dark colored, four–door vehicle and started shooting. [Appellant] then got back into his vehicle and reversed out of the Walgreens parking lot. [Appellant] was standing approximately ten-and–a-half feet away from her vehicle when he was shooting. Ms. Markey also testified that there was a passenger in [Appellant]'s vehicle.
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> Ms. Markey gave a statement to police on December 26, 2012. She was shown a photo array and identified [Appellant] as the shooter. Ms. Markey also identified [Appellant] at a line up in June 2013.

Trial Court Opinion, 6/25/15, at 2-5 (citations to transcript omitted). On January 12, 2015, the jury returned its verdict, and Appellant was sentenced the same day. Appellant timely appealed to this Court and complied with

the court's order to file a Pa.R.A.P. 1925(b) statement. The trial court prepared its opinion in response and the matter is ready for our review.

Appellant's sole issue on appeal concerns the introduction of statements made by the victim, Mr. Porter:

> Did the trial court commit legal error in admitting evidence and argument about the existence of a drug transaction and debt between Appellant and the victim, which were based solely on the deceased victim's out-of-court statements?

Appellant's brief at 1.

The admissibility of evidence rests within the sound discretion of the trial court, and we will reverse only if Appellant establishes that the trial court has abused its discretion. ***Commonwealth v. Christine***, 125 A.3d 394, 398 (Pa. 2015). We are guided by the following standard in assessing a trial court's ruling:

> It is not sufficient to persuade the appellate court that it might have reached a different conclusion; it is necessary to show an actual abuse of the discretionary power. An abuse of discretion will not be found based on a mere error of judgment, but rather exists where the court has reached a conclusion that overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Bryant, 67 A.3d 716, 726 (Pa. 2013) (quoting ***Commonwealth v. Eichinger***, 915 A.2d 1122, 1139 (Pa. 2007)).

We first note that Appellant's claim comprises two discrete arguments. The first attacks the admission of the statements, while the second, which is not specifically delineated as a distinct claim, concerns the prosecutor's

argument in opening and closing statements. Appellant appears to ask us to assess the admissibility of the evidence by, in part, considering the prosecutor's statements to the jury:

> The trial court erred in admitting Tammy Harris and Yvonne Porter's hearsay testimony regarding victim Louis Porter's out-of-court statements about Appellant owing him money over a drug deal. This testimony was classic inadmissible hearsay because the truth of the matters asserted in Porter's statements were relevant to establishing Appellant's alleged motive, and the prosecutor urged the jury to consider the truth of the matters asserted therein as evidence of motive.

Appellant's brief at 9. We address the arguments separately, and begin with the objection to the introduction of the statements. Appellant sought exclusion of the statements prior to the Commonwealth calling Appellant's mother, Tammy Harris.

> MR. MCMONAGLE: Your Honor, just for record purposes, my client's mother has indicated that in a statement, that she had various conversations with the deceased prior to his demise involving money that was owed by my client to the complainant. It is my understanding those conversations are being offered for the truth and for that reason, obviously he being deceased would be inadmissible hearsay.
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> THE COURT: Why is it admissible?
>
> MS. BOYLE: They are not being offered for the truth. It is being offered to establish motive. I am not offering it to establish the fact that the pills that were actually fake or the amount of money was actually $4,000. It is just to show there was ill will between the Defendant and the decedent and, therefore, motive for the Defendant to kill the decedent.
>
> MR. MCMONAGLE: My response to that is it is being offered for the truth. There was a debt owed and that is the truth of the matter and whether it is being offered for motive or anything as

> to an out-of-court statement being offered for the truth of the matter. It is not a state of mind. It is not excited utterance. It doesn't meet any exception and the same would hold true to the statement made by the deceased to his sister, which are along the same lines. He owes me money for X.
>
> MS BOYLE: Your Honor, there is case law that says statements by the declarant regarding any kind of situation between [Appellant] and the decedent, **which would constitute motive, are admissible for purposes of establishing motive and ill will** between the Defendant and the victim.
>
> THE COURT: I am not sure that is exactly what it says. If the decedent said if I die, it is [Appellant], that doesn't come in. It is very specific about what can come in. So if the decedent, who obviously can't be cross-examined -- there is a confrontation issue -- makes a statement to his sister and to [Appellant]'s mother?
>
> MS. BOYLE: Yes.
>
> THE COURT: So he speaks to [Appellant]'s mother and talks about [Appellant] owing him money?
>
> MS. BOYLE: Yes, and the mother actually going to give him money.
>
> THE COURT: Well, the fact of the matter is the mother will not deny it, will she? If she denies it, you can't prove it up either way.
>
> MS. BOYLE: It is in her statement. Other than that, if she denies it, I have a statement but I can't prove it up obviously with the decedent.
>
> THE COURT: It is admissible to show motive. I will allow it.

N.T. Trial, 1/7/15, at 2-4 (emphasis added).

The statements in question were as follows. Ms. Harris said she and the victim grew up a couple blocks from each other. N.T. Trial, 1/8/15, at 7.

She was acquainted with Mr. Porter's sister, whom she knew as "Fee." ***Id***. at 8. Mr. Porter left a message requesting Ms. Harris see him at the barbershop where he worked. ***Id***. at 10. The following exchange occurred:

> A. I went to the barbershop. He was cutting hair. He said give him a couple minutes. He will be right out. He came out and he said Jahmir owed him some money and that he needed his money because his life was threatened because he owed someone else some money.
>
> Q. What happened next?
>
> A. I said how much money is it and he said $3,900 and I replied I do not have $3,900 but I can see what I can come up with.
>
> Q. When Mr. Porter told you that your son owed him $3,900, you offered to try and help and pay that debt back on behalf of your son?
>
> A. Yeah. He said someone was after him, so I am a parent, so that is all I know how to do. He said Jahmir owed him some money and we knew each other, so I was trying to figure out what was going on. I said I need to call Jahmir.
>
> Q. Did you call Jahmir?
>
> A. I called Jahmir.

Id. at 10-11. Ms. Harris then testified that she talked to Appellant on the telephone about her conversation with the victim.

> Q. . . . I am asking you about you as a mom and as a friend of Mr. Porter, do you remember speaking to your son about the conversation that you had with Mr. Porter before Mr. Porter was shot?
>
> A. I said yes.
>
> Q. When did that conversation take place?

A. Sometime early that evening.

Q. Earlier the evening that he was shot?

Q. Yes.

Q. What did you talk about with him?

A. About him owing him money.

Q. What did --

A. And "him" being Lou.

Q. What did your son tell you?

A. He just said he didn't owe him any money.

Id. at 15-16.

With the foregoing factual discussion in mind, we turn to the legal inquiry. The trial court's Rule 1925(a) opinion justified the admission of the evidence as non-hearsay. Trial Court Opinion, 6/25/15, at 8. The judge opined that the evidence was used, not for its truth, but as evidence of motive. In pertinent part, the trial court stated:

> The Commonwealth attempted to establish: firstly, that there was some connection between [Appellant] and the decedent, and secondly, that there may have been some ill-will between them. The Commonwealth did not offer the decedent's statements to prove that a debt was actually owed or that the pills were indeed fake. Rather, the statements were offered to show that the decedent believed that there was a dispute between [Appellant] and he; that the decedent was actively seeking to resolve the dispute; and that that dispute had escalated to the point that the decedent needed to reach out to [Appellant]'s parents for help. Accordingly, these statements were admissible, since they were not offered to prove the truth of the matter asserted, but to provide the jury with the factual

> background necessary to complete the story and to establish a possible motive for [Appellant] to kill the decedent.

Trial Court Opinion, 6/25/15, at 8-9. The trial court therefore deemed the statements non-hearsay.

We begin by assessing whether the statements were hearsay or non-hearsay. The term 'hearsay' is defined as "a statement . . . offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Hearsay is not admissible except as provided by rule. Pa.R.E. 802. If a statement is not offered for its truth, then the hearsay bar does not preclude its admission. "In the alternative, out-of-court statements may be admissible because they are non-hearsay, in which case they are admissible for some relevant purpose other than to prove the truth of the matter asserted." ***Commonwealth v. Mason,*** 130 A.3d 601, 637 (Pa. 2015).

Complicating matters in the case *sub judice* is the hearsay exception for statements regarding the declarant's state-of-mind. Both parties' briefs discuss cases analyzing the admission of a homicide victim's statements under this exception. That exception reads as follows:

> **(3) Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Pa.R.E. 803(3). This exception has proven to be a contentious topic in our jurisprudence. ***See Commonwealth v. Moore***, 937 A.2d 1062, 1070 (Pa. 2007) ("The admissibility of evidence relating to a victim's state of mind has been a subject of difference in this Court's recent decisions."); ***Commonwealth v. Luster***, 71 A.3d 1029, 1059 (Pa.Super. 2013) (*en banc*) (describing the admissibility of such statements as the "subject of considerable discussion in Pennsylvania jurisprudence.").

The state-of-mind exception embodies a significant limitation: the statements may not be used to prove a fact remembered or believed.[1] Assuming other evidentiary prerequisites are satisfied, state-of-mind evidence may be used to show the declarant actually harbored the particular state of mind or condition. However, when those statements are relevant evidence only if true, the statement becomes inadmissible. We here quote the Tenth Circuit Court of Appeals for its cogent description of this distinction under the identical federal exception:[2]

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[1] Here we are discussing only hearsay statements subject to the exception, not statements offered for a non-truth purpose. "For example, a person stating, 'I am President Obama,' would not offer the statement to prove that the individual is in fact President Obama, but it could be admissible to establish that the person's state of mind at the time of the statement was delusional." ***Schmalz v. Manufacturers & Traders Trust Co.***, 67 A.3d 800, 804, n.5 (Pa.Super. 2013).

[2] "This rule is identical to F.R.E. 803(3)." Comment to Pa.R.E. 803(3).

> Under the state-of-mind exception itself, a statement is not excluded by the hearsay rule if it is:
>
> > [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed....
>
> Fed.R.Evid. 803(3). Thus, the Federal Rules of Evidence contemplate an exception to the exception: a statement that would otherwise be admissible under the state-of-mind exception is inadmissible if it is a statement of memory or belief offered to prove the fact remembered or believed.
>
> Case law makes it clear that a witness may testify to a declarant saying "I am scared," but not "I am scared because the defendant threatened me." The first statement indicates an actual state of mind or condition, while the second statement expresses belief about why the declarant is frightened. The phrase "because the defendant threatened me" is expressly outside the state-of-mind exception because the explanation for the fear expresses a *belief* different from the *state of mind* of being afraid.

United States v. Ledford, 443 F.3d 702, 709 (10th Cir. 2005) (emphases in original). We believe this "exception to the exception" description and the distinction between permissible and impermissible uses of such evidence captures the crux of the dispute herein.

The nature of the dispute is apparent when reviewing the respective framings of the issue. Appellant contends, "In the instant case, the fact of Porter's statements having been made was not particularly relevant to motive. Rather, it was the truth of the content of the statements that provided the motive." Appellant's brief at 12. Appellant asks us to focus on

the statements without considering Mr. Porter's state-of-mind. This is evident when you consider Appellant challenges the admission of the evidence in total, and treats the fact that Mr. Porter contacted both his sister and Appellant's mother as largely irrelevant. The Commonwealth, in contrast, asks us to consider the admissibility of the statements in light of their transmission to Appellant's mother. "Motive was made out by the fact of the accusations, and that the victim had made those accusations to defendant's mother." Commonwealth's brief at 12-13. The conjunctive in this statement encapsulates the dispute. Appellant largely focuses on the former clause, arguing that motive is not established by the statements themselves, since the statements are relevant only if the expressed belief is true. The Commonwealth, in contrast, looks to the fact that Appellant was aware of the accusations.

We view the framing inquiry as critical, and we find we must consider the effect of Mr. Porter contacting Appellant's mother. With respect to her testimony, she is relating the out-of-court statement of Mr. Porter as declarant. For the following reasons, we find the evidence admissible under the state-of-mind exception.

We first examine Appellant's arguments solely with respect to the statements themselves. Appellant draws our attention to ***Commonwealth v. Levanduski***, 907 A.2d 3 (Pa.Super. 2006) (*en banc*). Therein, the victim wrote a letter describing several letters he found written by the appellant,

his common law wife. The letter reported that Appellant's letters planned to get rid of the victim so she could be in a relationship with another man. ***Id***. at 9. The victim's letter expressed fear that his wife might kill him, and alleged that she abused him. We found the letter inadmissible since it was relevant only if the statements set forth in the letter were true. "Here, the jurors had to believe the actual text of the letter, that is, the matters asserted in it, to grasp what the letter was offered at trial to prove." ***Id***. at 18.

We would deem ***Levanduski*** more on point if, instead of speaking to Ms. Harris, Mr. Porter wrote in a letter, "Jahmir Harris sold me drugs for $4,000 that turned out to be fake. He owes me $4,000." This hypothetical letter would indeed be relevant evidence of Appellant's motive to kill the victim, but, absent any other evidence linking Appellant and Mr. Porter, only if the letter's contents were true. The letter would qualify as hearsay subject to the state-of-mind exception, yet inadmissible due to the "exception to the exception." To the extent the trial court's ruling suggests the mere existence of Mr. Porter's statements constitutes admissible non-hearsay, we do not agree with its conclusion. ***See Moore***, ***supra*** at 1071-72 ("Even those decisions adopting a broader view of the state of mind exception support the proposition that statements offered as evidence of a declarant's state of mind may not be admitted for their truth.")

However, we do not agree that the issue must be viewed so narrowly. The Commonwealth correctly points out that the statements at issue were introduced through Ms. Harris, whom Mr. Porter contacted specifically for the purpose of attempting to settle the debt. This fact significantly changes the analysis. The statements at issue are no longer, "Appellant owes me money," but rather, "I think Appellant owes me money" paired with statements showing intent to act on that belief. Thus, the evidence is no longer being introduced in a manner akin to memorialization in a letter, as in ***Levanduski***, or even through a witness who happened to overhear Mr. Porter referring to the debt's existence. As our learned colleague Judge Strassburger observed in his concurring opinion in ***Commonwealth v. Green***, 76 A.3d 575, 589 (Pa.Super. 2013), this is an important distinction:

> [S]tressing the distinction between stating directly a defendant's state of mind (*e.g.,* "he killed her because he was upset that she broke up with him"), and proving that state of mind indirectly with circumstantial evidence (*e.g.,* a victim saying "I intend to break up with" the defendant as evidence that she did so), is not "merely a linguistic joust." Our Courts have held consistently that statements of a victim's intent may be offered to prove that a victim acted in accordance with that intent.

Id. at 589 (Strassburger, J., concurring).

Introducing the statements themselves would be impermissible direct evidence of Appellant's possible motive. However, once the victim contacted Appellant's mother, the statements reflect evidence of Mr. Porter's state-of-mind. In other words, the challenged statements were used not as

substantive evidence to establish the validity of the debt, but to show that Mr. Porter not only intended to act, but actually acted, on that belief.

Viewed this way, the evidence fits squarely within holdings permitting the introduction of a homicide victim's statements under the state-of-mind exception. Consider, for example, ***Commonwealth v. Sneeringer***, 668 A.2d 1167 (Pa.Super. 1995), in which this Court permitted the introduction of a statement made by appellant's deceased girlfriend that she intended to end her relationship with the appellant. We held this statement admissible under this exception, stating:

> The fact that the victim intended to end her relationship with appellant made it more probable that she did end the relationship, than if she had no such intention. Moreover, if the victim did end her relationship with appellant, then such a factor is probative of appellant's motive. **The mere fact that the victim expressed an intent to end her relationship with appellant does not establish that she did in fact do so. It does, however, allow the jury to infer appellant's motive from such a revelation**, and is properly considered in resolving the question of whether appellant killed the victim. As such, the objectionable remarks were both competent and relevant, and they were properly admitted at trial.

Id. at 1171-72 (emphasis added). Therefore, our precedents permit evidence that the declarant **intends** to perform a particular act in the future to allow the jury to infer the declarant actually did so. Here, the conversation with Appellant's mother demonstrated Mr. Porter actually carried through with his intent. The jury could therefore properly infer Appellant's motive to prevent Mr. Porter from taking further actions in that

regard. Relevant is our Supreme Court's discussion of this principle in ***Commonwealth v. Collins***, 703 A.2d 418 (Pa. 1997):

> On several occasions, we have held that a deceased victim's out-of-court statements evincing an intent to meet the defendant shortly before the killing were admissible pursuant to the state of mind exception because such an intent provided circumstantial evidence that the victim did meet with the defendant.
>
> In each case, the victim's intent to meet the defendant was relevant to the case because it permitted the jury to conclude that the defendant had the opportunity to commit the crime in question. Additionally, the victim's intent to confront the defendant about a financial matter in [***Commonwealth v. Lownberg***, 392 A.2d 1274 (Pa. 1978)]. . . w[as] relevant to supply the jury with a potential motive for the killing in those cases.

Id. at 425.

For the foregoing reasons, we find that the statements were admissible under the state-of-mind exception. While the trial court incorrectly labeled the evidence non-hearsay, that mistake is of no consequence. We therefore find no abuse of discretion. ***See Luster***, ***supra*** (trial court incorrectly held the hearsay statements admissible under excited utterance exception instead of state of mind).

However, a final hurdle remains. We must determine if Mr. Porter's state of mind was relevant to some issue in the case. In ***Commonwealth v. Laich***, 777 A.2d 1057 (Pa. 2001), our Supreme Court stated:

> Pursuant to the state of mind hearsay exception, where a declarant's out-of-court statements demonstrate her state of mind, are made in a natural manner, and are material and relevant, they are admissible pursuant to the exception. Out-of-

> court declarations that fall within the state of mind hearsay exception are still subject to general evidentiary rules governing competency and relevancy. Accordingly, whatever purpose the statement is offered for, be it to show the declarant's intention, familiarity, or sanity, that purpose must be a "factor in issue," that is, relevant. Evidence is relevant if it logically tends to establish a material fact in the case, if it tends to make a fact at issue more or less probable, or if it supports a reasonable inference or presumption regarding the existence of a material fact.

Id. at 1060-61 (citations omitted). ***Laich*** found evidence of a statement by a homicide victim that her boyfriend made threats to kill her if he ever found her with another man inadmissible.

On the other hand, in ***Luster, supra***, this Court sitting *en banc* concluded a witness could testify that the homicide victim, Christine Karcher, declared that she feared the appellant, her romantic partner, was going to harm her. We said the statement showed the defendant's "ill-will and malice toward the victim." In addressing the statement's relevance, we distinguished ***Laich***.

> We similarly do not find that ***Laich*** supports [a]ppellant's contention that the victim's statements concerning her fear and apprehension of [a]ppellant were inadmissible hearsay. In ***Laich***, the defendant admitted his guilt, and therefore our Pennsylvania Supreme Court determined that the victim's statements regarding defendant's jealous threats to kill her were "simply not relevant given appellant's defense" of sudden provocation. In contrast, [a]ppellant has repeatedly denied his guilt, has not claimed any sudden provocation relative to the victim, and has denied acting with malice.

Id. at 1042.

We find that the victim's state-of-mind was at issue in this case. As in ***Luster***, Appellant "denied his guilt, has not claimed any sudden provocation relative to the victim, and has denied acting with malice." ***Id***. at 1042. Whether or not it was true, the victim was seeking out Appellant to collect a debt. Appellant's mother contacted her son about Mr. Porter's actions. This testimony, which was not objected to, was relevant for its effect on the listener, Appellant, and was probative of intent.

Consider ***Commonwealth v. Fisher***, 681 A.2d 130 (Pa. 1999), wherein the appellant was sentenced to death for killing his girlfriend, Linda Rowden. In the month before her murder, Rowden contacted local police to inform them Fisher had been harassing her due to her speaking to authorities regarding a murder in which Fisher had allegedly been involved. ***Id***. at 134. At trial, the Commonwealth presented evidence from a police officer, who testified as follows:

> Basically Rowden contended that the assault and the harassment by the Appellant had been taking place upon her due to the fact that she was providing information to the Montgomery County Detectives concerning the Nigel Anderson investigation of the homicide that occurred at the Crossroads Motel. She was in fear he might do her bodily harm.

Id. at 140. The Supreme Court found the hearsay challenge on appeal waived for failure to object, but, in the alternative, addressed the merits.

> If given the opportunity, the Commonwealth could have successfully argued that the statements were not offered to prove the truth of the matters asserted. The Commonwealth offered evidence that Rowden alleged, truthfully or untruthfully,

> that Appellant had harassed and assaulted her because of her cooperation with authorities in the Anderson murder investigation and that **Rowden's allegations, true or untrue were communicated to Appellant.** Evidence that Rowden believed that the Appellant was harassing and assaulting Rowden because of her cooperation in the Anderson murder, whether or not Appellant did, in fact, harass Rowden, is clearly relevant to the Commonwealth's argument that Appellant killed Rowden in retribution for and in order to stop her cooperation with authorities in the Anderson investigation.

Id. (emphasis in original omitted; present emphasis added). As in ***Fisher***, evidence that Mr. Porter believed he was owed money, whether true or not, was clearly relevant to the case once Appellant became aware of Mr. Porter's actions. Appellant had a motive to silence or stop Mr. Fisher's attempts to collect on the debt. That Mr. Porter intended to obtain what he felt was owed to him, regardless of whether he was actually owed it, establishes a dispute or ill-will between the parties. Hence, we find evidence of Mr. Porter's state-of-mind relevant to an issue in the case.

Having determined the evidence was admissible under the pertinent exception, we now address Appellant's averments concerning the use of the evidence. Appellant seemingly concedes Mr. Porter's state-of-mind is relevant, but argues that its relevance depends largely on the facts of the underlying debt:

> [The fact] that Appellant and Porter were involved in a drug transaction, that the drug transaction went bad because the pills were fake, and that the amount owed was several thousand dollars contributed to the motive inference. If the debt had been the repayment of a[n] innocent $10 loan, the motive inference would be obviously far weaker. Thus viewed, the nature of the

> debt being related to drugs, and that per the statements, Porter was cheated out of $4,000, all made the motive evidence far stronger. The statements were therefore used for their truth, and used by the prosecutor for their truth – this truth all being used to establish a motive for the killing.

Appellant's brief at 12-13.

We view this as a tacit admission that Mr. Porter's state of mind was, in fact, relevant to some degree. The strength of the motive inference may well wax and wane depending on the amount of debt involved, and whether the debt involved something illicit or illegal. Yet that simply demonstrates that Appellant's real complaint is not that Mr. Porter's state-of-mind was irrelevant, but rather that the precise nature of the debt should not have been revealed to the jury. In other words, if the statements to Ms. Harris had been testified to as, "Mr. Porter told me that Jahmir owed him money," Appellant seems to implicitly concede that no error would inhere. We therefore view this argument not as an attack on the admission of the evidence on hearsay grounds, but on the alternative ground that the evidence's potential for prejudice outweighed its probative value. Since Appellant has not developed this argument nor lodged it at trial, the claim is waived.

Finally, Appellant further argues that the prosecutor's remarks during opening and closing argument asked the jury to consider that Appellant did in fact owe the victim money as a result of the drug deal, and therefore the evidence was used for its substantive truth. Appellant does not cite any

case for the proposition that otherwise admissible evidence subsequently transforms into inadmissible evidence due to a prosecutor's remarks. Nor could that logically be so, in that it is well-settled that counsel's remarks are not evidence. The jury was instructed on that point immediately before closing arguments. N.T. Trial, 1/9/15, at 36. Furthermore, the trial court obviously could not predict the content of the prosecutor's summation. We do not see how the trial court could abuse its discretion on that basis.[3]

Nevertheless, we have considered this issue and note that in ***Moore***, ***supra***, our Supreme Court held that the trial court erroneously admitted out-of-court statements from the victim concerning alleged intimidation and bullying by the appellant therein over the course of several years. Our Court found the evidence was relevant only if true, and therefore inadmissible, *i.e.*, the exception to the exception. In so ruling, the Court said, "Moreover, the Commonwealth specifically and substantially relied upon their truth at trial, as reflected both in the prosecutor's arguments concerning admissibility, and in her closing remarks . . . and it is readily apparent that the state of mind hearsay exception was used as a conduit to support the admission of fact-bound evidence to be used for a substantive purpose." ***Id***. at 1073 (internal citation omitted). However, the Court had ruled the evidence inadmissible.

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[3] We also note that Appellant's counsel himself argued to the jury the contents of Mr. Porter's statements, when he urged the jury to consider Mr. Porter's statement that someone else was after him. N.T., 1/9/15, at 62.

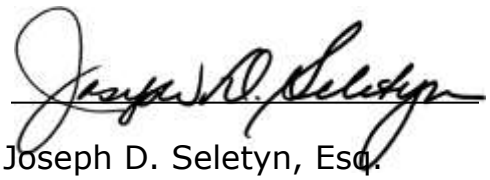
We therefore view this statement as *dicta* supporting the Court's conclusion that the evidence had value only if true. Since we have determined the evidence was admissible, we do not find this statement in ***Moore*** compels us to view the prosecutor's comments as bearing on the question of admissibility. Accordingly, we view this as a claim of prosecutorial misconduct, and, since no objection was made, we deem it waived.

Judgment of sentence affirmed.

Judge Olson joins the memorandum.

Judge Strassburger concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/16/2016