J-S13037-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROBERT MUHAMMAD, Appellant	: : : : : : : : :	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2176 EDA 2012

Appeal from the Judgment of Sentence entered on November 23, 2010
in the Court of Common Pleas of Delaware County,
Criminal Division, No. CP-23-CR-0004279-2008

BEFORE: BOWES, GANTMAN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED MAY 29, 2013**

Robert Muhammad ("Muhammad") appeals from the judgment of sentence imposed following his convictions of aggravated assault and firearms not to be carried without a license. ***See*** 18 Pa.C.S.A. §§ 2702(a); 6106(a). We affirm.

The trial court has set forth the relevant underlying factual and procedural history as follows:

> [Muhammad] was arrested and charged with[,] *inter alia*, Attempted Murder (two counts), Aggravated Assault (two counts), and Possession of a Firearm Without a License. The offenses stemmed from an incident that occurred on March 24, 2008, at approximately 12:25 a.m., when Chester Police Officers were called to the 400 block of Frank Young Avenue in Chester, Delaware County, Pennsylvania. The police found two juvenile victims suffering from gunshot wounds from a drive-by shooting emanating from a late model Ford Taurus. There were about eight teenage friends "just chilling, talking, laughing and stuff" in a park standing next to a generator, when a white car approached and two passengers began firing at the youths.

There were shots fired from the front passenger-seat and rear-passenger seat of the vehicle.

The first victim, Cephas Richardson ["Richardson"], suffered a gunshot wound to his left knee and will forever walk with a limp as a result of the injury. The second victim, David Johnson ["Johnson"], was shot multiple times, was in critical care at Crozer Chester Medical Center and recovered from his injuries.[fn] Both victims identified [] Muhammad and Daryl Beckett ["Beckett"] as the shooters. [] Johnson testified that he knew [Muhammad] because "he used to be on the street that my grandma lived on" and he made an in-court identification of [Muhammad]. [] Richardson identified [Muhammad] as the back-seat shooter and also testified that he knew [Muhammad] and his family prior to the shooting[,] but never had any problems with him.

[fn] After the conclusion of trial, [] Johnson was shot [on] April 8, 2011[,] and died [on] April 10, 2011[.]

On July 24, 2008, [Muhammad] was arraigned. … On July 7, 2010[,] through July 9, 2010, a jury trial was held. [Muhammad] was tried with co-defendant, [] Beckett. [Muhammad] was found guilty of the charges of Aggravated Assault (two counts) and Possession of a Firearm Without a License. The jury also found the co-defendant, [] Beckett, guilty of the charges of Aggravated Assault and Possession of a Firearm Without a License.

Prior to sentencing, this Court ordered a Pre-Sentence Investigation, as well as a Psychological Evaluation and Drug and Alcohol Evaluation. On October 4, 2010, [Muhammad's] trial counsel, Robert Miller, Esquire ["Miller"], presented an oral Motion for Extraordinary Relief Pursuant to Rule 704(B) … asserting that the shooting victim, [] Richardson, identified [Muhammad] at trial but now was recanting that testimony. …

Miller advised the [trial] court that he had a DVD of an interview with the victim, [] Richardson. During the interview, [] Richardson stated that he testified mistakenly at trial regarding the identity of [Muhammad]. …

> … On November 23, 2010, after a hearing, the Motion for Extraordinary Relief was denied without prejudice to raise the issue in a post-sentence motion or other post-sentence relief.
>
> Also on November 23, 2010, [Muhammad] was sentenced as follows: Information B, count 1, Aggravated Assault, 60 months to 120 months; Information B, count 2, [Aggravated Assault], 60 months to 120 months to be served consecutively to Information B, count 1; and Information C, Possession of a Firearm Without a License, seven (7) years' probation to be served consecutively to B1 and B2. …
>
> On December 3, 2010, [Muhammad] filed a timely Motion for a New Trial, based upon the recantation of [the] victim, [] Richardson. [Beckett] also filed a Motion for a New Trial on the same grounds.
>
> The Post-Sentence Motion evidentiary hearing was heard on June 21, 2011[,] and concluded on June 24, 2011. … On June 24, 2011, beyond 120 days from the filing of the Motion, th[e trial] court issued an [O]rder finding [Muhammad's] Motion for a New Trial and [Beckett's] Motion for Post-Sentence Relief deemed denied by operation of law. [Beckett filed a timely Notice of appeal,] but [Muhammad] did not. [This Court affirmed Beckett's judgment of sentence. ***See Commonwealth v. Beckett***, 55 A.3d 139 (Pa. Super. 2012) (unpublished memorandum).]
>
> On March 15, 2012, Muhammad filed a *pro se* [Post Conviction Relief Act] Petition requesting the reinstatement of his direct appeal rights. … A July 2, 2012 Order was signed reinstating [Muhammad's] direct appeal rights, *nunc pro tunc*. …
>
> On July 25, 2012, [Muhammad] filed a Notice of Appeal. On August 2, 2012, [the trial] court directed [Muhammad] to file a Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). On August 22, 2012, [Muhammad] filed a Concise Statement of Errors Complained of on Appeal[.]

Trial Court Opinion, 9/28/12, at 1-5 (citations and some footnotes omitted).

On appeal, Muhammad raises the following question for our review: "Whether the trial court erred in allowing irrelevant and/or prejudicial

testimony regarding a Commonwealth witness's fear of testifying, when the record was devoid of any evidence to support such a fear[?]" Brief for Appellant at 4.

> The admission of evidence is committed to the sound discretion of the trial court, and a trial court's ruling regarding the admission of evidence will not be disturbed on appeal unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous.

Commonwealth v. Moser, 999 A.2d 602, 605 (Pa. Super. 2010) (citation omitted).

Muhammad contends that the trial court erred in allowing the Commonwealth to introduce irrelevant and prejudicial evidence of Johnson's fear of testifying. Brief for Appellant at 11-12. Muhammad argues that Johnson provided ambiguous statements that he did not want to testify because he would not be protected "on the streets" and that "anything could happen to him after the trial was over." ***Id***. at 11. Muhammad asserts that the jury could have inferred from these statements that Muhammad had threatened Johnson and prejudiced them to find Muhammad guilty. ***Id***. at 13-15; ***see also id***. at 16. Muhammad claims that there was no evidence to suggest that he ever threatened Johnson for testifying. ***Id***. at 11, 15-16. Muhammad also argues that this error was not harmless and that he should be granted a new trial. ***Id***. at 17-20.

Initially, we note that "threats against a witness are not admissible as an admission of guilt against the accused unless the accused is linked in

some way to the making of the threat." ***Commonwealth v. Collins***, 702 A.2d 540, 544 (Pa. 1997). However, while this rule refers to the relevance of a threat that implicates the issue of guilt, evidence of fear or a threat is admissible and relevant where the purpose was not to establish guilt, but to demonstrate the effect the threat had on the witness's actions. ***See, e.g., id***. (stating that witness's testimony regarding his fear of testifying was admissible to demonstrate his motive for providing conflicting statements about the crime); ***Commonwealth v. Ragan***, 645 A.2d 811, 824 (Pa. 1994) (stating that questioning a witness about threats against his family was admissible to explain the witness's prior inconsistent statement).

Here, the trial court set forth the relevant testimony in question and determined Muhammad's claims were without merit. ***See*** Trial Court Opinion, 9/28/12, at 7-15. Indeed, Johnson did not identify Muhammad as the source of a threat, nor did the Commonwealth attempt to establish that Muhammad was the source of any threat. The jury only heard testimony of Johnson's fear and reluctance to testify because he could not be protected after the trial concluded. ***See*** N.T., 7/8/10, at 40-41; ***see also id***. at 43 (wherein the Commonwealth pointed out that Johnson was slumping in the chair while testifying and that his demeanor while testifying went to his credibility); ***Commonwealth v. King***, 990 A.2d 1172, 1180 (Pa. Super. 2010) (concluding that fully informed credibility determinations cannot be made without observing the demeanor of the witness). Thus, the trial court

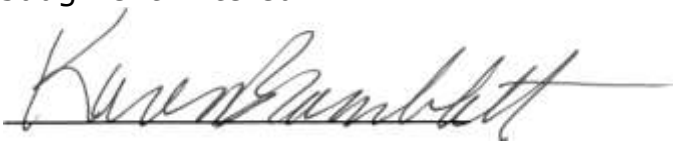
did not abuse its discretion in allowing the jury to hear Johnson state that he was reluctant to testify. ***See Collins***, 702 A.2d at 544 (concluding that where the witness did not identify the defendant as the source of the threat, the "line of questioning was permissible to demonstrate [the witness'] motive for changing his testimony[, that is,] that he was afraid of the consequences if he testified truthfully."); ***Commonwealth v. Randall***, 758 A.2d 669, 678 (Pa. Super. 2000) (holding that the admission of testimony of the witness's fear was proper as it was limited to the narrow purpose of establishing the emotional state of the witness at the time he gave his prior inconsistent statement). Accordingly, we affirm on the basis of the trial court's Opinion. ***See*** Trial Court Opinion, 9/28/12, at 7-15.[1, 2]

Judgment of sentence affirmed.

[1] We note that the trial court cites to California law to support its reasoning that the testimony was properly admitted. ***See*** Trial Court Opinion, 9/28/12, at 9-10. While this law is persuasive, we need not rely upon it to support the conclusion.

[2] With regard to the trial court's harmless error analysis, we note that Johnson repeatedly identified Muhammad as the shooter. ***See, e.g.,*** N.T., 7/8/10, at 27, 31-32 (wherein Johnson identified Muhammad at trial); ***id***. at 37 (wherein Johnson told the police that Muhammad had shot him at the hospital after the shooting); ***id***. at 39-40 (wherein Johnson picked Muhammad's photo from a photo array).

Judgment Entered.



Prothonotary

Date: 5/29/2013

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA v. ROBERT MUHAMMAD	NO. CP -23-CR-0004279-08

A. Sheldon Kovach, Esquire; Attorney for the Commonwealth
William Davis, Jr., Esquire; Attorney for the Defendant

OPINION

NILON, J. FILED: 9/28/12

Robert Muhammad, hereinafter "Appellant", argues that he is entitled to relief from his conviction for Aggravated Assault-Causing Serious Bodily Injury[1] and Possession of a Firearm Without a License[2] and his resulting sentence. Appellant's contention is meritless.

FACTUAL HISTORY:

This is an appeal from this Court's Judgment of Sentence imposed on November 23, 2010. The nature and history of the case are as follows:

The Appellant, Robert Muhammad, was arrested and charged with *inter alia*, Attempted Murder (two counts)[3], Aggravated Assault (two counts)[4], and Possession of a Firearm Without a License[5]. The offenses stemmed from an incident that occurred on March 24, 2008, at approximately 12:25 a.m., when Chester Police Officers were called

[1] 18 Pa.C.S. §2702.
[2] 18 Pa.C.S. §6106.
[3] 18 Pa.C.S. §901.
[4] 18 Pa.C.S. §2702.
[5] 18 Pa.C.S. §6106.

to the 400 block of Frank Young Avenue in Chester, Delaware County, Pennsylvania. The police found two juvenile victims suffering from gunshot wounds from a drive-by shooting emanating from a late model Ford Taurus. There were about eight teenage friends "just chilling, talking, laughing and stuff" in a park standing next to a generator, when a white car approached and two passengers began firing at the youths. (N.T. 7/8/10 pp.19, 251, 254). There were shots fired from the front passenger-seat and rear-passenger seat of the vehicle.

The first victim, Cephas Richardson, suffered a gunshot wound to his left knee and will forever walk with a limp as a result of the injury. The second victim, David Johnson, was shot multiple times, was in critical care at Crozer Chester Medical Center and recovered from his injuries[6]. Both victims identified Robert Muhammad and Daryl Beckett as the shooters. (N.T. 7/8/10 p.30, p.259). David Johnson testified that he knew the Appellant because "he used to be on the street that my grandma live on" and he made an in-court identification of the Appellant. (N.T. 7/8/10 p.38). Cephas Richardson identified the Appellant as the back-seat shooter and also testified that he knew Appellant and his family prior to the shooting but never had any problems with him. (N.T. 7/8/10 p.269).

PROCEDURAL HISTORY:

On July 24, 2008, the Appellant was arraigned. On November 3, 2008, Nicholena Rushton, Esquire, from the Delaware County Office of the Public Defender, entered her appearance on behalf of the Defendant but subsequently withdrew her representation. On September 21, 2009, James Famiglia, Esquire entered his appearance on behalf of the

[6] After the conclusion of trial, Mr. Johnson was shot April 8, 2011 and died April 10, 2011, as of this writing no one has been charged in his death.

Defendant and later withdrew as counsel on February 17, 2010. On February 18, 2010, Robert Miller, Esquire, Trial Counsel, entered his appearance on behalf of the Appellant. On July 7, 2010 through July 9, 2010, a Jury Trial was held. The Appellant was tried with Co-Defendant, Daryl Eugene Beckett. The Appellant was found guilty of the charges of Aggravated Assault (two counts) and Possession of a Firearm Without a License[7]. The Jury also found the Co-Defendant, Daryl Eugene Beckett, guilty of the charges of Aggravated Assault and Possession of a Firearm Without a License.

Prior to sentencing, this Court ordered a Pre-Sentence Investigation, as well as a Psychological Evaluation and Drug and Alcohol Evaluation. On October 4, 2010, Appellant's trial counsel, Robert Miller, Esquire, presented an oral Motion for Extraordinary Relief Pursuant to Rule 704(B) alleging extraordinary circumstances asserting that the shooting victim, Cephas Richardson, identified the Co-Defendant at trial but now was recanting that testimony. Co-Defendant's Trial Counsel joined in Appellant's Motion for Extraordinary Relief.

Miller advised the court that he had a DVD of an interview with the victim, Cephas Richardson. During the interview, Cephas Richardson stated that he testified mistakenly at trial regarding the identity of the Appellant. The interview was conducted by Appellant's Trial Counsel, Miller, in a Chester mosque in which Appellant and his family were members.

An order was signed appointing Scott Galloway, Esquire, as Fifth Amendment counsel for the victim, Cephas Richardson, based on the allegations raised in the Motion for Extraordinary Relief. On November 23, 2010, after a hearing, the Motion for

[7] The jury found the Appellant Not Guilty of the Criminal Attempt-Homicide charge.

Extraordinary Relief was denied without prejudice to raise the issue in a post-sentence motion or other post-sentence relief.

Also on November 23, 2010, the Appellant was sentenced as follows: Information B, count 1, Aggravated Assault, 60 months to 120 months; Information B, count 2, 60 months to 120 months to be served consecutively to Information B, count 1; and Information C, Possession of a Firearm Without a License, seven (7) years probation to be served consecutively to B1 and B2. The Appellant was not RRRI eligible, there was a five-year mandatory minimum on Information B, counts 1 and 2, there was to be no contact directly or indirectly with the victims (Cephas Richardson and David Johnson) or the victims' family, and credit for time served was granted, as determined by the prison.

On December 3, 2010, the Appellant filed a timely Motion for a New Trial, based upon the recantation of victim, Cephas Richardson. The Co-Defendant also filed a Motion for a New Trial on the same grounds.

The Post- Sentence Motion evidentiary Hearing was heard on June 21, 2011 and concluded on June 24, 2011.[8] Cephas Richardson invoked his Fifth Amendment privilege. Appellant's parents testified, as well as Rashieda Ishmel, who is related to Cephas Richardson. The court viewed the videotape of Cephas Richardson conducted by Mr. Miller, Esquire. On June 24, 2011, beyond 120 days from the filing of the Motion, this court issued an order finding Appellant's Motion for a New Trial and CoDefendant's

[8] Mr. Miller was out of town for the June 21, 2011 Motion Hearing.

Motion for Post-Sentence Relief deemed denied by operation of law.[9] The Co-Defendant timely appealed the order but the Appellant did not.[10]

On March 15, 2012, the Appellant filed a *pro se* PCRA Petition requesting the reinstatement of his direct appeal rights. On May 29, 2012, PCRA counsel Henry Forrest, Esquire, filed an Amended Petition for Post Conviction Hearing Relief Under the PCRA (Petition for Reinstatement of Direct Appeal Rights). A July 2, 2012 Order was signed reinstating the Appellant's direct appeal rights, *nunc pro tunc*. On July 5, 2012, as a result of a conflict with the Delaware County Office of the Public Defenders, William Davis, Jr., Esquire was appointed as the Appellate Attorney for Appellant, Robert Muhammad.

On July 25, 2012, Appellant filed a Notice of Appeal. On August 2, 2012, this Court directed Appellant to file a Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). On August 22, 2012, Appellant filed a Concise Statement of Errors Complained of on Appeal raising the following issue for appellate review:

> **1.** Appellant is entitled to a new trial because his Pa. Const., Art. I, § 9 and U.S. Const., Amend. XIV due process rights, as well as his non-constitutional rights under Pa.R.Evid. 403 to have unduly prejudicial evidence excluded, were violated when objectionable testimony from a Commonwealth witness-referring to his fear of testifying-was allowed over numerous objections, was not stricken from the record and the jury was not provided with a cautionary instruction relating to this objectionable testimony. N. T. July 8, 2010, pp. 40-48.

DISCUSSION:

A. Waiver:

The sole issue raised for appellate review presents a challenge to the admission of allegedly prejudicial evidence. Appellant simply submits that he is entitled to a new trial

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[9] Pa.R.Crim. P.720.

[10] The Pa Superior Court issued a non-precedential decision on July 18, 2012 in Com. v. Beckett, N0.1915 EDA 2011.

because his PA and U.S. constitutional rights were violated when the trial court allegedly admitted prejudicial evidence that should have been excluded. The Appellant's assertions are vague and overly broad and no specific questions are raised for appeal. The Appellant does not delineate how his "Pa. Const., Art. I, § 9 and U.S. Const., Amend. XIV due process rights" are implicated by the admission of the alleged evidence. This statement is the functional equivalent of no Concise Statement at all and thus waiver of this issue.

Whenever a trial court orders an Appellant to file a concise statement of errors complained of on appeal pursuant to Rule 1925(b), any issue not raised in an appellant's Rule 1925(b) statement will be deemed waived for purposes of appellate review. Hess v. Fox Rothschild, LLP, 925 A.2d 798, 803 (Pa. Super. 2007). On several occasions, the Superior Court has addressed the issue of Rule 1925(b) statements that are vague and/or overly broad. The Court has consistently held that a Rule 1925(b) statement is not in compliance with the Rules of Appellate Procedure if it is so vague and overly broad that it does not identify the specific questions raised on appeal. *See, e.g.,* Wells v. Cendant Mobility Financial Corp., 913 A.2d 929, 932-34 (Pa. Super. 2006).

If a Rule 1925(b) statement is too vague, the trial judge may find waiver and disregard any argument. Pa.R.A.P. 1925(b)(4)(vii). See also, Lineberger v. Wyeth, 894 A.2d 141 (Pa. Super. 2006). As the Superior Court provided in Lineberger:

> When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review. When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues. In other words, a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all...In the instant case, Appellant's Concise Statement was not specific enough for the trial court to identify and address the issue Appellant wished to raise on appeal. As

> such, the court did not address it. Because Appellant's vague Concise Statement has hampered appellate review, it is waived.

Id. at 148.

Here, the Concise Statement is too vague to allow the court to identify the issue of how his constitutional rights are allegedly violated and hence the issue is waived. Hess, *supra at* 803-804.

B. The Court Acted Within Its Discretion by Permitting Testimony Concerning Victim's Fear of Testifying

The second part of the issue raised by Appellant is whether the trial court erred by admitting allegedly prejudicial evidence. The objectionable evidence was the testimony of sixteen year-old shooting-victim, David Johnson, referring to his fear of testifying.

David Johnson began his testimony by describing the incidents that occurred on the night of March 24, 2008. He recounted that after attending a party with other teenage friends, when the party ended they went "back down the project." (N.T. 7/8/10 p.13). David Johnson and his friends were standing around and sitting on a generator and were talking. Suddenly, a car drove by, paused about 25-30 feet from the teenagers, and shots were fired at them. The windows dropped, and "they started shooting." (N.T. 7/8/10 p.24). The witness then identified the Appellant, Robert Muhammad, as the shooter in the front seat of the vehicle. (N.T. 7/8/10 pp.27-28, 29). The witness described the shooting:

> A. I turned around and started running, then I—then I realized I was in the dirt. I got up, tried to run. I fell again. And I got up again and tried to run. I fell again.
> Q. Why were you falling?
> A. Because I was shot.
> Q. Where did you get shot?
> A. In my left leg.

(N.T. 7/8/10 p.31).

The witness, David Johnson, testified that approximately 40 shots were fired from the car and he thought he was going to die. (N.T. 7/8/10 pp.33-34). David made an in-court identification of the Appellant, Robert Muhammad, and advised the police from his hospital bed that the Appellant and his co-defendant, Daryl Beckett, were the two individuals who shot him. David testified that he knew the Appellant prior to the shooting because "he used to be on the street that my grandma live on." (N.T. 7/8/10 p.38).

In the middle of this tense testimony in which the witness was identifying the two men who shot him, the prosecutor asks him the following questions:

> Q. David—David, do you want to be here today?
> A. No.
> Q. Do you want to be up there testifying today?
> A. No.
> Q. Why?
> A. Because I don't. Okay. You all—you all ain't going to protect me forever on the streets. Like after everything-- after everything's done and over with…
> Mr. Miller: Judge I'm going to object at this time.
> The Court: Overruled.
> Q. Go on.
> A. You all ain't going to protect me on the streets after everything is done and over with. You all just here with me for the day.
> Q. What's it like in the City of Chester for people who testify?
> A. Objection.
> A. Objection, your Honor.
> The Court: **Sustained**. (side-bar discussion) (emphasis added).

Both defense counsel objected to the statement's relevance. The prosecutor argued that the testimony should come in as it "goes to his credibility in terms of how he testifies. It goes to his credibility in terms of how he's slumping up there." [The prosecutor is referring to the witness' body language and demeanor showing his fear of testifying.] "…And, certainly, credibility is an issue for every witness who testifies." (N.T. 7/8/10 p.43).

> The Court:... You've already established what his state of mind is. That he's afraid to testify because he won't—he won't be protected. So the objection is sustained. I let you-- I let you get that in, but that's as far as we're going to go...We can't get into the relevance of what may have happened to other people who testified, ...
> ...
> The Court: You can establish his state of mind, but not through knowledge about what may have happened to other people who are not involved in this case.

(N.T. 7/8/10 pp.44-45).

Ultimately, the court **sustained** the objection as to what happened to other people in the City of Chester, Pennsylvania who have testified in the past in other cases. However, the court allowed the victim to testify about his own fear of testifying.

Here, the victim-witness was sixteen years-old (N.T. 7/8/10 p. 11) at the time of his testimony. He was fourteen years-old when he sustained a gun-shot wound to his left leg in this incident. He is currently deceased.[11]

His body language at the time of his testimony and staccato-style responses to the prosecutor's questions affected his credibility with the jury. As the prosecutor noted: "he's sitting up there. Won't look at these guys [the jury]. It goes to his credibility in terms of how he testifies. It goes to his credibility in terms of how he's slumping up there. [on the witness stand] This is reality..." (N.T. 7/8/10 p. 43).

Other appellate courts have specifically addressed this issue. The courts of California have aptly noted:

> Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible, and an explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court.

West's Ann.Cal.Evid.Code § 780(f, j). People v. Mendoza, 52 Cal. 4th 1056, 132

[11] As was noted earlier, after the conclusion of trial, David Johnson was shot April 8, 2011 and died April 10, 2011, as of this writing no one has been charged in his death.

Cal Rptr. 3d 808, 263 P. 3d 1 (2011).

As was noted by the Pennsylvania Superior Court in the case of Smith v. Smith, 43 A.2d 371, 372 (Pa. Super. 1945) the importance of a fact-finder's evaluation of a witness includes an assessment of such qualities as demeanor and body language:

> He[12] possesses an advantage not granted to us. He sees the parties and their witnesses face to face and observes their appearance and demeanor as they testify. We are restricted to the cold type of the record from which temperament and personality have been subtracted. Yet the demeanor of witnesses is the very touchstone of credibility; in the absence of reactions produced by other applicable tests, the appearance and demeanor of witnesses are the litmus by which the presence of truth is revealed. They are trifles light as air, imponderables, but for all that they are luminous integrants which ineluctably enter into the calculation by which trustworthiness is appraised. The spontaneous gesture, the lifting of an eyebrow, the shrug of the shoulders, the intonation of the voice, the flash of the eye, the facial expression,-these are a few of the vital and influential indicia of credibility which the master observes and by which he is guided...Frequently they speak more eloquently and possess greater significance than the verbal utterance which they accompany, yet they cannot be reproduced upon the record submitted to the reviewing court.

Id at 372.

In the case *sub judice*, evidence that David Johnson was afraid to testify or feared retaliation for testifying was relevant to the credibility of that witness and is therefore admissible. In denying Appellant's objection, this court appropriately exercised its discretion.

C. Pa.R.E. 403

The Appellant argues that David Johnson's testimony about his fear of testifying was unduly prejudicial pursuant to Pa.R.E. 403. Generally, "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402. Relevant evidence is defined as "evidence having any tendency

[12] ["He" in this case refers to a Master but the same holds true for any fact-finder.]

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. In particular, evidence is admissible if it is relevant and its probative value is not outweighed by the danger of unfair prejudice. Pa.R.E. 401 and 403. The admissibility of evidence is vested in the sound discretion of the trial court which will not be reversed unless there is an abuse of discretion. Commonwealth v. Brown, 839 A.2d 433, 435 (Pa. Super. 2003). A trial court abuses its discretion when it overrides or misapplies the law, or exercises judgment, which is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will when determining whether to admit evidence. Id.

The Rule provides:

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**
> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Pa.R.E. 403. The comment to Pa.R.E. 403 instructs: " 'Unfair prejudice' means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403 cmt. However, probative evidence will not be prohibited as unduly prejudicial merely because it is harmful to the defendant. Commonwealth v. Page, 965 A.2d 1212, 1220 (Pa. Super. 2009). Moreover:

> exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case... This Court has stated that it is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged.

Id. at 1221.

As the Superior Court of Pennsylvania has observed, "since all Commonwealth evidence in a criminal case will be prejudicial to the defendant, exclusion of otherwise relevant evidence will only be necessary where the evidence is so prejudicial that it may inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." Commonwealth v. Kitchen, 730 A.2d 513, 519 (Pa. Super. 1999).

Here, evidence of David's fear of testifying would not "rouse a jury to overmastering hostility." Commonwealth v. Kouma, _A.3d___, 2012 WL 1918876 (Pa. Super. 2012) *citing* Page at 1221. See also, Commonwealth v. Molina, 897 A.2d 1190 (Pa. Super. 2006) (finding trial counsel was not ineffective in failing to object to the prosecutor's questioning of the victim and the appellant regarding the appellant's illegal immigration status since such evidence was part of a chain or sequence of events and not unduly prejudicial). In the case *sub judice*, David's fear was relevant to his testimony and forms part of the history and natural development of the events and offenses for which the defendant is charged and it is not unduly prejudicial. David's fear of retaliation was relevant evidence for the jury to understand the reasons for the witness' demeanor. The probative value of the evidence was outweighed by its potential for prejudice. Pa. R.E. 403.

David's testimony in no way inflamed the minds of the jury. Taken as a whole, David Johnson testified to being shot by the Appellant on the night of March 24, 2008. His reference to his fear of testifying was more probative than prejudicial. The evidence was probative of the reasons for his demeanor on the witness stand. (N.T.7/8/10 p.43).

There was no unfair prejudice to the Appellant. His testimony is admissible under Pa.R.E. 403.

D. Admissibility

A trial court has broad discretion in admitting or excluding evidence and such a decision will only be overturned if there is an abuse of such discretion. Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (1989). In reviewing a challenge to the admissibility of evidence, the Superior Court will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. McManamon v. Washko, 906 A.2d 1259, 1268–1269 (Pa. Super. 2006), *appeal denied*, 591 Pa. 736, 921 A.2d 497 (Pa. 2007)

The evidence was admitted by the Court because it was relevant to show the witness' state of mind to explain his demeanor as he testified which in turn affected his credibility. (N.T. 7/8/10 pp. 44-45). The witness' fear of testifying was probative of his state of mind and helped explain why he was acting the way he was on the witness stand i.e., failing to make eye contact with the jurors, slumping in his chair, and providing only very brief responses to questions from the prosecutor. Therefore, the Court was not in error in admitting the testimony.

E. No Cautionary Instruction was Given

The Appellant argues that "the jury was not provided with a cautionary instruction relating to this objectionable testimony" (Statement of Matter complained of on Appeal). Appellant concludes the court's omission of a cautionary instruction warrants a new trial. However, "[f]ailure to request a cautionary instruction upon the introduction of evidence

constitutes a waiver of a claim of trial court error in failing to issue a cautionary instruction." Commonwealth v. Bryant, 579 Pa. 119, 141, 855 A.2d 726, 739 (2004); Commonwealth v. Jones, 501 Pa. 162, 460 A.2d 739 (1983) (deeming issue waived where defense counsel immediately objected to prosecutor's conduct but failed to request mistrial or curative instructions).

Instantly, the Appellant's counsel never requested a cautionary instruction from the court. (N.T. 7/8/10 pp. 40-48). As such, this argument is waived on appeal.

F. Harmless Error:

Assuming, *arguendo,* the court erred in admitting the objectionable testimony, any such error was harmless in this case. Harmless error has been defined by the appellate courts:

> An error is harmless where the uncontradicted evidence of guilt is so overwhelming that, by comparison, the error is insignificant. When discussing harmless error, we have also stated that the Commonwealth can meet its burden of showing harmlessness by persuading us the error did not prejudice the appellant or did so to a *de minimis* extent and/or by persuading us the properly admitted and uncontradicted evidence was so overwhelming and the prejudicial effect of the error so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Kouma, A.3d___,2012 WL 1918876, (Pa. Super. 2012) *(quoting* Commonwealth v. Hoover, 16 A.3d 1148, 1150 (Pa. Super. 2011)).

Here, the evidence of Appellant's guilt is so overwhelming that this court's ruling, allowing testimony from the victim as to his fear of testifying is, at most, harmless error. The Jury Trial in this case began on July 7, 2010 and ended on July 9, 2010. The Jury heard from seven Commonwealth witnesses including the two shooting victims, David Johnson and Cephas Richardson. Both victims identified the Appellant and the Co-Defendant as the shooters. (N.T. 7/8/10 pp.29-30, p.259).

The two eye-witnesses knew the Appellant prior to the shooting. (N.T. 7/8/10 p.38). David Johnson testified that he knew the Appellant because "he used to be on the street that my grandma live on" and he made an in-court identification of the Appellant. (N.T. 7/8/10 p.38). Cephas Richardson identified the Appellant as the back-seat shooter and also testified that he knew Appellant and his family prior to the shooting. Also, Cephas Richardson was related to the Appellant. (N.T. 7/8/10 p.269). Kim Dennis, victim-Cephas Richardson's mother, testified that her son told her from his hospital bed that the Appellant, Robert Muhammad, shot him. (N.T. 7/8/10 p.381).[13]

Thus, in light of the overwhelming evidence of Appellant's guilt, the evidentiary ruling was, at most, harmless error.

Not all errors in a trial entitle an Appellant to a new trial, and "[t]he harmless error doctrine, as adopted in Pennsylvania, reflects the reality that the accused is entitled to a fair trial, not a perfect trial." Commonwealth v. Lewis, 39 A.3d 341,351 (Pa. Super. 2012). The Appellant's request for a new trial should fail.

CONCLUSION:

For the foregoing reasons, the Trial Court's Judgment of Sentence should be affirmed on appeal.

BY THE COURT:

JAMES F. NILON, JR., J.

[13] Ultimately, the Jury acquitted the Appellant of the most serious charge of Criminal Attempt-Homicide and found him guilty of Aggravated Assault (two counts) and Possession of a Firearm Without a License.