NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KEVIN LEE SHAFFER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2237 MDA 2012

Appeal from the Judgment of Sentence Entered August 3, 2012
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0000016-2012

BEFORE: BENDER, P.J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J. **FILED DECEMBER 18, 2013**

Kevin Lee Shaffer, Appellant, appeals from the judgment of sentence of an aggregate period of approximately six to forty-seven months' incarceration, imposed after he was convicted of crimes including, *inter alia*, terroristic threats and two counts of recklessly endangering another person (REAP). On appeal, Appellant challenges the weight of the evidence to sustain his convictions, and the admission of testimony from two witnesses. After review, we affirm.

On the morning of October 23, 2011, Appellant entered a convenience store where Mr. Cody Neshteruk was working as a store clerk. Appellant, a regular customer of the convenience store, came into the store while Mr.

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* Former Justice specially assigned to the Superior Court.

Neshteruk was attending to another customer. Mr. Neshteruk observed Appellant acting erratically. For instance, Appellant, excited about a rifle he owned, announced to Mr. Neshteruk and the customer that if anyone tried to rob the store, he would "cut them in half with his rifle." N.T., 5/24/12, at 93. Mr. Neshteruk testified that he was extremely concerned by Appellant's statements. He also testified that he noticed a bottle of alcohol in Appellant's pocket, and that Appellant smelled of alcohol. ***Id.*** at 93-94. Appellant purchased cigarettes and left the store.

Tammy McGovern and Kristina Homan testified that they were parked at the convenience store on the morning of the incident when they observed Appellant rummaging through his trunk and talking, possibly to himself. Thereafter, Appellant, wielding a high-powered rifle, approached Ms. McGovern as she sat in the driver's seat of her vehicle. When he was within a few feet of Ms. McGovern, Appellant began rambling loudly about his intention to "shoot you robbers" and announcing that he could "shoot anything." Trial Court Opinion, 12/3/12, (T.C.O.) at 3. Ms. Homan, who had been sleeping in the backseat of the vehicle, awoke to Ms. McGovern and Appellant talking. Appellant moved the rifle back and forth across his body as they spoke and pulled bullet shells from his pocket. Ms. McGovern testified that she was not sure what Appellant was going to do with the rifle and felt that she had to engage Appellant in conversation and agree with him. Ms. Homan testified that she was concerned for both her life and Ms. McGovern's life because of the nearness that Appellant was holding the rifle

to Ms. McGovern, as well as her own uncertainty as to whether Appellant was intoxicated or mentally unstable. Eventually, the victims were able to escape, at which time they called police. Mr. Neshteruk, the store clerk, testified the he did not see the events that occurred in the parking lot following his interaction with Appellant.

Appellant was tried before a jury on May 24, 2012, and found guilty of terroristic threats and two counts of REAP. On the same date, following a non-jury trial, the trial court found Appellant guilty of driving under the influence of alcohol or controlled substances (DUI), disorderly conduct, public drunkenness, and restrictions on alcoholic beverages (*i.e.* an open container in a motor vehicle). Those offenses arose out of the same general incident described *supra*.

On August 3, 2012, Appellant was sentenced to the above-stated term of incarceration. Thereafter, he filed post-sentence motions, which included a motion for judgment of acquittal and a motion for a new trial. On December 3, 2012, the trial court denied Appellant's post-sentence motions. Appellant timely appealed, and raises three issues for our review:

> I. Whether the lower court erred in denying [Appellant's] motion *in limine* and then allowing testimony of the store clerk after it was established that he was not a witness to the alleged incident?
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> II. Whether the lower court abused its discretion in denying the motion for acquittal and motion for new trial after the verdict was against the weight of the evidence?

> III. Whether the lower court abused its discretion in allowing the state trooper to testify as to irrelevant and inflammatory statements?

Appellant's Brief at 5.

In the interest of clarity, we will initially address Appellant's first and third enumerated issues, which both concern the admission of testimony, followed by Appellant's remaining issue concerning the weight of the evidence.

Appellant's first issue challenges the trial court's denial of his motion *in limine*, and its admission of the testimony of Mr. Neshteruk, the store clerk, set forth *supra*. Appellant argues that Mr. Neshteruk was not a witness to the crimes at issue, and his testimony regarding statements Appellant made while inside the store was irrelevant. Additionally, Appellant avers that Mr. Neshteruk's testimony included opinions and/or inferences that were not based on his perception of Appellant, in contravention of Pa.R.E. 701 (concerning opinion testimony by a lay witness). Appellant concludes that the witness's testimony lacked relevance, and its probative value was outweighed by its potential for extreme prejudice. Thus, Appellant claims the trial court erred in denying his motion *in limine*.

The Commonwealth counters that Appellant's statements to the store clerk were an admission by a party opponent, which is an exception to the rule against hearsay. ***See*** Pa.R.E. 803(25)(a). The Commonwealth emphasizes, "Here, we had Appellant making statements about 'cutting people in half' to the store clerk IMMEDIATELY before he goes outside the

store and makes the very same, and worse, threats to Kristina Homan and Tammy McGovern." Commonwealth's Brief at 8 (emphasis in original). The Commonwealth also argues that the statements were not unfairly prejudicial.

Our Supreme Court has long observed the following:

> Not surprisingly, criminal defendants always wish to excise evidence of unpleasant and unpalatable circumstances surrounding a criminal offense from the Commonwealth's presentation at trial. Of course, the courts must make sure that evidence of such circumstances have some relevance to the case and are not offered solely to inflame the jury or arouse prejudice against the defendant. The court is not, however, 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, as appellant would have preferred.

Commonwealth v. Lark, 543 A.2d 491, 501 (Pa. 1988).

Here, the store clerk's testimony described the first act of a two-act play. Although Mr. Neshteruk only witnessed the events leading up to Appellant's most egregious behavior, his testimony provided highly relevant facts that formed part of the history and natural development of the case. Accordingly, we find no merit in Appellant's first issue.

Turning to Appellant's other admissibility argument, his third enumerated issue, Appellant argues that Trooper Derek Pacella of the Pennsylvania State Police was permitted to make "inflammatory statements to such a degree that it fixed bias and hostility against Appellant in the

minds of the jury." Appellant's Brief at 37. Additionally, Appellant argues that he was prejudiced by "courtroom theatrics." ***Id.*** at 38.

As a preliminary matter, we observe that Appellant did not object to Trooper Pacella's testimony at the hearing. Accordingly, his challenge to this testimony is waived. ***See*** Pa.R.A.P. 302(a); ***McCloud v. McLaughlin***, 837 A.2d 541, 543-44 (Pa. Super. 2003). Moreover, Appellant's brief does not explain what he means by "courtroom theatrics" or "the Trooper's inflammatory comments." ***Id.*** Thus, even if Appellant did not waive this issue by failing to object during the hearing, his argument is insufficiently developed to suggest any merit. Nevertheless, our independent review of the record reveals nothing unfairly prejudicial in Trooper Pacella's testimony or the Commonwealth's questioning. Accordingly, no relief is due on Appellant's third issue.

Finally, we return to Appellant's second issue, wherein he contends that the trial court abused its discretion in denying his motion for acquittal and a new trial because the verdict was against the weight of the evidence.[1]

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[1] Within this portion of his brief, Appellant also seeks review of the sufficiency of the evidence as to all of the offenses. His argument in this regard consists of a re-characterization of the facts found by the trial court, an effort to impeach the witnesses' testimony through his own assertions, and the re-raising of his issues concerning the admissibility of testimony, which we have already addressed and deemed meritless. Aside from his use of the word "sufficiency" and his citation to our standard of review concerning sufficiency, Appellant fails to make any argument as to how the elements of the offenses at issue are unsupported by the evidence. Indeed, within this portion of his argument, Appellant fails to mention even a single

In assessing a challenge to the weight of the evidence, our standard of review is as follows:

> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.
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> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons

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individual element of any of the offenses at issue. Moreover, the issue of sufficiency is not set forth or suggested by Appellant's statement of questions involved. Accordingly, we find this issue waived. ***See Lackner v. Glosser***, 892 A.2d 21, 29-30 (Pa. Super. 2006) ("An appellate court will ordinarily not consider any issue if it has not been set forth in or suggested by an appellate brief's Statement of Questions Involved.... Appellate arguments which fail to adhere to these rules may be considered waived and arguments which are not appropriately developed are waived.").

> for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.
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> Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

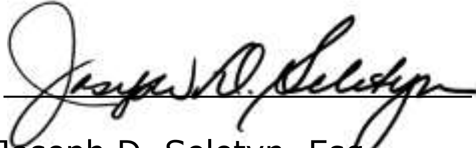
Commonwealth v. Widmer, 744 A.2d 745, 751-53 (Pa. 2000) (citations omitted).

Specifically, Appellant challenges the lack of video or photographic evidence and asserts that the victims, Ms. Homan and Ms. McGovern, testified to conflicting facts. ***See***, ***e.g.***, Appellant's Brief at 33 (taking issue with Ms. McGovern's use of the word "concerned" at trial, but not in her initial report to police). Our review reveals no suggestion of partiality, prejudice, bias, or ill will by the trial court in denying Appellant's motion for a new trial on the grounds that the verdict was against the weight of the evidence. The trial court properly determined that the record lacks any facts that are "so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." ***Widmer***, 744 A.2d at 752. Given the extensive testimony provided by the store clerk and the victims, the only facts weighing in favor of Appellant are those provided by his own self-serving testimony. For the jury to ignore that testimony is not to deny justice, but rather to apply it properly through a balancing of all the

evidence presented at trial. Accordingly, we ascertain no merit in Appellant's final issue.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2013