NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ANTHONY CAPPELLA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3297 EDA 2011

Appeal from the Judgment of Sentence November 8, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0010950-2008

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY BENDER, J. Filed: February 15, 2013

Anthony Cappella appeals the judgment of sentence of twenty to forty years' incarceration imposed following his conviction of Murder in the Third Degree and Possessing Instruments of Crime (PIC). Cappella challenges numerous evidentiary rulings by the trial court, arguing that the judge improperly precluded him from demonstrating an alternative scenario for the victim's death. Upon review, we find Cappella's assertions without merit. Accordingly, we affirm his judgment of sentence.

The trial court, as well as both parties, have summarized the occurrences underlying this case as follows:

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* Retired Senior Judge assigned to the Superior Court.

On January 15, 2008, Victor Alfonsi was found brutally beaten to death in the home he shared with Appellant. He was last seen on January 12, 2008, when he had dinner with his close friend Daniel Ruddy. Mr. Alfonsi was a mainstay in his neighborhood. He was always seen on the corner. When home, friends and family would drop in to see him. His lights were always on. His door was open. He spoke to his friends and family many times a day. Things changed after his dinner with Mr. Ruddy. The home was dark and locked. The only light came from a television. The victim appeared to have disappeared. He returned no phone calls. When asked if he knew where the victim was, Appellant denied knowing where Mr. Alfonsi was but gave conflicting stories to different people. Appellant denied friends and family access to the home.

On January 15, 2008, Mr. Ruddy climbed through a window and found Mr. Alfonsi lying dead on the living room floor. He had been beaten savagely about the skull. Substantial blood splatter was noticed throughout the home. A golf club was missing. Mr. Ruddy noticed that a sheet had been put up to separate the eating area from the area where the victim's body lay.

As police arrived on the scene, Appellant also arrived and identified himself as the victim's roommate. He was taken to the Police Headquarters Administration building as a possible witness. He told investigators that he had been away at a co-worker's home that weekend. Appellant remained at Headquarters as the investigators went to interview the co-worker. The co-worker told police that Appellant did not stay with him and Appellant asked him to provide Appellant with a false alibi for that weekend. The investigators returned to Headquarters, Mirandized Appellant and took a statement. In the statement Appellant said that he had been home that weekend. After returning from a bar he noticed the victim lying on the floor. He turned on the light and saw blood on the walls. He checked and noticed that the victim was not breathing. Despite this alarming situation, Appellant went to sleep, awoke and carried on his business for the next few days, going in and out of the house until the body was discovered. While taking his statement, investigators noticed scratches on Appellant's arm and what appeared to be blood droppings on the top of his sneakers. Photographs of the Appellant's arms were taken and

> the sneakers were seized for analysis. Appellant was released and the investigation continued.
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> The Medical Examiner determined that the victim died from blunt force trauma to the head. The wounds were consistent with being inflicted by a golf club. The sneakers were analyzed and the blood droppings on the top of the sneakers contained the victim's DNA. Eventually an arrest warrant for Appellant was obtained. The police were unable to find Appellant in Philadelphia. He eventually was located and arrested in Florida.

Trial Court Opinion, 6/28/12, at 2-3.

Cappella's case proceeded to a jury trial commencing August 16, 2011. In its case-in-chief, the Commonwealth called the victim's best friend, Daniel Ruddy, who testified concerning his relationship with the victim, as well as his relationships with former paramours. In addition, the Commonwealth presented numerous photos of the crime scene as well as the testimony of multiple police officers and investigators. Among those witnesses was Cesare Mujica, a civilian crime scene investigator employed by the Philadelphia Police Department. Mujica testified, among other things, that the blood splatter patterns at the crime scene were consistent with the Commonwealth's theory that the victim had been bludgeoned with an object. In his defense, Cappella presented testimony from other witnesses including Dana Ann Pirolli, the victim's former paramour, to demonstrate that the victim had died at the hands of Joseph Collins, another of Pirolli's lovers. Cappella theorized, and sought to prove, that upon release from prison, Collins had killed the victim in a fit of jealous rage. At the conclusion of all the evidence, the jury rejected Cappella's alternative theory of the murder's

commission and found Cappella guilty as charged. At the subsequent hearing on sentencing, the court imposed the sentence of twenty to forty years' incarceration that Cappella now appeals.

In support of his appeal, Cappella raises the following questions for our review:

> A. Did not the court err by not allowing the defendant to adduce evidence in support of his theory of defense—that the decedent was killed by the jealous paramour of the decedent's girlfriend shortly after the paramour was released from prison for assaulting another man that had dated her, to wit:
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> > Evidence of the relationship between the decedent and the girlfriend that was within the personal knowledge of witness Ruddy;
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> > Evidence from the girlfriend that the girlfriend was dating both the decedent and the paramour at the same time;
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> > Evidence that the paramour's in-court threats against the man that had been assaulted by the paramour from the man assaulted; [sic] and
> >
> > Evidence that the police focused the investigation on the defendant without investigating the paramour.
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> B. Did not the court err by not allowing Crime Scene Investigator Mujica to testify whether physical evidence that he personally observed was consistent with another, alternative scenario to that presented by the prosecution?

Brief for Appellant at 2. In response, the Commonwealth has re-characterized the issues as follows in its Counter Statement of the Questions Involved:

I. Where the trial court allowed defendant to present evidence that someone else had a motive to kill the victim, but sustained objections to improper questions, did the trial court abuse its discretion?

II. Where the trial court gave defendant wide latitude to cross-examine a crime scene investigator about blood splatters found at the scene, but sustained objections to improper questions, did the trial court abuse its discretion?

Brief for Appellant at 4.

In support of his first question, Cappella challenges the trial court's rulings prohibiting or limiting certain evidence. Brief for Appellant at 9. Cappella contends that the limits the trial court imposed prejudiced his access to relevant and material evidence and deprived him of the ability to present an adequate defense. ***See id.*** We recognize that "[a]n accused has a fundamental right to present evidence so long as the evidence is relevant and not excluded by an established evidentiary rule." ***Commonwealth v. Ward***, 509, 605 A.2d 796, 797 (Pa. 1992) (citing ***Chambers v. Mississippi***, 410 U.S. 284 (1973)). Thus, evidence of a defendant's motive or lack thereof is admissible, as is proof of facts showing the commission of the crime at issue by someone other than the defendant. ***See id.***

> In determining the admissibility of evidence, the trial court must decide whether the evidence is relevant and, if so, whether its probative value outweighs its prejudicial effect. ***Commonwealth v. Crews***, 536 Pa. 508, 640 A.2d 395 (1994); ***see, e.g., Commonwealth v. Dollman***, 518 Pa. 86, 541 A.2d 319 (1988). "Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact." ***Commonwealth v. Spiewak***, 533 Pa. 1, 8, 617 A.2d 696, 699 (1992). Evidence

> that merely *advances an inference* of a material fact may be admissible, even where the inference to be drawn stems only from human experience. ***See, e.g., Dollman*** (jury could have interpreted disposal of victim's body as evidencing consciousness of guilt). Moreover, even in the case of expert testimony, "[t]o be relevant, evidence need not be conclusive." ***Crews***, 536 Pa. at 523, 640 A.2d at 402.

Commonwealth v. Hawk, 709 A.2d 373, 376 (Pa. 1998). "The admissibility of evidence is a matter committed to the sound discretion of the trial court; an appellate court may reverse a trial court's ruling only upon a showing that the trial court abused its discretion." ***Id.***

Cappella's defense espoused a narrative that the victim's gruesome and untimely death was the product of jealous rage, committed by one Joseph Collins, a former paramour of Dana Ann Pirolli, with whom the victim had been involved in an intimate relationship prior to the murder. Consistent with this theory, Cappella asserts first that the trial court erred in not permitting testimony from Pirolli that she was dating the victim at the same time she was dating Collins. Brief for Appellant at 14. This allegation mischaracterizes the record. In point of fact, the trial court allowed Cappella's counsel expansive latitude in his examination of Pirolli and counsel fully explored her respective relationships with the victim and with Collins. On the occasion when counsel posed the question now at issue, "Were you, Ms. Pirolli, dating both Mr. Alfonsi and Mr. Collins at the same time?," the trial court sustained the Commonwealth's objection *only on the basis that the question was leading*. N.T., Jury Trial, Volume I, 8/23/11, at

22. The court then instructed counsel, "[y]ou must ask appropriate direct examination questions," whereupon counsel rephrased the question to inquire: "Can you explain for the ladies and gentlemen of the jury what your relationship was with Mr. Alfonsi and Mr. Collins the first week of January [2008]?" ***Id.*** at 23. Pirolli then clarified that she intended to return to Collins upon his release from prison and had so told the victim before his death. She testified specifically as follows:

> Well, Deeter and I, Victor, we were always friends, and we were going to continue to be friends. But I told him, when Joseph [Collins] got out of prison, that I was going to go—that I was going to go back with Joseph. He knew I was with Joseph, so that's how it was.

Id. Thus, contrary to Cappella's assertion, the trial court *did allow* an inquiry about the extent to which Pirolli's romantic activities with the two men overlapped. Pirolli's response both undermined Cappella's theory of the case and belies Cappella's assertion on appeal that the trial court prejudiced his case by not allowing the very question his counsel asked—and the witness answered. Cleary, this argument is devoid of merit.

Cappella also contends that the court erred in permitting Daniel Ruddy's testimony about a prior altercation between Cappella and the victim, while at the same time limiting Ruddy's testimony about the decedent's relationship with Pirolli and about a fight the victim had with Collins. Brief for Appellant at 14. Again, exploration of the record does not support Cappella's allegations. As concerns Ruddy's knowledge of

altercations between the victim and Collins, the court conducted an extended discussion at sidebar with both counsel to discern the extent to which such testimony was either relevant or admissible based both on the timeframe in which the alleged events occurred and whether Ruddy had actually witnessed the altercations. N.T., Jury Trial, 8/17/11, at 94-110. Initially concerned that Ruddy's testimony might be only hearsay, the court called the witness to the stand during the sidebar conference and asked him what he had actually seen. ***Id.*** at 104-07. As Ruddy confirmed that he had in fact seen an argument and shoving match between "[the victim] and the ex-boyfriend," ***id.*** at 105-06, his testimony effectively acted as an offer of proof and allayed the court's concern with admissibility, subject to further exploration and development in the defendant's case-in-chief. ***Id.*** at 108-09. Cappella's counsel accepted the court's ruling and requested Ruddy's continued availability to be recalled as a witness. ***Id.*** at 109. *Counsel then failed to recall the witness at the appropriate time*. Thus, Cappella's attempt now to impugn the court's ruling appears as no more than a veiled effort to shift the consequence of his counsel's action and fabricate reversible error where none is otherwise evident.

As concerns Cappella's allegation that Ruddy was "not permitted to testify about what he knew of the relationship between the decedent and Pirolli[,]" Brief for Appellant at 14, we observe that the defendant's characterization is both undeveloped and inaccurate. In truth, the court

merely limited Cappella's cross-examination of Ruddy about whether the victim was engaged in carnal relations with both Ms. Pirolli and another woman during the same period. The objectionable exchange transpired as follows:

> Q. Is it safe to say that he was kind of dating both of them at the same time?
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> A. Yes. He was – actually, he was kind of over with one of them, you know, and he started dating the second one. You know what I mean? You know, [the victim] was not really serious-serious with either of them, you know.
>
> Q. Okay. I don't mean to get personal about this, but did you know if he was sleeping with both of them?

N.T., Jury Trial, 8/17/11, at 83-84. At that juncture, the prosecutor objected to Cappella's question on the basis that "it's totally irrelevant," whereupon the trial court sustained the objection. We agree with the trial court that the extent to which the victim engaged in carnal relations with anyone other than Ms. Pirolli is of no demonstrable relevance even to the broader issue of who bludgeoned the victim, much less whether Cappella was guilty of the crime charged. In addition, Cappella's brief offers no argument to explain the relevance of the victim's sexual relations other than as they may have ignited a fatal rivalry with Mr. Collins. Accordingly, we discern no error in the trial court's ruling on this issue.

Cappella asserts further that the trial court erred in limiting the testimony of Lawrence Ferrari, who had been badly beaten by Mr. Collins when Collins learned that Ferrari was dating one of Collins' former

girlfriends. Brief for Appellant at 14. Ferrari's testimony established that he and Collins had been friends for several years prior to the incidents in question. During that period, Collins dated a woman who later, after her relationship with Collins had ended, began to date Ferrari. N.T., Jury Trial, Volume I, 8/23/11, at 47-48. Upon learning of the relationship, Collins assaulted Ferrari without warning, punching him in the face and head five or six times, and inflicting fractures of the nose, cheekbone, and the orbit of the left eye. ***Id.*** at 50-52. Ferrari testified that during the course of the attack he was dazed and taken off guard and, consequently, offered no resistance. ***Id.*** Following Ferrari's rendition of the attack on direct examination, Cappella's counsel continued to question him concerning any subsequent contact he had with Collins. In response, Ferrari attempted to describe threats that Collins made against him while in court on trial for the previous attack. The court instructed that Ferrari could attest only to what he had observed and would not be permitted to repeat Collins' words. When Ferrari attempted to characterize the situation further, stating "he threatened me as he walked[,]" the prosecutor objected to the testimony as hearsay and the court sustained the objection. ***Id.*** at 53.

We find no basis for relief on the foregoing claim. Although we are not entirely convinced that Ferrari's perception of a threat can be characterized as hearsay, we discern no abuse of discretion in the trial court's exclusion of the testimony. Indeed, the point that Cappella's counsel wished to make,

i.e., that Mr. Collins was a jealous and violent individual who would not hesitate to inflict harm on a perceived rival, had already been made in the testimony Ferrari offered detailing his relationships with Collins and his former paramour, the circumstances of the assault, and the injuries he sustained. Thus, while arguably relevant, Ferrari's testimony on Collins' threat was substantially cumulative—there appears little need to introduce evidence of threats of harm made by an individual who has already inflicted harm on the person to whom the threats were allegedly made. ***See*** Pa.R.E. 403 ("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."); ***see also Commonwealth v. Flamer***, 53 A.3d, 88 n.6 (Pa. Super. 2012) (quoting ***Commonwealth v. G.D.M., Sr.***, 926 A.2d 984, 989 (Pa. Super. 2007) ("We define cumulative evidence as 'additional evidence of the same character as existing evidence and that supports a fact established by the existing evidence.'")). Thus, we discern neither prejudice nor abuse of discretion in the trial court's exclusion of this evidence and no grounds for relief based on Cappella's first question.[1]

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[1] Cappella also argues that the trial court erred in not allowing the defense to adduce evidence that the police focused their investigation on himself without investigating Collins as a suspect in the victim's death. Nevertheless, Cappella fails to cite any portion of the record documenting an attempt to introduce such evidence, or to develop his claim in any other
(Footnote Continued Next Page)

In support of his second question, Cappella contends that the trial court erred in limiting the testimony of crime scene investigator Cesare Mujica, who offered forensic evidence concerning the blood splatter patterns in the apartment where the attack occurred. Brief for Appellant at 16. Cappella complains specifically that although Mujica expressed opinions on direct examination by the Commonwealth concerning the origin of numerous deposits of blood within the victim's apartment, the trial court precluded his examination on other opinions raised by the defense. Cappella argues specifically that:

> CSI Mujica was not allowed to testify that the stain on the wall (C-8) was not inconsistent with a blood transfer from a right arm (N.T. 8/16/11 168), that, hypothetically, if transferred from a right arm, it could not have been from the decedent's right arm (N.T. 8/16/11 170), and that the red stains on the radiator (C-31) were not inconsistent with the decedent's having bumped into it, transferring blood, knocking it over and then dripping blood on it (N.T., 8/16/11 173).

Id. at 17-18. Cappella premises his challenge on the proposition that "a jury looks at prosecution and defense expert testimony differently. That the

(Footnote Continued) ———————————

manner. Accordingly, we are constrained to deem this assertion waived. ***See Commonwealth v. Hakala***, 900 A.2d 404, 407 (Pa. Super. 2006) (citation omitted) ("As we have admonished in prior decisions, '[i]t is not this Court's function or duty to become an advocate for the appellants.' Because [Appellant] fails to offer either analysis or case citation in support of the relief he seeks, we deem all of his questions waived.").

testimony supporting the defense theory came from a prosecution witness rather than a defense [witness] tends to give it more weight."[2] ***Id.*** at 18.

Although Cappella presents his claim as a challenge to the trial court's admission of expert testimony, we note that CSI Mujica was not a defense witness and the defense did not attempt to present his testimony in its case-in-chief. Consequently, we find Cappella's claim more accurately described as a challenge to the scope of cross-examination. "The scope of cross-examination is within the trial court's discretion, and this Court cannot disturb the trial court's determinations absent a clear abuse of discretion or an error of law." ***Commonwealth v. Ramtahal***, 33 A.3d 602, 609-610 (Pa. 2011) (citation omitted). "In determining the scope of cross-examination the trial court may consider 'whether the matter is collateral, whether the cross-examination would be likely to confuse or mislead the jury, and whether it would waste time.'" ***Commonwealth v. Brinton***, 418 A.2d 734, 736 (Pa. Super. 1980) (citation omitted). "Cross-examination in criminal cases may extend beyond the subjects of direct testimony and 'includes the right to examine a witness on any facts tending to refute inferences or deductions arising from matters testified to on direct examination.'" ***Commonwealth v. Pagan***, 950 A.2d 270, 285 (Pa. 2008) (citation omitted). Nevertheless, "[w]hen the obvious purpose of cross-

[2] In point of fact, these sentences comprise the only argument Cappella presents in support of this assertion of error.

examination is to develop defendant's own case, a ruling by the trial judge to limit cross-examination is not an abuse of discretion." ***Commonwealth v. Lobel***, 440 A.2d 602, 605 (Pa. Super. 1982).

In view of the discretion granted the trial court to control cross-examination, we discern no grounds for relief on any of the claims Cappella raises. The first of those claims arises from the following exchange:

> Q: Correct me if I'm wrong, but what that looks like to me this is an arm, a bicep, an elbow, and as it goes down, a wrist and – the hand isn't there, but it goes down towards the wrist.
>
> Am I seeing that wrong?
>
> A: I could be.
>
> Q: I could be?
>
> A: But I can't positively tell you that that's an arm.
>
> Q: There's nothing about that transfer stain that's inconsistent with it being a right arm, a bloody right arm, is it?

N.T., Jury Trial, Volume I, 8/16/11, at 168. At this juncture, the prosecutor posed an objection, which the trial court sustained, reasoning that the question sought a conclusion beyond the witness's knowledge. We find the court's conclusion entirely consistent with Mujica's prior response—he had already attested that he could not tell whether the transfer was created by an arm. Thus, contrary to Cappella's implication, the trial court did not limit the scope of his cross-examination as a defendant, but merely declined to allow the use of cross as a vehicle for speculation. ***Cf. Commonwealth v. Tyler***, 587 A.2d 326, 330 (Pa. Super. 1991) (reasoning that the trial court

did not abuse its discretion in disallowing questions that "have their basis in speculation"). Indeed, the witness's response to the previous question demonstrated that he could not answer counsel's follow-up question without guessing. Such a ruling is fully within the purview of the trial court's discretion. ***See Brinton***, 418 A.2d at 736.

The second of Cappella's claims arises from the court's ruling sustaining the prosecutor's objection to the following question by Cappella's counsel: "If that is a stain, a transfer that's caused by a right arm, it's certainly not caused by the right arm of [the victim], is it?" N.T., Jury Trial, Volume I, 8/16/11, at 170. The trial court premised its ruling on the argumentative nature of the question, recognizing that while counsel might encourage the jury to consider the question in his closing, CSI Mujica could not provide the answer. Indeed, the witness had already stated that he could not opine as to whether the stain even reflected an arm. Accordingly, we discern no abuse of discretion in the trial court's ruling.

Finally, Cappella's third challenge to the trial court's ruling on cross-examination arises from Mujica's refusal to adopt counsel's interpretation of a photograph taken at the scene of the murder. The exchange in question transpired as follows:

> Q: Nothing in that photograph that's inconsistent with someone who was bleeding, bumping into that object, causing the transfer stains, knocking it over, and then managing to get to his feet and bleeding on it, is there?

> A: Well, that's an assumption. I don't know what happened there before I got there.
>
> Q. I'm not saying that I know what happened. What I'm asking you is, is there anything inconsistent with that scenario?

Id. at 173. Initially, we find the rank speculation of counsel's question more than self-evident. CSI Mujica had already testified on direct examination that the photo in question showed a "close-up view downward showing a red substance on a portable electric heater marked number one on the living room floor." ***Id.*** at 142. In addition, he agreed with the prosecutor's characterization that "it is almost like the blood is dripping down." ***Id.*** Nothing in that exchange or in any other portion of Mujica's testimony spawns the additional inferences that comprise the bulk of the defendant's questions on cross. Consequently, we find the inquiry far more tendentious than the legitimate scope of cross-examination should allow. Indeed, counsel's language appears calculated to construct a defense from whole cloth, crafting a scenario from layered suppositions that find no support in the evidentiary record. The court's ruling in sustaining the prosecutor's objection was not an abuse of discretion. ***See Pagan***, 950 A.2d at 285; ***Lobel***, 440 A.2d at 605. Accordingly, we find Defendant's second question devoid of merit.

For the foregoing reasons, we shall affirm Cappella's judgment of sentence.

Judgment of sentence **AFFIRMED**.