NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. OTIS SELLERS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3512 EDA 2012

Appeal from the Judgment of Sentence December 15, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009106-2009

BEFORE: PANELLA, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY PANELLA, J. **FILED DECEMBER 13, 2013**

Appellant, Otis Sellers, appeals from the judgment of sentence entered December 15, 2010, by the Honorable Gwendolyn N. Bright, Court of Common Pleas of Philadelphia County. We affirm.

Early in the morning on September 13, 2008, an altercation ensued between two women, Shawn Bright and Linda Holcomb, in Bright's apartment at 3428 North 17th Street in Philadelphia. Although the victim, Todd Wilson, was able to break up the fight, the two women began fighting again on the front porch a short time later. Sellers, his mother and his father were observed watching the fight through the screen door of their apartment in the same building.

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* Former Justice specially assigned to the Superior Court.

After the victim broke up the fight for the second time, Sellers approached the group and began a verbal altercation with the victim. Sellers then grabbed the victim and engaged in a "bear hug tussle," after which the victim fell to the porch in a pool of his own blood. Bright told police that she observed Sellers with a knife as he ran back into his apartment.

Sellers was subsequently arrested and charged with murder and other related charges. On October 8, 2010, a jury convicted Sellers of third degree murder. On December 15, 2010, the trial court sentenced Sellers to eight to twenty years' incarceration. On November 2, 2011, Sellers filed a petition pursuant to the Post Conviction Relief Act,[1] requesting reinstatement of his appellate rights *nunc pro tunc*, which the court granted on December 17, 2012. This timely appeal followed.

On appeal, Sellers raises the following issues for our review:

> I. Is the appellant entitled to an arrest of judgment concerning his conviction for third degree murder since the evidence is insufficient to sustain this conviction as the Commonwealth failed to sustain its burden of proving the appellant's guilt beyond a reasonable doubt?
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> II. Is the appellant entitled to a new trial as a result of the trial court's ruling that allowed the Commonwealth to present hearsay testimony from Commonwealth witness Caroline Yeager under the guise of an excited utterance?
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> III. Is the appellant entitled to a remand for resentencing since the trial court improperly utilized the "deadly weapon

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[1] 42 PA.CONS.STAT.ANN. § 9541, *et seq.*

> used" matrix of the Sentencing Guidelines in sentencing the appellant?

Appellant's Brief at 4.

When determining if evidence is sufficient to sustain a conviction, our standard of review is well-settled:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Kendricks, 30 A.3d 499, 508 (Pa. Super. 2011) (citation omitted).

> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Stokes, 38 A.3d 846, 853 (Pa. Super. 2011) (*quoting* ***Commonwealth v. Mobley***, 14 A.3d 887, 889-890 (Pa. Super. 2011)). "[T]he entire record must be evaluated and all evidence actually received must be considered." ***Stokes***, 38 A.3d at 854.

Third degree murder is defined as all other murders that are not first or second degree murder:

> Third degree murder occurs when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice. Malice is not merely ill-will but, rather, wickedness of disposition, hardness of heart, recklessness of consequences, and a mind regardless of social duty. Malice may be inferred from the use of a deadly weapon on a vital part of the victim's body. Further, malice may be inferred after considering the totality of the circumstances.

Commonwealth v. Garland, 63 A.3d 339, 345 (Pa. Super. 2013) (citation omitted).

Sellers argues that the Commonwealth "failed to present a single eyewitness who could testify that he or she saw the appellant stab the victim." Appellant's Brief at 23. Sellers also argues that the Commonwealth failed to establish that he acted with malice or the intent to cause serious bodily injury. ***Id***. at 27. We disagree.

At trial, the Commonwealth presented eyewitness testimony based on which the jury could infer that sellers stabbed the victim. Shawn Bright testified that she saw Sellers approach the victim and say "it's too early for this shit." N.T., Trial, 10/5/10 at 74. She then observed Sellers and the victim in a "bear hug tussle," after which the victim fell with his eyes "rolling back in his head" in a pool of blood. ***Id***. at 76, 80-81. Melissa Mercantini, a bus driver, testified that she witnessed Sellers and the victim fighting. N.T., Trial, 10/6/10 at 79-80, 85-86. Mercantini further testified she then heard a

woman on the porch yell, "You killed him, you killed him." ***Id***. at 88. Gary Lincoln Collins, M.D., testified that the victim died from a single stab wound to the back that punctured his lung and heart. ***Id***. at 137-141.

The testimony that the victim fell to the floor bleeding after coming in contact solely with Sellers provided sufficient circumstantial evidence from which the jury could establish Sellers inflicted the stab wound responsible for the victim's death. ***See Stokes***, ***supra*** (Commonwealth may sustain its burden of proving every element beyond a reasonable doubt by means of wholly circumstantial evidence). We further find the jury was entitled to infer that Sellers acted with malice when he stabbed the victim in the back and punctured his heart and lung, all vital parts of the body. Accordingly, Sellers's challenge to the sufficiency of the evidence fails.[2]

Sellers next argues that the trial court erred when it admitted as an excited utterance testimony from witness Caroline Yeager that she heard an individual yell, "You killed him. Look at all the blood," following the physical altercation between Sellers and the victim. N.T., Trial, 10/6/10 at 14, 16. Sellers argues that there was no testimony that the speaker witnessed the incident or was under the influence of a startling event at the time that he or she made the statement. Appellant's Brief, at 32.

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[2] Although Sellers suggests that the evidence could support a finding that he acted in mistaken self-defense or in the heat of passion, he does not point to any evidence in the record to support such defenses or otherwise develop these claims in any meaningful way.

It is well settled that "[e]videntiary rulings are committed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion." ***Commonwealth v. Johnson***, 556 Pa. 216, 242, 727 A.2d 1089, 1102 (1999). "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." ***Commonwealth v. Mendez***, 74 A.3d 256, 260 (Pa. Super. 2013) (citation omitted). An appellant cannot prove an abuse of discretion unless he shows how he was prejudiced by the court's decision. ***See Commonwealth v. Ogrod***, 576 Pa. 412, 462, 839 A.2d 294, 324 (2003).

> Pennsylvania Rule of Evidence 803(2) allows for the admission of an excited utterance as an exception to the hearsay rule. Rule 803(2) defines an excited utterance as: "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Pa.R.E. 803(2). Under Rule 803(2), for a statement to be an excited utterance, it must be:
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> > [A] spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.... Thus, it must be shown first, that [the declarant] had witnessed an event sufficiently startling and so close in point of time as to render her reflective thought processes inoperable and, second, that her declarations were a spontaneous reaction to that startling event.

> In determining whether a statement is an excited utterance and, thus, admissible under the excited utterance hearsay exception, there is no bright line rule as to the amount of time which has elapsed between the incident and the witness' statement. Rather the crucial question, regardless of time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance.

Commonwealth v. Manley, 985 A.2d 256, 265 (Pa. Super. 2009) (citations omitted).

Herein, Sellers merely argues that the "circumstances of the unidentified speaker were not known." Appellant's Brief at 32. Clearly, it does not strain credulity to infer that an individual heard screaming, "You killed him. Look at all the blood," immediately following or contemporaneous to a physical altercation resulting in the death of one of the participants, had just witnessed an unexpected and shocking occurrence. Caroline Yeager testified that the speaker's tone was "very dramatic" and "horrifying." N.T., Trial, 10/6/10 at 16. We do not hesitate to affirm the trial court's admittance of the hearsay statement as a classic excited utterance.

Lastly, Sellers argues that he is entitled to a remand for resentencing since the trial court improperly utilized the "deadly weapon used" matrix of the sentencing guidelines. Appellant's Brief at 33.[3] He relies upon the

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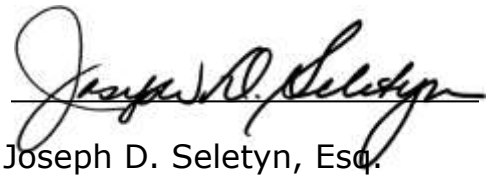
[3] Sellers did not include this issue in his Rule 1925(b) statement. However, this issue implicates the legality of Sellers' sentence, and is thus non-waivable. ***See Commonwealth v. Munday***, --- A.3d ---, 2013 WL 5568915 at *2 (Pa. Super. 2013).

United States Supreme Court's recent decision in ***Alleyne v. United States***, ––– U.S. ––––, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), in which the Court held that any fact that increases the mandatory minimum sentence for a crime "is 'an element' that must be submitted to the jury and found beyond a reasonable doubt." ***Id***., 133 S.Ct. at 2155, 2163. However, Sellers admits that a mandatory minimum was not implicated by the charges in his case. Therefore, we find ***Alleyne*** inapplicable and this issue meritless.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013