

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

KHALIAF D. ALSTON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 385 EDA 2012

Appeal from the Judgment of Sentence of February 1, 2008
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0902311-2006

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY WECHT, J.:

FILED MAY 17, 2013

Khali af Alston ("Appellant") appeals the judgment of sentence entered on February 1, 2008, upon his convictions for one count each of attempted murder, **see** 18 Pa.C.S. §§ 901, 2502; robbery and conspiracy to commit robbery, **see** 18 Pa.C.S. §§ 3701(a)(1)(i), 903; aggravated assault, 18 Pa.C.S. § 2702(a)(2); and possessing instrument of crime, 18 Pa.C.S. § 907(a). We affirm.

The trial court set forth the factual history of this case as follows:

Viewed in the light most favorable to the Commonwealth as the verdict winner, [trial] testimony established the following.

At approximately 1:30 a.m. on February 4, 2005, Antoine Pinkney left the Outer Limits bar at the corner of Somerset Street and 24th Street [in Philadelphia], stopping briefly at a deli

* Retired Senior Judge assigned to the Superior Court.

on Somerset Street. As he walked, Mr. Pinkney was suddenly approached from behind by two men. Mr. Pinkney did not know the men, but had seen them in the Outer Limits bar before he left. One man . . . told Mr. Pinkney not to make any "sudden moves" and began searching [Mr. Pinkney's] pockets, while the other man, [Appellant], pointed a revolver at Mr. Pinkney. The two men took Mr. Pinkney's cell phone and approximately \$800.00 in cash. During this time, [Appellant] was fewer than "three [or] four feet" from Mr. Pinkney.

Thereafter, Mr. Pinkney pleaded for his life, and told his assailants that he was "just trying to make it home to my kids." Nevertheless, [Appellant] then shot Mr. Pinkney in the face. The bullet struck Mr. Pinkney directly in his right eye.

Mr. Pinkney was able to run away from [Appellant] and his co-conspirator despite having lost vision in his right eye. As Mr. Pinkney fled, he heard [Appellant] shoot at him five or six more times. Mr. Pinkney ran into the street and flagged down a car, the occupants of which called the police. He was taken by ambulance to Temple University Hospital, where he remained for three days. Mr. Pinkney lost 90% of the vision in his right eye and has a permanent scar on the right side of his face.

On March 18, 2005, during an unrelated police investigation, Philadelphia Police Detective Ronald Dove executed a search warrant at 2849 North Taney Street, which was [Appellant's] home address. In the course of performing the search of the house, Detective Dove recovered three letters from the living room. One letter read, in part, "I just shot some bull in his eye the other day, but that Bitch nigger ain't died, but I feel sorry for my next victim." Handwriting analysis showed that the letter had been written by [Appellant]. After reading this letter, Detective Dove began looking for unsolved shootings in Philadelphia in which someone had been shot in the eye but survived.

Detective Dove was unsuccessful in matching the description in the letter to a specific shooting until December 2005, when he began working with a newly-formed task force in the Philadelphia Police Department. The task force was focused on investigating cases that involved "crimes of violence," specifically "shootings and murders" that had previously gone unsolved. On December 5, 2005, at a meeting of the task force, Detective Dove told Detective Thomas Gaul about the shooting mentioned

in the letter, and Detective Gaul began researching the incident. Using different search parameters within the police department's computer system, Detective Gaul uncovered the police report for Mr. Pinkney's shooting.

On December 7, 2005, Detectives Dove and Gaul went to Mr. Pinkney's house and interviewed him about the robbery and shooting. As a result of their investigation, they had prepared a photo array that included [Appellant's] photograph along with a second array. The detectives showed Mr. Pinkney the two photo arrays and asked him if he recognized anyone within those arrays. Mr. Pinkney immediately identified [Appellant] as the man who robbed and shot him.

Trial Court Opinion ("T.C.O."), 3/26/2012, at 3-5 (citations to the record omitted).

The case proceeded to a trial by jury. On December 19, 2007, the jury convicted Appellant of attempted murder, robbery and criminal conspiracy to commit same, aggravated assault, and possessing an instrument of crime. On February 1, 2008, the trial court sentenced Appellant to forty to eighty years' imprisonment.

Following his conviction, Appellant did not file post-sentence motions or a direct appeal. Thereafter, Appellant filed a timely *pro se* petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. Counsel was appointed and filed an amended petition alleging trial counsel ineffectiveness for failing to file a direct appeal, as requested by Appellant. The trial court restored Appellant's right to a direct appeal *nunc pro tunc*. However, after filing a timely notice of appeal, counsel failed to file a concise statement of errors complained of on appeal, as ordered by the trial court pursuant to Pa.R.A.P. 1925(b). Counsel also failed to file a docketing

statement in this Court, as required by Pa.R.A.P. 3517. Consequently, we dismissed that appeal. Thereafter, Appellant filed a second *pro se* PCRA petition seeking restoration of his right to file a direct appeal *nunc pro tunc*. New counsel was appointed and filed an amended PCRA petition again alleging ineffectiveness of counsel, this time based upon appellate counsel's failure to file a Rule 1925(b) statement and a Rule 3517 docketing statement. On December 16, 2011, the Commonwealth agreed to the reinstatement of Appellant's right to file a direct appeal. This appeal followed. The trial court directed Appellant to file a Rule 1925(b) statement, and Appellant timely complied. The trial court then filed a Rule 1925(a) opinion. Thus, after numerous mishaps, Appellant's direct appeal finally is ripe for our review. Once again, however, his opportunity to develop any basis for relief is subverted by counsel's failure to advocate effectively on his behalf.

Appellant raises the following issues for our consideration:

1. Whether the trial court erred by failing to grant [Appellant's] motion for a mistrial and [sustain] trial objections concerning the police investigation of homicides because Detective Thomas Gaul made reference to his investigation of homicides with Detective Bell¹ and [Appellant] was not charged [with] or investigated for homicide at the time.

¹ Our review of Detective Gaul's testimony has disclosed no reference to a Detective Bell. Whether or not he made such a reference has no bearing on our disposition of this case.

2. Whether the trial court erred by overruling defense counsel's objections concerning the police investigation of homicides were unrelated to [Appellant] [*sic*].
3. Whether the trial court erred by denying [Appellant's] objection to the introduction of a letter that cannot be associated with an intent to kill on February 4, 2005, because the letter was undated.

Brief for Appellant at 2.

Appellant's three stated issues all concern the admission of evidence, as to which we apply the following standard of review:

Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value. 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 a material fact.

Judicial discretion requires action in conformity with law, upon facts and circumstances judicially before the court, after hearing and due consideration. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused.

Commonwealth v. Levanduski, 907 A.2d 3, 13-14 (Pa. Super. 2006) (citations and internal quotation marks omitted).

Because the issues denominated 1 and 2 concern the same ruling(s), we address them together. Stated briefly, Appellant seeks a mistrial on the basis that the trial court refused to preclude investigating officers from referring to the fact that the initial investigation of Appellant in connection with another crime, which led to the attempted homicide and other charges

at issue here, arose in connection with investigators' work with a "homicide task force." Brief for Appellant at 10-15. Appellant notes that the investigation that brought Appellant to the detectives' attention was not in connection with a homicide, and that the references to the task force and its role in investigating homicides necessarily and prejudicially implicated Appellant in prior homicide investigations. Appellant further argues that the trial court's cautionary instruction, issued shortly after one witness mentioned the task force, not only did not ameliorate the prejudice, but in fact "caused the jurors to pay even more attention" to the problematic testimony. ***Id.*** at 11, 13.

The Commonwealth contends that Appellant has waived this issue due to his failure expressly to seek a mistrial on this basis contemporaneously with the problematic testimony. Brief for Commonwealth at 6-7. The Commonwealth contends that Appellant's trial objection to the first comment about the homicide task force referred only to the witness' "last response," which pertained to the miscoding in the police database of the shooting in the instant case as a robbery. ***Id.*** at 8. The Commonwealth further notes that Appellant raised no objections to Detective Dove's next five references to the task force. Only on the second day of trial, when a third detective referred to the task force, did Appellant properly object. ***Id.*** The Commonwealth also observes that Appellant's argument, which is based upon the proposition that the information in question was more prejudicial than it was probative, was never raised before the trial court. ***Id.*** Finally,

the Commonwealth argues that Appellant's claims, even if preserved, have no merit. *Id.* at 9-11. In particular, the Commonwealth argues that the trial court's cautionary instruction regarding the references to the task force was sufficient to ameliorate any prejudice under governing precedent. *Id.* at 10-11 (citing ***Commonwealth v. Watkins***, 843 A.2d 1203, 1216 (Pa. 2003) ("The jury is assumed to have followed the cautionary instruction given."); ***Commonwealth v. Simpson***, 754 A.2d 1264, 1272 (Pa. 2000) ("[A] mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice."); ***Commonwealth v. Meadows***, 553 A.2d 1006, 1009 (Pa. Super. 1989) ("[W]hen prompt curative or cautionary instructions are given by the court, an abuse of discretion will not readily be found.")). By implication, specifically a citation to this Court's decision in ***Commonwealth v. Page***, 965 A.2d 1212, 1222 (Pa. Super. 2009), the Commonwealth also suggests that Appellant waived his argument regarding the adequacy of the trial court's cautionary instruction because he failed to object contemporaneously to that instruction.

We need not delve deeply into this issue. Indeed, we need not delve deeply into the Commonwealth's bases for arguing that Appellant waived these claims, which is not to say that we reject these bases. Rather, we find that Appellant's argument in connection with his first and second issues as stated simply fails to satisfy the requirements of Pa.R.A.P. 2119(a), which requires citation and development of legal authority pertinent to the issue raised. Although Appellant cites rules and case law establishing general

principles governing the admission of evidence and the related questions of relevance and the need to measure probative value against prejudicial effect, he makes no effort to identify a single authority in which a Pennsylvania appellate court found similar comments sufficient to require a mistrial. Similarly, Appellant's argument regarding the alleged inadequacy or prejudicial effect of the trial court's curative instruction is wholly lacking in legal support.

Given the difficulties facing an appellant seeking to establish an abuse of discretion in the admission of evidence, it is incumbent on the appellant to make a robust legal argument establishing a basis upon which we may conclude that the trial court disregarded or misapplied the law, exercised its judgment in a manifestly unreasonable manner, or ruled on the basis of partiality, prejudice, bias, or ill will. **See Levanduski, supra.** Appellant has marshaled nothing more than boilerplate legal principles and bald rhetoric. We also agree with the Commonwealth that Appellant waived for purposes of appeal his argument regarding the adequacy of the jury instruction by failing to object on the record to that instruction at the time it was given. **See Page, supra;** Pa.R.A.P. 302(a) (directing that issues not raised in the trial cannot be pursued on appeal). For the foregoing reasons, we find that Appellant's first and second issues are waived. **See Commonwealth v. Brougher, 978 A.2d 373, 375-76 (Pa. Super. 2009).**

Appellant's next and last issue concerns the trial court's admission of the letter police obtained from Appellant's home, in which he indicated that

he had shot an unidentified "bull" in the eye. Appellant contends that the letter could not be used to establish Appellant's intent to kill because the letter was undated, and therefore could not be tied to the crime at bar. Brief for Appellant at 15-16. Appellant's argument comprises two paragraphs, which contain even less substantive argument than the arguments presented in support of the prior two issues. This issue, too, is waived for want of argument.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 5/17/2013