J-S75019-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
TOSHAAN OLIVER,	:	
	:	
Appellant	:	No. 413 EDA 2013

Appeal from the Judgment of Sentence Entered January 18, 2013,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0008556-2011.

BEFORE: GANTMAN, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JANUARY 31, 2014**

Appellant, Toshaan Oliver, appeals from the judgment of sentence entered January 18, 2013, in the Court of Common Pleas of Philadelphia County following his convictions for aggravated assault,[1] simple assault,[2] possession of an instrument of crime ("PIC"),[3] and recklessly endangering another person ("REAP").[4] Upon review, we affirm.

The trial court made the following findings of fact:

> On July 10, 2011 at approximately 2:30 a.m., Complainant was in his home on Reger Street when he heard a commotion

[1] 18 Pa.C.S.A. § 2702(a).

[2] 18 Pa.C.S.A. § 2701(a).

[3] 18 Pa.C.S.A. § 907(a).

[4] 18 Pa.C.S.A. § 2705.

> around the corner in the Germantown section of Philadelphia. He approached the scene, described as "chaotic," and found his girlfriend, Theresa Martina, fighting with [Appellant's] girlfriend, Angie, and another girl. There were approximately fifty people observing the altercation. [Appellant] and Ms. Martina's brother, Reggie, were also about to fight at the scene. The father of Reggie and Ms. Martina was attempting to break up the fight while other people in the crowd were trying to hold back [Appellant]. Complainant tried to intervene in the fight involving his girlfriend but was restrained. Complainant was then unrestrained.
>
> [Appellant] briefly left the scene, but returned from the direction of Seymour Street and approached Complainant. Complainant turned around and was standing face-to-face and within one foot of [Appellant]. [Appellant] stabbed Complainant in the face. After Complainant was stabbed, [Appellant] grabbed Angie and fled the scene on foot, in the direction of her house. As they walked away, Angie was talking animatedly to [Appellant].
>
> Police arrived and [Appellant] was arrested on Stenton Avenue, approximately four to five blocks from the crime scene. The weapon used to stab Complainant was never recovered. Complainant was transported to Einstein Hospital, where he was treated for the stab wound, which was approximately five to six inches long, running from his left ear to the corner of his mouth. Complainant received twenty stitches and was hospitalized for two days.

Trial Court Opinion, 8/13/13, at 1-2 (citations and footnotes omitted).

The case proceeded to a bench trial. During trial, Appellant's counsel attempted to elicit from Appellant statements made by Angie to Appellant following the incident. The Commonwealth objected to this line of questioning on the basis that these statements constituted hearsay. Appellant's counsel maintained that such statements were permitted under

the excited utterance exception to the hearsay rule. The trial court sustained the Commonwealth's objections.

Following Appellant's conviction, the court imposed a sentence of eight to sixteen years of incarceration for the charge of aggravated assault, and one to two years of consecutive incarceration for the charge of PIC, followed by four years of reporting probation. No further penalty was imposed for the charges of simple assault and REAP.

On January 23, 2013, Appellant filed a notice of appeal. Appellant timely filed a court-ordered Pa.R.A.P. 1925(b) statement. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

On appeal, Appellant presents the following issue for our review:

> Did the trial court commit an abuse of discretion by sustaining objections to questions posed to Appellant asking him to relate what "Angie," his girlfriend, said to him immediately following the incident because it is clear that the testimony counsel sought to elicit from Appellant fit under the "excited utterance" exception to the hearsay rule?

Appellant's Brief at 2.

Appellant argues that the trial court erred when it sustained the Commonwealth's objection to a question asking Appellant if his girlfriend, Angie, had said anything to him about the incident as they walked home immediately following the incident. Appellant's Brief at 7. Appellant maintains that testimony regarding Angie's statement should have been permitted under the "excited utterance" exception to the hearsay rule. ***Id.***

at 8. Without specifically identifying the substance of the girlfriend's alleged statement, Appellant asserts that "had the court permitted [A]ppellant to answer the questions, it would have been clear that [Angie] had seen who stabbed the victim." ***Id.*** at 14.

Our standard of review as to evidentiary rulings is well settled: "Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's decision absent a clear abuse of discretion." ***Commonwealth v. Bishop***, 936 A.2d 1136, 1143 (Pa. Super. 2007). "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. Keys***, 814 A.2d 1256, 1258 (Pa. Super. 2003) (quoting ***Coker v. S.M. Flickinger Co.***, 625 A.2d 1181, 1185 (Pa. 1993)).

In order to be admissible at trial, evidence must be relevant. Pa.R.E. 401.[5] Generally, "[h]earsay is not admissible except as provided by

[5] We note that during the pendency of this appeal, the Pennsylvania Rules of Evidence have been rescinded and replaced, effective March 18, 2013. However, as set forth in the explanatory comments to the new rules, they now "closely follow the format, language, and style of the amended Federal Rules of Evidence. The goal of the Pennsylvania Supreme Court's rescission and replacement of the Pennsylvania Rules of Evidence was . . . to make its rules more easily understood and to make the format and terminology more

these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802. One such rule is Pa.R.E. 803, which provides in pertinent part as follows:

> **Rule 803. Hearsay exceptions; availability of declarant immaterial**
>
> The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> **(2) Excited utterance.** 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).

For a statement to qualify as an excited utterance, it must be:

> [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 [his] reflective thought processes inoperable and, second, that [his] declarations were a spontaneous reaction to that startling event.

---

consistent, but to leave the substantive content unchanged." ***See*** Explanatory Comments preceding the Pennsylvania Rules of Evidence, at ¶ 2.

> 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). "The jurisprudence of this Commonwealth makes it clear that a statement, which otherwise qualifies as an excited utterance, is not precluded from falling within the excited utterance exception to the hearsay rule when made in response to questioning." ***Commonwealth v. Jones***, 912 A.2d 268, 282-283 (Pa. 2006). Furthermore, "the burden of production is on the proponent of the hearsay statement to convince the [trial] court of its admissibility under one of the exceptions." ***Commonwealth v. Smith***, 681 A.2d 1288, 1290 (Pa. 1996).

In determining whether a statement is an excited utterance, this Court has considered the following:

> 1) whether the declarant, in fact, witnessed the startling event; 2) the time that elapsed between the startling event and the declaration; 3) whether the statement was in narrative form (inadmissible); and, 4) whether the declarant spoke to others before making the statement, or had the opportunity to do so. These considerations provide the guarantees of trustworthiness which permit the admission of a hearsay statement under the excited utterance exception. "It is important to note that none of these factors, except the requirement that the declarant have witnessed the startling event, is in itself dispositive. Rather, the factors are to be considered in all the surrounding circumstances to determine whether a statement is an excited utterance."

Keys, 814 A.2d at 1258 (internal citations omitted).

We first note that we are unable to glean from the record whether Angie's alleged statement to Appellant was relevant to the charges against Appellant in this case. Furthermore, in his brief, the only reference Appellant makes to the content of this alleged statement is his single assertion that "had the court permitted appellant to answer the question, it would have been clear that [Angie] had seen who stabbed the victim." Appellant's Brief at 14. Because Appellant has failed to establish the relevance of this alleged evidence, he is entitled to no relief.

Assuming *arguendo* that the statement was relevant, the testimony would not have been allowed under the excited utterance exception to the hearsay rule. As noted, in determining whether the excited utterance exception applies, we must consider whether the declarant actually observed the startling event that serves as the basis for the excited utterance. ***Keys***, 814 A.2d at 1258.

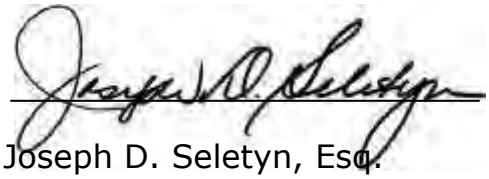
Testimony at trial establishes that Angie was involved in a fight with victim's girlfriend. N.T., 9/28/12, at 17-18, 28, 57-59. The scene was described as chaotic and involving approximately fifty people. ***Id.*** at 14, 30, 54-55. Amidst this pandemonium, other fights were ongoing. ***Id.*** at 24, 57-58. There is no evidence in the record that Angie observed the stabbing of victim. The victim himself testified that the stabbing happened so quickly

that he did not even realize it had happened until blood was running down his face. ***Id.*** at 18, 20, 34.

The requirement that the declarant observe the startling event is dispositive to the excited utterance exception. Testimony established that Angie was "riled up" and excited as she and Appellant walked away from the scene, not as a result of the stabbing, but rather, as a result of the fight in which she was involved. N.T., 9/28/12, at 64. The startling event that provoked Angie's statement was the fight in which she had been engaged, not the stabbing. Thus, Appellant has failed to establish that Angie's alleged statements were excited utterances based on witnessing the stabbing of victim. Accordingly, the trial court did not abuse its discretion in precluding testimony as to these statements at trial.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/31/2014