J-A01001-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
ROBIN BOWENS,	:	
Appellant	:	No. 481 EDA 2010

Appeal from the Judgment of Sentence entered January 15, 2010 in the Court of Common Pleas of Philadelphia County, Criminal Division, at No(s): CP-51-CR-0003224-2008 and MC-51-CR-0051993-2007.

BEFORE: LAZARUS, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: February 11, 2013

Robin Bowens (Appellant) appeals from the judgment of sentence entered January 15, 2010, after a jury found him guilty of simple assault.[1] We affirm.

The trial court summarized the relevant facts as follows:

> Appellant assaulted his girlfriend, complainant April Saunders, on the afternoon of November 7th, 2007 in the city and county of Philadelphia. Philadelphia police officer[] Brian Kulb [(Officer Kulb) testified that he and his partner, William Thrasher (Officer Thrasher)] responded to a 911 call regarding a person with a weapon on the 2300 block of North 26th Street, and upon arrival, they observed Appellant and Saunders involved in a domestic dispute, with Appellant holding a brick in his hand, cocked and ready to throw. As they exited the police cruiser, they observed him hurl the brick at her.
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> As the brick left Appellant's hand, the officer identified themselves and ran towards him. The brick barely missed

[1] 18 Pa.C.S. § 2701(a).

* Retired Senior Judge assigned to the Superior Court.

> Complainant's head and shattered against the wall behind her. Appellant then chased after Complainant, caught her, and beat her with his fists and feet. The officers caught up with, and tried . . . to separate the two, but Appellant resisted and had to be subdued with the help of two additional officers.
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> After a brief struggle, Appellant was arrested for the assault on Saunders and placed into custody.

Trial Court Opinion, 7/19/2011, at 1-2.

After Appellant's arrest but before trial, Officer Thrasher was "disciplined and dismissed from the [police] force" due to racist remarks allegedly made to a student journalist. N.T., 1/14/2012, at 6-7. Reportedly, Officer Thrasher described the African American residents of the area he patrolled as "animals" engaging in "typical shit." ***Id.*** at 7. The Commonwealth presented a motion *in limine* prior to trial to preclude evidence of Officer Thrasher's removal. ***Id.*** at 6. The trial court ruled that Officer Thrasher's alleged statements and the circumstances of his termination were relevant, but that they would be inadmissible as hearsay if Appellant's counsel attempted to bring them out through the testimony of Officer Kulb. ***Id.*** at 8-12.

At trial, Officer Kulb was the only witness presented by the Commonwealth, and Appellant's counsel sought on cross-examination to elicit information regarding the circumstances of Officer Thrasher's termination. ***Id.*** at 77-88. The trial court sustained an objection by the Commonwealth, thereby preventing Appellant's counsel from doing so. ***Id.*** at 78. Appellant's counsel requested a sidebar conference, at which the trial

court reaffirmed its prior decision. ***Id.*** at 78-83. Appellant's counsel again tried to elicit the details of Officer Thrasher's removal from Officer Kulb, and the trial court again sustained the Commonwealth's objection. ***Id.*** at 86. As a result, the jury heard testimony that Officer Thrasher had been disciplined and released from the police force for making certain comments, but were left to speculate as to specifically what those comments were.[2] ***Id.*** at 87. Appellant was convicted of simple assault and sentenced to 12 months' probation. Appellant filed a timely notice of appeal. The trial court did not order Appellant to file a statement pursuant to Pa.R.A.P. 1925, and none was filed. However, the trial court did issue an opinion pursuant to Pa.R.A.P. 1925(a).

Appellant raises the following issue on appeal:

> Did not the lower court err in barring [Appellant] from cross-examining the Commonwealth's only witness, a police officer, about the fact that his partner officer was not testifying because he had been disciplined and fired for making racist remarks to a student journalist about the African American residents of their police district?[3][4]

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[2] Other questions by Appellant's counsel strongly suggested that Officer Thrasher's alleged comments related to race. ***See*** N.T., 1/14/2012, at 86-87.

[3] This issue was not addressed by the trial court in its opinion.

[4] In its brief, the Commonwealth argues that Appellant has waived his claims because he "did not object to the [trial court's] ruling" concerning the admission of Officer Thrasher's statements, "and abided by it." Commonwealth's Brief at 7. However, Appellant's counsel argued in opposition to the Commonwealth's motion *in limine* prior to trial, and requested a sidebar conference at which he asked the trial court to revisit this issue after the Commonwealth's first objection was sustained. N.T.,

Appellant's Brief at 3.

Our standard of review is well-settled:

> The determination of the scope and limits of cross-examination are within the discretion of the trial court, and we cannot reverse those findings absent a clear abuse of discretion or an error of law. [A]n abuse of discretion is not a mere error in judgment, but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law.

Commonwealth v. Davis, 17 A.3d 390, 395 (Pa. Super. 2011).

Instantly, Appellant claims that the trial court erred by excluding evidence that ex-officer Thrasher was fired for making racist statements as hearsay, because this evidence "was not offered for the truth of the matter asserted, but rather as evidence of bias and motive." Appellant's Brief at 16. We disagree.

"The term 'hearsay' is defined as an out-of-court statement, which is offered in evidence to prove the truth of the matter asserted. . . . An out-of-court statement is not hearsay when it has a purpose other than to convince the fact finder of the truth of the statement." ***Commonwealth v. Busanet***, 54 A.3d 35, 68 (Pa. 2012) (citations omitted). At trial, Officer Kulb testified that he learned about Officer Thrasher's offensive statements by reading a newspaper article, and that Officer Thrasher had never used a racial epithet in his presence. N.T., 1/14/2010, at 86-87. Officer Kulb further testified

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1/14/2012, at 7-12, 78-83. The Commonwealth cites no case supporting the proposition that Appellant's counsel was required to object to, or to flout, the trial court's ruling in order to preserve this issue for appellate review. We see no basis to find waiver.

that, although he had asked Officer Thrasher about the situation, their discussion "didn't go into major details" because he knew Officer Thrasher "would not do that." ***Id.*** at 87-88. Therefore, on cross-examination, Appellant's counsel was attempting to elicit an out-of-court statement (the contents of the newspaper article that Officer Kulb read) for the purpose of proving the truth of what was asserted in that out-of-court statement (that Officer Thrasher made racist remarks). Thus, the statements, as Appellant's counsel sought to introduce them, were hearsay and were properly excluded.[5] ***See Commonwealth v. Saksek***, 522 A.2d 70, 71-72 (Pa. Super. 1987) (stating that the trial court did not err by excluding a newspaper article as hearsay).

Moreover, even if we determined that Officer Thrasher's alleged comments were not hearsay, they would still be inadmissible. "The admissibility of evidence depends on relevance and probative value. Evidence is only considered 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

[5] In contrast, if Officer Thrasher had made the statements in question directly to Officer Kulb, they would then be non-hearsay. In that case, Officer Thrasher's out-of-court statements would not be offered to prove their truth (that is, that the residents of the area Officer Thrasher patrolled were "animals."). Rather, the statements would be offered as evidence of the racial bias or motive of one of the arresting officers. ***See, e.g., Busanet***, 54 A.3d at 68 ("Lane's statement that he was robbed by the victim was not presented to demonstrate that the robbery actually occurred, but rather to demonstrate that Appellant was told that it occurred, and such information served as the motive for the victim's murder.").

fact." ***Commonwealth v. Bryant***, 57 A.3d 191, 195 (Pa. Super. 2012) (quotation marks and citations omitted).

It is true that "[t]he pertinent case law permits a police witness to be cross-examined about misconduct as long as the wrongdoing is in some way related to the defendant's underlying criminal charges and establishes a motive to fabricate." ***Commonwealth v. Bozyk***, 987 A.2d 753, 757 (Pa. Super. 2009). Here, however, the link between Officer Kulb and Officer Thrasher's alleged racist remarks is too tenuous to establish a motive for Officer Kulb to fabricate his testimony. According to Appellant, Officer Thrasher's alleged comments are relevant evidence to show that Officer Kulb is also a racist, that Officer Kulb and Officer Thrasher were driven to arrest Appellant falsely because of his race, and that Officer Kulb was perjuring himself on the witness stand to protect himself and Officer Thrasher from further scrutiny. Appellant's Brief at 13-16. This evidence is highly speculative and, accordingly, has little or no probative value. ***See Commonwealth v. Cook***, 676 A.2d 639, 647 (Pa. 1996). Although the trial judge here found the testimony to be relevant, we may affirm on any basis, ***Commonwealth v. Doty***, 48 A.3d 451, 456 (Pa. Super. 2012), and we hold that the testimony was not relevant.

Appellant also contends that because the trial court "erroneously curtailed the defense's cross-examination" of Officer Kulb, that "[t]his was a violation of [Appellant's] constitutional right to confrontation under the Sixth

Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution." Appellant's Brief at 10. In support of his Confrontation Clause claim, Appellant cites a number of cases emphasizing the importance of cross-examination, particularly as it relates to the bias or motive of a testifying witness. ***See*** Appellant's Brief at 10-11 (citing ***Davis v. Alaska***, 415 U.S. 308 (1974); ***Douglas v. Alabama***, 380 U.S. 415 (1965); ***Commonwealth v. Robinson***, 491 A.2d 107 (Pa. 1985)). However, Appellant makes no argument to the effect that the Confrontation Clause guaranteed him a right to elicit otherwise inadmissible testimony from Officer Kulb. Officer Thrasher was not called to testify against Appellant, and Appellant's only evidence that Officer Kulb had some motive to perjure himself was Officer Kulb's status as the former partner of Officer Thrasher. Hence, we find this claim to be meritless. As this Court has previously explained,

> [t]he Confrontation Clause of the Sixth Amendment confers a constitutional right upon the defendant to conduct cross-examination that reveals any motive that a witness may have to testify falsely; however, **that right is not unlimited**:
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> > The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, means more than being allowed to confront the witness physically. Indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. Of particular relevance here, we have recognized that the exposure of a witness'

> motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. **It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination** based on concerns about, among other things, harassment, and prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . [T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Commonwealth v. Bozyk, 987 A.2d 753, 756 (Pa. Super. 2009) (quoting ***Delaware v. Van Arsdall***, 475 U.S. 673, 678–79 (1986)) (citations and quotation marks omitted) (emphasis added, original emphasis omitted).

Judgment of sentence affirmed.