J-A28032-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
AARON VAUGHN HENDERSON,	:	
Appellant	:	No. 533 WDA 2012

Appeal from the Judgment of Sentence entered on February 29, 2012 in the Court of Common Pleas of Allegheny County, Criminal Division, No. CP-02-CR-0014877-2010

BEFORE: PANELLA, OLSON and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: FILED: December 24, 2013

Aaron Vaughn Henderson ("Henderson") appeals from the judgment of sentence imposed following his convictions of murder of the first degree and recklessly endangering another person ("REAP"). ***See*** 18 Pa.C.S.A. §§ 2502(a), 2705. We affirm.

The trial court set forth the relevant underlying facts:

> [O]n October 4, 2010, [police officers were] dispatched to the intersection of Penn Avenue at Princeton Boulevard in Wilkinsburg, Allegheny County, for a report of shots fired at a Port Authority bus stop. When first-responders arrived at the scene, they discovered the victim, Justin Strothers-Owens ["Owens"], lying on the sidewalk in [] front of the bus stop. He was pronounced dead at the scene, having suffered from numerous gunshot wounds [from an AK-47]. Also located at the scene was Rhonda Johnson ["Johnson"]. [] Johnson was not injured[,] but she was located near the bus stop, where she had been waiting for a bus. She took cover when the shooting occurred. [] Johnson identified [Henderson] as the person who shot the victim[.] [Johnson stated that Henderson] was driving

> a red Chrysler Sebring automobile [and that] he had circled the area of the bus stop a few times.

Trial Court Opinion, 12/19/12, at 2.

Henderson was arrested and charged with numerous crimes. Prior to trial, the Commonwealth filed a Motion *in limine*, seeking to introduce, *inter alia*, statements made by Owens to his mother, Sonya Owens ("Sonya"), regarding a January 2010 fight that he allegedly had with Henderson, during which Owens took a necklace belonging to Henderson. The trial court allowed the introduction of the testimony under the "excited utterance" exception to the rule against hearsay. Following a jury trial, the jury found Henderson guilty of murder of the first degree in Owens's death and REAP as to Johnson. The trial court sentenced Henderson to life in prison on the murder conviction and a consecutive period of one to two years in prison for the REAP conviction.

Henderson filed a timely Notice of appeal. The trial court ordered Henderson to file a Pennsylvania Rule of Appellate Procedure 1925(b) concise statement. Henderson filed a timely Concise Statement and the trial court issued an Opinion.

On appeal, Henderson raises the following questions for our review:

> 1. Whether the trial court erred as a matter of law by admitting [an] alleged statement by the deceased pursuant to the "excited utterance" exception to the rule against hearsay when there was no independent evidence of a startling occurrence necessary to trigger the hearsay exception?

2. Whether the trial court erred as a matter of law in allowing the Commonwealth to proceed, over defense objection, with his closing argument, which suggested to the jury that they were free to speculate on the existence and content of such evidence, thereby bolstering the Commonwealth's motive argument, which in turn, bolstered both the issue of the identity of the killer and the grading of the homicide?

3. Whether the trial court erred by denying defense counsel's request for a jury instruction specifically discussing the jury's deliberations with regard to the Commonwealth's chief witness[,] who received approximately $15,000 over a four-month period from the Commonwealth and [the] police to testify[?]

Brief for Appellant at 5.

In his first claim, Henderson contends that the trial court erred in admitting Sonya's testimony, as to statements made by Owens regarding the January 2010 incident, to show animosity between Owens and Henderson. ***Id***. at 11. Henderson argues that the testimony constituted hearsay and was not admissible under the "excited utterance" exception to the hearsay rule. ***Id***. at 11-28. Henderson claims that the Commonwealth failed to demonstrate that Owens's statement to Sonya constituted an unexpected or shocking occurrence or that the statement was spontaneous. ***Id***. at 13-15, 25-28. Henderson further claims that the Commonwealth did not corroborate the contents of the hearsay or demonstrate that Owens was speaking about Henderson when he made the statements. ***Id***. at 12-13, 19-24. Henderson asserts that the error was not harmless because the only evidence against him was Johnson's identification testimony, which was unreliable. ***Id***. at 15, 29-31.

> The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Thus our standard of review is very narrow. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

Commonwealth v. Lopez, 57 A.3d 74, 81 (Pa. Super. 2012) (citation omitted).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Generally, hearsay is not admissible into evidence; however, there is an exception if the statement is an excited utterance. ***See*** Pa.R.E. 802, 803. An excited utterance is "[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). Our Supreme Court has further defined such statement as

> [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 had 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.
>
> There is no clearly defined time limit within which the statement must be made after the startling event; the determination is factually driven, made on a case-by-case basis. The crucial question, regardless of the 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. Wholaver, 989 A.2d 883, 906-07 (Pa. 2010) (citations and quotation marks omitted). "In assessing a statement offered as an excited utterance, the court must consider, among other things, whether the statement was in narrative form, the elapsed time between the startling event and the declaration, whether the declarant had an opportunity to speak with others and whether, in fact, [he] did so." ***Commonwealth v. Bibbs***, 970 A.2d 440, 454 (Pa. Super. 2009).

Here, Sonya testified that on January 8, 2010, nine months before the shooting, Owens had left the house at midnight to go to a local club with some friends. N.T., 11/29/11, at 53-54. Sonya stated the the following occurred:

> [The Commonwealth:] So you said that you went to bed. What is the next thing that you remember happening?
>
> [Sonya:] All I remember is him coming in the house after the club.
>
> [The Commonwealth:] What time would that have been? How long after he left would that have been?
>
> [Sonya:] Around 2:00ish.
>
> [The Commonwealth:] Around two hours?
>
> [Sonya:] Yes.
>
> [The Commonwealth:] What happened, what do you remember?
>
> [Sonya:] I remember him running up the steps, waking me up, coming in my bedroom saying mom, mom, I just got that nigger, I just got that nigger. I said, boy, what are you talking about? He said I just got that nigger. I said what nigger? … He said

that nigger Aaron, I beat him up and took his necklace off of him.

[The Commonwealth:] Where did this conversation take place?

[Sonya:] In my bedroom.

[The Commonwealth:] You said up the stairs?

[Sonya:] Yes.

[The Commonwealth:] Does he have his own key to get in the house?

[Sonya:] Yes.

[The Commonwealth:] Did you hear him open the door?

[Sonya:] I heard him open up the door and running up the steps.

[The Commonwealth:] So you woke up at what point?

[Sonya:] When he came running in the room telling me the incident.

[The Commonwealth:] Now, was he holding anything when he told you this?

[Sonya:] A gold chain.

***

[The Commonwealth:] Can you also describe in words your son's demeanor, how he was acting when he came home and how he said what he said to you?

[Sonya:] He was so excited ….

[The Commonwealth:] What made you think he was excited?

[Sonya:] Because he said, mom, I just got that nigger. I just got that nigger.

[The Commonwealth:] So it was the way he was speaking?

[Sonya:] The way he was speaking.

Id. at 55-57. Sonya testified she did not know "Aaron." ***Id***. at 63. The trial court permitted the Commonwealth to introduce this testimony under the "excited utterance" exception of the hearsay rule because the fight caused Owens to be excited for such a period that he woke up Sonya to inform her of the fight. ***Id***. at 189-90; ***see also*** Trial Court Opinion, 12/19/12, at 6.

Here, there is no evidence to suggest that the "Aaron" cited in the statement was Henderson or that a fight between Owens and Henderson actually occurred. ***See Commonwealth v. Keys***, 814 A.2d 1256, 1259 (Pa. Super. 2003) (stating that "[w]here there is no independent evidence that a startling event has occurred, an alleged excited utterance cannot be admitted as an exception to the hearsay rule.") (citation omitted); ***Commonwealth v. Barnes***, 456 A.2d 1037, 1040 (Pa. Super. 1983) (noting that where the excited utterance itself is being used to prove that an exciting event occurred, and there was no independent evidence demonstrating the startling event, the alleged excited utterance cannot be admitted as evidence). Further, even if a fight occurred, there is no indication where the fight occurred, when the fight occurred in relation to Owens's statements to Sonya, or whether Owens talked to other people prior to making the statements to Sonya. Moreover, Owens's statements were in narrative form, as he informed Sonya about what had allegedly

transpired. Finally, the fact that Owens was excited when making the statements does not demonstrate that the statements were excited utterances. ***See Keys***, 814 A.2d at 1259 (stating that observation of a person's agitated state does not establish a startling event had occurred). Based upon the foregoing, we conclude that Owens's statements to Sonya do not fall under the excited utterance exception to the hearsay rule. ***See id***. (concluding that the statement of the victim was not an excited utterance where thirty minutes elapsed between the end of the startling event and the statement, the statement was elicited eight to ten blocks away from the scene of the startling event, and the utterance was a narrative of overnight events).

Nothwithstanding, we conclude that the error of admitting this evidence was harmless.

> It is well established that an error is harmless only if we are convinced beyond a reasonable doubt that there is no reasonable possibility that the error could have contributed to the verdict. The Commonwealth bears the burden of establishing the harmlessness of the error. This burden is satisfied when the Commonwealth is able to show that: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Green, 76 A.3d 575, 582 (Pa. Super. 2013) (citation and brackets omitted).

Initially, "[t]here are three elements of first-degree murder: (1) a human being was unlawfully killed; (2) the defendant was responsible for the killing; and (3) the defendant acted with malice and a specific intent to kill." ***Commonwealth v. Jordan***, 65 A.3d 318, 323 (Pa. 2013). Further, "[s]pecific intent may be established through circumstantial evidence, such as the use of a deadly weapon on a vital part of the victim's body." ***Commonwealth v. Ramtahal***, 33 A.3d 602, 607 (Pa. 2011)

Here, Owens was shot numerous times and died as a result of wounds to the trunk of his body. N.T., 11/30/11, at 356-64. Moreover, the jury credited Johnson's repeated identifications of Henderson as the shooter. ***See*** N.T., 12/1/11, at 404-08, 410, 414-21, 427-28 (wherein Johnson observed and identified Henderson multiple times while Henderson was circling in a red car near the bus stop); 421-26 (wherein Johnson stated that Henderson stopped his vehicle in front of the bus stop and fired his gun multiple times); 432-33 (wherein Johnson stated that she was confident in her identification of Henderson as the shooter); 434-36, 439-41 (wherein Johnson identified Henderson in a photo array a week after the shooting); ***see also*** Trial Court Opinion, 12/19/12, at 6 n.1. Given these facts, there was clearly both sufficient and compelling evidence that Henderson committed murder of the first degree in killing Owens. There is no reason to believe that the hearsay statements, erroneously admitted to demonstrate animosity between Henderson and Owens, significantly affected the verdict.

Thus, we conclude that the trial court's error in admitting the hearsay statements was harmless. ***See Green***, 76 A.3d at 582-83 (concluding that while the trial court erred in admitting hearsay statements, the error was harmless, as the prejudice caused was *de minimis* because a credible eyewitness identified the killer and malice was demonstrated due to the use of a deadly weapon on a vital part of the victim's body).

In his second claim, Henderson contends the prosecutor committed prosecutorial misconduct during his closing argument by inviting the jurors to speculate about Henderson's motives for killing Owens. Brief for Appellant at 32, 34. Henderson argues that the prosecutor implied that there was more evidence on the motive issue than what was presented at trial. ***Id***. at 34-39. Henderson further argues that the prosecutor's misstatements to the jury that it could infer motive based upon a mere connection between Henderson and Owens constituted misconduct. ***Id***. at 39-42. Henderson asserts that the prosecutor's conduct deprived him of a fair trial and that a new trial is required. ***Id***. at 34, 45.[1]

Here, the trial court addressed Henderson's claims and determined that they are without merit. ***See*** Trial Court Opinion, 12/19/12, at 10-12.

[1] We note that Henderson also asserts that the prosecutor improperly excited the jury's emotions and aroused hostility toward Henderson by making various statements, including that Henderson was "circling like a shark." Brief for Appellant at 43; ***see also*** N.T., 12/2/11, at 796. However, Henderson did not raise this specific claim in his Rule 1925(b) Concise Statement; thus, the claim is waived. ***See*** Pa.R.A.P. 1925(b)(4)(vii); ***Commonwealth v. Bradley***, 69 A.3d 253, 256 (Pa. Super. 2013).

We adopt the sound reasoning of the trial court for the purpose of this appeal. ***See id***.

In his third claim, Henderson contends that the trial court erred in denying his request for an instruction regarding Johnson's bias based upon her receipt of payments from the Commonwealth. Brief for Appellant at 46. Henderson maintains that his requested instruction was supported by evidence in the record. ***Id***. at 47-53. Henderson argues that the evidence demanded more than a bias instruction due to the facts of this case. ***Id***. at 53. Henderson asserts that by failing to provide an instruction, which would have included monetary gain as a motive for Johnson to testify against him, the trial court failed to adequately instruct the jury. ***Id***. at 53-54. Henderson therefore claims that he is entitled to a new trial. ***Id***. at 54.

Initially, we note that the trial court, in its Opinion, found Henderson's claim waived due to a failure to provide a specific objection to the denial of the proposed points of charge. ***See*** Trial Court Opinion, 12/19/12, at 8, 9-10; ***see also Commonwealth v. Pressley***, 887 A.2d 220, 225 (Pa. 2005) (stating that "the mere submission and subsequent denial of proposed points for charge that are inconsistent with or omitted from the instructions actually given will not suffice to preserve an issue, absent a specific objection or exception to the charge or the trial court's ruling respecting the points."). However, following the instructions, the trial court specifically stated the following:

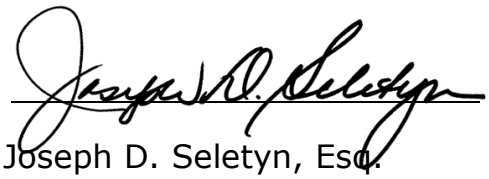
> I want the record to indicate that we had a charging conference and the objections of [defense counsel] and requests of [defense counsel] that were not used in jury selection are preserved. He did not come up after I gave the charge but that was because we had a charging conference and the [trial c]ourt made the rulings and recorded the objections and requests being preserved for the record.

N.T., 12/2/11, at 845. Based upon the trial court's own statements, we conclude that Henderson properly preserved his claims regarding the trial court's denial of his proposed instruction.

Here, the trial court set forth the relevant facts and instruction presented to the jury and determined that Henderson's claims are without merit. ***See*** Trial Court Opinion, 12/19/12, at 6-8, 8-9, 10.[2] We adopt the sound reasoning of the trial court for the purpose of this appeal. ***See id***.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013

[2] As noted above, contrary to the trial court's finding, ***see*** Trial Court Opinion, 12/19/12, at 8, 9-10, we conclude that Henderson did not waive this claim for failing to object.