

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
ERIC D. RUTLEDGE,	:	No. 776 WDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, April 10, 2012,
in the Court of Common Pleas of Butler County
Criminal Division at No. CP-10-CR-0002393-2010

BEFORE: FORD ELLIOTT, P.J.E., OTT AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED DECEMBER 18, 2013**

Following a three-day jury trial, Eric D. Rutledge was convicted of third degree murder in relation to the shooting death of his long-time friend Courtney Daily (“the victim”). Herein, he appeals from the judgment of sentence entered on April 10, 2012, in the Court of Common Pleas of Butler County. We affirm.

On the night of November 16, 2010, appellant and the victim had been drinking alcohol and were playing a video game called “Call of Duty” in a bedroom in appellant’s home. Appellant, who was 18 at the time of the incident, had recently moved to Pittsburgh with his mother, and the victim had come to visit him. The victim and appellant had been close friends since the third grade. (Notes of testimony, 2/14/12 at 62-65.)

At some point, they stopped playing the video game and retrieved a shotgun. (*Id.* at 78.) The two began to play with the gun, pointing the barrel back and forth at each other to see if they would get a “butterfly feeling,” or adrenaline rush. (*Id.* at 81.) To increase the rush, appellant placed a shell in the chamber of the shotgun. (*Id.*) Appellant testified that they stopped their shotgun game and ordered food to be delivered. After placing the order, appellant picked up the shotgun again and, forgetting there was a shell in the chamber, pointed the gun in the victim’s direction and pulled the trigger. (*Id.* at 83, 88.) A buck shell was expelled from the weapon and struck the victim in the upper right shoulder and chest area. Appellant testified that he told the victim he was going to call 9-1-1 and she needed to tell the authorities that she shot herself because he was on probation. (*Id.*) Appellant testified that he knew she was hit but did not know how bad. (*Id.* at 84.) Appellant testified that he was seated in the middle of the bed and she was seated on the bottom of the bed; he stated he did not have the gun against the victim’s arm. (*Id.* at 89, 108-109.)

Appellant testified that he was in a panic and walked down the hallway and inadvertently called his mother. He hung up on her and then called her back. (*Id.* at 84-85.) His mother instructed that he contact 9-1-1. When appellant contacted 9-1-1, he repeatedly stated that he had done nothing

wrong, and that the victim shot herself. (***Id.*** at 85.) Appellant then saw the victim and realized that things were “getting worse and worse.” (***Id.***)

Appellant was subsequently transported to the Cranberry Township Police Department where he met with a detective. During the drive, he texted his mother and at one point asked her to tell the police that the gun belonged to her. (***Id.*** at 90-91.) Initially, appellant expressed anxiety or an unwillingness to speak with the officers. (***Id.*** at 36.) He was advised that he was not under arrest, and appellant communicated that he understood. Appellant told the officers that he “didn’t do anything wrong.” (***Id.*** at 41.) Appellant told the officers that he had retrieved his mother’s shotgun from the closet when he heard a noise downstairs and stated that he was frightened. (***Id.*** at 42.) He returned to the room where he loaded a single round but he made it clear to the officers that he never cycled the slide that would have caused the round to move into the chamber of the shotgun. (***Id.*** at 43.) Then he and the victim began discussing what it would be like to get shot. Appellant proceeded to demonstrate for the officers how the victim pointed the gun at herself and fired the weapon. (***Id.*** at 40-41, 43-45.)

It was not until the police asked whether appellant would submit to a gun powder residue test of his hands that he admitted to pointing the

J. A20009/13

shotgun at the victim and discharging the round.¹ (*Id.* at 46-47.) Appellant was advised of his *Miranda*² rights and provided a statement. (*Id.* at 49.) His statement was videotaped and provided to the jury to see and hear. (*Id.* at 50.)

Police Officer William Ahlgren testified that he responded to a dispatch report indicating that a female had a self-inflicted gunshot wound. (Notes of testimony, 2/13/12 at 56-57.) Upon arrival, Officer Ahlgren observed the victim lying on the floor, she was bent backwards, and her left leg was bent underneath her. Her right leg was out to the side bent backwards, and her arms were out to her sides. (*Id.* at 60.) Although the victim was making some moaning sounds, she was unresponsive and exhibiting low vital signs. (*Id.*) Officer Ahlgren observed some towels on her right arm between her armpit area, and he recalled that EMS instructed the 9-1-1 caller to provide wound care. (*Id.*) The officer pulled the towel away and observed heavy trauma to the victim's upper right shoulder. (*Id.* at 61.) The officer also observed the shotgun lying on the bed. The corner of the bed was soaked with blood, and there was biological material and blood spattered about the room. (*Id.* at 63.) Officer Ahlgren then requested a camera and took several photographs documenting the scene and the victim's injuries while

¹ Appellant was on probation and possessed the weapon in violation of the terms thereof. He testified at trial that he initially lied to the police because he was worried about the probation violation.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

emergency medical technicians attended to the victim. (***Id.*** at 65.) The victim was life-flighted to Presbyterian University Hospital where life-saving measures were attempted.

The forensic pathologist, Dr. Todd Luckasevic, testified that the shotgun wound had a muzzle imprint abrasion, which indicated that the “muzzle of the shotgun was in tight contact with the skin.” (***Id.*** at 94.) Dr. Luckasevic also observed soot within the wound track and searing of the muscles and skin. The pathologist explained that the fatal shotgun blast entered the right posterior arm, damaging subcutaneous tissue, fracturing the right upper arm bone, and exited the right armpit. (***Id.***) The bucket shot re-entered the body at the right lateral upper chest, fracturing numerous right ribs, entering the lower lobe of the right lung and the right hemi-diaphragm and the liver. (***Id.*** at 95.) Dr. Luckasevic opined that size and shape of the entry wound also indicated that the shotgun muzzle was at contact range with the victim’s body. (***Id.*** at 120.) He also testified that the shotgun wound was located in a vital part of the human body. (***Id.*** at 103.)

Appellant was charged with criminal homicide. Several pre-trial motions were filed by both the Commonwealth and the defense. In relation to the issue presented at trial, the trial court permitted the Commonwealth to introduce 12 photographs of the crime scene and autopsy, finding the evidentiary value outweighed the likelihood that the photographs would inflame the jury. (Docket #40.) A jury trial was held and appellant was

convicted of third degree murder; he was subsequently sentenced to a term of incarceration of 20 to 40 years. A timely appeal was filed on May 8, 2012. (Docket #85.) Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

Herein, appellant presents the following issues for our review:

1. Did the trial court abuse its discretion in permitting the Commonwealth to admit into evidence several, [sic] graphic photos of the homicide victim . . . as well as several photos of the blood-stained location of the homicide, when neither the cause of the victim's death nor the location of her death were in dispute, and given that the Commonwealth was permitted to also admit several photos from [the victim's] autopsy (which were cropped to avoid inflaming the passions of the jury) to establish the cause of death and support the Commonwealth's narrative?
2. Did the trial court abuse its discretion when it utilized jury instructions that attempted, but failed, to accurately distinguish between third degree murder and involuntary manslaughter and to define the term "malice," considering that the jury subsequently indicated its confusion by requesting supplemental instructions, which the trial court did not provide?
3. Do those errors constitute prejudicial error, requiring a new trial be ordered in this case?

Appellant's brief at 2.³

We first consider whether the trial court erred in permitting the Commonwealth to introduce certain color photographs depicting the deceased victim, her fatal injuries, and the bloody crime scene. Appellant argues that these photographs were inflammatory and without evidentiary value sufficient to outweigh their prejudicial effect.

It has been a steadfast principle of our jurisprudence that pictures of the victim are not *per se* inadmissible. **See Commonwealth v. King**, 554 Pa. 331, ___, 721 A.2d 763, 773 (1998), **cert. denied**, 528 U.S. 1119 (2000). In relation to admissibility of these photographs, we have promulgated the following test:

[A] court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors. If an inflammatory photograph is merely cumulative of other evidence, it will not be deemed admissible.

The admissibility of photos of the corpse in a homicide case is a matter within the discretion of the trial court, and only an abuse of discretion will constitute reversible error. As we also explained in [**Commonwealth v.] Rush**[, 538 Pa. 104, 111, 646 A.2d 557, 560 (1994)]:

³ An additional issue contained in his Rule 1925(b) statement has not been presented by appellant to our court in his brief; hence, we deem it to have been abandoned.

A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further, the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Commonwealth v. Robinson, 581 Pa. 154, 224, 864 A.2d 460, 501-502 (2004), ***cert. denied***, 546 U.S. 983 (2005). To be deemed inflammatory, the photograph "must be of such a gruesome nature or be cast in such an unfair light that it would tend to cloud an objective assessment of the guilt or innocence of the defendant." ***Commonwealth v. Dotter***, 589 A.2d 726, 729 (Pa.Super. 1991) (citation and quotation omitted).

Presently, appellant contends the trial court erred in allowing four color photographs which depict bloody images of the victim and her wounds. Exhibit 1 is a photograph of the victim's bloody right shoulder, depicting two wounds taken at a close angle framed by a portion of her hair. (Notes of testimony, 2/13/12 at 68.) Exhibit 2 is a similar photograph of the victim's right shoulder wounds taken a little further back. It also depicts bruising

and the area of the right side of her body where she was lying. This photograph also depicts the towel that was used to wrap around her wound prior to the officer's arrival. (*Id.* at 68-69.) Exhibit 3 is a photograph depicting the end of the bed near where the victim was lying and includes a significant amount of blood on the lower right corner of the bed. (*Id.* at 69-70.) Exhibit 4, which was noted as a particularly graphic photograph for the jury, depicts the victim in the position she was found by Officer Ahlgren at the scene of the shooting, contorted on the floor of the bedroom. (*Id.* at 70-71.) Appellant argues that the introduction of these photographs was merely cumulative of the testimony of the forensic pathologist and his use of autopsy photographs and that the prejudicial effect of these pictures outweighed their probative value.

Following careful review, we cannot conclude that the trial court abused its discretion in determining that their evidentiary value outweighed any possible prejudicial effect. Appellant repeatedly reiterates in his brief that it is undisputed that he shot the victim in his bedroom and that the victim died from the gunshot wound; thus, he asserts there was no need to present the photographs. Appellant refers us to two cases which are examples of situations where the photographs were deemed to be inflammatory and without essential evidentiary value, ***Commonwealth v. Woods***, 454 Pa. 250, 311 A.2d 582 (1973), and ***Commonwealth v. Dankel***, 450 Pa. 437, 301 A.2d 365 (1973). In ***Dankel***, our supreme court

reviewed a challenge to the admission of six photographs of a victim killed during the commission of a burglary. Two of the photographs depicted the victim bound and gagged on his bed in the room where the police discovered the body. The remaining four photographs were taken in the bedroom and the morgue and depicted burns on the victim's face from the ammonia-soaked rag used to gag him. The court held that the commission of the burglary was undisputed; the only dispute was whether Dankel aided in the perpetration of the burglary. The photographs had no essential evidentiary value in resolving this issue. *Id.* at 441, 301 A.2d at 367-368.

Likewise, in *Woods, supra*, our supreme court awarded a new trial to a defendant when four photographs of the nude, extensively burned body of his wife had been admitted into evidence at his trial for her murder. The trial judge had admitted the photographs despite his determination that they were "somewhat gruesome" in nature. *Id.* at 252, 311 A.2d at 583. On appeal, our supreme court found that the photos had no essential evidentiary value. The police officers who took the photos had testified and described the scene of the crime. *Id.* Importantly, the photos were not needed to identify the victim, nor were they used to show the cause of the decedent's death. Because the Commonwealth had maintained that the appellant had choked his wife to death before burning her body, a view of the burned corpse added nothing to this determination. *Id.* The court awarded the appellant a new trial, finding that the resulting prejudice to the

defendant outweighed any limited probative value that the photos may have had. ***Id.***

We find these cases distinguishable as there was a valid evidentiary purpose for which the Commonwealth sought to introduce the photographs taken at the crime scene. Herein, the Commonwealth had the burden of demonstrating the specific intent necessary to prove first-degree murder or the malice needed to prove third-degree murder; the challenged photographs were relevant to establishing either of these elements essential to a finding of guilt.⁴ The photographs of the crime scene enhance the jury's awareness of the extent of the victim's injuries and the amount of blood at the scene. The fact that appellant desired to cover up his participation in the crime rather than acquiring the immediate medical attention which relates proving specific intent or malice. The location of the wound and contact of the shotgun became relevant as appellant denied that the gun was in contact with the victim's body. As we have previously stated, "the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs." ***Commonwealth v. Jacobs***, 536 Pa. 402, 407, 639 A.2d 786, 789 (1994). ***See also Commonwealth v. Tharp***, 574 Pa. 202,

⁴ Moreover, a verdict of third degree on facts which could have justified a verdict of first degree murder shows that the passions of the jury were not inflamed.

J. A20009/13

223-224, 830 A.2d 519, 531-532 (2003) (introduction of photographs was proper even though testimonial evidence to demonstrate injuries was available). Thus, these photographs were relevant and probative to the Commonwealth's efforts to establish the degree of homicide.

Appellant is correct in pointing out that the victim's wounds and blood were visible in the pictures; and the forensic pathologist used autopsy photographs, Exhibits 5 through 12, to discuss the fatal injuries. We note, however, that neither this testimony nor the gruesome nature of the pictures is an impediment to the admissibility of photographs of the homicide scene. **See, e.g., Commonwealth v. Marinelli**, 547 Pa. 294, 321, 690 A.2d 203, 217 (1997) (commenting that "[w]hile the presence of blood on the victim depicted in the photographs is unpleasant, it is not in and of itself inflammatory"); **Commonwealth v. Gorby**, 527 Pa. 98, ___, 588 A.2d 902, 908 (1991) (finding no abuse of discretion in allowing photographs, "which depicted a large gaping gash on the victim's neck as well as thirteen other knife wounds located on the victim's hands, arms back and chest"). While the photographs are unquestionably graphic and unpleasant to view, we agree that even if the nature of the photographs is found to be inflammatory, such was outweighed by their probative value.⁵

⁵ In support of his claim, appellant points out the fact that the trial court did not issue a jury instruction upon the Commonwealth's presentation of these four exhibits. Appellant, however, requested no charge along these lines and has therefore waived his right now to challenge this omission. **See** Pa.R.A.P. 302.

It is next averred the trial court erred in its supplemental instructions to the jury. Appellant argues that the trial court abused its discretion when failing to define malice in "layman's terms" to the jury.

It has been held that:

[w]here a jury submits on its own motion a question to the court indicating confusion or a request for clarification, the court may properly clarify the jury's doubt or confusion. The feasibility and scope of any supplemental instructions to the jury is a matter within the discretion of the trial court.

Commonwealth v. Kidd, 380 A.2d 416, 419 (Pa.Super. 1977) (citations omitted).

Instantly, during deliberations, the jury sent the court a question regarding a layman's definition of malice. After an on-the-record discussion, the judge sent out a written standardized jury instruction regarding the definition of malice. The court also stated that if there were any additional questions as to malice, the court would consider further instructions. (Notes of testimony, 2/15/12 at 77-78.) The jury, however, did not return with a further question but came back with a verdict of third degree murder. Nevertheless, appellant claims that the supplemental charge did not provide the necessary clarification to distinguish grossly negligent actions and malicious actions. (Appellant's brief at 17.)

We are not persuaded by appellant's argument that the charge, when considered in its entirety, caused any confusion. The supplemental instruction provided in writing to the jury was the standard jury instruction.

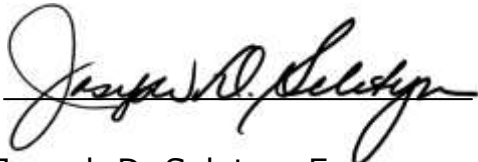
J. A20009/13

There is no indication that the jury remained confused as to the definition of malice as appellant claims. Thus, the trial court accurately and completely conveyed the applicable law to the jury. Accordingly, we find that appellant is entitled to no relief on this claim.

As we have found no merit to appellant's first two claims, we find no need to address his third issue which states that the "aforementioned abuses of discretion constitute prejudicial error, requiring that a new trial be ordered." (Appellant's brief at 18.)

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2013