

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

TYREE GAINES

Appellant

No. 96 WDA 2012

Appeal from the Judgment of Sentence December 15, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0012297-2010

BEFORE: GANTMAN, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, J.:

FILED MAY 22, 2013

Appellant, Tyree Gaines, appeals from the judgment of sentence entered in the Allegheny County Court of Common Pleas, following his jury trial convictions for second degree murder, robbery, burglary, carrying a firearm without a license, recklessly endangering another person ("REAP"), and criminal conspiracy.¹ We affirm.

The trial court provided the relevant facts of this case as follows:

The evidence presented at trial established that Arika Hainesworth and her four (4) year old son, Kyere, lived at 2340 East Hills Drive in the City of Pittsburgh. Ms. Hainesworth's boyfriend, Anthony Lemon, stayed at the house occasionally, but was known to keep drugs and money in the house.

¹ 18 Pa.C.S.A. §§ 2502(b), 3701, 3502, 6106, 2705, and 903, respectively.

*Former Justice specially assigned to the Superior Court.

In the early morning hours of July 11, 2010, [Appellant], along with two other men, co-Defendants Amir Ferguson and Richard Woodward, broke into Hainesworth's residence for the purpose of stealing the drugs and money they knew to be in the house. The three (3) men initially approached the front door and knocked, then left. Hainesworth, who was at home watching movies with her friends and son, looked out of the peep-hole in the door and saw the men wearing black clothing and scarves over their faces. She called another friend, Terry Johnson, who had just left, and asked him to look around the area. Johnson did not see anyone and returned to Hainesworth's residence.

Approximately fifteen minutes later, the three men knocked again. This time Johnson looked out the peep-hole and after seeing the three (3) men, he instructed everyone to go upstairs and hide and to call the police. The group hid in Kyere's room some inside the closet and some behind the bed. Hainesworth was on the phone with 911 when the men broke the front door down and entered the house. The men searched the downstairs level of the home, but were unable to find the drugs and money. [Appellant] and Ferguson went upstairs and broke down the door of the bedroom where everyone was hiding. They demanded that Hainesworth tell them where the drugs and money were, and when she did not, they grabbed Kyere, put the gun to his head and asked him where the items were. Kyere directed him to an air vent, where they found some money. They then let Kyere go, but put the gun to Hainesworth's head and forced her to take them to the drugs. Hainesworth and the men were downstairs, when Woodward, who had been standing by the patio door with an assault rifle, yelled that the police had arrived. The men ran upstairs.

Shots were fired at police from inside the house and the officers returned fire. [Appellant] ran back downstairs where he was able to escape out the front door.

Downstairs, City of Pittsburgh Police Officer Steven Sywyj had entered the house in pursuit of the men. He encountered Hainesworth and told her to get out of the house. As she fled, she was hit with a bullet fired from the

house. Johnson came out of the room in an attempt to find and aid Hainesworth and was shot in the hand. Eventually, [Appellant] and Ferguson were able to escape the police, but were apprehended several days later.

(Trial Court Opinion, entered as filed on July 23, 2012, at 2-3). A jury convicted Appellant of second degree murder, robbery, burglary, carrying a firearm without a license, REAP, and criminal conspiracy on December 15, 2011. That same day, the court sentenced Appellant to life imprisonment without the possibility of parole. Appellant did not file post-sentence motions. On January 13, 2012, Appellant filed a timely notice of appeal. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant complied.

Appellant raises the following issues for our review:

DID THE TRIAL COURT ABUSE ITS DISCRETION BY REFUSING TO PROVIDE NEWLY RETAINED DEFENSE COUNSEL WITH MORE THAN THIRTEEN DAYS TO PREPARE FOR MULTI-DEFENDANT HOMICIDE TRIAL INVOLVING MANY WITNESSES AND EXHIBITS AND VOLUMINOUS DISCOVERY?

DID THE TRIAL COURT ERR BY ADMITTING A SWEATSHIRT FROM AN UNRELATED INVESTIGATION, WHICH DISPLAYED THE IMAGE OF [APPELLANT] POINTING A FIREARM AT THE CAMERA, SINCE THIS IRRELEVANT AND EXTREMELY PREJUDICIAL PHOTOGRAPH ON THE SWEATSHIRT COULD NOT BE AUTHENTICATED?

(Appellant's Brief at 6).

In his first issue, Appellant maintains he was incarcerated, indigent, and unable to obtain the funds necessary to retain private counsel until right

before jury selection began.² Appellant contends this case involves a homicide, shootout with police, three defendants, multiple witnesses and exhibits, and private defense counsel did not have a reasonable opportunity to prepare, investigate, question witnesses, or conduct sufficient research into any defenses. Appellant suggests his newly-retained private counsel “probably” had other matters, clients, and cases which required his attention. Appellant claims the trial court abused its discretion by denying his continuance request for more than thirteen days to prepare for trial, and two weeks was inadequate to prepare a defense. Appellant concludes he is entitled to a new trial. We disagree.

“The grant or denial of a motion for a continuance is within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of discretion.” ***Commonwealth v. Ross***, 57 A.3d 85, 91 (Pa.Super. 2012). Abuse of discretion is “not merely an error of judgment; rather, discretion is abused when 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.” ***Id.*** Further, a mere allegation of insufficient time to prepare does not provide the basis for reversal of the denial of a continuance motion. ***Id.*** Specifically, the defendant must show “in what manner he was unable to

² Appellant concedes he was represented by a public defender at the time but allegedly counsel was unprepared, and Appellant did not trust him.

prepare his defense or how he would have prepared differently had he been given more time. We will not reverse a denial of a motion for continuance in the absence of prejudice.” ***Id.*** (quoting ***Commonwealth v. Brown***, 505 A.2d 295, 298 (Pa.Super. 1986)).

Instantly, with regard to Appellant’s continuance issue, the trial court reasoned as follows:

Between this court’s crowded trial schedule and administrative duties, the busy schedules of three active trial attorneys and speedy trial considerations, finding a mutually available and agreeable trial date was, in itself, a feat of gigantic proportions. At the time of the scheduled trial date, the case had been pending for over one (1) year. The co-Defendants had no reason to waive their speedy trial rights further, nor should they have been asked to. [Appellant] certainly had ample time to retain counsel or, if he did not have the funds, to file a motion seeking appointment of new counsel. He did neither. Instead, on the day jury selection was scheduled to begin, a new attorney advised the court that he *would be* entering his appearance and asking for a continuance the *following* day.

* * *

This case was about *three* defendants, all of whom had Constitutional rights to be protected. Their family members and friends arranged their schedules to be present for the trial. Their attorneys spent additional time finalizing their preparations for this case, when other matters required their attention. The Commonwealth subpoenaed many witnesses who were present for the start of the trial, including police officers, who had either come to court on their regularly-scheduled work shift when they could have been protecting our citizenry, or they were appearing outside their shift, in which case they were being paid additional money from an already-strapped budget. [Newly-retained private counsel] could have avoided all of this disruption by simply filing his request for

continuance on the day he was retained. He chose not to, and so this court's ire was entirely justified.

In the end, this court did give [new counsel] a two (2) week continuance to prepare. [New counsel] appeared to have used the time well, as he seemed to this court to be as well prepared as the other defense counsel. [New counsel's] representation of [Appellant] was perhaps the *most* effective of the three (3) defense counsel, with well-thought out questions and thorough cross-examinations. Ultimately, the guilty verdict was a reflection of the overwhelming evidence against [Appellant] and the other co-defendants, not a result of any failings or lack of preparation on [new counsel's] part. This claim is meritless.

(Trial Court Opinion at 9-10). The record supports the court's analysis. Appellant's new counsel entered his appearance on the day of jury selection, after the case had been pending for one year. The court considered its own schedule, the schedules of all three defense attorneys, the schedules of witnesses in the case, the constitutional rights of all the defendants, and the need to proceed in a speedy manner. Importantly, the court did give Appellant a two-week continuance. Therefore, we see no abuse of discretion in the court's decision to deny Appellant a longer continuance. **See Ross, supra**. Moreover, the record belies Appellant's contention that trial counsel was unprepared. The court noted counsel's preparedness at trial. Thus, Appellant's first issue merits no relief. **See Brown, supra**.

In his second issue, Appellant complains about a sweatshirt, admitted at trial, which depicts Appellant and his co-defendant, Mr. Ferguson, posing with firearms pointed at the camera. Appellant insists the detective who

testified about the sweatshirt did not take the photograph, did not know who took the photograph, or when the photograph had been taken. Appellant contends the detective testified she knew nothing about the photograph, and could only assume Appellant was holding a firearm in the picture. Appellant also maintains the photograph could have been digitally altered to portray Appellant and Mr. Ferguson holding guns. Appellant submits the sweatshirt photograph was irrelevant and established only that Appellant and Mr. Ferguson were together at some point with what appear to be firearms. Appellant concludes the prejudicial impact of this evidence outweighed its probative value and severely prejudiced Appellant such that he is entitled to a new trial. We do not agree.

The admissibility of evidence is a matter within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. ***Commonwealth v. Drumheller***, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003) (quoting ***Commonwealth v. Stallworth***, 566 Pa. 349, 363, 781 A.2d 110, 117 (2001)).

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.

Drumheller, supra at 135, 808 A.2d at 904 (quoting ***Stallworth, supra*** at 363, 781 A.2d at 117-18).

Evidence is relevant if the fact is of consequence to determining the action and has a “tendency to make a given fact more or less probable than it would be without the evidence.” Pa.R.E. 401. Pennsylvania Rule of Evidence 403 limits the admission of relevant evidence as follows:

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Pa.R.E. 403. Additionally:

Because all relevant Commonwealth evidence is meant to prejudice a defendant, however exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case. As this Court has noted, a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events and offenses with which a defendant is charged.

Commonwealth v. Owens, 929 A.2d 1187, 1191 (Pa.Super. 2007), *appeal denied*, 596 Pa. 705, 929 A.2d 1187 (2007). Further, evidence is admissible to rebut or contradict the defendant’s evidence. ***Commonwealth v. Barnett***, 50 A.3d 176, 190 (Pa.Super. 2012), *appeal denied*, ___ Pa. ___, 63 A.3d 772 (2013).

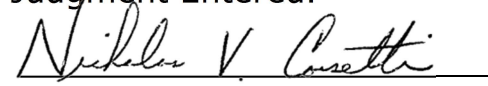
Instantly, at trial Detective Sherwood identified Appellant and Mr. Ferguson as the individuals shown in the sweatshirt photograph and identified the firearms as an assault rifle similar to the one discovered at the scene of the crime and a Glock semi-automatic pistol. Appellant had stated

other people “came and got” him to participate in the crimes, and he purchased the gun used in the robbery a few days prior to July 11, 2010. Appellant’s co-defendant, Mr. Ferguson, had stated he could not recall the names of the other two men involved. The sweatshirt/photograph established a link between Appellant and Mr. Ferguson, it was probative of their identities and the existence of a conspiracy. It also showed a handgun in Appellant’s possession similar to the one used on July 11, 2010. Thus, it was relevant evidence. Pa.R.E. 401. In light of the standard of review and pertinent case law, the probative value of the evidence exceeded the danger of unfair prejudice. Thus, the court properly admitted it at trial. **See** Pa.R.E. 403; ***Drumheller, supra; Owens, supra.*** Further, the court had the discretion to admit the sweatshirt photograph to rebut the statements of Appellant and Mr. Ferguson. ***See Barnett, supra.*** Moreover, the evidence of Appellant’s guilt was so overwhelming, any error associated with the admission of this evidence was harmless. ***See Commonwealth v. Mitchell***, 588 Pa. 19, 56, 902 A.2d 430, 452 (2006) (stating erroneous evidentiary ruling does not require this Court to grant relief where error was harmless). Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

J-S23003-13

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Cussetti", is written over a horizontal line.

Deputy Prothonotary

Date: 5/22/2013