[J-179-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 396 CAP
	:	
Appellee	:	Appeal from Judgment of Sentence entered July 9, 1999 at No. 9807-0114 1/4 & 0807-0114 4/4 in the Court of Common Pleas, Criminal Division of Philadelphia County. (Post-Sentence Motions denied on July 18, 2002.)
v.	:	
MIKAL MOORE,	:	
	:	
Appellant	:	ARGUED: April 11, 2005 RE-SUBMITTED: November 21, 2006
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 28, 2007**

I join the Majority Opinion, with the exception of its discussion of the admissibility of testimony concerning the murder victim's out-of-court statements, detailing prior abuse that he had suffered at appellant's hands. Majority Slip Op. at 10-16. The Majority finds that the trial court erred in admitting the testimony, albeit concluding that the error was harmless. In so holding, the Majority rejects the Commonwealth's reliance upon Commonwealth v. Fletcher, 750 A.2d 261 (Pa. 2000), cert. denied, 531 U.S. 1035, 121 S.Ct. 623 (2000) and the line of cases to which Fletcher belongs, all concerning the "state of mind" exception to the hearsay rule, cases which support the trial judge's ruling. Although the Majority does not say so directly, it effectively overrules this line of decisions and, instead, adopts the Fletcher dissenting opinion as the law of the Commonwealth. The

Majority does not overtly discuss *stare decisis*; instead, the Majority paints Fletcher as an aberrant decision, undercut by decisions rendered before and after it.

As the author of the majority opinion in Fletcher, I most respectfully disagree with the Majority's isolation of that decision. Fletcher was grounded in existing case law and it appears that there was no request forwarded in that case to overrule that law. See Fletcher, 750 A.2d at 276, (citing Commonwealth v. Puksar, 740 A.2d 219, 225 (Pa. 1999), cert. denied, 531 U.S. 829, 121 S.Ct. 79 (2000), Commonwealth v. Chandler, 721 A.2d 1040, 1045 (Pa. 1998), and Commonwealth v. Collins, 703 A.2d 418, 424-25 (Pa. 1997), cert. denied, 525 U.S. 1015, 119 S.Ct. 538 (1998)). Having said this, however, I have no objection to greater refinement and precision in this general area.[1] If it is so intended, I would make it clear that the Court is overruling the Fletcher line of cases to the extent they applied the state of mind exception to the hearsay rule. By the same token, I would emphasize that it is not accurate to say that the trial court "erred" in this matter. It is not error to implement existing case precedent.

One problem involving evidentiary questions in criminal cases is that much of this Court's case precedent arises in capital appeals. In the capital cases, the evidentiary question may be but one in a laundry list of complaints, often fact-specific, often supported by cursory adversarial representations, and the result may be a ruling and precedent that is similarly conclusory. In such cases, the Court frequently lacks the focused argumentation that characterizes the narrow appeals arising on our discretionary docket. See Commonwealth v. Brown, 925 A.2d 147, 160, n.8 (Pa. 2007). The state of mind issue having been specifically joined by the Majority today, some further commentary is warranted.

[1] I also join the Majority's harmless error analysis.

As Mr. Justice Saylor noted in his responsive opinion in Commonwealth v. Stallworth, 781 A.2d 110, 126-130 (Pa. 2001) (Saylor, J., concurring and dissenting) Pennsylvania courts at times have seemed to blur the distinction between Pa.R.E. 803(3), the "state of mind" hearsay **exception** (statements offered for their truth) and **non-hearsay** statements offered to show the declarant's state of mind, which are not offered for the truth of the matter asserted. See generally PACKEL & POULIN, PENNSYLVANIA EVIDENCE, § 803(3)-1(a) (3rd ed. 2007); see also OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE, §§ 801.12, 803.3 (2007-2008 ed.). Non-hearsay state of mind statements are those that "do not directly assert a declarant's state of mind but are circumstantially probative of it, *e.g.*, demonstrating fear, knowledge, or motive." OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE, §§ 801.12[1]. For example, "a child's statement about how his father punishes him is admissible to explain why he feared going home," but that statement cannot be used to prove how punishment is administered. Id. Of course, for such statements to be admissible, the declarant's state of mind must be relevant. See Pa.R.E. 402.

On the other hand, direct statements by the declarant regarding his or her state of mind are hearsay (because they would be admitted for the truth of the matter asserted, *i.e.*, the speaker's state of mind) and only admissible pursuant to a hearsay exception. See PACKEL & POULIN, PENNSYLVANIA EVIDENCE, § 801-4. The hearsay **exception** represented by Rule 803(3) would allow statements of a "declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, or bodily health," to be offered for the truth of the matter asserted. For example, the Commonwealth could offer a victim's hearsay statement such as, "I am going to [the defendant's] home tonight" as evidence under Rule 803(3) to prove that the victim indeed went to the defendant's home that evening. PACKEL & POULIN, PENNSYLVANIA EVIDENCE, § 803(3)-1(a)(2). This type of state of mind evidence is admissible to show that

the declarant subsequently acted in accordance with his stated intent. Id. Again, of course, such statements are subject to the bedrock requirement of relevance.

The tendency to blur the two separate state of mind theories of admissibility no doubt arises from the thin line separating statements that are probative, but not directly assertive of a declarant's state of mind (non-hearsay) and those that are direct expressions of the declarant's present state of mind, which would fall within Rule 803(3). While the two theories may overlap, the distinction is important because it determines how, and for what purpose, the evidence may be used at trial.

The Majority broadly states that, "[e]ven those decisions adopting a broader view of the state of mind exception support the proposition that statements offered as evidence of a declarant's state of mind may not be admitted for their truth." Majority Slip Op. at 14. This statement, and the discussion surrounding it, confuses the distinction between non-hearsay and hearsay exception uses of state of mind evidence.

Finally, I write to note the fact that the dead victim's statements are not admissible under Rule 803(3) does not mean that those statements lack relevance, and being relevant, they might be admissible under another theory. If appellant had not succeeded in killing the victim, but only in assaulting him, the victim clearly could have properly testified to everything that was relevant in his prior relationship with appellant, including evidence going to malice, ill will, motive, etc. In my view, the victim's relevant statements concerning his prior victimization at appellant's hands properly could be admitted for the truth of the matter asserted under Pa.R.E. 804(b)(6), the forfeiture by wrongdoing exception to the hearsay rule. See id. ("Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness"). This is another case "involv[ing] the [not uncommon] circumstance of a criminal defendant, on trial for murdering a human being, now complaining about the admission of the now-deceased victim's out-of-court statement

upon hearsay grounds." Commonwealth v. Hutchinson, 811 A.2d 556, 563 (Pa. 2002) (Castille, J., joined by Newman, J., concurring) (collecting cases). Not all criminal homicides involve perfect strangers, and so it is to be expected that, in many instances, there is a history -- often recorded by the victim's statements to others -- between victim and perpetrator which may shed light upon guilt, degree of guilt, intent, motive, or the background of the case.

As I recently noted in Commonwealth v. Mitchell, 902 A.2d 430, 471 (Pa. 2006) (Castille, J., concurring and dissenting, with Eakin, J., joining the relevant point) that when a criminal defendant complains about his inability to "confront" a victim at trial that he made "unavailable" through his own criminal conduct, I would find that the victim's relevant out-of-court statements should be deemed admissible for the truth of the matter asserted under the forfeiture by wrongdoing exception. See also Hutchinson, 811 A.2d at 564-65; Commonwealth v. Laich, 777 A.2d 1057, 1067-69 (Pa. 2001) (Castille, J., concurring). This Court has recognized that, in cases were the exception is implicated, "the rule appears to negate the traditional hearsay challenge to statements having the same character and context as [the victim's]." Commonwealth v. Paddy, 800 A.2d 294, 310 n.10 (Pa. 2002) (referring to murder victim's statement to police that she had witnessed defendant commit a prior murder, which was the argued motive for his killing her). Of course, the defendant can try to explain away the victim's account, and can argue to the jury the fact that he is impaired in his ability to challenge the statements; but I continue to believe that it is absurd to reward an accused for criminal conduct, by letting the accused totally silence his victim a second time at trial.

Here, the Majority has summarized the substantial evidence in the record, independent of any out-of-court statements by the victim, which proved that Donald Burroughs was unavailable at trial only because appellant murdered him. Based upon this independent evidence of appellant's wrongdoing in rendering Burroughs unavailable, I

believe that Rule 804(b)(6) authorizes admission of the relevant statements of the victim to his friends and family concerning his relationship with appellant. As the Majority notes, we can affirm a valid judgment based upon any reason appearing of record, Majority Slip Op. at 16, and so the ruling below can be affirmed on this alternative ground. Moreover, a discussion of alternative grounds for affirmance is particularly appropriate here, since the Court overrules *sub silentio* the authority upon which the trial court relied.

The Majority says that a footnote in the Laich Majority Opinion requires a conclusion that evidence of this sort can be admitted under the Forfeiture by Wrongdoing theory only where there is proof that the reason for the killing was to eliminate the victim as a witness, rather than personal animosity. To the extent the Laich footnote would enact such an absolutist proposition, I think it warrants revisiting. First, Laich failed to appreciate that this Court's Rules of Evidence are largely a codification of case precedent. The Rules are not legislation. The same practical logic and sense of proportion that led to recognition of Forfeiture by Wrongdoing in instances of witness elimination applies anytime a defendant raises a hearsay objection premised upon the unavailability of a witness he unlawfully killed. The Laich view presumes that the law of evidence is immutable. I would decline to treat Laich as a quasi-legislative rule.

Secondly, Laich also failed to recognize the absurdity of making the forfeiture exception depend upon the defendant's supposed intention. Only the defendant knows for certain the reason or reasons why he murdered the victim. He cannot be made to explain why he committed the murder, and even if he could, he would be unreliable. Thanks to the defendant, the victim, of course, is unavailable to shed light on the matter. The distinction identified by Laich is, in my view, artificial and non-responsive to the circumstance presented in these cases. By definition, murdering a person renders him unable to testify against the killer in court. I would not make the standard of admissibility further dependent

upon Laich-like speculation concerning a murderer's motive. I continue to vote to end the absurdity.[2]

For the foregoing reasons, with the exception of the points made above, I join the Majority Opinion.

Mr. Justice Eakin joins this concurring opinion.

[2] I also note that my joinder in footnote 9 of the Majority Opinion is subject to my understanding that in referring to the recommendations of the American Bar Association ("ABA") it goes no further than Commonwealth v. Spencer, 275 A.2d 299 (Pa. 1971), *i.e.*, how the court should respond in the event of a jury deadlock. Trial courts of this Commonwealth, however, are not generally bound by ABA recommendations.