[J-119-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 205 Capital Appeal Docket
v.	:	Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal Division entered on April 8, 1996, at C C Nos. 9500193 and 9500097.
RALPH BOLDEN, Appellant	:	
	:	ARGUED: September 14, 1999

OPINION OF THE COURT

CHIEF JUSTICE FLAHERTY **DECIDED: June 20, 2000**

This is a direct appeal of appellant's 1996 conviction of criminal homicide, robbery, aggravated assault, recklessly endangering another person and theft by unlawful taking or disposition. The jury returned a sentence of death. On April 8, 1996, the court sentenced appellant to death on the homicide conviction, and three consecutive sentences of ten to twenty years for the robbery and aggravated assault convictions.

The facts established at trial are as follows. On June 30, 1994, at about 10:00 a.m., Michael Elder arrived at Valor Hi Adventure Shop, a sporting goods store in Baldwin Borough, where he worked. He saw two cars in the store parking lot, "a primer station

wagon" and a car belonging to John Calabro, Elder's co-worker. As Elder approached the store, he noted that the door was open. When he went inside the store, however, it seemed as if something was wrong. He walked to the back of the store in order to put his lunch in the refrigerator and was confronted by appellant holding a chrome plated autoloading pistol pointed at his face. Within three seconds, appellant shot Elder in the face, knocking him unconscious, but not killing him.

Minutes later, two other customers arrived in the store and discovered not only Elder's body, but the body of John Calabro, who had been shot dead. Elder was conscious but unable to speak. The customers called for help. When police and paramedics arrived, Elder was taken to the hospital and Calabro's dead body was found in a kneeling position behind the counter. Calabro had a single gunshot wound to the forehead with powder burns. The glass case containing guns was smashed. The store owner subsequently determined that several guns were stolen, including a number of handguns, a rifle and a shotgun. The handguns, including a Colt .380 pistol, were stored in the glass case without magazines.

Elder identified appellant at the preliminary hearing and at trial. Both Elder and the store owner identified appellant as a person who had been in the store on several previous occasions.

Reginald Brown, who had grown up with appellant, testified that appellant sold him a number of handguns for $1,500 in the summer of 1994. The serial numbers had been obliterated, but an expert was able to raise most of the obliterated serial numbers from these guns. These numbers were the same as those for the weapons stolen from Valor. Brown indicated that some of the guns he purchased from appellant, particularly the .380

Colt pistols, did not have magazines and appellant told Brown that he would get him magazines.

After the crime, police requested local gun stores to take notice of anyone purchasing magazines for handguns. Harry Moore, a manager of Braverman Arms Company in Wilkinsburg, testified that on July 13, 1994 appellant purchased two magazines for a Colt .380 pistol. Moore recorded appellant's driver's license at the time of the purchase.

An ATF agent testified that the only handguns registered to appellant at this time were two .380 caliber Lorsen pistols and a .40 caliber Niberia. No Colts were registered to appellant.

A firearms expert testified that he performed ballistic tests on bullets removed from Elder and Calabro. He determined with reasonable scientific certainty that they had been fired from the same .380 caliber Lorsen pistol. This pistol was recovered by police after the shooting and Harry Moore, of Braverman Arms, testified that appellant had purchased this gun on June 13, 1994. Brown testified that this Lorsen pistol was similar to one of the guns appellant sold him and which he, Brown, gave to one Chris Williams to clean. Williams, in turn gave the gun to police.

Appellant owned two Lorsen .380 pistols and reported one of them stolen on June 15, 1994.

Thus, appellant purchased the Lorsen pistol used in the crime on June 13, 1994, shot the two victims with this gun on June 30, 1994, and sold the gun to Reginald Brown in the summer of 1994.

Blood stain analysis concluded that blood from the broken counter was consistent with appellant's blood and that Elder and Calabro were eliminated as being the source of this particular stain. Additional analysis of this blood by the manager of the DNA laboratory for the Pennsylvania state police in Greensburg indicated that the blood taken from the broken gun case matched the genetic profile of the blood of appellant.

Appellant did not testify, but presented a diminished capacity defense. Appellant's mother testified that appellant had been hospitalized twice before for mental disease. Dr. Bernstein, a psychiatrist, testified that he examined appellant on three occasions, and that his conclusion was that appellant was schizophrenic and was, for that reason, unable to form the specific intent required for first degree murder. He testified that appellant was unresponsive to powerful anti-psychotic drugs because of the severity of his condition, and that appellant heard voices which drove him to commit the crimes in question.

Over objection, the Commonwealth played a tape of a television interview which appellant conducted after his arrest in which he denied any participation in the crimes at issue.

In every case in which a death penalty has been imposed, this court is required to review the sufficiency of evidence for a conviction of first degree murder. Commonwealth v. Zettlemoyer, 454 A.2d 937, 942 n.3 (Pa. 1982). In considering sufficiency of evidence, this court must determine whether the evidence and all reasonable inferences from the

evidence, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to enable the fact finder to establish all of the elements of the offense beyond a reasonable doubt. Commonwealth v. Hall, 701 A.2d 190, 195 (Pa. 1997). As this court recently stated in Commonwealth v. Koehler, 737 A.2d 225. 233-34 (Pa. 1999):

> To sustain a conviction for first degree murder, the Commonwealth must prove that the defendant acted with a specific intent to kill, that a human being was unlawfully killed, that the accused did the killing, and that the killing was done with deliberation. It is the specific intent to kill which distinguishes murder in the first degree from lesser grades of murder. We have held that the use of a deadly weapon on a vital part of a human body is sufficient to establish the specific intent to kill. Finally, the Commonwealth can prove the specific intent to kill through circumstantial evidence.

(Footnotes and citations omitted.)The presence of appellant's blood at the murder scene, the identification of apellant by Elder, appellant's possession and sale of firearms stolen from Valor Sports, and appellant's shooting of Elder when Elder walked in on the robbery are sufficient to establish that appellant acted with specific intent, premeditation and deliberation in killing Calabro during the course of a robbery.

Appellant's first claim of error is that pre-trial counsel was ineffective in allowing appellant to conduct a television interview prior to the coroner's hearing. At this hearing, appellant denied being involved in the shooting, but at trial, his defense was diminished capacity. Appellant's theory of ineffectiveness is that by allowing appellant to conduct the television interview, which would be available for viewing by the jury and in which appellant

denied any involvement in the crime, pre-trial counsel undermined the diminished capacity defense that would be presented at trial.

As this court recently stated: "A criminal defendant sustains a claim of ineffectiveness of counsel by proving: (1) that the underlying claim is of arguable merit; (2) that counsel's performance had no reasonable basis; and (3) that counsel's ineffectiveness worked to his prejudice." Commonwealth v. Baez, 720 A.2d 711, 733 (Pa. 1998).

At the Capital Unitary Review And Death Penalty Cases Act hearing on April 10, 1997, which occurred a little more than a year after appellant was convicted of first degree murder, aggravated assault, robbery, theft and recklessly endangering another, appellant testified that he fabricated the entire diminished capacity defense.[1] He testified that when the forensic evidence indicated the presence of his blood at the scene of the shooting, he realized he needed a defense other than the denial that he was present:

> Q. Did you not tell Dr. Bernstein [the defense psychiatrist] about pulling the trigger?
>
> A. Not that I recall. I may have. You never can get the facts of your life straight, you know. In that gist, I don't want to say it is going to be hard for me to remember everything I told Dr. Bernstein because that whole thing was fabricated.
>
> Q. The whole thing was fabricated?
>
> A. The thing I told Dr. Bernstein was fabricated.

[1] By order of August 11, 1997 this court permanently suspended the Capital Unitary Review Act. *In Re Suspension of the Capital Unitary Review Act and Related Sections of Act No. 1995-32 (SSI),* No. 224 Criminal Procedural Rules Docket No. 2.

> Q. How about Dr. Levitt when you told him he devil forced you to shoot Mr. Elwood?
>
> A. Once again. . .
>
> Q. It was all fabricated?
>
> A. Yes.

N.T. 58-59 (April 10. 1997).

> Q. At what point, sir, did you decide to fabricate this? Was there any particular point in time that you decided the mental defense would be the best?
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> A. Well, like I said, I didn't want a mental defense, but I had to think of something, and that's what I thought of.
>
> It was right after I had that meeting with [trial counsel]. I started thinking --who is going to believe me. I could go up there and scream my lungs out, but who was going to believe me.
>
> Q. The blood that was left at the scene was yours?
>
> A. The blood that was there, they so-called tested that and found it was mine and other things. I didn't know what to do.

Id. at 60.

Appellant's claim, in essence, is that the lie he told the news media undermined the lies he arranged to be told in court through the manipulated testimony of his expert medical witnesses. Such a claim is unsustainable. When it is certain, as it is here, that appellant's claim boils down to the complaint that counsel was ineffective in his handling of lies, we will not even reach the question of ineffectiveness. Counsel, as a matter of law, cannot be

ineffective in his treatment of lies, for the perversion of truth, of course, has no legitimate or accepted place in litigation. The claim is without arguable merit.

Appellant's second claim of error is that trial counsel was ineffective in not calling one Jewel Thomas, appellant's lady friend, who would have testified, inter alia, that appellant at times exhibited behavior consistent with schizophrenia. In order to prevail on this claim, appellant must not only meet the requirements for ineffectiveness of counsel, set out above, but also he must meet an additional five part test: he must be able to show (1) the witness existed; (2) the witness was available; (3) counsel was informed or should have known of the existence of the witness; (4) the witness was available and prepared to cooperate and would have testified for appellant; and (5) the absence of the testimony prejudiced appellant. Commonwealth v. Crawley, 663 A.2d 676, 679-80 (Pa. 1995).

This claim too fails for a number of reasons. First, it fails because once again appellant complains that his lawyer did not facilitate his lie. As we stated above, a lawyer may not be found to be ineffective because he failed to facilitate a defense based upon lies. But in addition, appellant's trial counsel testified that appellant ordered him not to call this witness during the guilt phase of the trial because he believed that her involvement would jeopardize her job. Trial counsel cannot be ineffective for failing to take a course of action which appellant forbade.

Finally, appellant argues that it was error for the trial court to instruct the jury that it could find as an aggravating circumstance that appellant knowingly created a grave risk of

death to another person in addition to the victim of the murder.[2] 42 Pa.C.S. §9711(d)(7). Citing Commonwealth v. Paolello, 665 A.2d 439 (Pa. 1995), where this court stated that the aggravating circumstance of creating a grave risk to persons other than the murder victim "has been found by this Court in those instances where the other persons are 'in close proximity' to the decedent 'at the time' of the murder, and due to that proximity are in jeopardy of suffering real harm," 665 A.2d at 456, appellant asserts that Elder was not in the zone of danger created by the murder. "At an absolute minimum," appellant asserts, the Commonwealth must have shown that Elder could have been struck with the bullet that killed Calabro.

The evidence established that when Elder arrived at the store, appellant was already inside and that he shot Elder as Elder walked to the rear of the store. Elder did not see his co-worker Calabro as he entered the store, and the Commonwealth presented no evidence that Elder was nearby or within the zone of danger when Calabro was killed. Presumably, Calabro was already dead when Elder entered the store.

On these facts, we are constrained to agree that it was error for the trial court to instruct the jury that it could find (d)(7) (creating a grave risk of death to another person in addition to the victim of the murder) as an aggravating circumstance.

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[2] The jury found that two aggravating circumstances outweighed four mitigating circumstances. The aggravating circumstances found were that "the defendant committed a killing while in the perpetration of a felony "and that "in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense." The mitigating circumstances found were that "the defendant has no prior criminal convictions;" "the defendant served in the armed forces;" "the defendant [did} average in school;" and "unrefuted expert testimony of mental predisposition."

Because the jury found two aggravating circumstances and four mitigating circumstances, but one of the aggravating circumstances was erroneously determined, the penalty of death is vacated and the case is remanded for a new sentencing hearing pursuant to 42 Pa.C.S. §9711(h)(3)(ii).[3]

Mr. Justice Nigro concurs with the majority and files a concurring opinion in which Mr. Justice Cappy joins. Mr. Justice Cappy also joins the majority opinion.

Mr. Justice Castille files a concurring and dissenting opinion.

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[3] 42 Pa.C.S. § 9711(h)(3)(ii) provides:

> (3) The Supreme Court shall affirm the sentence of death unless it determines that:
>
> * * *
>
> (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d).