

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
Appellee	:	PENNSYLVANIA
	:	
v.	:	
	:	No. 0507 EDA 2004
MARK ANTHONY SAY,	:	
Appellant	:	Submitted: Nov. 29, 2004

Appeal from the JUDGMENT OF SENTENCE January 29, 2004,
in the Court of Common Pleas of MONROE County,
CRIMINAL, at No. 63 of 2002.

BEFORE: TODD, OLSZEWSKI, JJ. and McEWEN, P.J.E.

MEMORANDUM:

FILED MARCH 15, 2005

A bullet ended Jamie Walling's life at the ever so early age of twenty-one. Mark Say, her boyfriend at the time, was charged with her murder and, after a jury trial, was convicted of third-degree murder, aggravated assault and tampering with evidence. In this appeal from his judgment of sentence, we affirm.

At 9:17 on the night of October 14, 2000, police received a dispatch that a possible or attempted suicide occurred at appellant's Pocono Mountain home. Eight minutes later, Officer Michael Rice arrived at the home and was greeted by the "calm not over excited" appellant who told the officer that "my girlfriend and I were arguing and she shot herself." N.T. Trial, 10/28/03, at 83. Appellant showed the officer to the bedroom where Jamie Walling "lay[] on the floor between the bed and dresser. Her feet were

toward me; her head was away from me There was blood around her head area . . . [and] the gun lay[] underneath [her] right foot." N.T. Trial, 10/28/03, at 83. The bullet which passed through Jamie's head caused significant damage to her brain, yet it did not immediately kill her and she was flown by helicopter to Saint Luke's Hospital.

At Saint Luke's, Jamie was treated by trauma surgeon Dr. Andrew Hoffman, who was informed that he was dealing with a possible suicide attempt. Dr. Hoffman, however, immediately became suspicious; he did not believe Jamie shot herself. According to the doctor, there was nothing to suggest that this was a close-range injury: the entrance wound had "no obvious star pattern" (which would have been present with a close-range firing); the skin around the entrance wound was not burned from the hot particles and gases that a gun emits; there was no odor of gunpowder on Jamie's hair or clothes; the blood flowing from the entry wound was moving toward the back of Jamie's head; and the location of the entrance wound (above and behind the right ear) was "an unusual place for someone to inflict their own wound." Because of these suspicions, Dr. Hoffman ordered that the hair surrounding the entrance wound be shaved and collected as evidence for the police.

Jamie, however, was fatally injured. The bullet traveled from one side of her head to the other and went through the middle of her brain. She was

pronounced dead on October 15, 2000, the day after she entered the hospital.

Back at appellant's home, appellant himself began to raise the suspicions of the police. First, Sergeant Christopher Wagner noticed that there was no "blow back"¹ on the gun. Further, while appellant strenuously denied ever having washed his hands after Jamie was shot, Sergeant Wagner "noticed in the bathroom that the sink was wet. It appeared that there was diluted blood in the sink. I noted a single drop of what appeared to be blood on the floor in front of the sink. I noted that the bathtub was wet; the faucet was dripping as if it had recently been used." N.T. Trial, 10/28/03, at 122-23. Sergeant Wagner also discovered a "spot of blood in the kitchen [sink]." Later, it was found that all of this blood was Jamie's.

Sergeant Wagner's suspicions were further raised when, and prior to appellant's hands being tested for gunshot residue, the sergeant observed appellant "continually rubbing his hands as if washing them." N.T. Trial, 10/28/03, at 127.

Sergeant Wagner also noticed a spot of blood on appellant's sneakers. Appellant told the Sergeant that the blood happened when:

¹ Sergeant Wagner defined "blow back" as "what can be found sometimes during a close contact shooting where blood and skull fragments, hair fragments, will actually travel back from the trajectory of the round to impact either the weapon itself or whatever is in that area." N.T. Trial, 10/28/03, at 124.

he had requested a pair of sneakers to be retrieved from the bedroom where the victim was found. He requested this of Officer Rice. He and Officer Rice then went into the residence. He then observed on the floor what he believed to be a leech. He then picked up the leech and realized it was a blood clot. He then wiped the blood clot off of his shoes.

N.T. Trial, 10/28/03, at 136.

According to Officer Rice, however, appellant did not enter the residence; rather, Officer Rice retrieved the shoes alone.

Appellant also began to give inconsistent and improbable versions of the events. He first told the police:

he had an employee by the name of Joe Laird at the residence. Joe Laird was doing some painting for him at the house Eventually Joe Laird finished up painting and wanted to go home. Joe Laird then asked Jared if he could take him home, at which point in time Mark related he would give Joe a ride home. He stated this upset Jamie, and she made the statement that you're going to leave me up here.

He indicated that he stated he will be right back and that she does this to him all of the time . . . when she is with her friends.

Joe or Mark stated that he told Joe he would jump in the shower and be right back out. He went into the shower, into the bathroom, took off his shirt at which time Jamie entered the bathroom. She again asked him if he was going to leave her up here. And at this point, she had an annoyed voice.

He determined it as nothing more than an annoyed voice. Joe Laird then knocked on the bathroom door, and Jamie exited. She then immediately went into the bedroom and closed the door. Mark related that within one minute of her closing the door he heard what he thought is a gunshot. He

then asked Joe if that was a gunshot. He then went to the bedroom, opened the door and found Jamie lying there.

He then yelled to Joe, that he told Joe to call 911. I think she shot herself. He then related that Joe called 911.

N.T. Trial, 10/28/03, at 128-29.

The morning after Jamie was shot, however, appellant called Mary Bodosky, a friend of his. As Ms. Bodosky testified, appellant spoke to her with "no emotion. No concern for Jamie in any way" and "rambl[ed] that there could have been two of them. They could have been behind the door and jumped her when she walked into the room." N.T. Trial, 10/31/03, at 43-44.

Appellant related a couple of other versions of the event to Jamie's mother. The day after Jamie died, appellant told Jamie's mother that he and Jamie

had an argument, and then he said that they were watching TV, he, Joe Laird and Jamie. He thought it was a football game, but he was not sure. Jamie then got up, went into the bedroom, slammed the door, and it was Joe Laird who said you better go check. That sounded like a gunshot. Mark's remark was no, it didn't, or I didn't hear it He went to the bedroom and opened the door and found her lying on the floor, and then he said to Joe Laird to call 911. He told me he went over and held onto Jamie. Her arms were moving and her lips and her arms were moving as though she was trying to grab onto his arms and her lips were moving.

N.T. Trial, 10/30/03, at 22.

And, a couple of days after telling Ms. Walling this version of the events, he told Ms. Walling

that he and Joe Laird were in the kitchen having a conversation, Jamie went into the bedroom, slammed the door. The sound, it sounded like she had thrown something at the wall or something, and it was Joe again who said better check that out. It sounded like a gunshot . . . Jamie was laying on the floor. As he was walking over to her, he was looking on the floor because he didn't want to step on any brain matter, and he said he picked up what appeared to look like a piece of liver and it fell apart in his hands. And then he went on about the police questioning him he said of course I washed my [h]ands because he had already known about the blood in the bathroom sink. Of course I washed my hands. He said I had blood on them And then he said he held Jamie until the ambulance came. And told me again that her arms were moving as if to grab onto him. And her lips were moving.

N.T. Trial, 10/30/03, at 26.

While the inconsistencies are obvious, it bears noting that parts of the stories are inherently improbable. As Dr. Hoffman testified, Jamie could not have moved her arms; the bullet destroyed "the part of the brain that is responsible for the control of muscles. The area of speech is also located in the left side of the brain the area that was very badly swollen and damaged by the fragments and the break of the bone on the left side." N.T. Trial, 10/28/03, at 60-61.

The improbabilities were further apparent from other versions he related. In some versions, after he saw Jamie lying and bleeding on the ground, he ran to Jamie and "picked her up and was screaming Jamie, Jamie. And he said Jamie looked at him. He said he held her and he said Jamie picked her arms and put them around his neck and he said she was trying to say something to him but no words were coming out. But as I -

like she was trying to say sorry. I'm sorry." N.T. Trial, 10/31/03, at 77. Yet, appellant had only one drop of Jamie's blood on his jeans. When asked "how could you possibly be holding her with a gunshot wound to the head and not get a drop of blood on you?" appellant responded "I can't explain it, but I don't - I don't know. I didn't have one drop on me anywhere." N.T. Trial, 10/31/03, at 82.

Joe Laird also gave inconsistent versions of the events to the police. At trial, however, he told the jury that after the argument started in the bathroom, he opened the bathroom door only to see appellant's "hands around Jamie's throat." N.T. Trial, 11/4/03, at 8. Laird pulled Jamie away but the argument continued into the bedroom. There, appellant "grabbed the pistol off of the bedroom dresser, and Jamie was behind [Laird]. And [appellant] pointed the gun into the direction of Jamie and stated I'll blow your fucking head off." N.T. Trial, 11/4/03, at 9. Laird pushed appellant away and, since in Laird's opinion things began to settle down, Laird walked into the kitchen, leaving appellant and Jamie in the bedroom. It was at that point that Laird heard a bang and, when appellant came out of the bedroom, appellant told him that "Jamie was in there with a gun." Asked by Laird "that was not the gun I heard in the loft, was it?", appellant gave Laird "a dumbfounded look. And he kind of like he looked like dumbfounded on me like a shrug like dumbfoundedly. He was maybe unsure." N.T. Trial 11/4/03, at 11.

Laird then entered the bedroom and saw Jamie lying on the floor and bleeding. There was, however, no gun at her feet. After Laird called 911, he drove the truck down to the main road in order to show the police and medical personnel the way to the house. Yet, when he came back to the house, appellant "was standing on the porch, and he was dressed differently. And his hair was wet." N.T. Trial, 11/4/03, at 14. Appellant told Laird, "[h]e said, Joe, you know that I was standing right by you the whole time, right? . . . [and] also made the comment that they were never going to believe me." N.T. Trial, 11/4/03, at 15.

The ballistics and gunshot residue analyses also doomed appellant's case. Skip Schwoeble, an expert in gunshot residue, testified that the gunshot residue on Jamie's clothing was too light for her to have pulled the trigger. According to Mr. Schwoeble, such a light load of particles could only be laid if the gun was "outside a foot and a half, maybe further" from Jamie's body when the trigger was pulled. N.T. Trial, 10/29/03, at 82.

Nicholas Mogish, another expert, tested the hair shaved from around the entrance wound. There was only "one spec" of characteristic particle on the hair sample, leading Mr. Mogish to conclude that "the distance of the muzzle of the firearm to the victim's head was not contact or near contact, but was held a distance away." N.T. Trial, 10/30/03, at 121. In this case, the muzzle distance would have had to have been "12 inches or greater"

from Jamie's head to lay such a small load of characteristic particles. N.T. Trial, 10/30/03, at 131.

The defense theorized that Jamie committed an impulse suicide and had held the gun further than 12 inches away from her body when she pulled the trigger. Skip Schwoeble, the Commonwealth's expert, found the defense theory impossible. As he testified: "[i]f this was from a self-inflicted wound and the gun were held in those two positions, there would be very heavy deposits of gunshot residue on the clothing from the muzzle or the end of the barrel to the head, that distance there are virtually thousands of particles that are expelled and would be deposited in a high amount along the clothing of the victim." Yet, on Jamie's right sleeve, there was only "one characteristic particle, 6 particles." N.T. Trial, 11/5/03, at 24.

The jury found appellant guilty of third-degree murder, aggravated assault and tampering with evidence. In this appeal, eight issues of error have been raised. In appellant's own words:

I. [t]he lower court erred and deprived Defendant of a fair trial when it denied Defendant's motion for a mistrial, denied Defendant's motion for a cautionary instruction, and denied Defendant's motion to strike the testimony of government expert witness Mihalakis after said witness testified to and relied on the report of a blood spatter expert where despite a specific discovery request the Defendant was not provided with said expert report and where Defendant petitioned the lower court pretrial to compel the production of said report and the government represented to the lower court that no such report existed.

II. [t]he lower court erred and deprived Defendant of a fair trial when it prohibited any evidence of the alleged victim

having an abortion where Defendant would testify that he heard the alleged victim make a statement regretting said abortion while entering the bedroom moments before hearing a gunshot and where under the circumstances of the instant case said statement was relevant and admissible as evidence of the alleged victim's state of mind.

III. [t]he lower court erred and deprived Defendant of a fair trial when it allowed the assistant district attorneys and all government witnesses to repeatedly and without limitation refer to the alleged victim as "the victim" throughout the entire trial and over a continuing objection.

IV. [t]he evidence was legally insufficient to support the convictions for Third Degree Murder, Aggravated Assault, and Tampering with Evidence beyond a reasonable doubt.

V. [t]he lower court erred and deprived Defendant of a fair trial when it allowed into evidence over objection government exhibit number 67, an F.B.I. gun experiment video, used in the testimony of government expert witness Kapelsohn.

VI. [t]he lower court erred and deprived Defendant of a fair trial when it allowed into evidence over objection government exhibits number 82 and 83, both enlarged photographs used in the testimony of government expert witness Kapelsohn.

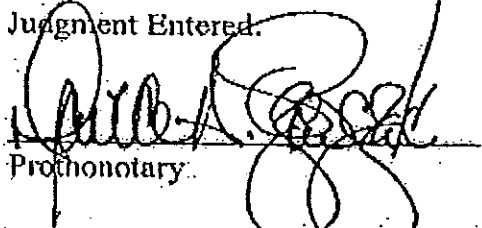
X VII. [t]he lower court erred and deprived Defendant of a fair trial when it prohibited the Defendant from cross-examining government witness Laird as to a Petition for Writ of Habeas Corpus filed by him through counsel while he was incarcerated and charged with Unsworn Falsification to Authorities and False Reports during the investigation of the instant case and arising out of inconsistent statements given to police relative to the instant case where said charges were later dropped once Laird became a cooperating government witness against Defendant.

VIII. [t]he lower court erred and deprived Defendant of a fair trial when it prohibited the Defendant from cross-examining Deputy Coroner Krause as to the basis of his opinion that the manner of death was homicide.

After reviewing all of the material in this case, we conclude that appellant's issues are without merit. We note that President Judge Vican has done a very fine job of discussing all of appellant's claims and the applicable law in support of his ruling. We thank President Judge Vican and adopt both his 1925(a) opinion (dated 4/16/04) and Order (dated 11/1/02) for purposes of *allocatur*.

Judgment of Sentence AFFIRMED.

Judgment Entered.


Prothonotary.

Date: _____

MAR 15 2005