IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**CR-1969-2012**
	:	
v.	**:**	
	:	**CRIMINAL DIVISION**
RAYMARR DAQUAN ALFORD,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

For the Defendant's first and second issues, the Court will rely on its Opinion filed on March 3, 2015. For the Defendant's third issue, the Court will rely on its Opinion filed on May 1, 2013. For the Defendant's fourth and fifth issues, the Court will rely on this Opinion. For the Defendant's sixth, seventh, eighth, ninth, and tenth issues, the Court will rely on its Opinion filed on March 3, 2015.

I. The Court did not Err in Allowing a Witness to Describe the Actions of Individuals in a Bus Surveillance Video and Allowing Another Witness to Identify the Individuals in the Video.

In his fourth issue, the Defendant argues that the Court "erred by permitting Commonwealth witnesses ST and Agent Trent Peacock to identify for the jury persons they believed were depicted on a bus surveillance video and to describe those persons' actions." Agent Peacock did not identify the individuals in the bus video. See N.T., 4/25/14, at 89-92. Peacock did, however, describe the actions of the individuals in the video. See id. For the issue of Peacock describing the actions, the Court will rely on its Opinion filed on March 6, 2014.

ST did not describe the actions of the individuals in the bus video. He did, however, identify the individuals. See N.T., 4/23/14, at 176-77. "Lay opinion identification testimony is more likely to be admissible, for example, where the surveillance photograph is of poor or grainy

quality, or where it shows only a partial view of the subject." United States v. Dixon, 413 F.3d 540, 545 (6th Cir. 2005). Under Pennsylvania Rule of Evidence 701, "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Pa.R.E. 701.

Here, the video did not clearly show the individuals. However, the jury saw the video, so it was in a position to determine whether anybody could have recognized the individuals. See Commonwealth v. Harris, 884 A.2d 920, 933 (Pa. Super. 2005) (quoting trial court's opinion that Kloiber instruction was not needed in part because the jury was in an adequate position to determine whether the video image of [the defendant] was unrecognizable). The Commonwealth laid a foundation for how ST was able to identify the Defendant, Enty, and Cooley as being the individuals in the video. ST had known the Defendant for about 10 years before the video. N.T., 4/23/14, at 113. Cooley was a friend who ST knew from school. Id. ST had known Enty for two months before the video. Id. at 113-14. The Commonwealth also established that the identifications were based on ST's perception. ST recognized the Defendant from "his shirt, his jeans, and how dark he is." N.T., 4/23/14, at 176. He recognized Enty because "he had on the same white T-shirt and pants [as the Defendant], but [was] lighter than [the Defendant]." Id. 176-77. ST also recognized Enty from the "twisties" in his hair. Id. at 177. ST recognized Cooley because "that day he had on a black T-shirt and shorts." Id.

ST's identification testimony was helpful to determining the identities of the shooters since it put certain individuals near the location of the shooting shortly after the shooting. Finally, ST did not present any scientific, technical, or other specialized knowledge of the type

that is precluded under Rule 701. Because ST's identifications of the individuals in the video meet the criteria of Rule 701, the Court did not err in permitting the identification testimony.

II. The Court did not Err in Allowing the Commonwealth to Play a Recorded Phone Call Involving AJ and Her Brother.

In his fifth issue, the Defendant argues that the Court "erred by permitting the Commonwealth to introduce recorded prison phone calls during the trial." The Commonwealth played a recorded phone call involving AJ and her brother, who was in prison at the time of the call. "In an effort to ensure that only those hearsay declarations that are demonstrably reliable and trustworthy are considered as substantive evidence, we now hold that a prior inconsistent statement may be used as substantive evidence only when the statement is given under oath at a formal legal proceeding; or the statement had been reduced to a writing signed and adopted by the witness; or a statement that is a contemporaneous verbatim recording of the witness's statements." Commonwealth v. Lively, 610 A.2d 7, 10 (Pa. 1992).

"[W]hen the prior inconsistent statement is a contemporaneous verbatim recording of a witness's statement, the recording of the statement must be an electronic, audiotaped or videotaped recording in order to be considered as substantive evidence. This will ensure that the requisite degree of reliability demonstrated will be similar to instances in which the statement was given under oath at a formal legal proceeding or the statement is reduced to a writing signed and adopted by the declarant." Commonwealth v. Wilson, 707 A.2d 1114, 1118 (Pa. 1998).

AJ made inconsistent statements because, during trial, she testified that she did not see who fired the gun, but, during the phone call, she said that she saw the Defendant shoot Kevan Connelly. See N.T., 4/22/14 (under a separate cover), at 13. Before the call was played for the jury, AJ testified that she did not recall telling her brother about the shooting in a phone call on

the day after the shooting. Id. at 14-15. At sidebar, the Defendant's attorney did not dispute that AJ was involved in the phone call:

> "The fact that she made a phone call is not at issue, but the content of the phone call I think is."

N.T., 4/22/14 (under a separate cover), at 17. Because the Defendant's attorney did not dispute that AJ was involved in the call and AJ's statements were audiotaped contemporaneously with her making the statements, the Court properly admitted AJ's statements as substantive evidence.

Even if AJ's statements are not inconsistent statements that can be considered substantive evidence, they were properly admitted under the excited utterance exception to the hearsay rule. An excited utterance is:

> [A] spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.

Commonwealth v. Keys, 814 A.2d 1256, 1258 (Pa. Super. 2003) (quoting Allen v. Mack, 28 A.2d 783, 784 (Pa. 1942)). The following is considered in determining whether a statement is an excited utterance:

> 1) whether the declarant, in fact, witnessed the startling event; 2) the time that elapsed between the startling event and the declaration; 3) whether the statement was in narrative form (inadmissible); and, 4) whether the declarant spoke to others before making the statement, or had the opportunity to do so. These considerations provide the guarantees of trustworthiness which permit the admission of a hearsay statement under the excited utterance exception. It is important to note that none of these factors, except the requirement that the declarant have witnessed the startling event, is in itself dispositive. *Rather, the factors are to be considered in all the surrounding circumstances to determine whether a statement is an excited utterance*.

Id. (quotations and citations omitted). "The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance." Id.

Here, AJ witnessed the shooting. She was in the park and saw the Defendant arguing with Kevan Connelly and Braheem Connelly. N.T., 4/22/14 (under a separate cover), at 8-10. She heard gun fire and saw that her son was in the crossfire. Id. at 12-13. Finally, AJ saw that Kevan Connelly had been shot. Id. at 13.

AJ had the phone conversation with her brother the day after the shooting. During the conversation, AJ talks very quickly and has an excited tone. Her statement that she saw the Defendant shoot Kevan Connelly is not in response to a question. When listening to the call, it is apparent that AJ's excitement continued to dominate while her reflective processes remained in abeyance. Therefore, the call was properly admitted under the excited utterance exception to the hearsay rule.

III. Conclusion

For the forgoing reasons, the Court respectfully requests that its Order of November 10, 2014 be affirmed.

DATE: _____ By the Court,

Nancy L. Butts, President Judge