

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 2065-2005
 :
 ANTHONY BLOOM, : CRIMINAL ACTION - LAW
 :
 Defendant :
 : POST-SENTENCE MOTION

DATE: November 30, 2006

MEMORANDUM OPINION and ORDER

Before the court for determination is the Post-Sentence Motion of Defendant Anthony Bloom (hereafter “Bloom”) filed July 3, 2006. The court will grant the motion. The Commonwealth’s reference to excluded hearsay evidence in its closing argument prejudiced Bloom, and that prejudice could not be cured by the court’s instructions to the jury.

The charges against Bloom stem from the Commonwealth’s allegation that he took Brandy Ergott’s (hereafter “Ergott”) vehicle without her permission. During the Commonwealth’s examination of Ergot, she testified that she had a telephone conversation with a woman from Clearfield, Pennsylvania who told her that Bloom and Rye Itsell-Schaben (hereafter “Itsell-Schaben”) had been there. Bloom objected to this testimony as hearsay. The objection was sustained, and the jury was instructed to disregard the testimony.

During closing argument, the Commonwealth again made reference to this excluded testimony. In recounting the evidence at trial, the Commonwealth argued the evidence demonstrated that Bloom had asked Ergott two days before the theft to borrow her vehicle so that he could collect a debt from a woman. Notes of Testimony, 18 (4/20/06) (closing argument). The

Commonwealth contended that the evidence demonstrated that Ergott refused to let Bloom borrow her car for this purpose. Following this background, the Commonwealth argued what the evidence established concerning the theft of the vehicle. The Commonwealth stated

So what happened? He [(Bloom)] says if she's not going to let me take it, I'll take it. She owes it to me. She owes it to me. What happens? We know what happened because Rye [(Schaben)] tells you what happened. Why is that so important? Well Rye says, you know what, he came by, we walked over to Brandy's house, you know, its 4:00 in the morning. Do you remember that at the preliminary hearing he said it was 10, 11:00 a.m. --- or 11:00 p.m., but he called me to tell me, that it was 4, you know, he remembered. I don't want to get caught for perjury or anything. He remembered 4.

He says, What do I say? He thinks about things, he told you it's 4, I want you to know it wasn't 10 or 11. He passed that information on. He knew what it was, it's 4:00 a.m. when they leave. Where are they going? They are going to get some money from some girl, I don't know the name of the girl.

Brandy talked to the girl, she confirmed it, they were there.

Id. at 19-20. (emphasis added). Following the Commonwealth's closing argument, Bloom made an objection outside of the presence of the jury to the Commonwealth's reference to this excluded hearsay evidence. N.T., 3, 4 (4/20/06) (jury charge). Bloom moved for a mistrial, which was denied. Id. at 5. Bloom then requested an instruction in the jury charge that despite there having been an implication in the Commonwealth's closing argument that there had been evidence presented that Bloom was in Clearfield no such evidence had been presented. Id. at 6-7.

During the charge to the jury, this court provided the jurors with an overall instruction with regard to what evidence it may consider in reaching its decision. We instructed the jury that in determining the facts they could only consider the evidence that was presented in court and any

logical inference derived from that evidence. N.T., 11 (4/20/06) (jury charge). We told the jurors that they could not rely upon conjecture, supposition, or guess upon any matters not in evidence. Ibid. We further instructed the jury that if we sustained an objection and told them to disregard something, then they must disregard that evidence and not allow it to take any part in their deliberations. Id. at 24. With regard to the excluded hearsay evidence, we specifically instructed the jury as follows:

In that regard, I specifically would instruct you that you may not consider anything at all related to the objected to testimony concerning a conversation of Miss Ergott with a lady in Clearfield that matter was stricken from the record in this case. The only evidence and testimony that you may consider as to whether or not the defendant did or did not drive the vehicle to Clearfield is the testimony of Mr. Schaben.

Ibid. We then went on to instruct the jury that the arguments presented by counsel were not evidence and should not be considered as such. Id. at 24-25.

With regard to the credibility of witnesses, we provided the jury with a general instruction that they had the sole responsibility of determining whether the testimony of the witnesses in this case were truthful and accurate. N.T., 29 (4/20/06) (jury charge). During trial it was brought out that Ergott had been convicted of theft. As such, we instructed the jury that it could only consider that conviction in deciding whether to believe her testimony. Id. at 30. During trial, it was brought out that Itsell-Schaben had made some prior inconsistent statements. As such, we instructed the jury they could only consider the prior inconsistent statements to help judge the credibility and weight of Itsell-Schaben's testimony at trial. Ibid. Also during trial, it was brought out that Itsell-Schaben was involved with Bloom in the theft of Ergott's vehicle. As such, we instructed the jury

as to how to judge the testimony of an accomplice. We told the jury that if they believed that itself-Schaben was Bloom's accomplice, then they should view his testimony with disfavor because it came from a corrupt and polluted source, that they should examine his testimony closely and accept it with caution and care, and should consider whether his testimony is supported in whole or part by other evidence. *Id.* at 32. We told the jury, "Accomplice testimony is more dependable if supported by independent evidence." *Ibid.*

The Commonwealth's reference to the excluded hearsay evidence regarding the conversation between Ergott and the woman from Clearfield was not a harmless error. An error is harmless if it can be established beyond a reasonable doubt that there is no reasonable probability that the error could have contributed to the verdict. *Commonwealth v. Mitchell*, 839 A.2d 2002, 214 (Pa. 2003); *Commonwealth v. Overby*, 809 A.2d 295 , 306 (Pa. 2002). Harmless error exists if:

- (1) the error did not prejudice the defendant or the prejudice was *de minimis*;
- (2) the erroneously admitted evidence was merely cumulative of the untainted evidence which was substantially similar to the erroneously admitted evidence; or
- (3) the properly admitted and uncontroverted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant that the evidence could not have contributed to the verdict.

Commonwealth v. Gray, 867 A.2d 560, 571-72 (Pa. Super. 2005), *app. denied*, 879 A.2d 781 (Pa. 2005); *Commonwealth v. Passmore*, 857 A.2d 697, 711 (Pa. Super. 2004), *app. denied*, 868 A.2d

1199 (Pa. 2005). The Commonwealth bears the burden of establishing that the error was harmless. *Mitchell*, 839 A.2d at 214; *Overby*, 809 A.2d at 306.

The Commonwealth's use during its closing argument of the excluded hearsay evidence prejudiced Bloom. Itsell-Schaben's testimony is what really linked Bloom to the theft of Ergott's vehicle. His testimony established that he was with Bloom when Bloom took Ergott's vehicle from her residence and drove it to Clearfield to meet some woman. Itsell-Schaben's testimony is the only direct link between Bloom and the theft of Ergott's vehicle.

But, the weight to be accorded Itsell-Schaben's testimony was called into serious question. It was revealed during trial that Itsell-Schaben had made some prior inconsistent statement concerning the events pertaining to the theft of Ergott's vehicle. More significantly, when Itsell-Schaben was cross-examined about his theft of a vehicle in August of 2005, he stated that when he went down to the police station to be questioned about the theft he did not have a prepared story to tell them. He was not concerned because he said that he could construct a believable lie on the fly. Thus, the credibility of the Commonwealth's key witness was in doubt.

However, the Commonwealth's use of the excluded hearsay evidence during its closing argument rehabilitated Itsell-Schaben's credibility. The hearsay statement by Ergott allowed the mystery woman from Clearfield to testify before the jury and corroborate Itsell-Schaben's story that he and Bloom had met her in Clearfield the day Ergott's vehicle was stolen. In addition to rehabilitating Itsell-Schaben's credibility, the use of the hearsay statement allowed the Commonwealth to present another witness that linked Bloom to the theft of Ergott's vehicle. But, unlike Itsell-Schaben, this witness's credibility was not at issue particularly since she did not

testify before the jury and permit them to evaluate her credibility. Thus, the use of the hearsay statement during the Commonwealth's closing argument was prejudicial to Bloom because it allowed the Commonwealth to use evidence that could not really be attacked to establish that Bloom took Ergott's vehicle, be it by bolstering Itsell-Schaben's testimony or by presenting another witness to the crime.

The prejudice created by the Commonwealth use of the excluded hearsay statement during its closing argument could not be cured by the court's instructions. Generally, the law presumes that the jury will follow the instructions of the court. *Commonwealth v. Brown*, 786 A.2d 961, 971 (Pa. 2001), *cert. denied*, 537 U.S. 1187 (2003); *Commonwealth v. Hood*, 872 A.2d 175, 185 (Pa. Super. 2005), *app. denied*, 889 A.2d 88 (Pa. 2005). In some circumstances, a curative instruction may eradicate any possible prejudice created by an error. *Commonwealth v. Maloney*, 365 A.2d 1237, 1241 (Pa. 1976); *Commonwealth v. Redel*, 484 A.2d 171, 173 (Pa. Super. 1984).

The instructions given by this court to the jury in its charge were not sufficient to eradicate the prejudice created by the use of the excluded hearsay evidence during the Commonwealth's closing argument. The court did instruct the jury that they could only consider evidence that was presented in court and specifically instructed them that they could not consider any evidence relating to a conversation between Ergott and a woman from Clearfield. However, the possibility that the jury may have considered the hearsay evidence in evaluating Itsell-Schaben's credibility is too great. The court instructed the jury to view an accomplice's testimony with suspicion and to see if there was independent evidence that may support the accomplice's testimony. In accordance with this instruction, the jury may have relied upon the excluded hearsay evidence to corroborate

Itsell-Schaben's testimony. Given the possible confusion that these instructions may have created in the minds of the jurors, the court cannot say that the instructions were sufficient enough to eliminate the prejudice created by the use of the excluded hearsay evidence during the Commonwealth's closing argument.

Accordingly, Bloom's Post-sentence Motion is granted.

ORDER

It is hereby ORDERED that the Post-Sentence Motion of Defendant Anthony Bloom filed July 3, 2006 is GRANTED. Defendant is hereby GRANTED a new trial. A status conference will be held on February 27, 2006 at 9:00 a.m. in Courtroom 2 of the Lycoming County Courthouse.

Defendant's sentence imposed on June 21, 2006 is hereby VACATED.

BY THE COURT,

William S. Kieser, Judge

cc: Joel McDermott, Esquire
District Attorney
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
Christian J. Kalas, Esquire