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# OPINIONS

## ALLEGHENY COUNTY COURT OF COMMON PLEAS



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# PLJ

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# Opinions

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# COMMONWEALTH OF PENNSYLVANIA v. CHARLES MICHAEL BECHER

*Criminal Appeal—Interest of Justice—Interlocutory Appeal*

*Commonwealth filed an interlocutory appeal from the Order granting a new trial to defendant convicted of third-degree murder following a jury trial. Court affirms order stating that a new trial was granted in the interest of justice after multiple witnesses testified to blatantly inadmissible hearsay throughout the trial.*

CC No. 2021-001032. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Mariani, J.

**OPINION**

This is an interlocutory appeal filed by the Commonwealth of Pennsylvania after the defendant was convicted of Third Degree Murder and the Court granted a motion for new trial filed by the defendant "in the interest of justice," a basis not raised in the defendant's motion. For the reasons set forth below, this Court's order should be affirmed.

This case arises out of confrontational interaction between two of the defendant's (Becher's) cousins and various members of a motorcycle club[1] (victim group) which led to the deaths of two members of the motorcycle club. Becher was charged with criminal homicide in relation to the death of one of the victims, Seth McDermit. Another alleged actor, Khalil Walls (Walls), was charged with criminal homicide in relation to the death of Christopher Butler. Becher remained at the scene of this event, with his firearm in his possession, and advised responding police officers that he acted in self-defense; Walls is alleged to have left the scene. From the outset of pretrial litigation in this case, Becher claimed that he shot Mr. McDermit with his (Becher's) licensed firearm in self-defense.

Becher's case was severed from Walls' case upon motion of Becher's counsel due to concerns of confusion of issues and the representations by Becher's counsel that if Becher's and Walls' trials were joined, he (Becher's counsel) would argue that Walls caused the deaths of both victims (directly as to Mr. Butler and indirectly as to Mr. McDermit). Becher's counsel also indicated that he (Becher's counsel) would contend that Walls shot Becher during the confrontation while Becher was fighting with members of the victim group and that Becher's having been shot was a substantial factor in Becher's decision to use his own weapon.[2]
Prior to Becher's being physically present at the scene of the confrontation that resulted in the death of Mr. McDermit, Becher's cousin, Cailyn Richards, engaged in (if not started) a confrontation with members of the victim group. The Commonwealth called three members of the victim group, David Li, William Especto and Robert Johnson, as witnesses during Becher's jury trial. The Commonwealth elicited substantial testimony from these witnesses that during the altercation Ms. Richards made statements that her "cousin" was going to "smoke" them.

The Commonwealth first asked David Li about the events in question. The Commonwealth asked Mr. Li the following question:

Q: And at some point, were you able to separate them?

A: Yes we did. I separate them out. Finally, both of them calmed down and then one of her friends was standing right there, and then she was the female was like swinging at Chris. She was saying. "I'm going to call my cousin, and then every single one of you is going to get smoked.

The Commonwealth then asked Mr. Li:

Now, what happened to you when you got back into the lot:

I got back to the lot and I started to tell Chris, tell everybody, you know, I said, "It's time to leave." I said "There's a of of action going on." I said, you know, "Let's go." I said "On top of that, the girl already told me, told all of us saying, hey, I don't care who you guys are. I'm going to call my cousin up, he's going to smoke every single one of you.

The Commonwealth then questioned Mr. Li as follows:

Now, if I could ask you, sir, after your first encounter with the girls, what were you trying to do, what was your intention after that first argument with the two females?

A: I just want to try to stop everybody, you know. And the I kept apologize to both girls. I said, you know, "I'm so sorry that's not at all like what we do: I said something like I'll go home. You know, I just tried to stop the fight from right there.

Q: Did you tell that to them?

A: Yes.

Q: And how did they respond?

A: The one – her friend seemed okay. The one girl that was following Chris, she seemed like she had a lot to drink. So her action was just that either we do something to Chris something really bad or like other than that, every single one of us was going to get killed.

Q: Was going to get what? I'm sorry?

A: Was going to get smoked.

Q: And what does smoked mean to you, sir?

A: It's saying to get killed.

Mr. Wymard: I can't hear him Judge.

The Court: Can you speak up? What does smoked mean to you sir?

A: Smoked means getting killed. Get shot, get killed.

William Especto was asked the following questions:

Q: Now, after the fight broke up, what happened?

A: I was on the other side on the left side of Erotica, there as a smaller – little bit of an argument with me and this other woman.

Q: Describe that for me, please.

A: She was running around screaming that someone hit her and that she was having her homies or cousin come down and smoke us.

The Commonwealth reiterated the point when it questioned Mr. Especto as follows:

Q: She said what to you when you said you needed to get your people out of there?

A: Oh, she made the statement that she was calling her people to come down and smoke us.

Especto further testified as follows concerning events after the shooting:

Q: Now sir, when you went over to Mr. Johnson what did you do?

A: Um, I had to sit there and tell him, you know, that he wasn't going to die, and then I realized he had a hole in his arm, it was shooting blood everywhere so I plugged his arm and sat there. And then at some point, that same girl came over screaming and talking about, "I told you my people were going to smoke you."

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Q: and what was she saying to you at that point?

A: She was like, "I told you to get your fucking people out." Sorry. "To get your people out of here." You know, "My people are coming to smoke y'all this that or the other . . .

While questioning witness Robert Johnson, who personally knew Cailyn Richards, the Commonwealth asked:

Q: And once you got to the vehicles what happened?

A: They followed us to the vehicle and they kept saying, "we called our cousin…"

At that point, the defendant's counsel objected on hearsay grounds. The Court overruled the objection.[3]

The questioning of Robert Johnson continued:

Q: Once you got to the vehicle what happened?

A: Whenever we got to the vehicle, the two females followed us to the vehicle, and that whole time, they're in front of me. I'm just trying to like, block myself because they're being extra aggressive, and they was like, "no." she said "We called our cousins, you all are getting smoked."

***

Q: Now sir, when you were having this conversation with the females, what were you saying to them?

A: Just telling them I kept saying "Cailyn, I know who you are, I know your mom. Calm down, settle down. It ain't that important for us to be going on like this."

Q: And how was she responding to you?

A: She just kept saying, "Fuck you, we called our cousins, yinz are getting smoked."

In his closing argument, the prosecutor mentioned this testimony four different times and placed substantial significance on Ms. Richards' statements.[4] Specifically, the prosecutor made the following statements to the jury:

We have shown you that Khaiya Richards threatened to get her cousins to go and smoke those men.

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That fight was over, those men were trying to walk away. You saw the video, they were leaned up against the side of the building, they weren't following anybody until Khaiya Richards started telling them that she was going to get their cousin to "smoke" them. That's the real essence of it [emphasis supplied]

***

You saw them drag Chris out, and everybody that was present for the altercation outside, that was within earshot, told you that Khaiya said that she was going to go and get her cousin to "smoke" all of them.

***

They remember that the girls threatened to have their cousin come and smoke them.

At the time the threats described above were made by Ms. Richards, Becher was not present and no evidence was presented that Becher authorized, endorsed or promoted the making of the threats of that he was even aware that such threats were made by his cousin. After hearing how the Commonwealth used the evidence of Ms. Richards' threats in its closing arguments, this Court read the following unsolicited instruction to the jury prior to deliberations:

Now you also heard evidence that Ms. Richards made statements to the effect that my cousin will smoke you, my cousin will shoot you. There's conflict as to whether those statements were made. If you find that she did make such a statement, you cannot regard the statement standing alone as proof of any intent or state of mind of the defendant. You may regard that evidence if you find that it happened in evaluating and find out other facts that might bear on the events of this case, but the statement made outside the presence of the defendant cannot be proof of the defendant's intent or state of mind unless you determine from the evidence that the defendant was conscious of and promoted the statement, or endorses that statement in some fashion.

1248-1249

Despite reading this instruction to the jury, this Court believes that the trial in this case was fundamentally unfair and it appropriately granted Becher's motion for a new trial in the interest of justice. As set forth in Commonwealth v. Powell, 527 Pa, 288, 590 A.2d 1240 (1991):

It is the trial judge's review of the conditions and activity surrounding the trial which leaves him or her in the best position to make determinations regarding the fairness of the process and its outcome. It is apparent, therefore, if a trial court determines that the process has been unfair or prejudicial, even where the prejudice arises from actions of the court, it may, in the exercise of its discretionary powers, grant a new trial "in the interest of justice."

The right of a court in an appropriate case to provide relief under the rubric of "interest of justice" cannot at this stage of the development of our jurisprudence be seriously questioned.

As noted by the Pennsylvania Supreme Court in Powell,

The rationale "in the interest of justice," employed to rectify errors which would otherwise result in unfairness, is deeply rooted in both federal jurisprudence and the common law of Pennsylvania. In the federal system this aspect of judicial discretion is evidenced in Rule 33 of the Federal Rules of Criminal Procedure. The first sentence of the Rule provides, "[T]he court on motion of a defendant may grant a new trial to him if required in the interest of justice." Fed.R.Crim.P. 33. The application of this discretionary provision has been held to apply broadly and its use may only be reviewed if there is evidence of manifest abuse. In United States v. Narciso, 446 F.Supp. 252, 304 (1977), the court stated that "the very words of the rule—'interest of justice'—mandate the broadest inquiry into the nature of the challenged proceeding." A judge granting a new trial under this Rule need assign no reason other than it is required in the interest of justice. See United States v. Smith, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1946). The federal system has recognized that this power is not without restriction, especially when the action taken potentially intrudes upon the domain of the jury. In Tennent v. Peoria & P.V. Ry. Co., 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944), the United States Supreme Court stated, "Courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

This concept of "interest of justice" has also been historically recognized as a viable ground for granting a new trial in this Commonwealth. A trial court has an "immemorial right to grant a new trial, whenever, in its opinion, the justice of the particular

case so requires." March v. Philadelphia & West Chester Traction Co., 285 Pa. 413, 416, 132 A. 355 (1926). See also, Streilein v. Vogel, 363 Pa. 379, 69 A.2d 97 (1949); Frank v. W.S. Loiser & Co., Inc., 361 Pa. 272, 64 A.2d 829 (1949); Frank v. Bayuk, 322 Pa. 282, 185 A. 705 (1936). Indeed, as occurred in the instant matter, this Court has expressly approved of a trial court's granting a new trial, sua sponte, for the promotion of justice, if sufficient cause exists. Commonwealth v. Dennison, 441 Pa. 334, 338, 272 A.2d 180, 182 (1971); Getz v. Balliet, 431 Pa. 441, 446, 246 A.2d 108 (1968); see also, Bergenv. Lit Bros., 354 Pa. 535, 47 A.2d 671 (1946); Trerotola v. Philadelphia, 346 Pa. 222, 29 A.2d 788 (1943). Where it will result in the attainment of justice, a trial court may grant a new trial without the initiation of the defendant. Fisher v. Brick, 358 Pa. 260, 56 A.2d 213 (1948); Commonwealth v. Jones, 303 Pa. 551, 154 A. 480 (1931).

Id. at 1242-1243

This Court recognizes the extraordinary nature of the relief granted in this case and did not make the ruling lightly. This Court believes that the admission of the evidence of the threats attributed to Cailyn Richards was unduly and egregiously prejudicial to Becher such that it denied him a fair trial.[5]

"The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion." Commonwealth v. Cunningham, 805 A.2d 566, 572 (Pa.Super. 2002), appeal denied, 573 Pa. 663, 573 Pa. 663, 820 A.2d 703 (2003). It is axiomatic that evidence that is not relevant is not admissible. Pa.R.E. 402; Commonwealth v. Robinson, 554 Pa. 293, 304-305, 721 A.2d 344, 350 (1998) ("The threshold inquiry with admission of evidence is whether the evidence is relevant."). Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. See also Commonwealth v. Edwards, 588 Pa. 151, 181, 903 A.2d 1139, 1156 (2006) (evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact).

In Commonwealth v. Broaster, 863 A.2d 588, 592 (Pa. Super. 2004), the Superior Court explained that "[r]elevant evidence may nevertheless be excluded 'if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" See also Commonwealth v. Dejesus, 584 Pa. 29, 880 A.2d 608, 614-615 (Pa. Super. 2005). As set forth in Commonwealth v. Owens, 929 A.2d 1187, 1191 (Pa. Super.2007) quoting Broaster, 863 A.2d at 592.

Because all relevant Commonwealth evidence is meant to prejudice a defendant, [however] exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case. As this Court has noted, a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events and offenses with which [a] defendant is charged.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). It is clear that the statements attributed to Ms. Richards were admitted and used by the Commonwealth not to prove why members of the victim group did or did not do something in relation to hearing the threats, but to prove the truth of the matter asserted, i.e, that Becher was going to shoot someone in the victim group, so as to argue the defendant's criminal intent. This evidence was blatant, inadmissible hearsay. Even assuming there is some probative justification for the admission of the evidence, such probative value was far outweighed by its highly prejudicial nature and effect.

In its final charge to the jury, this Court read instructions on third-degree murder, voluntary manslaughter, involuntary manslaughter and self-defense, including imperfect self-defense. The jury returned a verdict of guilty as to third degree murder. Though not requested by either counsel, the Court gave a limiting instruction regarding the evidence of the threats made by Ms. Richards.

The principal issues in the trial were (a) Becher's state of mind and/or intent and (b) whether Becher was acting in self-defense when he used a firearm which caused the death of Mr. McDermit. In this Court's view, the inadmissible hearsay statements attributed to Ms. Richards were prejudicial to the point of depriving Becher of a fair trial because these statements went directly to the issues of malice and to whether the Commonwealth disproved self-defense beyond a reasonable doubt. The significance placed on this evidence by the Commonwealth at trial cannot be overstated. The Commonwealth elicited these statements at least seven times during its case-in-chief through three different eyewitnesses. The Commonwealth referenced the statements at least four times during its closing argument in order to convince the jury that it fulfilled its burden of proof. As set forth above, in his closing argument to the jury, the Commonwealth's attorney argued: "We have shown you that Khaiya [sic] Richards threatened to get her cousin to go and smoke these men;" later, in his closing argument, the prosecutor argued that the victim group was trying to walk away, "they weren't following anybody until Khaiya [sic] Richards started telling them that she was going to get their cousin to 'smoke' them. That's the real essence of it" [emphasis supplied].[6] In this Court's view, it improperly permitted the jury to repeatedly hear and consider blatantly inadmissible hearsay that was irreparably prejudicial to the defendant.

This Court's unsolicited limiting instruction cannot be regarded as sufficient and curative. As an initial matter, the Court's instruction was simply not accurate. Contrary to the language of the instruction, the evidence was blatant hearsay and should not have been offered to the jury for the purpose intended. Furthermore, the prejudicial impact of this inadmissible evidence was enormous given that the evidence was presented numerous times through three separate Commonwealth witnesses and given that the Commonwealth implored the jury that this evidence was the "essence" of this case in its closing argument to the jury. While this Court attempted to ameliorate the impact of this evidence prior to verdict, it is clear that the Court's attempt did not, and could not have had, the appropriate curative effect.

The fact that defense counsel did not object to the admission of the threats evidence until well after it had been admitted is of no moment. The substance of the statements went directly to the ultimate issues in this case and the Commonwealth extolled the statements as "the essence" of this case. The curative instruction read by this Court was legally insufficient. Under the unusual circumstances in this case, this Court cannot permit the verdict in this case to stand. The interest of justice requires that Becher be given a new trial such that a new jury can deliberate and reach a verdict after considering only legally admissible evidence. The motion for a new trial was properly granted.

BY THE COURT:
/s/Anthony M. Mariani, J.

[1] The evidence presented by the Commonwealth indicated that the motorcycle club members were men of differing employment positions who shared a common interest in riding motorcycles, as distinguished from a motorcycle "gang" as suggested by defense counsel.

[2] There seems to be no dispute that Becher was shot in his leg while in the physical confrontation with members of the victim group and that Becher was shot before he (Becher) discharged his own weapon.

[3] The Court overruled the objection, in part, because the evidence of these comments had been put in through other witnesses several times by that point without objection. In addition, the evidence of Ms. Richards' threats may have been relevant to supply information as to the actions of the members of the motorcycle club (upon hearing these threats). The prejudicial use of this evidence by the Commonwealth had not yet been revealed. Had such been disclosed, the Court would have reversed the ruling, given the jury an instruction to disregard all evidence of that statement and issued an order precluding any additional reference to that evidence due to its highly prejudicial nature.

[4] The prosecutor repeatedly credited Khaiya Richards with using the word "smoked." Robert Johnson, who knew Cailyn Richards personally, testified that Cailyn Richards is the person who allegedly threatened to have her cousin "smoke" the victim group. The prosecutor appears to have identified the wrong person during his closing argument.

[5] Recently, the Superior Court of Pennsylvania, in affirming a grant of a post-verdict motion for a new trial by the trial court on due process grounds, observed that the grant of the new trial in that case could have also been justified "in the interest of justice" as a separate legal basis. See Commonwealth v. Lang, __ A.3d __, 2020 WL 1531764 (Pa. Super. May 16, 2022).

[6] In addition, the Commonwealth's written response in opposition to Becher's motion for a new trial (challenging the weight of the evidence) relies, in part, on this inadmissible, highly prejudicial evidence: "[Ms.] Richards told the group that her cousin was going to "smoke all of [them]."