NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MARCUS UPSHAW, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1700 WDA 2012

Appeal from the Judgment of Sentence February 2, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0001280-2009

BEFORE: BOWES, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: **FILED MARCH 28, 2014**

Marcus Upshaw appeals from the judgment of sentence of life imprisonment that was imposed after a jury convicted him of second degree murder, robbery, burglary, conspiracy, and two counts each of unlawful restraint and reckless endangerment. We affirm.

The Honorable Jill E. Rangos, who presided over Appellant's jury trial, provided a comprehensive outline of the facts supporting Appellant's convictions:

> The charges against Appellant stem from an incident that occurred on December 26, 2008, at approximately 1:00 a.m. (TT 54) Pittsburgh Police Office[r] Ryan Young testified that he was dispatched to 2755 Bergman Street along with two other units on a report of a man shot in the chest. (TT 55) He arrived shortly thereafter and found the victim, Charles Hall, conscious but lying in a pool of his own blood on the basement steps. (TT 57) Officer Syska, who with his partner Officer Walters arrived moments after Officer Young, asked Hall who shot him. (TT 58)

Hall stated he did not know. *Ibid.* Hall told Officer Walters that his assailant wore an orange coat. (TT 120)

Anika Thomas, former girlfriend and then roommate of the victim, met Officer Young at the door and led him to the victim. (TT 56) Thomas testified that on the night in question, she went to bed at approximately 10:00 p.m. (TT 82) Hall and his then fiancée, Sateshia Dorsey, were also in the residence at that time. *Ibid.* Thomas was awakened by a masked gunman putting a gun to her face and ordering her to go to the living room. (TT 83) Once in the living room, she sat with Dorsey on the couch. She heard someone whom she was unable to identify say "I'm a shooter. I shoot people." (TT 87) She also heard one of the men say that he knew Dorsey, he used her first name. (TT 88)

Dorsey testified that on December 25, 2008, at shortly before midnight, Darryl Reese (known to her as "Butt Butt") knocked on her door wanting to buy marijuana from Hall. (TT 205) Dorsey opened the door and Reese entered, along with another man who was wearing a mask. (TT 206) Dorsey requested several times for the masked man to pull down the mask. (TT 207) Eventually, he pulled his mask down to his chin. *Ibid.* Dorsey testified that the men who later broke into her house wore masks similar to the one that this masked man wore. (TT 212) Reese returned five to ten minutes later, this time alone, and purchased more marijuana. (TT 213)

Dorsey testified that five minutes later, Reese returned to purchase additional marijuana. (TT 215) Hall declined to sell him more, saying he only had one blunt left. (TT 216) As Reese turned to leave, "he put his head down a little and he just made a sound like 'Oh man' and he kicked the door back open." *Ibid.* Four masked men then rushed in, all carrying handguns. (TT 217) One of the four men who entered the residence wore a green coat which was orange inside. (TT 220) This man was with Reese at the first transaction; Dorsey recognized the green coat with the orange lining as the same one worn earlier by the person who was with Reese. That man and another man ran down the stairs and Dorsey could hear one inquiring of the other where the dogs were. (TT 219) Two other men remained upstairs, William Faulkner, wearing a camouflage coat, stood by Hall and the other man went into Anika Thomas' bedroom. (TT 222)

Thomas was brought into the living room and seated next to Dorsey on the couch. Dorsey testified that she cradled Thomas' head against her body so that Thomas could not see what was happening. (TT 223) Dorsey then witnessed Faulkner shoot Hall. After he shot Hall, Faulkner said, "I'm a shooter. I shoot people. Bitches can get it, too." (TT 222; 293) Faulkner then forced Thomas and Dorsey to lay down on the living room floor. He leaned over to within a few inches of Dorsey and told her he knew her, knew her name, knew her family and warned her to say nothing. (TT 225-226; 294-295)

Dorsey testified that she recognized Faulkner as one of the men who entered Hall's residence and as the man who shot Hall. Dorsey identified him as the man in the camouflage coat and testified that she knew him for about ten years from living in the neighborhood and going to school and also because he previously dated her sister. (TT 226-228) Dorsey testified that she recognized Faulkner's voice. (TT 294) She testified that while she told police the night of the murder that she knew one of the assailants, she didn't initially identify Faulkner to the police because she was afraid. (TT 236; 297) However, shortly after the shooting, after learning that Hall had died, she picked Faulkner out of a photo array. (TT 239; 240-24; 299)

Reese testified that on December 25, 2008, he, Michael Smith and Pernell Littleberry agreed to rob someone who Littleberry said had marijuana. (TT 346) Littleberry told Reese that he knew where everything was in Hall's house. (TT 349) He directed Reese to run down to the basement and open the back door for him and instructed Smith to hold up Hall. *Ibid.* While planning the robbery, Faulkner called Reese wanting to know where to buy some marijuana. (TT 351) Faulkner and a fifth conspirator, Appellant, then arrived in Faulkner's sister's car and became involved in the plan. (TT 357)

Reese further testified that Appellant and Faulkner said that they didn't want to spend their money when they could just take the drugs. (TT 359) After agreeing to the plan, Reese said that he did not want to go through with the robbery because after the first purchase, he saw that Dorsey was present in Hall's home. (TT 351) On the third time Reese went to Hall's residence, he testified that he purchased additional marijuana. (TT 361) As he was leaving, Faulkner, [Appellant,] and Smith entered Hall's home with masks on and guns held high. (TT 362) Specifically,

> Reese stated that Appellant had a black and silver gun (TT 363) and was the individual who held a gun to Thomas' head and forced her to sit on the living room sofa. (TT 376) Reese said that Faulkner shot Hall while Hall was seated at a desk. (TT 364) Faulkner left the residence carrying a shotgun case and a green plastic container with marijuana inside. (TT 366) Appellant, Reese and Faulkner left together in the same car in which Faulkner and Appellant arrived. (TT 372)
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> Reese later identified Faulkner out of a photo array. (TT 375) Reese wrote "Shooter" under Faulkner's face on the array. (TT 376) Reese also acknowledged that surveillance video images of a Sunoco gas station, recorded at 1:59 a.m. on December 26, 2008, were of him, Faulkner, [Appellant] and Littleberry shortly after the shooting. (TT 396)
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> Reese was confronted at trial with Affidavits he purportedly executed while incarcerated at the Allegheny County Jail. (TT 418) Reese indicated that the Affidavits were not the truth, but were executed to protect himself from Appellant and his cohorts. He was concerned about being labeled a "snitch", which in his experience meant the possibility of torture or even death. (TT 442-443)

Trial Court Opinion, 6/29/12, at 3-7.

On February 2, 2011, Appellant was sentenced to life imprisonment for murder plus a consecutive sentence of nine to eighteen months on each unlawful restraint count. No further penalty was imposed on the other convictions. Appellant failed to file a timely post-sentence motion, but, on March 25, 2011, he filed a post-sentence motion and requested reinstatement of his appellate rights. On March 28, 2011, the trial court granted Appellant relief and accepted the filing of the post-sentence motion *nunc pro tunc*. It denied that motion on September 20, 2011. Appellant filed a timely appeal on October 3, 2011. Three weeks later, on October 21,

2011, Appellant filed a petition for remand for the conduct of an evidentiary hearing based on the existence of after-discovered evidence. We granted relief, dismissed the appeal, and remanded for a hearing.

On October 27, 2011, Appellant filed a second post-sentence motion. The trial court conducted a hearing as to Appellant's request for a new trial based upon after-discovered evidence, and it denied relief. Appellant filed the present appeal from the denial of his post-sentence motion. He presents two issues for our review:

> I. The trial court erred when it denied Appellant's Motion for Judgment of Acquittal where evidence of record demonstrated that the jury necessarily engaged in conjecture and speculation when arriving at a verdict of guilty. As such the Commonwealth failed to prove Appellant's guilt beyond a reasonable doubt.
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> II. The trial court erred when it denied Appellant's Motion for a New Trial in light of after discovered evidence in the form of Darryl Reese's post-conviction statement via letter that Appellant was not present at the time of the homicide.

Appellant's brief at 4.

A challenge to a trial court's denial of a motion for acquittal is treated on appeal as a claim that the evidence was insufficient to sustain a conviction. ***See Commonwealth v. Hutchins***, 42 A.3d 302 (Pa.Super. 2012). We review sufficiency challenges pursuant to the following standard of review:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the

> crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Antidormi, 2014 WL 255492, 11-12 (Pa.Super. 2014) (citation omitted).

"A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S. § 2502. When the crime in question occurred, the crime of burglary, a felony, was committed as a person entered "a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." 18 Pa.C.S. § 3502 (amended on July 5, 2012, and on December 23, 2013). A person is guilty of robbery, also a felony, if, while committing a theft he, *inter alia*, "threatens another with or intentionally puts him in fear of immediate serious bodily injury[.]" 18 Pa.C.S. § 3701(a)(1)(i) (amended on December 23, 2013).

Section 903 of the Crimes Code provides that a person is guilty of conspiracy if he either "agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime" or "agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime." 18 Pa.C.S. § 903(a). Once a conspiracy is proven by the evidence, "Even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators in furtherance of the conspiracy." ***Commonwealth v. Nypaver***, 69 A.3d 708, 715 (Pa.Super. 2013).

Reckless endangerment occurs where a person "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S. § 2705. "Brandishing a loaded firearm during the commission of a crime" constitutes the crime of reckless endangerment in that such action "provides a sufficient basis on which a factfinder may conclude that a defendant proceeded with conscious disregard for the safety of others, and that he had the present ability to inflict great bodily harm or death." ***Commonwealth v. Hopkins***, 747 A.2d 910, 916 (Pa.Super. 2000); ***see also Commonwealth v. Martuscelli***, 54 A.3d 940 (Pa.Super. 2012). A person commits involuntary restraint when he, *inter alia*, "knowingly . . . restrains another unlawfully in circumstances exposing him to risk of serious bodily injury[.]" 18 Pa.C.S. § 2902(a)(1). In

Commonwealth v. Dehoniesto, 624 A.2d 156, 161 n.10 (Pa.Super. 1993), "simply holding an individual subject to the will of another was sufficient to establish unlawful restraint." (citing ***Commonwealth v. Wells****,* 460 A.2d 328 (Pa.Super. 1983)).

In the present case, the evidence, viewed in the light most favorable to the Commonwealth, established the following. Reese reported that Appellant agreed with his co-defendant, Faulkner, to enter the home of Mr. Hall without Mr. Hall's permission in order to steal drugs from Mr. Hall. This testimony established the existence of a conspiracy and that Appellant was engaged in the perpetration of a felony, burglary, as a principal when Faulkner shot Mr. Hall, and thus, was guilty of second-degree murder. Additionally, during the course of the burglary, Appellant and his cohorts brandished guns at the people inside of the residence, and Ms. Thomas and Ms. Dorsey were held at gunpoint in the living room. This evidence established the two counts of reckless endangerment and unlawful restraint. Drugs were successfully stolen from the residence after the victims were threatened with guns, which constituted robbery. Hence, the evidence was sufficient to sustain Appellant's convictions.

Herein, Appellant's challenge to the sufficiency of the evidence supporting his convictions rests on the premise that "this Court is not bound by the credibility determination of the jury herein because it was necessarily required to engage in speculation[.]" Appellant's brief at 12. Appellant

acknowledges that Reese specifically identified him at trial as one of the people who agreed to and then participated in the crimes, but he suggests that Reese's testimony should not be credited since Reese obtained a reduction of charges and sentence in exchange for his testimony. Appellant also points to the fact that Reese signed affidavits in prison stating that he had been forced by police to identify Appellant as one of the perpetrators, even though Appellant was not involved in the episode. In assailing his convictions, Appellant additionally relies upon Ms. Dorsey's testimony that she did not think that Appellant, who was masked, was one of the men involved in the crimes.

The jury was apprised both of the cooperation agreement and the documents that Reese executed while he was in jail. Reese explained that he wrote the affidavits that were exculpatory to Appellant under duress since he feared that he or his family would be harmed by Appellant or his friends. The jury also heard Ms. Dorsey state her belief as to Appellant's participation in the crime. A well-ensconced principal of appellate review is the maxim that it "is not the function of an appellate court to re-assess the credibility of the witnesses' testimony." ***Commonwealth v. Cox***, 72 A.3d 719, 722 (Pa.Super. 2013); ***Commonwealth v. Page***, 59 A.3d 1118, 1130 (Pa.Super. 2013) ("A determination of credibility lies solely within the province of the factfinder.") ***Commonwealth v. Blackham***, 909 A.2d 315, 320 (Pa.Super. 2006) ("The weight of the evidence is exclusively for the

finder of fact, which is free to believe all, part, or none of the evidence, and to assess the credibility of the witnesses. . . . It is not for this Court to overturn the credibility determinations of the fact-finder.”). Hence, we are compelled to reject Appellant’s contention that his judgment of acquittal should have been granted due to the inherent unreliability of Reese’s testimony and the more credible testimony proffered by Ms. Dorsey.

Appellant also claims entitlement to a new trial based upon the existence of after-discovered evidence. On appeal from a trial court’s decision to deny a new trial on this ground, we must examine whether the trial court “committed an abuse of discretion or error of law that controlled the outcome of the case.” ***Commonwealth v. Foreman***, 55 A.3d 532, 537 (Pa.Super. 2012). To be awarded a new trial due to the discovery of new evidence, the defendant has the burden of proving by a preponderance of the evidence that the new proof

> (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted.

Id. (quoting ***Commonwealth v. Pagan,*** 950 A.2d 270, 292 (Pa. 2008)) (citations omitted); ***see also Commonwealth v. Chamberlain***, 30 A.3d 381 (Pa. 2011).

In this case, the evidence in question consisted of two letters executed by Reese after trial in this matter. In those documents, Reese, once again,

claimed that Appellant was not a participant in the criminal episode and that police coercion led to his trial testimony to the contrary. Likewise again, when called to the stand, Reese disavowed the letters and indicated that they, like the previous affidavits, had been executed under duress. Reese represented at the evidentiary hearing that his trial testimony identifying Appellant as one of the culprits was true.

The trial court concluded that the letters were cumulative to the evidence presented at trial in that they were identical to the affidavits signed by Reese and produced at trial. The trial court also observed that Reese's testimony at the evidentiary hearing tracked his trial testimony. It found that the letters, as well as the affidavits produced at trial, were written under duress. Finally, the trial court made the following observation.

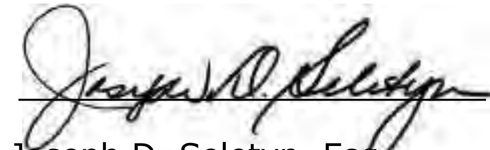
> This Court notes the ongoing and significant efforts taken by the Commonwealth and the Department of Corrections, at Reese's request, to insure his safety while he serves his five to ten year sentence of incarceration. This Court also notes that Appellant's original trial counsel withdrew on the basis that Appellant had sent correspondence to at least two people asking them to get witnesses to recant statements and indicating that his attorney had advised him to send those letters, a claim counsel strenuously denied. The eight letters written by Appellant and his mother after trial to Reese further corroborate the ongoing pressure to recant being placed on Reese by Appellant. Reese has consistently expressed concern about the consequences of being a "snitch", including references in the subject letters, and also about both direct and indirect threats made against him as a result of his testimony. Reese's fears for his safety are valid and ongoing and his testimony, both at trial and at the Post-Sentence Motion hearing, was credible.

Trial Court Opinion, 6/29/12, at 9-10.

It is evident that the trial court did not abuse its discretion or commit an error of law. We concur that the letters were cumulative in nature to other proof already presented to the jury. Before trial, Reese had provided identical statements exonerating Appellant and then, upon appearance in the courtroom, retracted those representations as procured under duress. Hence, Appellant is not entitled to a new trial based upon after-discovered evidence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/28/2014