

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHRISTIAN KENYON,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Nos. 658 & 659 MDA 2012

Appeal from the Judgment of Sentence of October 17, 2011,
in the Court of Common Pleas of Lackawanna County,
Criminal Division at Nos. CP-35-CR-0002437-2009 and
CP-35-CR-0002436-2009

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

FILED MAY 22, 2013

This is an appeal from a judgment of sentence. We affirm Appellant's convictions, vacate his judgment of sentence, and remand for re-sentencing.

The background underlying this appeal can be summarized in the following manner.

On August 18, 2009, [Appellant] was charged with offenses related to two separate incidents. The first incident was the June 27, 2009 shooting of Shaquan Burgess at or near 324 South 10th Avenue, Scranton ("Shooting Case"). The second incident was the July 13, 2009 robbery of the Dunkin' Donuts at Moosic Street, Scranton ("Robbery Case"). . . .

On August 19, 2009, through a separate Criminal Complaint, [Appellant] was charged with offenses related to the July 30,

*Retired Senior Judge assigned to the Superior Court.

2009 murder of Allen Fernandez in Ransom Township ("Murder Case").

Trial Court Opinion, 03/06/12, at 1.

Appellant filed an omnibus pretrial motion, which included a "Motion to Sever." In the "Motion to Sever," Appellant sought separate trials for the Shooting, Robbery, and Murder Cases. The Commonwealth later sought to have all of the cases tried together. The trial court granted the Commonwealth's "Motion for Joinder" and denied Appellant's "Motion to Sever."

The cases were tried together before a jury. The jury convicted Appellant of several counts in each case. Most significantly, the jury convicted Appellant of first-degree murder and criminal conspiracy to commit first-degree murder. For his first-degree murder conviction, the trial court sentenced Appellant to a mandatory term of life in prison without the possibility of parole. Notably, Appellant was a juvenile when he committed the murder for which he was convicted. Appellant filed post-sentence motions, which the trial court denied. This appeal followed.

Appellant presents the following questions for our consideration:¹

[1.] Whether the TRIAL COURT erred and/or abused its discretion in failing to grant [Appellant's] judgment of acquittal on the charge of murder in the first degree in that the Commonwealth failed to establish that [Appellant] directly or substantially caused the death of Allen Fernandez?

¹ We have reordered Appellant's issues.

[2.] Whether the TRIAL COURT erred and/or abused its discretion in failing to grant [Appellant] a new trial because the verdict was contrary to the weight of the evidence presented to support a finding of guilt beyond a reasonable doubt that [Appellant] directly or substantially caused the death of Allen Fernandez with respect to the offense of murder in the first degree?

[3.] [W]hether the TRIAL COURT erred as a matter of law and/or manifestly abused its discretion in denying the portion of [Appellant's] Omnibus Pretrial motion seeking to sever the MURDER CASE, ROBBERY CASE and SHOOTING CASE for trial?

[4.] Based upon the United States' Supreme Court decision in Miller v. Alabama and this Court's subsequent decision applying same in Commonwealth v. Knox, whether [Appellant's] sentence for all convictions should be vacated and the instant matter be remanded to the TRIAL COURT for re-sentencing?

Appellant's Brief at 5.

We first will address Appellant's claim that the Commonwealth failed to present sufficient evidence to support Appellant's conviction for first-degree murder. Appellant's Brief at 20-32. The following principles of law govern the manner in which we consider challenges to the sufficiency of the evidence:

In reviewing sufficiency of evidence claims, we must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all the elements of the offense. Additionally, to sustain a conviction, the facts and circumstances which the Commonwealth must prove, must be such that every essential element of the crime is established beyond a reasonable doubt. Admittedly, guilt must be based on facts and conditions proved, and not on suspicion or surmise. However, entirely circumstantial evidence is sufficient so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.

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 fact finder is free to believe all, part, or none of the evidence presented at trial.

Commonwealth v. Eckrote, 12 A.3d 383, 385-86 (Pa. Super. 2010) (citations omitted).

The Commonwealth presented evidence that Appellant, Jeff Future, and Tonie Future agreed to shoot and kill Allen Fernandez and that the threesome succeeded in their plan. While Appellant's argument to this Court spans nearly twelve pages, his position is that the Commonwealth failed to prove beyond a reasonable doubt that a bullet associated with the gun he fired caused an injury to Mr. Fernandez. ***See, e.g.***, Appellant's Brief at 31 ("The Commonwealth failed to associate any bullet, projectile or fragment related to [Appellant] to any wounds, lethal or non-lethal, of [Mr. Fernandez]."). Appellant's argument is misguided.

Evidence is sufficient to sustain a conviction for first-degree murder where the Commonwealth establishes that the defendant acted with a specific intent to kill; that a human being was unlawfully killed; that the person accused was responsible for the killing; and that the killing was done with premeditation or deliberation. A specific intent to kill may be proven by circumstantial evidence; it may be inferred by the use of a deadly weapon upon a vital part of the victim's body. Each member of a conspiracy to commit murder may be convicted of first degree murder, **regardless of which of the conspirators inflicted the fatal wound**, where the elements of first degree murder are made out as to that conspirator.

Commonwealth v. Busanet, 817 A.2d 1060, 1063-64 (Pa. 2002) (citations and quotation marks omitted) (emphasis added).

At trial, the Commonwealth offered the testimony of several witnesses, including that of Tonie Future ("Tonie"). Tonie explained that he, Appellant, and Jeffrey Future ("Jeff") are members of a gang known as the Lincoln Park Piru. Lincoln Park Piru is affiliated with a larger group known as the Bloods.

Tonie further explained that, on July 29, 2009, Jeff told him that Jeff, Tonie, and Appellant would be picking up "some dude" and that they should bring their guns. N.T., 08/11/11, at 51. Jeff eventually told Tonie that they would be picking up Mr. Fernandez. Mr. Fernandez was a member of a different group of Bloods known as the Miller Gangster Bloods. Mr. Fernandez allegedly caused some trouble for the Lincoln Park Piru. Consequently, Jeff concocted a plan to kill Mr. Fernandez. In short, the plan was that Jeff, Tonie, and Appellant would pick up Mr. Fernandez, feign friendliness with Mr. Fernandez, and eventually shoot and kill him. Importantly, according to Tonie, Appellant was aware of, and a willing participant in, the plan to pick up and kill Mr. Fernandez. *Id.* at 61.

Tonie testified that the three men had picked up Mr. Fernandez and were driving with him when Jeff stated that "he had to take a piss." *Id.* at 64. After Jeff exited the vehicle and began to relieve himself, Tonie got out of the vehicle, gun in hand, and instructed Mr. Fernandez, who was in the rear of the vehicle, to exit of the vehicle. Tonie stated that Appellant also was in the rear of the vehicle and, at this point, had a gun in his hand.

Mr. Fernandez exited the vehicle, at which time Jeff told him to empty his pockets. After he emptied his pockets, Mr. Fernandez ran but soon tripped. Tonie testified that he, Jeff, and Appellant surrounded Mr.

Fernandez and that they all pointed their guns at him. Tonie further testified that Appellant then shot Mr. Fernandez "about twice." *Id.* at 70. According to Tonie, "The first shot it just sparked and the second time I seen his head move." *Id.* Jeff and Tonie then proceeded to shoot Mr. Fernandez multiple times. The group eventually fled the scene after seeing another vehicle headed in their direction. That vehicle ran over Mr. Fernandez's body. Mr. Fernandez died.

The Commonwealth also offered the testimony of Gary Ross, M.D., a clinical pathologist. Dr. Ross testified that Mr. Fernandez was shot several times, including in his head. Dr. Ross also testified to a reasonable degree of medical certainty that "[t]he cause of death in this case is multiple gunshot wounds and the manner of death is homicide." N.T., 08/12/11, at 125.

Viewed in a light most favorable to the Commonwealth, this evidence establishes that Appellant willfully participated in the intentional killing of Mr. Fernandez. As we noted above, it is of no significance whether the Commonwealth proved that a shot from Appellant's gun caused or contributed to Mr. Fernandez's death. Instead, because the Commonwealth demonstrated that Appellant conspired with Jeff and Tonie to murder Mr. Fernandez² and that the threesome succeeded in this plan, the Commonwealth presented sufficient evidence to sustain Appellant's

² Appellant does not challenge his conviction for conspiracy to commit first-degree murder.

conviction of first-degree murder. ***See, e.g., Commonwealth v. Simpson***, 754 A.2d 1274, 1269 (Pa. 2000) (“Viewed in the light most favorable to the Commonwealth, the prosecution presented evidence to the jury to support a finding that [Simpson] willingly and consciously participated in the intentional killing of the victim. The evidence demonstrated that [Simpson] took part in a conspiracy to abduct the victim for ransom. The evidence further confirmed the Commonwealth's theory that the group followed through on their threat to kill the victim when the victim's brother failed to surrender the requested amount of money. While the police were unable to deduce exactly which of the kidnappers ultimately killed the victim, the prosecution still managed to produce evidence to support a finding that [Simpson], on his own, whether he actually pulled the trigger or not, maintained the requisite specific intent to take the victim's life. This clearly satisfies the statutory elements of first-degree murder, and the evidence is therefore sufficient to sustain the conviction.”).

We next will address Appellant's issue regarding the weight of the evidence presented at trial. Appellant's Brief at 32-38. Appellant maintains that Tonie's version of the shooting of Mr. Hernandez was inconsistent with the Commonwealth's forensic evidence. Thus, in Appellant's view, Tonie's testimony was completely unreliable. According to Appellant, because the Commonwealth could not sustain its burden of proving Appellant guilty of first-degree murder without Tonie's unreliable testimony, that verdict is contrary to weight of the evidence.

“Weight of the evidence claims must be raised via oral, written, or post-sentence motions in the trial court for the issue to be preserved for appeal.” **Commonwealth v. O'Bidos**, 849 A.2d 243, 252 (Pa. Super. 2004) (citations omitted). “Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a).

Here, Appellant did file a post-sentence motion, which included two boilerplate allegations that the verdict of guilty of first-degree murder was contrary to the weight of the evidence. Appellant asserted as follows:

13. The evidence at trial, even if sufficient to sustain the verdict as a matter of law, was nevertheless contrary to the weight of the evidence presented with respect to the offense of First Degree Murder as charged in Count I of the MURDER CASE (1009-CR-2437).

14. The evidence at trial, even if sufficient to sustain the verdict as a matter of law, was nevertheless contrary to the weight of the evidence presented to support a finding of guilt beyond a reasonable doubt that [Appellant] caused, intended to cause or contributed to the death of Allen Fernandez with respect to the offense of First Degree Murder as charged in Count I of the MURDER CASE (1009-CR-2437).

Post-Sentence Motion, 10/27/11, at ¶¶ 13. and 14.

The trial court rejected Appellant’s various boilerplate assertions regarding the weight of the evidence. Trial Court Memorandum and Order, 03/06/12, at 16-17. After stating that a wealth of evidence supported the jury’s verdicts, the court determined that the jury’s conclusion did not shock the court’s conscience. **Id.** The court did not specifically address a weight-of-the-evidence claim contrasting Tonie’s testimony with the

Commonwealth's forensic evidence, presumably because Appellant's post-sentence motion failed to present any such claim.

We conclude that Appellant failed to present to the trial court the weight-of-the-evidence claim that he raises on appeal. Consequently, he failed to preserve the claim for appellate review. We, therefore, find the issue waived.

We now turn to Appellant's issue regarding the trial court's decision to grant the Commonwealth's "Motion for Joinder" and to deny Appellant's "Motion to Sever." Appellant's Brief at 13-20.

Whether to join or sever offenses for trial is within the trial court's discretion and will not be reversed on appeal absent a manifest abuse thereof, or prejudice and clear injustice to the defendant.

Commonwealth v. Wholaver, 989 A.2d 883, 898 (Pa. 2010).

[O]ur Supreme Court [has] established the following test for severance matters:

Where the defendant moves to sever offenses not based on the same act or transaction . . . the court must therefore determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Pursuant to this test, a court must first determine if the evidence of each of the offenses would be admissible in a separate trial for the other.

This determination of admissibility is critical to the court's disposition of the severance motion; thus, the evidence must be weighed in no less rigorous a fashion than if it were proffered for admission at trial. Accordingly:

Evidence of crimes other than the one in question is not admissible solely to show the defendant's bad character or propensity to commit crime. Nevertheless:

[E]vidence of other crimes is admissible to demonstrate (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial. Additionally, evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts.

Commonwealth v. Brookins, 10 A.3d 1251, 1255-56 (Pa. Super. 2010) (citations and quotation marks omitted).

By way of further background, with regard to the Shooting Case, the Commonwealth alleged that Appellant and Tonie conspired to and, in fact, did shoot Shaquan Burgess on June 27, 2009. As to the Robbery Case, the Commonwealth alleged that Appellant, Tonie, and Jasmine Rivera, Tonie's girlfriend, conspired to and, in fact, did rob a Dunkin' Donuts shop while armed on July 13, 2009. Lastly, with regard to the Murder Case, the Commonwealth alleged that, on July 30, 2009, Appellant, Tonie, and Jeff murdered Mr. Fernandez.

In arguing that each of Appellant's offenses would be admissible in a separate trial for the others, the Commonwealth maintained, *inter alia*, that Appellant's motive for committing the various crimes was to demonstrate his

adoption of the gang lifestyle.³ The trial court ultimately agreed with the Commonwealth's position. Trial Court Memorandum and Order, 07/15/11, at 5-8.

In his brief to this Court, Appellant attempts to rebut the court's conclusion that evidence of Appellant's various offenses tended to demonstrate Appellant's gang-related motives for committing the offenses. In so doing, Appellant relies on Tonie's pre-trial testimony. Appellant's Brief at 17-19. Appellant's reliance on this testimony is misguided.

The trial court ruled on Appellant's "Motion to Sever" and the Commonwealth's "Motion for Joinder" on July 15, 2011. The pre-trial testimony upon which Appellant's allegation of error relies occurred on August 3, 2011, and was unrelated to the "Motion to Sever" and the "Motion for Joinder." The court did not have the benefit of Tonie's pre-trial testimony when it ruled on the competition motions. Thus, our scope of review does not allow us to consider this testimony in determining whether the trial court properly ruled on the "Motion to Sever" and the "Motion for Joinder." **See Commonwealth v. Widmer**, 744 A.2d 745, 750 (Pa. 2000) ("Scope of review refers to the confines within which an appellate court must

³ **See, e.g.**, Commonwealth's Response to Appellant's Omnibus Pre-Trial Motion, 05/27/11, at 7 ("Here, the natural development of the facts will show that [Appellant] was a willing participant in a series of crimes demonstrating an escalating level of violence as well as an escalating adoption of the 'Blood' mentality. The interwoven nature of the co-defendants, the crimes, the victims, the co-conspirators, and most importantly the motive for each crime makes each a necessary part in providing a jury with the entire picture.").

conduct its examination of a trial court decision. In other words, it refers to *what* the appellate court is permitted to examine.”) (citation omitted) (emphasis in original). Appellant has failed to convince us that the trial court abused its discretion by concluding that the evidence of each the offenses would be admissible in a separate trial for the others. **See Commonwealth v. Wrecks**, 931 A.2d 717, 722 (Pa. Super. 2007) (“An appellant also has the burden to convince us that there were errors and that relief is due because of those errors.”).

As to whether a jury would be capable of separating such evidence so as to avoid the danger of confusion, the trial court concluded:

The [c]ourt answers the second prong in the affirmative. The evidence of distinct offenses is capable of separation by a jury so that there is no danger of confusion. The offenses are clearly distinguishable in time, space, and characters. Furthermore, the jury will be instructed to consider each offense separately.

Trial Court Memorandum and Order, 07/15/11, at 7. In his brief to this Court, Appellant offers no meaningful argument that the trial court erred in this regard. We, therefore, will not disturb the court’s conclusion.

Lastly, Appellant apparently claims that he suffered prejudice due to his cases being tried together. He states,

Even if this Court is persuaded by the TRIAL COURT’s association of the relationship of the offenses/events in question as “demonstrating an escalating adoption of the ‘Blood’ mentality for future potential membership in the Bloods”, severance was nevertheless required based upon the inability of [Appellant] to invoke his right to remain silent with respect to any questions concerning the ROBBERY CASE and/or SHOOTING CASE when he elected to testify on his own behalf at Trial concerning the MURDER CASE.

Appellant's Brief at 19 (citations omitted).⁴ Appellant fails to cite any legal authority to support this undeveloped, bald assertion. As such, it is waived. **See Commonwealth v. Clayton**, 816 A.2d 217, 221 (Pa. 2002) ("Furthermore, it is a well settled principle of appellate jurisprudence that undeveloped claims are waived and unreviewable on appeal."). For all of the reasons provided above, Appellant has failed to convince us that the trial court erred by granting the Commonwealth's "Motion for Joinder" or by denying Appellant's "Motion to Sever."

Appellant also claims that his sentence is illegal. Appellant's Brief at 11-13. He is correct. The record shows Appellant was under the age of eighteen at the time of Mr. Fernandez's murder. On October 17, 2011, the trial court sentenced Appellant to a mandatory penalty of life imprisonment without parole pursuant to 18 Pa.C.S.A. § 1102. In June 2012, the United States Supreme Court ruled that mandatory life imprisonment without parole for a person under the age of eighteen at the time of the offense violates the Eighth Amendment to the U.S. Constitution. **Miller v. Alabama**, 132 S.Ct. 2455 (2012); **Commonwealth v. Batts**, 2013 WL 1200252 (Pa. filed March 26, 2013). Accordingly, Appellant's sentence is unconstitutional.

⁴ As we stated above, when faced with Appellant's "Motion to Sever," the trial court was charged with determining whether Appellant would be prejudiced by the consolidation of the offenses. At that time, Appellant did not state with certainty that he would testify in any particular case or cases. **See, e.g.**, Appellant's Omnibus Pre-Trial Motion, 05/13/11, at ¶25 ("In the event [Appellant] chooses to testify in only one (1) or two (2) cases, his right to remain silent in the other cases will be prejudiced.").

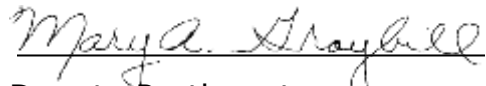
In **Batts**, the Pennsylvania Supreme Court indicated that the appellate remedy for the unconstitutional imposition of a mandatory life-without-parole sentence upon a juvenile situated similarly to Appellant is a remand for resentencing at which the court must consider the sentencing factors set forth in **Miller** and then resentence the appellant accordingly. **See Batts**, 2013 WL 1200252 at 10, 12. Therefore, we vacate Appellant's judgment of sentence and remand this case for resentencing in accordance with **Batts**.

Based on our foregoing discussion, we affirm Appellant's convictions but vacate his sentence. We remand this case for resentencing in accordance with **Batts**.

Convictions affirmed. Sentence vacated. Case remanded. Jurisdiction relinquished.

Judge Ott concurs in the result.

Judgment Entered.


Deputy Prothonotary

Date: 5/22/2013