

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
EDWARD N. DANIELS,	:	No. 188 EDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, December 1, 2011,  
in the Court of Common Pleas of Philadelphia County  
Criminal Division at Nos. CP-51-CR-0012194-2009,  
CP-51-CR-0012199-2009

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED SEPTEMBER 27, 2013**

Edward N. Daniels appeals from the judgment of sentence of December 1, 2011, following his conviction of two counts of murder in the second degree, criminal conspiracy, and related charges. After careful review, we vacate one of his convictions for criminal conspiracy, but affirm in all other respects.

The trial court has aptly summarized the facts of this matter as follows:

During daylight hours on June 27, 2009, at the Piazza Navona apartments, located in Northern Liberties section of Philadelphia, the defendant and co-defendants entered the building with semi-automatic weapons with the intention to carry out a robbery. Each floor of the apartment building contained surveillance cameras, which captured practically every move of the defendant and his

co-defendants[, Keith Epps and Antonio Wright,] and the murders of Rian Thal and Timothy Gilmore. Rian Thal was a party promoter, but was also involved in the selling of powder cocaine. She was specifically targeted because word had gotten out that she was to receive a shipment of approximately one half million dollars' worth of powder cocaine, which amounted to eleven or twelve kilos of powder cocaine, which was being transported from Texas to Philadelphia.[Footnote 3] The two drug couriers, Timothy Gilmore and Edward Emerson,[Footnote 4] transported the drugs by way of a tractor-trailer to Philadelphia.

On the Friday before the murders, Leon Woodard was moving the cocaine into Ms. Thal's apartment on the seventh floor of the Piazza Navona. Accompanying Mr. Woodard was a man named Vernon Williams who Ms. Thal did not permit into her apartment because she did not trust him.[Footnote 5] At trial, Mr. Woodard testified that Mr. Williams left his cell phone in Mr. Woodard's vehicle. After the murders occurred, Mr. Woodard saw text messages between Mr. Williams and Mr. Wright that indicated Mr. Woodard was being set up.[Footnote 6] Unbeknownst to Ms. Thal or Mr. Woodard, Mr. Williams contacted co-defendant, Mr. Epps, about the shipment of cocaine and the drug money tied to its purchase and a plan was hatched to steal it.

Mr. Epps then contacted a friend named Katoya Jones, who lived in the building, and asked her to help him enter the apartment in exchange for a cut of the profits should the robbery scheme succeed.[Footnote 7] [At] [a]pproximately 3:30 a.m., that Saturday, the 27<sup>th</sup>, the day of the murders, Mr. Epps called Ms. Jones to let him and his friend, Robert Keith, into the building. This attempted burglary failed because Mr. Epps and Mr. Keith entered the wrong apartment.

Instead of taking that as a sign that the scheme would go awry, the next afternoon, at about

2:00 p.m., Mr. Epps called Ms. Jones again to tell her to allow a friend of his into the building within the next hour. Mr. Epps had planned the robbery with three men, Donnell Murchison, Langdon Scott[Footnote 8], and defendant, Mr. Daniels. Around 3:00 p.m., Ms. Jones opened the locked door for Mr. Murchison; Mr. Murchison then opened the door for Mr. Epps and Mr. Scott. Mr. Scott was under the impression that he was buying \$4,500 worth of powder cocaine.

According to the testimony of Mr. Scott, once all three men were in the elevator,[Footnote 9] Mr. Murchison informed Mr. Scott that when he went to buy the drugs from Mr. Gilmore and Ms. Thal, Mr. Murchison and Mr. Daniels were going to rob them. At that point, Mr. Scott decided not to go through with the buy and all three of them left the apartment building to report back to Mr. Epps, who was sitting in a white van outside of the apartment building. While Mr. Murchison waited outside of the van, Mr. Scott and defendant entered the van to talk with Mr. Epps.

A friend of Mr. Epps, Caesar Holloway, told him that he would take Mr. Scott home and get a replacement, who turned out to be co-defendant Wright. Around 5:00 p.m., Mr. Wright, Mr. Daniels, and Mr. Murchison entered the Piazza Navona and proceeded to the seventh floor to wait for Ms. Thal and Mr. Gilmore to return. Mr. Wright and Mr. Daniels went to one end of the hallway while Mr. Murchison went to the other in order to box in the victims. Mr. Epps called Mr. Murchison as the two enter[ed] the apartment building. As Ms. Thal and Mr. Gilmore exited the elevator, the defendant and his co-defendants pulled out guns and announced a robbery. When Mr. Gilmore resisted, Mr. Wright shot him. Mr. Murchison then shot Ms. Thal behind the head killing her instantly. As the three men exited the building, Mr. Murchison noticed that Mr. Gilmore was still alive and shot him twice in the head killing him. All of the men then entered Mr. Epps' van, and fled the scene without the money

or the drugs. Police later discovered four kilos of cocaine and over \$100,000 in Ms. Thal's apartment.

Later that evening police identified Ms. Jones as a person of interest because she was observed on a surveillance video opening the doors for Mr. Murchison twice. Initially, Ms. Jones lied to police about being involved in the incident and was freed. However, police picked her up again once police reviewed another surveillance video, which showed her letting Mr. Keith into the building. Upon being taken into custody, Ms. Jones gave a statement to the detectives and later pleaded guilty to two counts of third-degree murder, one count of conspiracy, two counts of robbery in the first-degree, and one count of burglary.

Police used Ms. Jones' cell phone records and learned that she and Mr. Epps had been in contact with one another. After police obtained Mr. Epps' cell phone records, the detectives found numerous phone calls to the individuals involved: defendant, Mr. Wright, Mr. Scott, Mr. Murchison, Mr. Holloway, and Ms. Jones. According to Detective Ron Dove of the Homicide Unit, on the day of the murders, June 27<sup>th</sup> of 2009, Mr. Holloway and Mr. Epps communicated with each other 53 times, Mr. Williams and Mr. Epps 34 times, Mr. Keith and Mr. Epps spoke 52 times, Ms. Jones and Mr. Epps spoke to each other 29 times, Mr. Scott and Mr. Epps communicated with each other 11 times, Mr. Wright and Mr. Epps spoke with each other 4 times, and 36 communications were made between Mr. Murchison and Mr. Epps.[Footnote 10] The detective was unable to find any calls placed between Mr. Epps and defendant. The investigation continued and ballistic tests revealed that the bullets in Mr. Gilmore and Ms. Thal's head[s] belonged to the weapon used by Mr. Murchison. Detectives also arrested Mr. Wright, and he confessed to being involved in the conspiracy to commit the robbery and shooting Mr. Gilmore multiple times. He did not mention anyone else involved in the murders.

During trial, surveillance tapes shown to Mr. Scott allowed him to identify Mr. Murchison and defendant as the men with whom he entered the building. After giving testimony at a preliminary hearing, Mr. Scott was stabbed numerous times in prison.[Footnote 11]

In addition thereto, at trial Mr. Woodard identified Mr. Wright in a surveillance video; Ms. Jones identified Mr. Wright, as well as, Mr. Epps and Mr. Holloway as being part of the criminal conspiracy. Testimony from Mr. Murchison was stricken from the record after he refused to undergo cross-examination.[Footnote 12]

Defendant's probation officer, Akaga Campbell, testified and identified defendant as one of the men depicted on the surveillance video and still photographs from the video. She based her opinion on defendant's recognizable facial features and choice of clothing. During cross-examination she testified that from February of 2009, until his arrest on July 10, 2009, she saw the defendant four to six times a month.

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[Footnote 3] Rian Thal's business partner, Leon Woodard, was responsible for setting up the deal with a Texas dealer, Kevin Harks, a/k/a Big Bank Hank, who was interested in breaking into the Philadelphia market to sell Mexican cocaine. Mr. Woodard is currently serving 262 months in federal prison for the charge of drug trafficking.

[Footnote 4] Mr. Emerson received thirty-six months in federal prison for the charge of drug trafficking.

[Footnote 5] Mr. Williams died in a car accident a month after the murders occurred.

[Footnote 6] Cell phone records confirmed that Mr. Wright sent a text message to Mr. Williams saying, "Yo, dawg, we need this. This is a big one. We can't let this one get by us."

[Footnote 7] The building required both a key and security code to enter.

[Footnote 8] Mr. Scott was permitted to enter an open guilty [plea] to the charges of robbery, conspiracy, and burglary in exchange for his testimony.

[Footnote 9] The three men entered the building once before, but after Mr. Murchison asked Mr. Scott if he had the money on him to buy the cocaine, Mr. Scott said he did not have the money on him. All three men left the building so that Mr. Scott could retrieve the money.

[Footnote 10] The phone calls mentioned above were obtained from Mr. Epps' phone number, (215)207-4472. Special Agent William Shute of the FBI was able to determine using cell tower sites and video surveillance tapes, that Mr. Epps made and received 57 phone calls while in the Piazza Navona on the day of the murders.

[Footnote 11] Mr. Scott's stabbing occurred the day he was moved to the cell block holding the Defendant. Prior to the testimony, the individuals were involved in a fistfight.

[Footnote 12] Mr. Murchison pled guilty to two counts of first-degree murder, two counts of robbery, and one count of conspiracy. In return for his plea, the Commonwealth agreed to place him in federal custody for his safety. During his direct testimony, the Commonwealth read in statements he gave to detectives, which implicated the defendant and co-defendants as those men that took part in the robbery-turned-murder. (N.T. 11/18/2011, 32[, 37-45, 47, 53, 56-57.)

Trial court opinion, 4/4/12 at 2-6.

On December 1, 2011, following a jury trial before the Honorable Jeffrey P. Minehart, appellant was found guilty of two counts each of murder in the second degree, robbery, and criminal conspiracy. Appellant was also found guilty of one count of carrying firearms in public in Philadelphia. On December 1, 2011, appellant was sentenced to consecutive life terms for second-degree murder. Appellant received concurrent sentences on the firearms and conspiracy charges; the robbery charges merged for sentencing purposes. (Notes of testimony, 12/1/11 at 18-20.) This timely appeal followed. Appellant has complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and, as noted, the trial court has filed an opinion.

Appellant has raised the following issues for this court's review:

1. Did not the lower court err as a matter of law by not granting appellant's motion for a mistrial when the main Commonwealth witness, a co-defendant, testified as to appellant's participation in a double murder on direct examination, but refused to answer any questions on cross-examination, thus depriving appellant of his constitutional right to cross-examination?
2. Did not the trial court err in admitting a probation officer's lay opinion testimony that appellant was the person depicted in the surveillance camera video recording of the crime?
3. Was not the evidence insufficient to convict appellant of two counts of conspiracy, rather than one, after a trial involving a number of crimes involving the same actors and the same

events on the Commonwealth's theory that they were all part of one overarching conspiracy?

Appellant's brief at 3.

Instantly, Donnell Murchison ("Murchison") negotiated a plea with the Commonwealth in exchange for his testimony at trial. (Notes of testimony, 11/18/11 at 3-4.) However, Murchison was clearly a reluctant witness. While he agreed that his prior statement to police was the truth, he repeatedly expressed his reluctance to testify. Eventually, Murchison shut down and basically refused to answer any more questions on cross-examination. (*Id.* at 121-122.)

The trial court denied appellant's motion for mistrial but gave the jury a curative instruction and struck Murchison's testimony in its entirety:

A couple things, first of all, the delay was we had a witness on the witness stand Friday and we had difficulty getting him in today which is logistics and we finally did get him in and you observed on Friday the fact that he did not answer questions, the majority of the questions. He had some difficulty with the Commonwealth's questions and he did not answer a majority of Mr. Warren's questions and as such, he did not sit for cross-examination, so I am striking his testimony. Now, what that means is you have to strike him from your memory bank as if this witness didn't testify. The fact that he testified to giving a statement, you strike that out. The fact that he testified to certain portions of that statement or the majority of the statement or the whole statement, you strike it out. You are not to consider that when you go back to deliberate. You are not to consider his demeanor. You are not to consider anything about him. The witness' testimony has been stricken and I can't emphasize that enough. It

is something that under the law, someone has to sit for cross-examination and I have made the determination this witness will not sit for cross-examination and as such, the testimony, it is as if it never happened. Just put it right out of your minds and we will move on from there.

Notes of testimony, 11/21/11 at 24-26.

With regard to the denial of mistrials, the following standards govern our review:

In criminal trials, the declaration of a mistrial serves to eliminate the negative effect wrought upon a defendant when prejudicial elements are injected into the case or otherwise discovered at trial. By nullifying the tainted process of the former trial and allowing a new trial to convene, declaration of a mistrial serves not only the defendant's interests but, equally important, the public's interest in fair trials designed to end in just judgments. Accordingly, the trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. In making its determination, the court must discern whether misconduct or prejudicial error actually occurred, and if so, . . . assess the degree of any resulting prejudice. Our review of the resulting order is constrained to determining whether the court abused its discretion.

***Commonwealth v. Hogentogler***, 53 A.3d 866, 877-878 (Pa.Super. 2012), ***appeal denied***, \_\_\_ Pa. \_\_\_, 69 A.3d 600 (2013) (citations omitted). "The remedy of a mistrial is an extreme remedy required 'only when an incident is

of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial tribunal.” **Id.** at 878 (citations omitted).

“In conducting a criminal trial, the court must protect the rights of the accused under the Sixth Amendment, including the right ‘to be confronted with the witnesses against him.” **United States v. Morgan**, 757 F.2d 1074, 1076 (10<sup>th</sup> Cir. 1985). “[T]he defendant must be provided with an adequate opportunity to fully and fairly cross-examine the witnesses against him.” **Id.**, citing **California v. Green**, 399 U.S. 149 (1970). “[T]he right of confrontation includes the right of the accused to use cross-examination to present a defense to the charges against him.” **Id.** (citation omitted).

In this case, Murchison refused to be cross-examined so the trial court struck his testimony, in its entirety, and cautioned the jury. This was well within the trial court’s discretion. **See id.** at 1077, citing **United States v. Nunez**, 668 F.2d 1116, 1121 (10<sup>th</sup> Cir. 1981) (“The usual remedy when a government witness invokes the Fifth Amendment on cross-examination on matters to which the witness testifies on direct examination is to strike the witness’ direct testimony.”). **See also United States v. McGlory**, 968 F.2d 309, 344 (3<sup>rd</sup> Cir. 1992), **cert. denied**, 507 U.S. 962 (1993) (“Courts often prevent an emasculation of the confrontation right by striking the testimony of a non-respondent witness. Use of this remedy lies within the district court’s discretion.”) (citations omitted). When the trial court provides cautionary instructions to the jury in the event the defense raises a motion

for mistrial, “[t]he law presumes that the jury will follow the instructions of the court.” **Commonwealth v. Brown**, 567 Pa. 272, 289, 786 A.2d 961, 971 (2001) (citation omitted), **cert. denied**, 537 U.S. 1187 (2003).

Furthermore, we agree with the trial court that there was ample evidence introduced by the Commonwealth, apart from Murchison’s stricken testimony, that established appellant’s participation in the crimes, including testimony from Langdon Scott and Akaga Campbell. (Trial court opinion, 4/4/12 at 9-10.) Therefore, the trial court did not abuse its discretion in denying appellant’s motion for mistrial and instead striking Murchison’s testimony and giving a curative instruction to the jury. **McGlory**, 968 F.2d at 344 (“Prejudicial testimony will not mandate a mistrial when there is other significant evidence of guilt which reduces the likelihood that the otherwise improper testimony had a substantial impact upon the verdict of the jury.”), quoting **United States v. Rodriguez-Arevalo**, 734 F.2d 612, 615 (11<sup>th</sup> Cir. 1984).

We also note that Murchison was not a co-defendant. Therefore, **Bruton v. United States**, 391 U.S. 123 (1968), upon which appellant relies, is inapposite. **Bruton** involved the admission of a co-defendant’s confession that also implicated the non-testifying defendant.

Next, appellant argues that the trial court erred by allowing his probation officer, Akaga Campbell (“Campbell”), to identify him as the perpetrator depicted in the surveillance tape. According to appellant, this

was impermissible lay opinion testimony and the jury should have been allowed to make its own determination as to whether he was the individual in the videotape. (Appellant's brief at 20.) Appellant contends that the Commonwealth failed to establish a basis for Campbell's testimony and that her testimony invaded the province of the jury. (***Id.*** at 19-20.) We disagree.

"The admission of evidence is in the sound discretion of the trial judge, and will not be disturbed on appeal absent a manifest abuse marked by an error of law." ***Commonwealth v. Brown***, 911 A.2d 576, 584 (Pa.Super. 2006), quoting ***Commonwealth v. Brennan***, 696 A.2d 1201, 1203 (Pa.Super. 1997) (citations omitted).

The Pennsylvania Rules of Evidence provide, with regard to lay opinion testimony,

**Rule 701. Opinion Testimony by Lay Witnesses**

If 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., Rule 701, 42 Pa.C.S.A.

Here, Campbell testified that she was appellant's federal probation officer from February 2009 until July 2009, when he was arrested in this case. (Notes of testimony, 11/17/11 at 38.) She met with appellant four to six times per month. (*Id.* at 39.) Each visit would last anywhere from twenty minutes to one hour. (*Id.*) Campbell testified that she saw appellant frequently during the course of her duties and is familiar with his appearance. (*Id.* at 54.) Campbell positively identified appellant as the individual depicted in the videotape. (*Id.* at 41.)

We find that the trial court did not err in permitting Campbell to testify regarding appellant's identity.<sup>1</sup> The Commonwealth laid a foundation for her testimony by establishing that she was very familiar with appellant, meeting with him four to six times per month over a period of approximately six months. Although the surveillance tape was apparently of good quality, we determine that Campbell's testimony was admissible to aid the jury in deciding a material fact in issue, *i.e.*, whether appellant was the man depicted in the videotape. ***See Commonwealth v. Spencer***, 639 A.2d 820, 824 (Pa.Super. 1994) (witness' testimony that the defendant had a

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<sup>1</sup> The Commonwealth claims that the issue is waived because appellant failed to object to Campbell's testimony at trial. (Commonwealth's brief at 11.) However, appellant filed a pre-trial motion *in limine* to exclude Campbell's identification testimony which was argued and denied on November 8, 2011. Therefore, the issue is preserved for appeal. ***See*** Pa.R.E., Rule 103(b), 42 Pa.C.S.A. ("Once the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

distinctive and easily recognized gait, and that the robber in the videotape walked like the defendant, was rationally based on her perception and was clearly relevant to establish the identity of the robber).

Finally, appellant argues that he could not be convicted and sentenced on two separate counts of criminal conspiracy where the Commonwealth only proved a single, overarching conspiratorial agreement. The Commonwealth concedes the point and agrees that one of the convictions for criminal conspiracy must be vacated. (Commonwealth's brief at 18.)

Initially, we note that this issue was not raised via post-sentence motions or in appellant's Rule 1925(b) statement. However, a claim that two or more convictions should have merged for sentencing purposes goes to the legality of the sentence, and is therefore not subject to waiver. ***Commonwealth v. Wesley***, 860 A.2d 585, 591 n.6 (Pa.Super. 2004), ***appeal dismissed as improvidently granted***, \_\_\_ Pa. \_\_\_, 896 A.2d 564 (2006), citing ***Commonwealth v. Duffy***, 832 A.2d 1132, 1136 (Pa.Super. 2003), ***appeal denied***, 577 Pa. 694, 845 A.2d 816 (2004).

"A claim that the trial court imposed an illegal sentence by failing to merge sentences is a question of law. Accordingly, our standard of review is plenary." ***Commonwealth v. Snyder***, 870 A.2d 336, 349 (Pa.Super. 2005), quoting ***Duffy, supra*** at 1137.

Our Courts have long held that where a defendant commits multiple distinct criminal acts, concepts of merger do not apply. ***Commonwealth v. Anderson***, 538 Pa. 574, 650 A.2d 20 (1994);

[***Commonwealth v. Johnson***, 874 A.2d 66, 70 (Pa.Super. 2005), ***appeal denied***, 587 Pa. 720, 899 A.2d 1122 (2006)]; ***see also*** 42 Pa.C.S.A. § 9765 (“no crimes shall merge for sentencing purposes unless the crimes **arise from a single criminal act** and all of the statutory elements of one offense are included in the statutory elements of the other offense.”)

***Commonwealth v. Robinson***, 931 A.2d 15, 24 (Pa.Super. 2007) (***en banc***) (emphasis in original). ***See also Commonwealth v. Healey***, 836 A.2d 156, 157-158 (Pa.Super. 2003), quoting ***Commonwealth v. Gatling***, 570 Pa. 34, 48, 807 A.2d 890, 899 (2002) (plurality) (“The preliminary consideration is whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge.”).

In determining whether a single conspiracy or multiple conspiracies have been established, we must consider several relevant factors: The factors most commonly considered in a totality of the circumstances analysis of the single vs. multiple conspiracies issue . . . are: the number of overt acts in common; the overlap of personnel; the time period during which the alleged acts took place; the similarity in methods of operation; the locations in which the alleged acts took place; the extent to which the purported conspiracies share a common objective; and, the degree to which interdependence is needed for the overall operation to succeed.

***Commonwealth v. Barnes***, 871 A.2d 812, 820 (Pa.Super. 2005), ***affirmed***, 592 Pa. 301, 924 A.2d 1202 (2007).

Although there were two victims here, we agree that the evidence demonstrated only a single, continuing conspiracy. Appellant and his co-conspirators hatched a plan to rob Thal and Gilmore of drugs and money, during which they were shot and killed. Therefore, appellant could not be convicted on two separate counts of criminal conspiracy. It is necessary to vacate one of his conspiracy convictions; however, since he received concurrent sentences, the trial court's overall sentencing scheme remains intact and we will not remand for re-sentencing. Appellant is serving two consecutive life sentences for murder.

Appellant's conviction of Count 3 at CR-0012194-2009, criminal conspiracy, is vacated. Appellant's petition to complete the record, filed May 1, 2013, is denied.<sup>2</sup> Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambetta", written in dark ink over a horizontal line.

Prothonotary

Date: 9/27/2013

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<sup>2</sup> With regard to Campbell's testimony, the Commonwealth argued the matter was waived because appellant failed to include the surveillance tape in the certified record. (Commonwealth's brief at 12.) On May 1, 2013, appellant filed a petition to complete the record to include the videotape. For the reasons discussed above, we find Campbell's testimony was properly admitted and the actual videotape is not crucial to our analysis. In addition, there are numerous still photos from the videotape in the certified record.