

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DANIEL LIVINGSTON,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3334 EDA 2012

Appeal from the Judgment of Sentence of July 31, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0001552-2011
and CP-51-CR-0001554-2011.

BEFORE: PANELLA, OLSON AND PLATT,* JJ.

MEMORANDUM BY OLSON, J.:

FILED NOVEMBER 08, 2013

Appellant, Daniel Livingston, appeals from the judgment of sentence entered on July 31, 2012, as made final by the denial of his post-sentence motion on November 15, 2012. We affirm.

On July 31, 2012, a jury convicted Appellant of murder in the first degree,¹ intimidation of a victim,² retaliation against a victim,³ two counts of carrying a firearm without a license,⁴ two counts of possessing an

¹ 18 Pa.C.S.A. § 2502(a).

² 18 Pa.C.S.A. § 4952(a)(1).

³ 18 Pa.C.S.A. § 4953(a).

⁴ 18 Pa.C.S.A. § 6106(a)(1).

instrument of crime,⁵ and two counts of possession of a firearm by a prohibited person.⁶ Appellant was sentenced to an aggregate term of life imprisonment without the possibility of parole.

Appellant's convictions are the result of two incidents that occurred in 2009. The trial court summarized the facts of the first incident, which are not disputed on appeal, as follows:

On September 28, 2009, at approximately 3 p.m., Jesse Jones [("Jones")] was walking to the store in his East Germantown neighborhood. N.T. 7/26/2012 at 55-56. Jones had reached the corner of Locust Street and Crowson Street when he ran into a few men, including [Appellant], whom he knew. N.T. 7/26/2012 at 56-57. Two of the men, Gerald Outland [("Outland")] and Parrish Holmes [("Holmes")], [began] to argue and got into a fistfight. N.T. 7/26/2012 at 58. After about one minute, Outland extricated himself from the fight, walked over to [Appellant], lifted [Appellant's] shirt, and removed [Appellant's] gun from the waistband of his pants. N.T. 7/26/2012 at 59-60. Outland then walked back to Holmes and shot him in the stomach. N.T. 7/26/2012 at 61.

Holmes was taken to Albert Einstein Medical Center. N.T. 7/25/2012 at 65; 7/26/2012 at 62. On September 29, 2009, the police interviewed Holmes at the hospital. N.T. 7/25/2012 at 65-66. Holmes told police that Outland had shot him with [Appellant's] gun, and that he could identify both men if he saw them again. N.T. 7/25/2012 at 67-69.

On October 27, 2009, Detective William Knecht interviewed Holmes. N.T. 7/25/2012 at 148. During this interview, Holmes identified Outland from a photo array as the man who shot him, and identified [Appellant] from a photo array as the man who

⁵ 18 Pa.C.S.A. § 907(a).

⁶ 18 Pa.C.S.A. § 6105(a.11).

had provided the gun. N.T. 7/25/2012 at 149-156. As Holmes and Detective Knecht left the squad room, Holmes pointed to the photograph of [Appellant] that Detective Knecht was carrying in his hand, and told Detective Knecht, "if you ever find me dead, he did it." N.T. 7/25/2012 at 157.

Based on Holmes'[] statements to police, on November 4, 2009, search warrants were issued for the homes of Outland and [Appellant]. N.T. 7/25/2012 at 159-160. On November 5, 2009, Detective Knecht executed the search warrants. N.T. 7/25/2012 at 160-162. [Appellant] was not home at the time the search warrant was executed. N.T. 7/25/2012 at 161-162. Later that day, [Appellant] contacted detectives and asked why his home had been searched. N.T. 7/25/2012 at 184-185. Detective Kevin McShea told [Appellant] that he should come down to the police station to be interviewed. N.T. 7/25/2012 at 185. [Appellant] ultimately agreed to go to the police station, but did not do so. N.T. 7/25/2012 at 186. Detective Knecht prepared an affidavit of probable cause and an arrest warrant for [Appellant], but police were unable to locate him. N.T. 7/25/2012 at 162-164.

Trial Court Opinion, 2/14/13, at 2-4 (footnotes and honorifics omitted).

The trial court summarized the undisputed facts of the second incident as follows:

On November 7, 2009, at approximately 12:00 p.m., Jones was standing on the street in his neighborhood when he ran into Holmes. N.T. 7/26/2012 at 67-68. Holmes told Jones that "he was going to get his gun, because [Appellant] was saying he was going to kill him." N.T. 7/26/2012 at 67. About ten minutes later, Jones saw Holmes walking from the direction of his home. N.T. 7/26/2012 at 68-69. As Jones watched, Holmes reached the corner of Bloyd Street and Woodlawn Street, approximately one block from where Jones was standing on Chew Street. N.T. 7/26/2012 at 69, 71, 135-136. [Holmes then walked up and spoke to an individual for a few seconds. N.T. 7/26/2012 at 69-73. That individual then shot Holmes multiple times. N.T. 7/26/2012 at 72-73].

Holmes walked up Woodlawn Street for approximately half a block before collapsing. N.T. 7/26/2012 at 73-75. Police arrived

on the scene and transported Holmes to Albert Einstein Medical Center, where he was pronounced dead at 1:02 p.m. N.T. 7/25/2012 at 104; 7/26/2012 at 169. Holmes had been shot five times, once each in the back, stomach, hand, chest, and left arm. N.T. 7/26/2012 at 173-180. The gunshot wound to the back severed his carotid artery, which caused him to bleed to death. N.T. 7/26/2012 at 175-173. No weapon was found near Holmes or on his person. N.T. 7/25/2012 at 103; 7/27/2012 at 44.

Philadelphia Police Officer Scott McLane, who had been on foot patrol in the area of Chew Street when the police were contacted about the shooting, received information over the police radio that a male had been seen running north on Bloyd Street. N.T. 7/25/2012 at 120-123. Officer McLane ran up Bloyd Street, asking people on their porches on the street as he ran whether they had seen anyone else running up the street. N.T. 7/25/2012 at 125. One person said yes and pointed into an alleyway, which Officer McLane entered.^[7] N.T. 7/25/2012 at 125. On the ground in the alleyway, Officer McLane found a Ruger 9-millimeter handgun with an empty ammunition magazine laying next to it. N.T. 7/25/2012 at 130-131; 7/26/2012 at 23.

The police were able to lift three usable fingerprints from the ammunition magazine. N.T. 7/27/2012 at 9. All three matched [Appellant's] fingerprints. N.T. 7/26/2012 at 25-27; 7/27/2012 at 12, 15. Police also recovered 11 fired cartridge casings from the scene of the shooting, all of which were determined to have been fired from the Ruger 9-millimeter handgun that was found in the alleyway next to the empty magazine N.T. 7/26/2012 at 28-29, 160, 207, 209-210.

On June 4, 2010, Jones was arrested by the FBI for bank robbery. N.T. 7/26/2012 at 52, 83. Jones told the FBI that he had information about other crimes and was willing to assist the authorities. N.T. 7/26/2012 at 83-84. On July 10, 2010, Jones

⁷ The trial court did not “admit that [testimony] for the truth of what the juvenile said, that he actually saw somebody running. [The trial court only admitted the evidence so the jury] could understand why the [officer] did what he did, his course of conduct[.]” N.T., 7/25/12, at 125.

signed an open plea agreement with the United States Attorney's Office. N.T. 7/26/2012 at 52-54, 87. One of the requirements of the plea agreement was that Jones "testify truthfully in any matter in which law enforcement determined [he had] information about." N.T. 7/26/2012 at 54. In a series of interviews with homicide detectives, Jones relayed the details of both the September 28, 2009 shooting, and the November 7, 2009 murder. N.T. 7/26/2012 at 87-88. Jones told the police that [Appellant] was the individual who killed Holmes, and identified [Appellant] from a photo array. N.T. 7/26/2012 at 81-82. Jones also told police that during the period between the September 28, 2009 shooting and the November 7, 2009 shooting, he ran into [Appellant] on the street and [Appellant] told Jones several times that "he was going to kill [Holmes], because he thought he was telling on him." N.T. 7/26/2012 at 63-65.

Trial Court Opinion, 2/14/13, at 4-6 (fifth and tenth alterations in original; honorifics omitted).

The procedural history of this case is as follows. The informations were filed on February 11, 2011. Appellant requested, and was granted, eight continuances that were deemed excludable under Pa.R.Crim.P. 600. Jury selection occurred on July 23, 2012. On July 25, 2012, the jury trial commenced. On July 27, 2012, testimony concluded and Appellant moved for acquittal, which the trial court denied. The jury was charged and began deliberations on July 30, 2012. On July 31, 2012, the jury returned a verdict of guilty as to murder in the first degree, intimidation of a victim, retaliation

against a victim, two counts of carrying a firearm without a license, and two counts of possessing an instrument of crime.⁸

The trial court withheld charging the jury on the two counts of possession of a firearm by a prohibited person as to not prejudice Appellant with respect to the other counts. After the jury returned the first guilty verdict, the jury was instructed on the charges of possession of a firearm by a prohibited person and returned a guilty verdict later on July 31, 2012. With the consent of the parties, the trial court immediately sentenced Appellant to the mandatory life imprisonment without the possibility of parole on the first-degree murder charge and imposed concurrent guideline sentences for the other charges. Appellant filed a post-sentence motion on August 6, 2012. That motion was denied on November 15, 2012. This timely appeal followed.⁹

On appeal, Appellant presents two issues for our review:¹⁰

1. Whether the adjudication of guilt is based upon insufficient evidence . . . ?

⁸ The jury also found Appellant not guilty on several counts, *inter alia*, aggravated assault in relation to the September 2009 incident.

⁹ The trial court entered an order requiring Appellant to file a concise statement of errors complained of on appeal ("concise statement") on November 26, 2012. Appellant filed his concise statement on December 3, 2012. The trial court filed its opinion pursuant to Pa.R.A.P. 1925(a) on February 14, 2013. All of the issues raised on appeal were included in Appellant's concise statement.

¹⁰ We have re-numbered the issues for ease of disposition.

2. Whether the adjudication of guilt is against the weight of the evidence . . . ?

Appellant's Brief at 6-7.

Appellant contends that the jury verdict was based upon insufficient evidence. Appellant's Brief at 20-22. "A claim challenging the sufficiency of the evidence presents a question of law." **Commonwealth v. Fortune**, 68 A.3d 980, 983 (Pa. Super. 2013) (citation omitted). "In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense." **Commonwealth v. Cox**, 72 A.3d 719, 721 (Pa. Super. 2013), *quoting Commonwealth v. Koch*, 39 A.3d 996, 1001 (Pa. Super. 2011). "[T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence [T]he trier 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. Thomas**, 65 A.3d 939, 943 (Pa. Super. 2013) (first alteration in original), *quoting Commonwealth v. Ratsamy*, 934 A.2d 1233, 1236 n.2 (Pa. 2007).

"A person is guilty of first-degree murder where the Commonwealth proves that: (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific

intent to kill.” ***Commonwealth v. Bedford***, 50 A.3d 707, 711 (Pa. Super. 2012), *appeal denied*, 57 A.3d 65 (Pa. 2012).

Appellant argues that the Commonwealth failed to meet its burden of proof with respect to the second and third elements of first-degree murder. Appellant’s Brief at 20-22. Appellant first argues that there was insufficient evidence that Appellant is the individual who murdered Holmes. Appellant argues that Jones’ identification was flawed because: (1) Jones was a block from the shooting; (2) the shooter was wearing a hood at the time of the murder; and (3) Jones had been smoking marijuana on the day of the murder.

The evidence presented at trial, when considered in the light most favorable to the Commonwealth, is sufficient to prove that Appellant was the individual who murdered Holmes. Although Jones was a block from the shooting when it occurred, this distance is insufficient to completely disregard his testimony. ***See Commonwealth v. Perrie***, 9 Phila. Co. Rptr. 423, 440 (1983), *affirmed*, 482 A.2d 669 (Pa. Super. 1984) (unpublished memorandum) (identification of defendant from over 90 feet away was plausible). Appellant argues that the shooter was wearing a hood at the time the shooting occurred; however, this contention is not supported by the record. The evidence presented at trial was that the shooter was wearing a hoodie at the time of the crime. N.T., 7/27/12, at 54-56. There was no evidence that the shooter’s head was covered by the hood or that the hoodie obstructed Jones’ view of the shooter.

Finally, although Jones admitted that he had been smoking marijuana on the day of the murder, this is insufficient to completely disregard his testimony. **See Commonwealth v. Boich**, 982 A.2d 102, 112 (Pa. Super. 2009), *appeal denied*, 3 A.3d 669 (Pa. 2010) (citations omitted) (“Under Pennsylvania law, a witness’ use of alcohol and drugs historically implicated the witness’ physical condition and constituted a matter of credibility for the fact finder and does not alone render witness’ testimony patently unreliable.”).

Furthermore, Jones’ testimony was corroborated by the physical evidence recovered at the scene of the crime. Police were directed into an alleyway where the Ruger was recovered. N.T., 7/27/12, at 125, 130-131. Three fingerprints were lifted from the Ruger, and those three fingerprints matched Appellant’s fingerprints. N.T., 7/26/12, at 25; 7/27/12, at 9, 12. All 11 of the casings recovered at the crime scene were fired by the Ruger found in the alleyway. N.T., 7/27/12, at 207, 209-210.

Appellant’s argument that the Ruger was an illegal handgun and Appellant’s fingerprints could have been found on the gun for a number of reasons is unconvincing. Appellant presents “no innocent explanation for the presence of [his] fingerprints.” **Commonwealth v. Sloan**, 67 A.3d 808, 814 (Pa. Super. 2013) (citation omitted). For example, Appellant does not argue that he had handled the Ruger in the past. Instead, his argument rests on mere conjecture about illegal handguns. Furthermore, no other fingerprints were found on the Ruger and the eyewitness testimony supports

the conclusion made by the jury that Appellant was the individual who murdered Holmes. **See id.** (“the probative value of [fingerprint] evidence depends entirely on the circumstances of each case.”). Accordingly, the Commonwealth satisfied its burden of proof with respect to the second element of murder in the first degree.

Appellant also argues that the Commonwealth failed to prove the specific intent to kill required for first-degree murder. He argues that: (1) Holmes was larger than Appellant; (2) Holmes had armed himself; and (3) Holmes was the aggressor. As to the first argument, the relative size of Holmes and Appellant does not mean that Appellant did not have the specific intent to kill when he shot Holmes. Second, taken in the light most favorable to the Commonwealth, the evidence does not show Holmes armed himself. Instead, the evidence shows that no second weapon was recovered at the scene and no weapon was recovered from Holmes’ body at the hospital. N.T. 7/25/12, at 103; 7/27/12, at 44.

As to Appellant’s argument that Holmes was the aggressor, the evidence does not support this contention. The evidence, viewed in the light most favorable to the Commonwealth, only shows that Holmes approached Appellant and they argued. N.T., 7/26/12, at 69-70. As the Commonwealth points out, Holmes may have been approaching Appellant to broker peace. Commonwealth’s Brief at 2-3 n.2.

Finally, specific intent can be inferred from multiple gunshot wounds. **Commonwealth v. Hughes**, 865 A.2d 761, 793 (Pa. 2004). In this case,

Holmes was shot five times. N.T., 7/26/12, at 173-180. Gunshots to a vital part of the body are also sufficient to establish the specific intent to kill. **Commonwealth v. Robertson**, 874 A.2d 1200, 1207 (Pa. Super. 2005). Holmes was shot in the stomach and chest, vital parts of the body. N.T., 7/26/12, at 179-180. Thus, the evidence was sufficient for the jury to find the specific intent necessary for first-degree murder. Accordingly, the evidence was sufficient for the jury to conclude that the Commonwealth proved each element of first-degree murder.

Appellant next contends that the conviction is against the weight of the evidence. Appellant's Brief at 17-20. A challenge to the weight of the evidence must first be raised at the trial level "(1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion." Pa.R.Crim.P. 607; **Commonwealth v. Foley**, 38 A.3d 882, 891 (Pa. Super. 2012), *appeal denied*, 60 A.3d 535 (Pa. 2013). Appellant properly preserved his weight of the evidence claim by raising the issue in his post-sentence motion.

"To grant a new trial based upon the weight of the evidence, it must appear to the trial court that the verdict was so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative." **Commonwealth v. Luster**, 71 A.3d 1029, 1049 (Pa. Super. 2013) (internal quotation marks and citation omitted). "[We do] not answer for [ourselves] whether the verdict was against the weight of the evidence [O]ur review is limited to whether the trial judge's discretion was

properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion.” ***Commonwealth v. Brown***, 71 A.3d 1009, 1013 (Pa. Super. 2013), *quoting Commonwealth v. Karns*, 50 A.3d 158, 165 (Pa. Super. 2012).

Appellant first argues that the verdict shocks one’s sense of justice because Jones’ identification of Appellant as the murderer is unreliable. He argues that “[while] Jones may have heard Appellant state that he was going to kill . . . Holmes . . . that in and of itself does not establish that the Appellant engaged in the act of killing Holmes.” Appellant’s Brief at 18. The trial court reasoned that although Appellant’s statement to Jones did not establish that Appellant killed Holmes, it provided the motive for the killing. Trial Court Opinion, 2/14/13, at 9. The trial court noted that not only did Appellant say that he was going to kill Holmes; he said he was going to kill Holmes because he believed Holmes was speaking with the police regarding the September 2009 incident. ***Id.***, *citing* N.T. 7/26/12, at 63-64.

Appellant next argues that the circumstances surrounding Jones’ identification, *e.g.*, the shooter was wearing a hood, Jones was a block away from the crime, and Jones was smoking marijuana that day, makes Jones’ testimony not credible. The trial court found that it was not unreasonable for the jury to credit Jones’ testimony. The trial court noted that there was no evidence that the hoodie obstructed Jones’ view of the shooter’s face. ***Id.*** at 10, *citing* N.T. 7/27/12, at 54. The trial court also noted that Jones had known Appellant for many years and that Jones unequivocally identified

Appellant as the individual who shot Holmes. **Id.** at 10-11, *citing* N.T. 7/26/12, at 51, 151.

Appellant also contends “[t]hat the jury would have credited [Jones] with truthful accuracy as to Appellant’s identification is shocking.” Appellant’s Brief at 18. Appellant’s argument is based upon Jones only coming forward with information regarding the murder after the FBI arrested him for bank robbery. The trial court noted that Jones’ plea agreement with the United States Attorney’s Office “required that he testify truthfully in any criminal cases of which he had knowledge.” Trial Court Opinion, 2/14/13, at 11, *citing* N.T. 7/26/12, at 52-55. The trial court instructed the jury that it “could consider Jones’[] criminal convictions and open sentence in determining the credibility of his testimony.” **Id.**, *citing* N.T. 7/26/12, at 215-216; 7/30/12, at 15; Pa. SSJI (Crim.) 4.08D.

The trial court found that the forensic evidence presented at trial also corroborated Jones’ testimony. Specifically, the trial court noted that Appellant’s “fingerprints were on the ammunition magazine that was found next to the firearm that was used in the shooting.” **Id.** at 9, *citing* N.T. 7/26/12, at 25-29, 160, 207, 209-210; 7/27/12 at 9, 12, 15. Thus, the trial court concluded that “the jury was entitled to accept [Jones’] testimony . . . as true.” **Id.** at 11.

Appellant also argues that the weight of the evidence did not support the jury’s finding that Appellant possessed the specific intent necessary for first-degree murder. Appellant’s Brief at 19. Appellant contends that the

evidence suggests Holmes had his fist clenched around a handgun. The trial court, however, found that the evidence did not support a finding that Holmes was armed. Trial Court Opinion, 2/14/13, at 10, *citing* N.T. 7/25/12, at 103; 7/27/12, at 44. Appellant again relies on the fact that Holmes was larger than Appellant. The trial court determined that “the relevant size of each man is irrelevant” because an armed man shot an unarmed man. ***Id.***

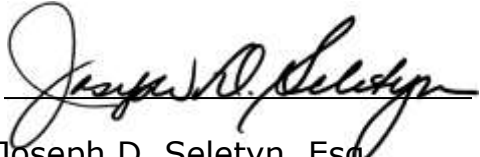
Appellant argues that there was no indication that the shots were fired at close range and that only one shot was fatal. He also argues that all of the shots were fired from one location even though Holmes was moving away from the shooter. The trial court determined that the evidence showed that Appellant had aimed the firearm at a vital part of Holmes’ body and fired several times, evidencing the necessary specific intent for first-degree murder. Trial Court Opinion, 2/14/13, at 9, *citing* N.T. 7/26/12, at 173-180.

The trial court thoroughly considered all of the evidence that was offered at trial and found that “there was extremely compelling evidence establishing that [Appellant] committed the first-degree murder of . . . Holmes” and “the evidence . . . clearly established that [Appellant] acted with the requisite criminal intent.” ***Id.*** at 9, 11. We conclude that the trial court did not abuse its discretion with respect to Appellant’s post-sentence motion based upon the weight of the evidence.

Judgment of sentence affirmed.

J-S52020-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/8/2013