

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

LISA EL,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1091 EDA 2012

Appeal from the Judgment of Sentence March 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006255-2011

BEFORE: BOWES, LAZARUS, and WECHT, JJ.

MEMORANDUM BY BOWES, J.:

FILED NOVEMBER 12, 2013

Lisa El appeals from the judgment of sentence of two and one-half to five years imprisonment followed by three years probation that was imposed after she was found guilty at a bench trial of robbery and conspiracy. Both offenses were graded as second-degree felonies. We affirm.

The trial court outlined the evidence that it weighed in adjudicating Appellant guilty of the two offenses in question:

On a Sunday morning in March 2011, Ms. Wanda Stanford was walking to church by herself when an unfamiliar car drove by. It was a dark blue Chevy Malibu with heavily tinted windows. As the car passed with the driver-side window rolled down, Ms. Stanford could see [Appellant] operating the vehicle and a male riding in the passenger seat. The car pulled down an alleyway just up the block from where Ms. Stanford was walking. After briefly disappearing out of sight, the blue Malibu backed out of the alley and parked along the side of the street. At the same time, Ms. Stanford noticed that the male passenger, who had apparently exited the car in the alley, was now walking toward her on the sidewalk.

The man confronted Ms. Stanford and ordered her to hand over her money. Ms. Stanford complied at first, but resisted when the man reached for her purse, which contained her ID, credit cards, and several hundred dollars in cash. At that point, the man produced a black handgun. Ms. Stanford surrendered the purse, and the man walked directly to the blue Malibu that was still parked just up the street. He climbed back in the passenger seat, and the car drove off.

Ms. Stanford immediately pulled out her cell phone and called the police. In addition to describing the suspects and their vehicle, she was able to provide a partial license plate number. Shortly after this information went out over police radio, officers stopped a dark blue Malibu with a matching tag number just a few blocks from the crime scene. Ms. Stanford was driven to where officers had the car pulled over, and there she identified its occupants—[Appellant] and a male passenger—as the two she had encountered earlier. Officers recovered nearly \$400 in cash from [Appellant's] pockets. And under the front passenger seat they found a black BB gun and a wallet containing Ms. Stanford's ID.

Trial Court Opinion, 1/31/13, at 1-2.

On appeal from the judgment of sentence, Appellant raises two contentions:

I. Is the Defendant entitled to an arrest of judgment on the charges of Robbery as a Felony of the Second Degree and Criminal Conspiracy as a Felony of the Second Degree because the evidence is insufficient to support the verdict?

II. Is the Defendant entitled to a new trial on all charges as the verdict is not supported by the greater weight of the evidence?

Appellant's brief at 3.

Our standard of reviewing a sufficiency claim is well established:

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. Fabian, 60 A.3d 146, 150-51 (Pa.Super. 2013) (citation omitted).

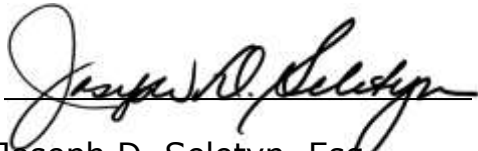
Appellant contends that her convictions of robbery and conspiracy are infirm because the evidence failed to demonstrate that she had knowledge of and participated in the robbery of Ms. Stanford. She maintains that she was merely present at the scene of the crime. After consideration of the brief, facts, and pertinent law, we reject this allegation based upon the January 31, 2013 opinion of the trial court, the Honorable Ramy I. Djerassi, at pages four through six.

Appellant's position that the verdict is against the weight of the evidence is waived. The trial court, which failed to address this claim, observed that this issue is not preserved for appellate review since Appellant failed to raise it during the trial proceedings by means of a written or oral motion. We agree. ***Commonwealth v. Sherwood***, 982 A.2d 483 (Pa.

2009); **Commonwealth v. Griffin**, 65 A.3d 932 (Pa.Super. 2013); Pa.R.Crim.P. 607(A) (“A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial: (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.”). The fact Appellant’s Pa.R.A.P. 1925(b) statement included the contention does not save it from being waived for purposes of this appeal. **Sherwood, supra**. Hence, we affirm.

Judgment of sentence affirmed.

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: 11/12/2013

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
TRIAL DIVISION

FILED

JAN 31 2013

Criminal Appeals Unit
First Judicial District of PA

Commonwealth of Pennsylvania

v.

Lisa El

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CP-51-CR-0006255-2011

J. DJERASSI

January 31, 2013

OPINION

Before the Court is defendant Lisa El's direct appeal from the judgment of sentence for robbery and conspiracy entered against her on March 1, 2012. In her 1925(b) Statement of Matters Complained of on Appeal, El raises the following issues: (1) the Court's verdict was contrary to the weight of the evidence; and (2) the evidence was insufficient to support her convictions.¹

Having reviewed the evidence and relevant law, the Court concludes that El is not entitled to relief. Accordingly, the judgment should be affirmed.

I. FACTUAL BACKGROUND

On a Sunday morning in March 2011, Ms. Wanda Stanford was walking to church by herself when an unfamiliar car drove by. It was a dark blue Chevy Malibu with heavily tinted windows. As the car passed with the driver-side window rolled down, Ms. Stanford could see El operating the vehicle and a male riding in the passenger seat. The car pulled down an alleyway just up the block from where Ms. Stanford was walking. After briefly disappearing out of sight, the blue Malibu backed out of the alley and parked along the side of the street. At the same time,

¹See attached 1925(b) Statement of Matters Complained of on Appeal.

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LOWER COURT OPINION



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Ms. Stanford noticed that the male passenger, who had apparently exited the car in the alley, was now walking toward her on the sidewalk.

The man confronted Ms. Stanford and ordered her to hand over her money. Ms. Stanford complied at first, but resisted when the man reached for her purse, which contained her ID, credit cards, and several hundred dollars in cash. At that point, the man produced a black handgun. Ms. Stanford surrendered the purse, and the man walked directly to the blue Malibu that was still parked just up the street. He climbed back in the passenger seat, and the car drove off.

Ms. Stanford immediately pulled out her cell phone and called the police. In addition to describing the suspects and their vehicle, she was able to provide a partial license plate number. Shortly after this information went out over police radio, officers stopped a dark blue Malibu with a matching tag number just a few blocks from the crime scene. Ms. Stanford was driven to where officers had the car pulled over, and there she identified its occupants—El and a male passenger—as the two she had encountered earlier. Officers recovered nearly \$400 in cash from El's pockets. And under the front passenger seat they found a black BB gun and a wallet containing Ms. Stanford's ID.

II. PROCEDURAL HISTORY

The Commonwealth charged El with robbery, conspiracy to commit robbery, and possession of an instrument of crime (PIC). On December 7, 2011, at the conclusion of a one-day waiver trial, the Court found El not guilty of PIC, but guilty as to the robbery and conspiracy charges. Both offenses were graded as felonies of the second degree. Subsequently, on March 1, 2012, the Court imposed concurrent state prison terms of two and one-half to five years, followed by three years of probation, as to each of the two convictions. This appeal followed.

III. LAW AND ANALYSIS

A. Weight of the Evidence

El's first claim is that the Court's verdict was against the weight of the evidence.

However, El has not previously asserted a weight claim and cannot raise the issue for the first time on appeal. Because the granting of a new trial is a matter committed to the discretion of the trial court, the Superior Court has stated:

It seems clear . . . that this Court cannot entertain, in the first instance, a request for a new trial on the grounds that the verdict was contrary to the weight of the evidence. . . . [A] defendant, who wishes to seek a new trial on grounds that the verdict was contrary to the weight of the evidence, must necessarily raise this issue via post-sentencing motion in the trial court. If the trial court denies the motion, the defendant may then file an appeal in which the trial court's exercise of discretion will be subject to review.

Commonwealth v. Hodge, 441 Pa. Super. 653, 658 A.2d 386, 389 (1995).

Under Pa. R. Crim. P. Rule 607, there are three ways to challenge the weight of the evidence: "(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." Neither El nor her trial counsel made any such motion. Her trial counsel did, at the conclusion of the Commonwealth's evidence, move for a judgment of acquittal, but that is wholly distinct from a weight of evidence claim.

Under Pa. R. Crim. P. Rule 606, a motion for judgment of acquittal is a challenge to the sufficiency of the evidence, not its weight. The Superior Court has expressly rejected the argument that a motion for judgment of acquittal preserves a weight claim for appeal.

Commonwealth v. Smith, 2004 Pa. Super. 77, 853 A.2d 1020, 1027 (2004).

As El has not given the Court an opportunity to exercise its discretion in evaluating the weight of the evidence, there is nothing for the Superior Court to review and thus no claim for

this Court to address here. *See Commonwealth v. Robinson*, 450 Pa. Super. 428, 676 A.2d 249, 250 (1996) (“[E]ven if the trial court has filed an opinion pursuant to Pa. R.A.P. 1925(a) in which it addresses the weight of the evidence issue, the trial court had no basis upon which to grant a new trial without a motion for a new trial before it. Thus, it could not exercise its discretion in granting or denying same.”). Thus, El’s claim fails.

B. Sufficiency of the Evidence

Next, El asserts that there was insufficient evidence to support the Court’s verdict. Specifically, El argues that the Commonwealth failed to show that she was involved in the robbery in any way. The Pennsylvania Supreme Court has endorsed the following articulation of the standard of review for challenges to the sufficiency of the evidence:

The standard we apply in reviewing the sufficiency of 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 that of the fact-finder. . . . 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. . . . Finally, the 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. Ratsamy, 594 Pa. 176, 934 A.2d 1233, 1236 & n.2 (2007) (citing *Commonwealth v. Lambert*, 2002 Pa. Super 82, 795 A.2d 1010, 1014-15 (2002)).

A conviction for robbery under 18 Pa.C.S. § 3701(a)(1)(iv) requires proof that the defendant, in the course of committing a theft, threatened another with immediate bodily injury. In her 1925(b) Statement, El contends that her robbery conviction was improper because there

was no evidence that she was the “principal” actor. While it is true that the evidence implicated another person—El’s male associate—as the primary robber, her argument ignores the fact that the Court expressly rested its verdict on accomplice liability. One is an accomplice, and thus legally responsible for the conduct of another person, when she aids that person in the planning or commission of an offense. 18 Pa.C.S. § 306. To be an accomplice, the defendant must actually intend that the crime be carried out, but even “[t]he least degree of concert or collusion” is enough for liability to attach. *Commonwealth v. Rosario-Hernandez*, 446 Pa. Super. 24, 666 A.2d 292, 297 (1995).

The Commonwealth’s uncontested evidence showed that the male who robbed Ms. Stanford was a passenger in El’s blue Malibu immediately prior to and after committing the crime. While the robbery was taking place, El remained in the car, which she had parked nearby. And when police officers stopped the blue Malibu just a few blocks away, they found some of Ms. Stanford’s money in El’s pockets. Taken together, these facts suggest that El functioned as the getaway driver in return for a share of the robbery’s proceeds—a combination of facts which has previously been held sufficient to establish accomplice liability. *See, e.g., Commonwealth v. Calderini*, 416 Pa. Super. 258, 611 A.2d 206, 209 (1992); *Commonwealth v. Perry*, 334 Pa. Super. 495, 483 A.2d 561, 565 (1984); *see also Commonwealth v. Wilson*, 394 Pa. 588, 606, 148 A.2d 234, 244 (1959) (holding that possession of recently stolen items alone is sufficient evidence of accomplice liability); *Rosario-Hernandez*, 666 A.2d at 297 (holding that driving the getaway car is enough, by itself, for accomplice liability to attach). Therefore, the evidence was sufficient to support El’s robbery conviction.

El also claims that there was no evidence she participated in a conspiracy to rob Ms.


Stanford. To convict a defendant of conspiracy, the Commonwealth must prove (1) an intent to commit or aid the commission of an unlawful act, (2) an agreement with a co-conspirator, and (3) an overt act in furtherance of the conspiracy. *Commonwealth v. Galindes*, 2001 Pa. Super. 315, 786 A.2d 1004, 1010 (2001), *appeal denied*, 569 Pa. 691, 803 A.2d 733 (2002). With respect to the agreement element, because smoking gun evidence of a formal pact among criminal confederates is seldom available, the Commonwealth may prove the existence of such an agreement inferentially by circumstantial evidence of the parties' relationship and conduct. *Galindes*, 2001 Pa. Super. 315, 786 A.2d at 1010.

Conspirator liability requires a greater degree of participation in the commission of an offense than does accomplice liability, in that no agreement is needed for accomplice liability to attach. *Commonwealth v. Graves*, 316 Pa. Super. 484, 463 A.2d 467, 470 (1983). In this case, however, the same facts that show El aided in the robbery also establish that she conspired to do so. As soon as El drove past Ms. Stanford walking down the street by herself, she pulled into an alleyway to let her male passenger out of the car. El then parked nearby and waited for the man to return so they could drive off together. This evidence indicates that El agreed, prior to dropping the man off in the alley, that she would stay in the getaway car while he robbed Ms. Stanford. Accordingly, there was sufficient evidence to support El's conspiracy conviction.

IV. CONCLUSION

For the foregoing reasons, the judgments of sentence should be AFFIRMED.

BY THE COURT:



Ramy I. Djerassi, J.