NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TROY ROBINSON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 308 WDA 2012

Appeal from the Judgment of Sentence August 24, 2011
in the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0007055-2010

BEFORE: PANELLA, J., OLSON, J., and WECHT, J.

MEMORANDUM BY PANELLA, J. FILED: February 5, 2014

Appellant, Troy Robinson, appeals from the judgment of sentence entered August 24, 2011, in the Court of Common Pleas of Allegheny County. After careful review, we affirm.

The trial court set forth the relevant facts as follows:

> The evidence at trial showed that in the early morning hours of February 26, 2010, Christopher Solis was awakened after hearing 5 gunshots. The shots came from the direction of the Hide-Away Bar. As he looked out his window, Solis saw a male wearing balky [sic] winter clothing walking down the street in deep snow looking back several times in the direction of the bar.
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> At approximately 2:44 a.m. that day, police were dispatched to the Hide-Away Bar as a result of Solis' call to 911. When police arrived at the scene, they were not able to find evidence of gunfire, a suspect, or victims. Snow was falling that morning.

The next day, a body was found in deep snow in an area not far from the bar. It was later determined that the victim died as a result of multiple gunshot wounds to his torso, and that bullets recovered were all fired from the same firearm.

Detectives began an investigation and were able to ascertain that videos existed from both inside and outside the bar and that there was projectile damage to the structure that housed the bar. The manager of the bar also gave police a bullet that she found in front of the bar's door as she was salting and sweeping the sidewalk.

The inside video showed that on the night in question, both [Appellant] and the victim were in the bar. The video shows [Appellant] standing next to the victim as the victim's head is lying on the bar. The victim lifts his head and is given a bottle of water by the bartender. [Appellant] then walks out of the bar and the victim follows holding the bottled water. The outside video shows the two outside of the bar and the [Appellant] taking the victim's water, drinking it, and then returning it to the victim. [Appellant] then backs out of camera view, but the video shows the victim being shot and falling down.

The bartender at the Hide-Away Bar testified that the victim was asleep at the bar when [Appellant] went up to him and said: "I got you mother fucker, now you are all asleep…[.]" When the victim and [Appellant] went outside of the bar, an eye-witness, who had been waiting to give [Appellant] a ride, testified that he heard the victim and [Appellant] yelling obscenities at each other. The witness saw [Appellant] step away from the victim, and then heard gunshots. [Appellant] ran away.

Tonya Darby, [Appellant's] girlfriend, also testified that she was with [Appellant] 12 days earlier when he and the victim got into a heated argument in the Hide-Away Bar, on February 14, 2010. The argument continued outside of the bar. In that incident, the victim in this case pointed a gun at [Appellant]. The confrontation was then defused without further incident. The bartender also confirmed that this Valentine's Day incident occurred between [Appellant] and the victim.

Trial Court 1925(a) Opinion, 10/5/2012, at 4-6.

Appellant was charged with one (1) count of first-degree murder,[1] one (1) count of persons not to possess a firearm,[2] and one (1) count of carrying a firearm without a license.[3] The trial court subsequently severed the persons not to possess a firearm count and reassigned it to a new case number.[4]

The trial court held a jury trial for the remaining counts. With the jury unable to reach a verdict, the trial court declared a mistrial and scheduled the case for retrial. A retrial was held, and the jury found Appellant guilty on both counts.

At sentencing, the trial court imposed the mandatory sentence of life imprisonment for first-degree murder, and a concurrent term of 3 ½ to 7 years for carrying a firearm without a license. For the remaining firearm conviction, the trial court sentenced Appellant to a consecutive term of 5 to 10 years.

Appellant filed timely post-sentence motions that were denied by operation of law. This timely appeal followed.

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[1] 18 PA.CONS.STAT.ANN. § 2501.

[2] 18 PA.CONS.STAT.ANN. § 6105(a)(1).

[3] 18 PA.CONS.STAT.ANN. § 6106.

[4] Appellant was found guilty of this count at a non-jury trial held on June 2, 2011.

Appellant presents three (3) issues for our review:

I. Whether the evidence in this matter was legally insufficient to sustain the convictions of first degree murder and carrying a firearm without a license?

II. Whether the verdict in this matter was against the weight of the evidence?

III. Whether the trial court erred in dismissing Appellant's post-trial sentence motions without a hearing?

Appellant's Brief at 5.

We begin by addressing Appellant's arguments regarding the weight and sufficiency of the evidence. It is important to discuss the distinctions between these two challenges. If a defendant prevails on a challenge to the sufficiency of the evidence, it would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution. ***See Commonwealth v. Widmer***, 744 A.2d 745, 751 (Pa. 2000). On the other hand, if a defendant were to prevail on a challenge to the weight of the evidence, a second trial would be permitted. ***See id.***

A challenge to the sufficiency of the evidence is a question of law. ***See id.*** When reviewing a challenge to the sufficiency of the evidence, we must determine "whether the evidence presented at trial and all reasonable inferences derived therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to satisfy all elements of the offense beyond a reasonable doubt." ***Commonwealth v. Johnson***, 42 A.3d

1017, 1025 (Pa. 2012). "The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." ***Commonwealth v. Harper***, 403 A.2d 536, 538 (Pa. 1979) (citations omitted).

"[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence, but the question of any doubt is for the trier of fact unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." ***Commonwealth v. Davis***, 799 A.2d 860, 866 (Pa. Super. 2002) (citation and brackets omitted). "The proper application of this test requires us to evaluate the entire trial record and all evidence actually received, in the aggregate and not as fragments isolated from the totality of the evidence." ***Commonwealth v. Rosado***, 684 A.2d 605, 607-08 (Pa. Super. 1996).

We now apply these principles to Appellant's first-degree murder conviction. An accused is guilty of first-degree murder when the Commonwealth "demonstrate[s] that a human being was unlawfully killed; that the defendant did the killing; and that the killing was done in an intentional, deliberate, and premeditated manner, which this Court has construed to mean that the defendant acted with a specific intent to kill." ***Commonwealth v. Cousar***, 928 A.2d 1025, 1032 (Pa. 2007) (citations omitted); ***see also*** 18 PA.CONS.STAT.ANN. §§ 2501, 2502(a).

The crux of Appellant's argument is that the evidence does not directly establish he shot and killed the victim. Specifically, he maintains that since there were no eyewitnesses to the shooting, and because the shooter was outside the view of the surveillance video, there is insufficient evidence to establish the second element of first-degree murder. However, our case law is clear that homicide, including murder of the first-degree, need not be proven by eyewitness testimony; instead, a conviction may rely upon circumstantial evidence so long as the resulting inferences can prove the fact in question beyond a reasonable doubt. ***See, e.g., Commonwealth v. Hardcastle***, 546 A.2d 1101, 1107, 1008 (Pa. 1988); ***Commonwealth v. Crowson***, 542, 412 A.2d 1363, 1365 (Pa. 1980); ***Commonwealth v. Amato***, 297 A.2d 462, 464 (Pa. 1972).

Viewing the evidence in the light most favorable to the Commonwealth, sufficient evidence exists to support the first-degree murder conviction. The testimony of Appellant's girlfriend established that Appellant harbored animosity towards the victim arising out of a confrontation they had 12 days prior to the incident. ***See*** N.T. 6/9/11 at 194-199. At the conclusion of this confrontation, the victim pointed a gun at Appellant. ***See id.*** at 198. Appellant continued to express ill will towards the victim on the night in question as evidenced by the verbal threats he made in the bar. ***See id.*** at 301. This evidence establishes that Appellant possessed a motive to kill the victim based on their past acrimonious relationship.

At closing time, Appellant and the victim left the bar together. ***See id.*** at 303. Two individuals, who were waiting to give Appellant a ride, testified that they overheard Appellant and the victim engage in an intense argument outside of the bar. ***See id.*** at 327-328, 358-359. Shortly thereafter, they both heard shots ring out from the area occupied by Appellant and the victim.[5] ***See id.*** at 328-329, 359-360. One of the witnesses observed Appellant fleeing the scene while attempting to conceal a handgun in his waistband. ***See id.*** at 330-331.

This circumstantial evidence is sufficient to establish that Appellant shot the victim. While not captured on the surveillance video, common sense dictates that Appellant, who was in a heated argument with the victim a mere five seconds earlier, fired the fatal shots. Moreover, an eyewitness observed Appellant fleeing the scene with a handgun. Appellant suggests a second individual, identified only as "Black," could have shot the victim because he exited the bar at some point before Appellant and the victim. However, there is no evidence suggesting this individual expressed hostility toward the victim, or had any motive to harm him. ***See*** N.T. 6/9/11 at 300. Furthermore, the two occupants in the vehicle testified that this individual exited the bar, asked them for a lighter, and then proceeded to walk down

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[5] The outdoor surveillance video depicts both Appellant and the victim located outside of the bar. Appellant then moves out of frame, and five (5) seconds later the victim is shot twice in the torso and once in his right side.

the street. ***See*** N.T. 6/9/11 at 326, 357-358. These aforementioned facts establish that Appellant caused the victim's death.

Next, Appellant argues the Commonwealth failed to establish that his actions on the night in question result in a finding that he possessed a specific intent to kill. The Commonwealth can establish a specific intent to kill based solely on the accused's use of a deadly weapon on a vital part of the victim's body. ***See Commonwealth v. Jones***, 886 A.2d 689, 704 (Pa. Super. 2005).

The medical examiner testified that three bullets struck the victim: two in the torso and one in the right thigh. ***See*** N.T. 6/8/11 at 116-118. The examiner opined that the torso is a vital part of the body based on the existence of various organs and blood vessels. ***See id.*** at 119-125. He concluded that the victim died as a result of multiple gunshot wounds to this area. ***See id.*** at 126-127. Consequently, these facts support a finding of a specific intent to kill necessary to sustain Appellant's conviction.

We next determine if the Commonwealth presented sufficient evidence to support Appellant's conviction of carrying a firearm without a license. This offense occurs when "any person…carries a firearm in any vehicle or any person…carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license…." 18 PA.CONS.STAT.ANN. § 6106(a)(1).

In the case *sub judice*, eyewitness testimony established that Appellant was running from the scene of the crime while attempting to conceal a handgun in his waistband.[6] ***See*** N.T. 6/9/11 at 330-331. He was not located in his home or place of business. He also did not possess a valid license to carry a concealed firearm. ***See*** N.T. 6/8/11 at 171-172. Consequently, sufficient evidence exists to support Appellant's conviction of carrying a firearm without a license.

Next, we address Appellant's argument concerning the weight of the evidence underlying his convictions. "An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court[,]" who does not view the evidence in the light most favorable to the verdict winner. ***Widmer***, 744 A.2d at 751-52 (citation omitted). A challenge to the weight of the evidence concedes there is sufficient evidence to sustain the verdict. ***See Widmer***, 744 A.2d at 751. "[T]he role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight

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[6] Appellant argues that inconsistency between the eyewitness' initial statement to police, and his subsequent statement at trial, regarding whether he witnessed Appellant carrying a firearm amounts to reasonable doubt sufficient to preclude a conviction. However, we will not usurp the function of the jury to determine the credibility of the witnesses and the weight to accord their testimony, since they are "matters within the province of the trier of fact, who is free to believe all, some, or none of the evidence." ***See Commonwealth v. Rickabaugh***, 706 A.2d 826, 842 (Pa. Super. 1997).

with all the facts is to deny justice." ***Id.*** (citation and internal quotations omitted). "An appellate court cannot substitute its judgment for that of the finder of fact…thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice." ***Commonwealth v. Burns***, 988 A.2d 684, 693 (Pa. Super. 2009) (citation omitted).

In support of his claim, Appellant merely reiterates the rationale underlying his sufficiency argument. These contentions plainly do not establish that the trial court's verdict is so egregiously conflicted with the evidence to result in a shock to one's sense of justice. Accordingly, this argument fails.

In Appellant's last argument, he maintains that the trial court's abused its discretion by dismissing his post-sentence motions without a hearing. Appellant claims this decision "foreclosed [him] from presenting evidence that would support his claims of trial error." Appellant's Brief at 20. He neglects to set forth the evidence he would have presented if granted a hearing, and instead concludes the decision "delayed the relief that [he] should be afforded." Appellant's Brief at 21.

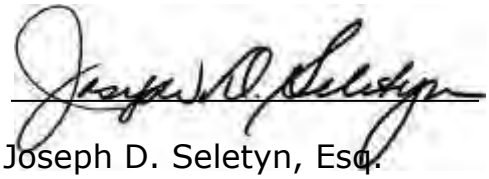
Rule 720 of the Pennsylvania Rules of Criminal Procedure governs post-sentence motions. This rule does not require an evidentiary hearing or argument on post-sentence motions; instead, it leaves that decision to the discretion of the trial court. ***See*** Pa.R.Crim.P. 720(B)(2)(b) ("The judge

shall also determine whether a hearing or argument on the motion is required, and if so, shall schedule a date or dates certain for one or both.").

Appellant's post-sentence arguments included the aforementioned weight and sufficiency claims, a claim of error based on the trial court denying a continuance request, a claim the trial court erred by denying Appellant's request for new counsel, and a claim that the sentences imposed were excessive. Undoubtedly, disposition of these arguments could be accomplished without an evidentiary hearing. Therefore, the trial court did not abuse its discretion.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/5/2014