NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DREW CROSBY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2938 EDA 2011

Appeal from the Judgment of Sentence entered December 16, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0004465-2009

BEFORE: OLSON, WECHT AND COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.: Filed: March 7, 2013

Appellant, Drew Crosby, appeals from the judgment of sentence entered on December 16, 2009. We affirm.

Appellant and Appellant's co-defendant, Troy Thomas, were jointly tried for robbery and related offenses. As the trial court explained in its thorough and well-written opinion, the following evidence was presented during the two-day bench trial:

> [At around 1:35 p.m. on the afternoon of] August 6, 2008, Diruel Mayes [was on the 5100 block of Old York Road in Philadelphia. At the time, Mr. Mayes had parked his gray Cadillac SLS automobile on the street and had stopped in a deli to get something to drink. When Mr. Mayes left the deli, he noticed that a burgundy Oldsmobile vehicle with tinted windows had parked in front of his Cadillac. Appellant and Thomas then exited the burgundy Oldsmobile and Thomas began speaking with Mr. Mayes. Mr. Mayes

*Retired Senior Judge assigned to the Superior Court.

testified that he knew both Appellant and Thomas, as he had seen them "off and on in the neighborhood and everything." Moreover, Mr. Mayes testified that he noticed another individual still sitting in the back seat of the burgundy Oldsmobile].

[According to Mr. Mayes, after speaking with Thomas for a short time, Mr. Mayes turned around and saw that Appellant was holding a gun to his face. Appellant told Mr. Mayes "you already know what it is" and, while Appellant continued to hold the gun to Mr. Mayes' face, Thomas began rifling through Mr. Mayes' pockets. Thomas took Mr. Mayes' wallet, money, car keys, and house keys. Further, after robbing Mr. Mayes, Thomas walked over to Mr. Mayes' Cadillac and drove away in Mr. Mayes' car, while Appellant returned to the burgundy Oldsmobile and drove away in that vehicle].

[As Mr. Mayes testified, "[a] couple seconds" after the vehicles drove away, Mr. Mayes saw Philadelphia Police Officer Colleen Michvech operating a marked police car. Mr. Mayes waved the officer down and told her] that two men had stolen his [gray] Cadillac. Officer Michvech put this information on the radio and began driving in the direction Mr. Mayes indicated the suspects drove. Shortly thereafter, Police Officer [Mark] Klein stated over the radio that he saw a vehicle matching the description of the Cadillac. [Officer Klein] also saw [Appellant] and a young woman exit the burgundy vehicle and get into the Cadillac. Officer Michvech joined Officer Klein and both officers pursued the stolen vehicle with lights and sirens. This high speed chase continued until the Cadillac was driven through a heavily trafficked intersection [and crashed into] three other vehicles. . . .

After the collision, [Thomas, Appellant, and a] young woman exited the Cadillac and attempted to flee. Officers Michvech and Klein continued the chase on foot. [Appellant] and the woman were both apprehended in a fenced-in area behind [a convenience] store, and [] Thomas was apprehended while hiding under a car. Officer Michvech returned to the scene of the accident and noted a loaded gun in the back of [Mr. Mayes' Cadillac] and Mr. Mayes' wallet lying on the floor in the front [of the car.

> Police officers later recovered the burgundy Oldsmobile and discovered that it, too, had been stolen].

Trial Court Opinion, 6/26/12, at 1-2.

Following Appellant's bench trial, Appellant was found guilty of robbery, robbery of a motor vehicle, criminal conspiracy, recklessly endangering another person, persons not to possess a firearm, firearms not to be carried without a license, possessing instruments of crime,[1] and other, related offenses. On December 16, 2009, the trial court sentenced Appellant to an aggregate term of 15 to 30 years in prison for the above convictions.

On November 8, 2010, Appellant filed a *pro se* petition under the Post-Conviction Relief Act ("PCRA"),[2] claiming that his counsel was ineffective for failing to file a direct appeal. *Pro Se* PCRA Petition, 11/8/10, at 3. Counsel was appointed and, on August 5, 2011, counsel filed an amended PCRA petition on Appellant's behalf. Within this amended petition, counsel again requested that the PCRA court "reinstate [Appellant's] right to a direct appeal *nunc pro tunc*." Amended PCRA Petition, 8/5/11, at 1-3. On October 7, 2011, Appellant's direct appeal rights were reinstated *nunc pro tunc* and, on October 31, 2011, Appellant filed the current, timely appeal to this Court.

Appellant now raises three issues on appeal:

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[1] 18 Pa.C.S.A. §§ 3701(a)(1)(ii), 3702(a), 903(a)(1), 2705, 6105(a)(1), 6106(a)(1), and 907(a), respectively.

[2] 42 Pa.C.S.A. §§ 9541-9546.

> [1.] Whether the trial court erred [in] allowing the Commonwealth to call additional witnesses to testify to buttress the Commonwealth's case after the Commonwealth rested[?]
>
> [2.] Whether the trial court erred in denying [Appellant] a new trial because the verdict was against the weight of the evidence[?]
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> [3.] Whether the trial court erred in denying [Appellant] relief because the verdict was contrary to [the] law on the charges of [robbery of a motor vehicle, possession of a prohibited firearm, criminal conspiracy, robbery – threat of imminent serious bodily injury, theft by unlawful taking, receiving stolen property, carrying a firearm without a license, carrying firearms in public, possession of an instrument of crime, simple assault, and recklessly endangering another person?]

Appellant's Brief at 4.[3]

Appellant first claims that the trial court erred when it "allow[ed] the Commonwealth to call additional witnesses . . . after the Commonwealth [had already] rested" its case. ***Id.*** at 11. Appellant has waived this claim.

On the first day of trial – which was October 29, 2009 – the Commonwealth presented the testimony of Mr. Mayes and Philadelphia

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[3] The trial court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant filed a Rule 1925(b) statement and specifically listed the first and second claims he currently raises on appeal. However, with respect to Appellant's sufficiency of the evidence claim, Appellant's Rule 1925(b) statement simply reads: "[t]he verdict was contrary to the law as to all charges [Appellant] was convicted of for the reasons stated above and stated by counsel in closing arguments as well as in arguments for judgment of acquittal." Appellant's Rule 1925(b) Statement, 11/23/11, at 2.

Police Officers Colleen Michvech, Timothy Auty, and Donald Murdock. The Commonwealth then rested its case. N.T. Trial, 10/29/09, at 151. After the Commonwealth rested, Appellant and Thomas moved for a judgment of acquittal, claiming that Mr. Mayes' testimony was incredible, that no robbery occurred, and that Mr. Mayes conspired with Appellant and Thomas to stage the automobile theft. ***Id.*** at 151-156. The trial court did not rule on the motion for judgment of acquittal. Instead, the trial court declared that it wished to ask questions of Officer Klein (as Officer Klein had been absent on the first day of trial and had not testified) and that it wished to ask additional questions of Mr. Mayes. ***Id.*** at 164-165. Thus, as the trial court made clear, it proposed that the Commonwealth reopen its case and allow for the introduction of additional evidence. The Commonwealth, Appellant, and Thomas agreed to the trial court's proposed course of action and the trial court continued the case until November 4, 2009. ***Id.*** at 169-170.

On November 4, 2009, trial reconvened and – without objection – the trial court proceeded to ask additional questions of Mr. Mayes. ***See*** N.T. Trial, 11/4/09, at 7-12. After concluding its questioning, the trial court declared that, because this was the Commonwealth's case and because "we have not properly gotten into [Appellant's] case," the Commonwealth would have the opportunity to directly examine Mr. Mayes. ***Id.*** at 12. The Commonwealth did so without objection and, after Appellant and Thomas cross-examined Mr. Mayes, Mr. Mayes was excused as a witness. ***Id.*** at 25.

The Commonwealth then called Officer Klein as a witness. After doing so, trial court asked Officer Klein questions concerning the arrest and search of Appellant. Following its questioning, the trial court permitted the Commonwealth to question Officer Klein about his entire involvement in the case. It was only at this point that Appellant objected. Yet, Appellant's objection was restricted to the ground that Officer Klein was brought back for the "limited purpose[of seeing] what was recovered from [Appellant]" and that any additional testimony from Officer Klein would be repetitive. ***Id.*** at 32. To be sure, Appellant argued only that, if the Commonwealth were permitted to question Officer Klein about the entire course of the events, Officer Klein's testimony would be cumulative of what "20 different officers [testified about] with regard to this whole car accident, people following . . . I mean, what else are we going to go through? Are we going to beat this like a dead horse now?" ***Id.*** The trial court overruled Appellant's objection and, following direct and cross-examination of Officer Klein, the Commonwealth rested its case. ***Id.*** at 54.

While Appellant now contends that the trial court erred in allowing the Commonwealth to reopen its case, it is clear that Appellant has waived this claim. In ***Dilliplaine v. Lehigh Valley Trust Co.***, our Supreme Court held that a party must make a timely, specific objection to alleged trial court errors, so as to "ensure that the trial judge has a chance to correct" any such errors. 322 A.2d 114, 116 (Pa. 1974); ***see also Commonwealth v. Clair***, 326 A.2d 272 (Pa. 1974). To be sure, in order to "advance[] the

orderly and efficient use of our judicial resources," the trial court must be given the opportunity to "correct alleged errors at trial." ***Dilliplaine***, 322 A.2d at 116. As our Supreme Court has explained, this requirement was borne from a host of factors:

> First, appellate courts will not be required to expend time and energy reviewing points on which no trial ruling has been made. Second, the trial court may promptly correct the asserted error. With the issue properly presented, the trial court is more likely to reach a satisfactory result, thus obviating the need for appellate review on this issue. Or if a new trial is necessary, it may be granted by the trial court without subjecting both the litigants and the courts to the expense and delay inherent in appellate review. Third, appellate courts will be free to more expeditiously dispose of the issues properly preserved for appeal. Finally, the exception requirement will remove the advantage formerly enjoyed by the unprepared trial lawyer who looked to the appellate court to compensate for his trial omissions.

Id. at 116-117 (internal footnotes omitted).

In the case at bar, Appellant did not object when the trial court allowed the Commonwealth to reopen its case. In fact, Appellant consented to the trial court's decision. ***See*** N.T. Trial, 10/29/09, at 169. Regardless, since Appellant did not object to the trial court's ruling, Appellant did not give "the trial court . . . the chance to correct its alleged error, [thus allowing] all of ***Dilliplaine's*** concerns to come into play." ***Faherty v. Gracias***, 874 A.2d 1239, 1249 (Pa. Super. 2005). Appellant's claim of error is waived.

Appellant next claims that his convictions were against the weight of the evidence. This claim is waived, as Appellant failed to raise the claim before the trial court.

As our Supreme Court has explained:

> in a challenge to the weight of the evidence, the function of an appellate court on appeal is to review the trial court's exercise of discretion based upon a review of the record, rather than to consider *de novo* the underlying question of the weight of the evidence. In determining whether this standard has been met, appellate 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. It is for this reason that the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings.

Commonwealth v. Rivera, 983 A.2d 1211, 1225 (Pa. 2009) (internal quotations and citations omitted).

A weight of the evidence challenge must first be raised with the trial court either before sentencing or in a post-sentence motion. Pa.R.Crim.P. 607(a). Here, Appellant failed to raise his weight claim before the trial court. Moreover, within Appellant's PCRA petition, Appellant did not request that the PCRA court restore his rights to file a post-sentence motion. *Pro Se* PCRA Petition, 11/8/10, at 3; Amended PCRA Petition, 8/5/11, at 1-3. Rather, within Appellant's PCRA petition, Appellant requested – and was granted – only the restoration of his direct appellate rights. Amended PCRA

Petition, 8/5/11, at 1-3. Appellant's weight of the evidence claim is thus waived.[4]

Finally, Appellant claims that the evidence was insufficient to support his convictions. We conclude that Appellant's claim is both waived and meritless.

We have explained:

> In ***Commonwealth v. Lord***, 719 A.2d 306 (Pa. 1998), the Pennsylvania Supreme Court held that issues not included in a Pa.R.A.P. 1925(b) statement are deemed waived on appeal. The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review. Pa.R.A.P. 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. Rule 1925 is thus a crucial component of the appellate process. When the trial court has to guess what issues an appellant is appealing,

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[4] Appellant claims that, at sentencing, the trial court did not inform him "that it was necessary to [file a post-sentence motion] in order to preserve [a weight of the evidence claim] on appeal." Appellant's Brief at 4 n.1. Because of this "failure," Appellant claims that we must consider his weight claim, in the first instance, on appeal. ***Id.*** This is a meritless contention. At the outset, a trial court does not have the obligation to educate a defendant as to the legal requirements for preserving a weight of the evidence claim. ***See*** Pa.R.Crim.P. 704(c)(3). Second, this Court is simply ill-equipped to "consider *de novo* the underlying question of the weight of the evidence." ***Rivera***, 983 A.2d at 1225. Indeed, a weight of the evidence claim is vested primarily in the trial court, as that court is the one that is given the "opportunity to hear the evidence and observe the demeanor of the witnesses." ***Armbruster v. Horowitz***, 813 A.2d 698, 701 (Pa. 2002). Appellate courts, on the other hand, are never able to see witnesses testify or observe attorneys zealously presenting their cases at trial. Rather, our review of the claim is limited to the record and briefs. It is for this reason that we, as an appellate court, look only at whether the trial court properly employed its discretion when ruling on the weight claim. ***Rivera***, 983 A.2d at 1225.

> that is not enough for meaningful review. [As such, w]hen an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues. In other words, a [c]oncise [s]tatement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no [c]oncise [s]tatement at all.

Commonwealth v. Lemon, 804 A.2d 34, 36-37 (Pa. Super. 2002) (internal quotations and some internal citations omitted).

In the case at bar, Appellant was convicted of numerous, varied crimes, including robbery, robbery of a motor vehicle, criminal conspiracy, possession of a firearm by a prohibited person, and possession of instruments of crime. Each of these crimes contains multiple elements that are potentially subject to challenge on appeal. Further, the facts supporting Appellant's convictions varied in both time and place.

Notwithstanding the varied nature of the convictions and underlying facts, Appellant tendered a boilerplate Rule 1925(b) statement, in which Appellant purported to contest the sufficiency of the evidence supporting "all of the charges." Appellant's Rule 1925(b) Statement, 11/23/11, at 2. Moreover, Appellant provided no reason as to why "all of the charges" were unsupported by the evidence.

We conclude that Appellant's vague Rule 1925(b) statement failed to "adequately [] identify . . . the issues sought to be pursued on appeal." ***Lemon***, 804 A.2d at 37. Appellant's claim is thus waived on appeal. ***See Commonwealth v. Manley***, 985 A.2d 256, 262 (Pa. Super. 2009) ("if [an

a]ppellant wants to preserve a claim that the evidence was insufficient, then the 1925(b) statement needs to specify the element or elements upon which the evidence was insufficient") (internal quotations, citations, and corrections omitted); ***Commonwealth v. Williams***, 959 A.2d 1252, 1257 (Pa. Super. 2008) (same); ***Lemon***, 804 A.2d at 37 (sufficiency claim waived where appellant's Rule 1925(b) statement "never mentioned which conviction he [was] appealing and for what specific reasons").

In the alternative, we conclude that Appellant's sufficiency of the evidence claim fails, as the claim is meritless.[5] ***See Commonwealth v. Markman***, 916 A.2d 586, 606 (Pa. 2007) ("[w]here a decision rests on two or more grounds equally valid, none may be relegated to the inferior status of *obiter dictum*"), *quoting* ***Commonwealth ex rel. Fox v. Swing***, 186 A.2d 24, 26 (Pa. 1962); ***see also Commonwealth v. Reed***, 971 A.2d 1216, 1220 (Pa. 2009) (where Superior Court determined that appellant's claims were both waived and meritless, the merits-based decision "was a valid holding [and] constitutes the law of the case").

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[5] In ***Commonwealth v. Laboy***, our Supreme Court held that, when an appellant raises a boilerplate sufficiency challenge within his Rule 1925(b) statement, the issue is not waived where the case is "straightforward," the issue is simplistic, and the common pleas court is able to "readily apprehend[the] claim and address[] it in substantial detail." ***Commonwealth v. Laboy***, 936 A.2d 1058, 1060 (Pa. 2007). Given this holding – and in an abundance of caution – we will analyze the merits of Appellant's challenge.

We review Appellant's sufficiency of the evidence challenge under the following standard:

> 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 [that of] 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 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. Brown, 23 A.3d 544, 559-560 (Pa. Super. 2011) (*en banc*), *quoting* ***Commonwealth v. Hutchinson***, 947 A.2d 800, 805-806 (Pa. Super. 2008).

Within Appellant's brief to this Court, Appellant claims that the evidence was insufficient to support his convictions, as Mr. Mayes' testimony "was contradictory and unreliable." Appellant's Brief at 21, 24, 26, 28, 30, 32, 34, 36, and 38. In the case at bar, however, the trial court expressly concluded that Mr. Mayes' testimony was credible. N.T. Trial, 11/4/09, at 118. We note that "the credibility of witnesses and weight of evidence are

determinations that lie solely with the trier of fact. The trier of fact is free to believe all, part or none of the evidence." ***Commonwealth v. Williams***, 854 A.2d 440, 445 (Pa. 2004) (internal citations omitted). As Appellant has limited his sufficiency of the evidence challenge to a simple assailment of the trial court's credibility determinations, the claim fails.

Judgment of sentence affirmed.