

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

OMAR BRADLEY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1587 WDA 2011

Appeal from the Judgment of Sentence entered April 18, 2011,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0012296-2010

BEFORE: ALLEN, WECHT, and STRASSBURGER*, JJ.

MEMORANDUM BY ALLEN, J.:

Filed: March 4, 2013

Omar Bradley ("Appellant") appeals from the judgment of sentence imposed after a jury convicted him of first degree murder and carrying a firearm without a license.¹ We affirm.

The trial court summarized the factual and procedural history of this case as follows:

The evidence produced at trial showed that on August 20, 2010, Kieonda Smith, at approximately 8:00 p.m., saw [Appellant] walking down the street where she, the victim, and others had been hanging out. Smith had known [Appellant] for 6 or 7 years. [Appellant] stopped walking, pulled out a gun from his waist, and shot several times. Smith and the others ran, and Smith called 9-1-1. When Smith returned to the scene shortly thereafter, she saw the victim bleeding from the side of his head. The victim died of a single gunshot wound to the head.

¹ 18 Pa.C.S.A. § 2502(a) and § 6106(a).

[Appellant] was charged ... with Criminal Homicide and Firearms Not to Be Carried Without a License. On January 19, 2011, a jury trial commenced for [Appellant]. On January 21, 2011, [Appellant] was found guilty of First Degree Murder, and Carrying a Firearm Without a License. On April 18, 2011, [Appellant] received a term of imprisonment of Life, and a concurrent period of incarceration of 3 to 6 years.

On April 27, 2011, defense counsel filed a Post-Sentence Motion. On September 8, 2011, the Post-Sentence Motion was denied by operation of law pursuant to Pa.R.Crim.P. 720(B)(3)(b).

On October 7, 2011, a timely Notice of Appeal was filed. On August 17, 2012, in a Concise Statement of Matters Complained of on Appeal filed, the defense argues that the verdict rendered at trial by the jury was against the weight of the evidence.

Trial Court Opinion, 8/22/12, at 1-2.

Appellant expressly queries:

WAS THE GUILTY VERDICT RENDERED CONTRARY TO THE WEIGHT OF THE EVIDENCE WHERE THE ONLY EYEWITNESS WHO IDENTIFIED [APPELLANT] AS THE PERPETRATOR OF THE CRIMES DID SO UNDER EXTREMELY LIMITED CIRCUMSTANCES, HER TESTIMONY WAS INCONSISTENT WITH THE TESTIMONY OF OTHER WITNESSES IN THE AREA WHO COULD NOT IDENTIFY THE SHOOTER, AND THE EYEWITNESS HAD A MOTIVE TO FABRICATE HER TESTIMONY, AND FINALLY NO WEAPON WAS FOUND IN [APPELLANT'S] POSSESSION?

Appellant's Brief at 6.

Our standard of review of a weight of the evidence claim is as follows:

The finder of fact is the exclusive judge of the weight of the evidence, as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses. As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of

justice. Our appellate courts have repeatedly emphasized that “[o]ne of the least assailable reasons for granting or denying a new trial is the lower court’s conviction that the verdict was or was not against the weight of the evidence.”

Furthermore,

Where the trial court has ruled on the weight claim below, an appellate court’s role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Rabold, 920 A.2d 857, 860-861 (Pa. Super. 2007) (citations omitted).

The essence of Appellant’s claim is that his conviction cannot rest with the testimony of one eyewitness, Kieonda Smith. Appellant’s Brief at 14-20. Appellant asserts that there were seven other individuals present at the shooting, and none of them identified Appellant. *Id.* Moreover, Appellant contends that Ms. Smith had a motive to “fabricate what she saw” because Ms. Smith anticipated that criminal charges would be dismissed against her, and she would benefit monetarily from being placed in the Witness Protection Program. *Id.* at 14. Finally, Appellant asserts that there was no physical evidence to support his conviction. *Id.* We are not persuaded by Appellant’s argument.

To convict a defendant of first degree murder, the jury must find that (1) a human being was unlawfully killed; (2) the defendant is responsible for the killing; and (3) the defendant acted with a specific intent to kill.

Commonwealth v. Montalvo, 956 A.2d 926 (Pa. 2008). The specific

intent to kill supporting a conviction for first degree murder can be established through circumstantial evidence, such as the use of a deadly weapon on a vital part of the victim's body. *Id.*

With regard to carrying a firearm without a license, a person is guilty of this offense if he:

Carries a firearm in a vehicle or concealed on his person, except in his home or place of business, without a valid, lawfully issued license.

18 Pa.C.S.A. § 6106(a)(1).

Our review of the record reveals that around 8:00 p.m. on August 20, 2010, City of Duquesne police sergeant Ozie Sparks received a 911 call that a man had been shot in the head. N.T., 1/19-21/11, at 32. Sergeant Sparks went to the scene where he saw the victim, Charles Gibson, slumped over and bleeding from the head. *Id.* at 33. Sergeant Sparks stated that Duquesne is "absolutely" a violent neighborhood. *Id.* at 35. He further testified:

No one ever comes up immediately and tells you who shot who. That never happens. ... [T]hey don't want to get involved. Later during the investigation, when county takes over the investigation, sometimes the witnesses do come forward.

Id. at 38.

Paramedic Edward Bloomer testified to being in his 30th year with Duquesne Emergency Medical Services. Mr. Bloomer reported to the shooting and noticed several people "upset and agitated." *Id.* at 44.

Daniel Thiem testified to being a K-9 sergeant with the City of Duquesne. Sergeant Thiem stated that there were "a lot" of people at the shooting scene who were "upset, crying and yelling, wanted the medics to save [the victim]." *Id.* at 48-49.

Allegheny County forensic pathologist Dr. Todd Luckasevic testified that Mr. Gibson, the victim, died of a gunshot wound to the head. *Id.* at 60.

Duquesne resident Beverly Dupree testified that she was in the back yard of her home on August 20, 2010 when she heard gunshots. *Id.* at 70-71. Ms. Dupree explained why she did not want to get involved:

Because I have a daughter and grandchildren and we stay to ourselves. We don't socialize with people in that neighborhood. ... We are a family to ourselves. And I don't know these people, so I didn't want to get involved period. And I was very upset about coming here [to court] today.

Id. at 76.

Duquesne resident Paul Ruhl testified to walking to his house on the evening of August 20, 2010, when he heard a gunshot and saw a man shooting. *Id.* at 97. Mr. Ruhl saw the black man fire four shots and then run away. *Id.* at 98. He described the shooter as having a medium build, and wearing black pants and a black tee shirt. *Id.* at 99. Mr. Ruhl called 911. *Id.* Mr. Ruhl stated that he had "anxiety" about testifying, and concern for his safety. *Id.* at 100. He explained:

Given the nature of the circumstances that I found myself in that day and the history of the area. There has been a lot of violence in the area in recent years. So yeah, I was concerned about my safety.

Id. at 100-101.

Dashana Smith testified to being in Duquesne on August 20, 2010. She was visiting her aunt, and was "hanging out like any other day" with a group of people, including her cousin, Kieonda Smith, and the victim, Charles Gibson. *Id.* at 106-108. Ms. Smith heard "about four or five" gunshots, and heard Kieonda Smith screaming that the victim had been shot. *Id.* at 110. Dashana Smith testified:

I didn't see nothing. I just seen like fire.

Id. at 111-112. Dashana Smith testified that Kieonda Smith called 911. *Id.* at 112. Dashana Smith also testified that she did not want to testify in court and that she only appeared because she was subpoenaed. *Id.* She said that even though she considered the victim to be a good friend, she was "a little bit" afraid and did not "want to be involved." *Id.* at 113-114. Dashana Smith testified that she "did not get a look" at the shooter. *Id.* at 128.

Duquesne resident Andrea Kish also testified. She stated:

I was sitting outside on my back porch and I seen a dude walk through the yard and heard gunshots and the dude came running back through.

Id. at 131. Ms. Kish described the "dude" as a tall, black male with a stocky build, who was dressed in black. *Id.* at 132. Ms. Kish testified that she could not identify the male, that she did not see his face, that she did not want to testify in court, and that she was "scared." *Id.* Ms. Kish explained:

I'm scared for my life because [of these] things I don't want to get involved with. It's a bad situation.

Id. at 133.

Brittney Wilson also testified. She said that she was the niece of Ms. Kish and a resident of Duquesne. Ms. Wilson testified, "I really don't want to be here." *Id.* at 135. She said she was "scared" for herself and her family because she did not "know who this dude is, who he's affiliated with." *Id.* at 136. Ms. Wilson testified that at the time of the shooting she saw a black male dressed in all black walk by, and that she then heard gunshots. *Id.* at 137. She saw the same black male running away. *Id.* at 138. She could not identify the man in black. *Id.* at 138-139.

Michael Getner testified to living in Duquesne for "over 50 years." *Id.* at 140. He was sitting in his living room with his wife on August 20, 2010 when he heard gunshots. *Id.* at 141. Mr. Getner looked out of his living room window and saw a black male, wearing all black, running down the street. *Id.* at 141-142. Mr. Getner said the black male appeared to be "in his late teens, early twenties." *Id.* at 142. Mr. Getner testified:

My main concern was for myself and my property. There are a lot of shootings that go on in the area of Duquesne. Every time we hear shootings, we kind of get a little nervous and wait for the next shot to come through the window.

Id. at 144.

Jalisa Scott testified to living in Duquesne all of her life and not wanting to testify in this case. *Id.* at 147-148. Ms. Scott said, "I didn't see

anything. I was just there." *Id.* at 148. Ms. Scott stated that she was with a group of people, including Kieonda Smith, when she heard gunshots and saw the victim lying on the ground. Ms. Scott said, "It happened so quick." *Id.* at 154. Ms. Scott testified that immediately after the shooting, Kieonda Smith said, "it was [Appellant's] punk ass that did it." *Id.* at 155, 160. Ms. Scott testified that she did not know Appellant, but that she had "seen him around." *Id.* at 156. Ms. Scott was 21 years old and Appellant was younger. *Id.* Ms. Scott did not know of Kieonda Smith having "any problems" with Appellant. *Id.* at 157.

Kieonda Smith testified to being in witness protection and living in an undisclosed location as a result of her identification of Appellant. *Id.* at 163. Before the shooting, Ms. Smith lived in Duquesne. *Id.* at 164. At the time of the shooting, Ms. Smith was outside with Dashana Smith, Jalisa Scott and a few others, including the victim. *Id.* Immediately after the shooting, Ms. Smith called 911; she was "upset, crying and screaming" because she had seen the victim shot in the head. *Id.* at 165-168, 178. Ms. Smith did not identify Appellant as the shooter when she called 911; she explained that she called 911 to get help for the victim and not to report who shot the victim. *Id.* at 204.

Ms. Smith testified that she had known Appellant for "six, seven years" and that she had gone to school with Appellant and "her aunt used to go with his uncle." *Id.* at 172-173. Ms. Smith testified that on August 20, 2010, she saw Appellant walk down the street, stop, pull out a gun and start

shooting. *Id.* at 174-176. Ms. Smith made eye contact with Appellant and had "no doubt" it was him. *Id.* at 175. When she was first interviewed, Ms. Smith did not tell detectives that she knew Appellant shot the victim; she told detectives she was in her house "because I was scared for me and my kids." *Id.* at 179, 185-187. Ms. Scott explained her reluctance to speak with detectives: "Somebody trying to do something to us. Reality." *Id.* Two days after the shooting, detectives approached Ms. Smith and she identified Appellant as the shooter. *Id.* at 182-183.

Ms. Scott stated that she does not "enjoy" being in witness protection. *Id.* Ms. Smith testified that detectives told her she had to testify, that she had no choice, and they "made" her enter the witness protection program. *Id.* at 197-198. Ms. Smith testified she received money to move and set up her new household. *Id.* at 200. She stated that she lives "far" from Duquesne, but before relocating she received a call in which she was offered money "to not come to court." *Id.* at 181-182, 193-196. Ms. Scott testified that she declined the money, and was going to "come to court regardless, for [the victim]." *Id.* at 182. Ms. Smith said that she does not want to be in witness protection, and would rather live in Duquesne. *Id.* at 205-206. When asked whether she was "getting anything positive" from being in court and testifying, Ms. Smith responded:

No. Well, getting the killer locked up for [the victim].

Id. at 207.

On cross-examination, defense counsel asked Kieonda Smith about being charged on October 22, 2010 – 2 months after identifying Appellant -- with endangering the welfare of a child. *Id.* at 202. Ms. Smith explained "I was tired. I was asleep and my two year old opened the door" and left the residence. *Id.* at 206. Ms. Smith also explained that the incident led to her first and only involvement with Children and Youth Services, who returned her children to her. *Id.* at 206-207. Kieonda Smith clarified that she was not testifying against Appellant in exchange for the child endangerment charges being withdrawn. *Id.* at 207.

Allegheny County homicide detective Lane Zabelsky testified to "going to" Kieonda Smith two days after the shooting. Detective Zabelsky "learned from other people" that Ms. Smith had been outside at the time of the shooting. *Id.* at 223. Detective Zabelsky said that Ms. Smith was not happy to be interviewed, and that the interview occurred prior to her being offered witness protection. *Id.* at 224. Detective Zabelsky testified that Kieonda Smith was not forced into witness protection, but that it was "highly suggested." *Id.* at 249. In the course of his investigation, and in addition to Kieonda Smith identifying Appellant as the shooter, Detective Zabelsky determined that Appellant was not licensed to carry a firearm. *Id.* at 230; Exhibit 40, Verified Record of Appellant not having a valid license to carry a firearm.

The foregoing testimony supports Appellant's convictions and militates against his weight claim. In reviewing the propriety of identification

evidence, we are mindful that "the central inquiry is whether, under the totality of the circumstances, the identification was reliable." ***Commonwealth v. Brown***, 23 A.3d 544, 558 (Pa. Super. 2011). Based upon the testimony of record, *supra*, the jury's verdict in this case is not against the weight of the evidence. The record is replete with the fear and apprehension of Duquesne residents in matters pertaining to criminal prosecution. Kieonda Smith's sole eyewitness testimony, in conjunction with that of Detective Zabelsky relative to Appellant not having a license to possess a firearm, supports Appellant's convictions of first degree murder and carrying a firearm without a license. ***See Commonwealth v. Diggs***, 949 A.2d 873, 879 (Pa. 2008) (the factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses). It is not dispositive that the other bystanders did not identify Appellant. Moreover, the jury heard Ms. Smith testify that she was motivated to testify "for the victim", and because she perceived that she had "no choice." N.T., 1/19-21/11, at 197-207. Ms. Smith also explained that was not testifying in exchange for the withdrawal of child endangerment charges against her, and that she did not want to be in witness protection. *Id.* at 207, 182-183. The jury was free to credit Ms. Smith's testimony. Finally, the fact that there was no physical evidence introduced to support Appellant's conviction is likewise unavailing, because Ms. Smith's eyewitness testimony supported the conviction. ***See Commonwealth v. King***, 959 A.2d 405, 410-411 (Pa.

Super. 2008) (rejecting appellant's assertion that the verdict was infirm because no physical evidence linked him to the murder).

Given the foregoing, we conclude that the trial court did not abuse its discretion in rejecting Appellant's challenge to the weight of the evidence. We therefore affirm the judgment of sentence.

Judgment of sentence affirmed.