

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
Appellee :
: v. :
LEEVEVERNE JAMES, :
Appellant : No. 3025 EDA 2011

Appeal from the Judgment of Sentence June 24, 2011,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0012427-2008

BEFORE: BENDER, DONOHUE and COLVILLE*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: March 5, 2013

Leeeverne James (“James”) appeals from the judgment of sentence entered by the Court of Common Pleas, Philadelphia County, on June 24, 2011, following his conviction of first-degree murder for the shooting death of Kenneth Sims and possessing an instrument of crime.¹ As we conclude that none of the issues he raises on appeal warrant relief, we affirm.

The trial court summarized the relevant testimony presented at trial:

Philadelphia Police Officer Nick Lei, one of the first officers to arrive at the scene, testified that on June 14, 2008 he received a radio call of a shooting in the 5400 block of Gibson Drive. He arrived on the scene less than a minute later and observed the decedent lying of [*sic*] the sidewalk. The victim was facing up and there was a lot of blood underneath the victim. He performed CPR until rescue personnel arrived.

¹ 18 Pa.C.S.A. §§ 907(a), 2502(a).

*Retired Senior Judge assigned to the Superior Court.

Police Officer David Gerard also heard the radio call and arrived at approximately the same time. While the other officer performed CPR, Officer Gerard noticed a large wound around the victim's stomach area as well as six [] spent green shotgun shells around the victim's body. Most of the shells were within two [] to three [] feet of the victim. The farthest one was approximately six [] feet away.

Amy Harris testified that immediately before the shooting she walked from the shooting scene across the street to a 'Chinese store.' While she was in the store she heard gunshots. After the shooting stopped she ran over and saw the decedent down on the ground and saw [James], whom she knew as 'Q' carrying a large gun and leaving the scene in a gold car.

Tamika Sims, the victim's sister was an eyewitness to the shooting. She observed the shooting from the 'Papi store[,] ' which was next to the 'Chinese store.' She saw [James], whom she also knew as 'Q[,] ' fire multiple shots into her brother. After the first shot[,] the decedent fell and [James] then stood over him and continuously shot at him. She described the gun as a big pump gun. When [James] finished shooting[,] he jumped into a gold car and left. At the time of the shooting she had known [James] for nine [] or ten [] years.

Tayanna Slusher also witnessed the shooting. As she was walking from the 'Papi store' towards the shooting scene[,] she saw [James] get out of a gold car carrying a big black gun with two hands. She saw [James] shoot the decedent. The decedent fell. [James] stood over the victim and continued to fire.

Dr. Edwin Lieberman, the medical examiner[,] testified that the victim received six shotgun blasts to his body from a distance of approximately three [] feet. Two blasts were to the left side of his body[,] which shredded both lungs his heart, his left kidney, his spleen and bowel. Another blast was to the left

chest[,] which struck the left lung and bowel. Another blast was to the abdomen and two were to the upper left arm. The victim died as a result of those injuries. Numerous shotgun pellets and other material from the shotgun shells were recovered from the victim's body.

Officer Ernest Bottomer, the ballistics expert[,] examined the ballistics evidence recovered from the crime scene as well as the evidence received from the medical examiner and from the search of [James'] mother's home. The recovered pellets were all .33 caliber Double O buckshot usually found in a 12[-]gauge shotgun. A total of 33 pellets were recovered from the crime scene and from the decedent's body. The fired cartridge shells recovered from the scene were all Remington shells[,] which were chambered and extracted from the same gun. Each shell was designed to contain eight [] double O buckshot pellets. The other shotgun material recovered from the decedent's body was consistent with a Remington design. An unfired shotgun cartridge recovered from the rear bedroom in [James'] mother's house^{[FN]4} was a Remington double O buckshot with an eight [] pellet load.

[Police arrested James on July 12, 2008 at an amusement park in Clementon, New Jersey.] The arresting officer, Sgt. Robert Worrick of the Clementon [] Police Department testified that [James] had a tattoo of a Q on his forearm.

[FN]4 Evidence was presented that [although James testified that he resided with his sister at another address, James also] used [his mother's] address as his legal address. This evidence was recovered during a search pursuant to a warrant. Also recovered from that bedroom was a safe which contained two boxes of Remington shotgun shells. The safe was taken pursuant to the search warrant, but was not opened until an additional warrant was

obtained authorizing a search of the safe. [Police found James' identification in the same bedroom.]

Trial Court Opinion, 4/25/12, at 3-5 (record citations omitted).

James testified in his own defense, denying that he shot the victim or that he was present at the time of the shooting. James testified that he was playing basketball with people he knew from high school at a different park when he received calls informing him that the victim had been murdered and that James was a suspect. He admitted that he knew police were looking for him on the day of the shooting and that he did not turn himself in. James' sister, Sharona Hargrove, testified that James resided with her beginning in 2006 and that he had a good reputation in the community for being peaceful and law-abiding.

At the conclusion of the five-day trial, the jury convicted James of the aforementioned crimes. The trial court sentenced James on June 24, 2011, the same day as the jury verdict, to the mandatory sentence of life in prison without the possibility of parole.² James filed post-sentence motions on

² During the testimony of one of the Commonwealth's witnesses, it was suggested that James was 17 years old at the time he committed the murder. *See* N.T., 6/22/11, at 151 (describing the murder suspect as "17, black male, 5'6", Q on right forearm"). If James was under the age of 18 at the time of the murder, his automatic sentence of life in prison without the possibility of parole would be illegal. *See Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012); *Commonwealth v. Knox*, 50 A.3d 749, 768 (Pa. Super. 2012); *see also* N.T., 6/24/11, at 52. However, various documents created and issued by the lower court contained in the certified record indicate that James' date of birth is June 4, 1988, making him 19 at the time of the murder. *See, e.g.*, Criminal Docket, 4/30/12, at 2; Court

June 29, 2011, raising arguments that the verdict was against the weight and sufficiency of the evidence. The trial court denied the motions on October 12, 2011.

This timely appeal follows, wherein James raises three issues for our review:

- I. Is [James] entitled to an arrest of judgment with respect to his convictions for first[-]degree murder and possessing instruments of crime since the evidence is insufficient to sustain these convictions as the Commonwealth failed to prove [James'] guilt or the essential elements of these crimes beyond a reasonable doubt?
- II. Is [James] entitled to a new trial as a result of the trial court's ruling that allowed the Commonwealth to play the 911 tape during the testimony of Commonwealth witness Tamika Sims?
- III. Is [James] entitled to a new trial as a result of the trial court overruling [James'] objection to the prosecutor's misconduct in his summation during which he made reference to the Central High School Lancers?

James' Brief at 4.

To decide James' first issue – that there was insufficient evidence to convict him of either crime – we employ the following standard of review:

Commitment, 6/24/11, at 1; Warrant of Arrest, 6/15/08, at 1. As no party raised this issue on appeal or contests the correctness of James' date of birth as reflected in the certified record, we conclude that James was 19 years old at the time he committed the murder in question, and thus, there is no legality of sentencing issue present in this case. ***Cf. Commonwealth v. Bowen***, __ A.3d __, 2012 WL 5359264, *9 n.4 ("illegality of sentence is a non-waivable issue that is subject to our *sua sponte* review").

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. 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. Helsel, 53 A.3d 906, 917-18 (Pa. Super. 2012)
(formatting and citation omitted).

James challenges the sufficiency of the evidence to sustain his convictions on three bases: (1) the Commonwealth failed to prove his identity as the perpetrator; (2) the Commonwealth failed to present "physical or scientific evidence" establishing his guilt; and (3) the Commonwealth failed to present a motive for James to murder the victim. James' Brief at 19-23. The trial court found that "the evidence

overwhelmingly proved that [James], using a shotgun, intentionally and with malice killed the decedent.” Trial Court Opinion, 4/25/12, at 5. We agree.

With respect to his argument regarding his identification as the perpetrator, there is absolutely no support in the record for James’ assertion that “[n]either Sims nor Slusher could identify [James] as the perpetrator with certainty.” James’ Brief at 21. To the contrary, the record reflects that both Tamika Sims and Tayanna Slusher unequivocally identified him as the murderer. **See** N.T., 6/21/11, at 155-56; N.T., 6/22/11, at 64-65. The law is clear that eyewitness identification is sufficient to support a defendant’s conviction of a crime. **See, e.g., Commonwealth v. King**, 959 A.2d 405, 411 (Pa. Super. 2008); **Commonwealth v. Duncan**, 473 Pa. 62, 69, 373 A.2d 1051, 1054 (1977) (finding sufficient evidence based upon the testimony of a single eyewitness). Moreover, to the extent that there are any “inconsistencies and contradictions” in their testimony, that goes to the weight of the evidence, not its sufficiency. **See Commonwealth v. Brown**, ___ Pa. ___, 52 A.3d 1139, 1165 (2012).

James’ argument that “the Commonwealth did not present any physical or scientific evidence” connecting him to the crime likewise challenges the weight, not the sufficiency of the evidence, and thus does not merit relief on a sufficiency review. **See King**, 959 A.2d at 411 (addressing the defendant’s argument that no physical evidence linked him to the crime as a weight of the evidence claim); James’ Brief at 23. His argument that

the Commonwealth failed to present a motive also does not entitle him to relief, as “proof of motive is not necessary for a conviction of first-degree murder[.]” ***Commonwealth v. Chmiel***, 585 Pa. 547, 574, 889 A.2d 501, 517 (2005).

Based on the evidence presented at trial, we conclude the evidence was sufficient to prove that James was guilty of murder in the first degree and possessing an instrument of crime. “A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.” 18 Pa.C.S.A. § 2502(a). “Specific intent to kill can be established through circumstantial evidence, such as the use of a deadly weapon on a vital part of the victim’s body.” ***Commonwealth v. Montalvo***, 598 Pa. 263, 274, 956 A.2d 926, 932 (2008). “A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.” 18 Pa.C.S.A. § 907(a). Viewed in the light most favorable to the Commonwealth, the record reflects that James possessed a firearm, which he used to shoot the decedent and that he used the firearm on a vital part of the decedent’s body. N.T., 6/21/11, at 155-56; N.T., 6/22/11, at 64-65.

As his second issue on appeal, James contends that the trial court committed reversible error by permitting the Commonwealth to play the recording of Tamika Sims’ 9-1-1 call at trial. James’ Brief at 25. He asserts that the recording was “irrelevant and cumulative,” as she had already

testified to the content of the 9-1-1 call. *Id.* at 26. He further argues that the recording “had the tendency to inflame the passions of the jury,” as “[i]t allowed the jury to hear a narration of the incident in an excited, emotional fashion.” *Id.* at 27. The trial court found that the 9-1-1 recording “was necessary and probative as it gave the jury a context as to the chaotic nature of the crime scene and corroborated the testimony of all of the various witnesses.” Trial Court Opinion, 4/25/11, at 5. It further found that the recording “contained nothing uniquely prejudicial to this particular defendant,” and that it did not abuse its discretion by permitting the recording to be played for the jury. *Id.*

The recording of Tamika Sims’ 9-1-1 call was admitted into evidence as Commonwealth’s Exhibit C-55. That exhibit was not included in the certified record on appeal to this Court. We issued two Orders to the trial court requesting production of the exhibit, and on February 8, 2013, we received a response from the trial court that it did not have the exhibit and that the exhibit could not be located.

The law is well settled that “the duty is on the appellant to initiate the action necessary to provide the appellate court with all the documents necessary to allow a complete and effective appellate review[.]” *Commonwealth v. Almodorar*, 610 Pa. 368, 370, 20 A.3d 466, 467 (2011) (*per curiam*); Pa.R.A.P. 1931 (2004 Explanatory Comment). James has not alleged that any “extraordinary breakdown in the judicial process”

caused the record to be incomplete. *See Almodorar*, 610 Pa. at 370, 20 A.3d at 467. In fact, James has not submitted anything to this Court explaining or commenting on the absence of the exhibit. As such, the issue is waived.

However, even if the issue was not waived, and assuming for the sake of this argument that the trial court erred by allowing the admission of the 9-1-1 call, we are compelled, based upon the evidence before us and the arguments presented by James, that any error in its admission was harmless, because by James' admission, the 9-1-1 call was cumulative of other, properly admitted evidence.³ *See Commonwealth v. Brown*, ___ Pa. ___, 52 A.3d 1139, 1183 (2012) (stating that error is harmless if "erroneously admitted evidence was cumulative with respect to other properly admitted evidence"). Tamika Sims testified to what occurred at the time of the shooting and the content of her 9-1-1 call. N.T., 6/21/11, at 155-56, 160, 165-66. The jury also heard testimony of the chaotic nature of the scene following the shooting. *See id.* at 15, 29. Moreover, James does not assert that he was prejudiced by the **content** of the 9-1-1 call, but by the jury hearing Tamika Sims' excited and emotional **tone** during the call. James' Brief at 27. We disagree that this would have caused the jury to

³ We review the admission of evidence for abuse of discretion by the trial court. *Commonwealth v. Huddleston*, 55 A.3d 1217, 1222-23. In cases that we determine the trial court abused its discretion by admitting certain evidence, we then must determine whether that error was harmless beyond a reasonable doubt. *Id.* at 1223.

make a decision based upon passion rather than the evidence. She had just witnessed her brother's murder; no one would expect her to be calm when reporting the incident immediately thereafter to police. As such, James would not be entitled to a new trial on this basis.

As his final issue on appeal, James raises an argument of prosecutorial misconduct during the Commonwealth's summation. James' claim of misconduct stems from the fact that the prosecutor became aware during *voir dire* that the prosecutor and one of the jurors attended the same high school. Because of this, the prosecutor inserted the name of the high school mascot in his closing argument when arguing to the jury that James' alibi – that he was playing basketball with individuals he knew from high school when the shooting occurred – was not worthy of belief. Specifically, the prosecutor stated:

And further, what makes it even more shocking, and he's saying that one of the people he was playing basketball with went to his high school. They were in high school together. I don't know about you, but I know where I went to high school, and if something like this happened and I was out with another member of my class, **a fellow Lancer**, and I said [']what you know, they are saying I did something,['] do you really think that person is not going to say, [']hey, you were with me?['] Come on now. If they are high school classmates, what better person is there to come forward and say, [']yeah, he was with me and these are the other people because we were all playing ball.['] And yet according to him, he didn't think let me go find one of those people?

N.T., 6/23/11, at 171 (emphasis added).

The record reflects, however, that James did not make an objection during the Commonwealth's closing at the time the offending statement was made, nor did he object immediately after the summation ended. Rather, James waited until the following morning to object to the statement. N.T., 6/24/11, at 2. Our Supreme Court has held that "the lack of a contemporaneous objection constitutes a waiver of any challenge to the prosecutor's closing remarks." *Commonwealth v. Rivera*, 603 Pa. 340, 370, 983 A.2d 1211, 1229 (2009) (citation omitted). In *Rivera*, defense counsel waited to object to statements made by the prosecutor during his summation until the prosecutor had completed his argument, defense counsel had completed his argument, and a 15-minute recess had elapsed. *Id.* Here, counsel for James waited until the following morning, just prior to the trial court issuing its charge to the jury, to object to the prosecutor's closing argument. As such, this claim is waived.

Regardless of waiver, the issue is nonetheless meritless. The record reflects that when counsel for James made his objection, it requested that the juror who may have been influenced by the Commonwealth's superfluous statement be removed and replaced by an alternate. N.T., 6/24/11, at 2. The trial court decided to question the juror and stated that it would grant the requested relief if the juror indicated that he was affected by the Commonwealth's statement. *Id.* at 5. The questioning by the trial court proceeded as follows:

Q. Juror number 8, yesterday during the closing arguments by [the prosecutor], there was a reference to Lancers. Did that reference mean anything to you?

A. Yes, Your Honor.

Q. And what did it mean to you.

A. It was my high school mascot too.

Q. It was – it's the Central Lancers?

A. Yes.

Q. Okay. So here's what I wanted to know, in relationship to that reference, will it have any impact on your ability to be a fair juror and to fairly assess both the arguments of both counsel and the events in this case?

A. Would it have an effect?

Q. In other words, because [the prosecutor] in his argument referenced Central Lancers, will you give his argument more or less weight because of that?

A. No, ma'am.

Q. Is there anything about that reference that would, in any way, impact on your ability to be a fair juror?

A. No, ma'am.

Q. Do you understand, as I've told you throughout the case, that our job is to assess the facts, to listen to the facts and then apply the law as I give it to you? Will you still be able to do that?

A. Yes, ma'am.

Q. Okay. And I will also instruct you in [...] my closing charge to you, that you make your decision on this case based upon the facts and the law and not on the attorneys, which attorney you like better, which argument you may have liked better or whether or not an attorney may or may not have gone to a school with the same mascot as your high school. Would you be able to do that as well?

A. Yes, ma'am.

Id. at 6-7. As a result of the juror's answers to the trial court's questions, it found that there was no reason to remove the juror. *Id.* at 10.

We review the trial court's decision regarding the removal of a juror for abuse of discretion and with great deference. ***Commonwealth v. Dennis***, 597 Pa. 159, 204-05, 950 A.2d 945, 972 (2008). Based upon the record before us, we find no abuse of discretion in the trial court's decision not to remove Juror 8 and its determination that the juror would be fair and impartial in executing his duties. As such, no relief is due.

Judgment of sentence affirmed.

Colville, J. concurs in the result.