NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
MATTHEW CORDERO	
Appellant	No. 3319 EDA 2016

Appeal from the Judgment of Sentence Dated September 30, 2016
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0000654-2015

BEFORE: BOWES, J., SOLANO, J., and PLATT, J.*

MEMORANDUM BY SOLANO, J.: **FILED SEPTEMBER 27, 2017**

Appellant Matthew Cordero appeals from the judgment of sentence following his convictions for first degree murder, robbery, conspiracy to commit robbery, and possession of an instrument of crime.[1] We affirm on the basis of the trial court's opinion.

The trial court aptly summarized the underlying facts. ***See*** Trial Ct. Op., 12/9/16, at 2-6. On September 13, 2013, Appellant and his girlfriend, Krista McDevitt, conspired to lure the decedent, Joseph Britton (McDevitt's former boyfriend), to a location in the Frankford neighborhood of Philadelphia, where Appellant and McDevitt planned to rob him. McDevitt

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 2502(a), 3701(a)(1)(i), 903, and 907(a), respectively.

successfully lured Britton to Frankford, but when she met Appellant to tell him, Appellant became jealous and enraged, approached Britton (who was waiting for McDevitt in a borrowed car), and struck him three or four times with an aluminum baseball bat, killing him. Appellant searched the car and Britton's pockets for drugs and money, but retrieved only $1. Appellant discarded the car keys and then boasted to others of the crime and warned them not to report him to the police.

At trial, in addition to various law enforcement officers and the medical examiner, the Commonwealth presented the testimony of McDevitt,[2] Howard Hilgendorff (Britton's roommate, who lent Britton his car that day), Ian Pawlowic (Appellant's friend, who lent Appellant his baseball bat when Appellant confided his plans for the robbery, and who helped Appellant search the car following the murder), and Daquan Calloway (who, at thirteen years old, heard Appellant announce his intention to rob Britton, observed Britton's body immediately following the murder, heard Appellant warn him and his (Calloway's) mother against reporting Appellant to the police, witnessed his (Calloway's) mother falsely tell a 911 operator and the responding law enforcement officers that a group of four males had committed the murder, and who had himself given a false statement to the police which he recounted at trial).

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[2] McDevitt was not an eyewitness to the murder.

During his closing argument, in order to demonstrate the force used in the murder, the prosecutor "struck a cardboard [file storage] box resting on the prosecutor's table four times with a baseball bat, warping and slightly cracking the top of the box." Trial Ct. Op. at 11. Appellant moved for a mistrial based on the prosecutor's conduct, which the trial court denied.

On September 30, 2016, the jury convicted Appellant of the aforementioned charges. Trial Ct. Op. at 1. Appellant received a mandatory sentence of life imprisonment without parole for the first-degree murder charge, and lesser concurrent sentences for the remaining counts. ***Id.*** Appellant filed no post-sentence motions, but filed a timely notice of appeal, and raises the following issues:

> I. Is Appellant entitled to an arrest of judgment with regard to his convictions for first degree murder, robbery, criminal conspiracy to commit robbery and possessing instruments of crime since the evidence is insufficient to sustain the verdicts of guilt as the Commonwealth failed to sustain its burden of proving Appellant's guilt beyond a reasonable doubt?
>
> II. Is Appellant entitled to a new trial based upon the trial court's denial of his motion for a mistrial made as a result of prejudicial misconduct of the prosecutor during his summation?

Appellant's Brief at 4 (answers by the court below omitted).

Sufficiency of the Evidence

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. When reviewing a sufficiency claim the court

> is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
>
> As a reviewing court, we may not weigh the evidence or substitute our judgment for that of the fact-finder, who is free to believe all, part, or none of the evidence.

Commonwealth v. Chambers, 157 A.3d 508, 512 (Pa. Super. 2017) (ellipses, citations, and formatting omitted).

Appellant broadly argues that "there was no evidence presented to show that Appellant acted with the specific intent to kill, malice, ill will or premeditation, that he entered into an agreement to commit a crime, that he removed any property from someone with force or the threat of force or that he used or possessed a weapon or instrument of crime." ***See*** Appellant's Brief at 18. More specifically, he complains that there was no physical or scientific evidence presented by the Commonwealth to establish Appellant's involvement, ***id.***; the Commonwealth failed to prove Appellant's identity as one of the perpetrators, ***id.*** at 22; no eyewitness testimony was presented, ***id.***; and the testimony presented by the Commonwealth "was contradictory, inconsistent,[3] and biased" — in particular, Appellant asserts that the testimony of Krista McDevitt and Ian Pawlowic was "tainted" because they had received lesser sentences in their own cases in exchange for their testimony at Appellant's trial, ***id.*** at 22, 25-26.

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[3] Appellant does not specify which testimony was contradictory or inconsistent.

Moreover, Appellant contends that the allegations "did not evidence a specific intent to kill, but an individual who was out of control and who was under the influence of a sudden and intense passion stemming from belief that Krista McDevitt shared drugs with or had sex with the victim." Appellant's Brief at 22. Appellant asserts that "the Commonwealth did not rebut evidence showing that Appellant acted in the heat of passion at the time the victim was killed. At most, Appellant's actions constitute voluntary manslaughter." ***Id.*** at 25.

After a review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Barbara A. McDermott, we conclude that there was sufficient evidence presented to establish beyond a reasonable doubt that Appellant committed the above crimes. ***See*** Trial Ct. Op. at 6-10 (reviewing the elements of each crime of which Appellant was convicted and concluding (1) that specific intent to kill was proven by the evidence establishing that Appellant "ambushed the unsuspecting decedent as he waited in his car and employed a deadly weapon, an aluminum baseball bat, to strike him in his vital head and neck three to four times, killing him instantly," that Appellant had done so after purposefully travelling to the decedent's location in a fit of rage, and that Appellant boasted about the murder afterwards; (2) that conspiracy to commit robbery was established when McDevitt testified that she and Appellant had "concocted a scheme to support their drug habits by luring her

former friends and paramours to Philadelphia and robbing them," and had done so with Britton; (3) that Appellant "manifested his intent to rob decedent by obtaining a baseball bat and lying in wait to ambush the decedent outside Wissinoming Park," "clearly attacked the decedent with the dual intent to murder him and rob him of his belongings," and "[a]fter the murder, . . . returned to ransack the vehicle . . . [and] took control of the decedents' car keys and a single one-dollar bill, completing the robbery"; and (4) that possessing an instrument of a crime was established by the evidence that "[o]n the day of the murder, [A]ppellant acquired the baseball bat from Pawlowic and a pair of socks he used as gloves . . . [Appellant] struck the decedent with the bat three to four times with the intent to kill him for taking drugs and having sex with McDevitt and to rob him of any money or drugs he had on his person").

In addition, we note that Appellant's arguments relate mainly to the weight, and not the sufficiency, of the evidence. ***See Commonwealth v. Wilson***, 825 A.2d 710, 713-14 (Pa. Super. 2003) ("A sufficiency of the evidence review . . . does not include an assessment of the credibility of the testimony offered by the Commonwealth. . . . Such a claim is more properly characterized as a weight of the evidence challenge" (citations omitted)).

Finally, regarding Appellant's argument that the evidence establishes the lesser crime of voluntary manslaughter,[4] we find that Appellant made no argument at trial regarding voluntary manslaughter, did not request a jury charge on provocation, and did not raise the issue in his Rule 1925(b) statement. We therefore hold that Appellant waived that aspect of his claim. ***See*** Pa.R.A.P. 302 (claims may not be raised for the first time on appeal); Pa.R.A.P. 1925(b)(4)(vii) (issues not raised in the 1925(b) statement are waived).

Motion for Mistrial/Prosecutorial Misconduct

> In reviewing an assertion of prosecutorial misconduct, our inquiry centers on whether the defendant was deprived of a fair trial, not deprived of a perfect trial. It is well-settled that a prosecutor must be free to present his or her arguments with logical force and vigor. Comments grounded upon the evidence or reasonable inferences therefrom are not objectionable, nor are comments that constitute oratorical flair. Furthermore, the prosecution must be permitted to respond to defense counsel's arguments. Consequently, this Court has permitted vigorous prosecutorial advocacy provided that there is a reasonable basis in the record for the prosecutor's comments. A prosecutor's remarks do not constitute reversible error unless their unavoidable effect would prejudice the jurors, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. Finally, we review the allegedly improper remarks in the context of the closing argument as a whole.

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[4] A successful "heat of passion" defense reduces a homicide charge to voluntary manslaughter. ***See*** 18 Pa.C.S. § 2503(a)(1) ("A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by . . . the individual killed").

Commonwealth v. Sneed, 45 A.3d 1096, 1109–10 (Pa. 2012) (quotation marks, brackets, and citations omitted).

Appellant argues that "the prosecutor's demonstration in front of the jury went beyond permissible oratorical flair, and was done in a flamboyant, erratic, or frightening manner. The striking of the cardboard filing box could only have been designed to appeal to the jury's prejudices." Appellant's Brief at 32. Appellant complains that the medical examiner "did not testify to the amount of force used to strike the victim," and that "[t]here was no testimony presented by the Commonwealth to indicate that the victim was struck in the same manner as the prosecutor struck the cardboard filing box. As a result, the prosecutor's demonstration had the effect of impermissibly introducing evidence that was not presented at trial." ***Id.*** at 32-33.

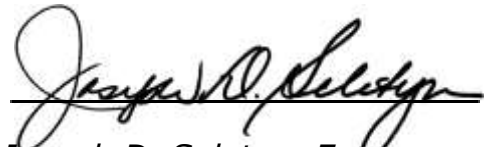
After a thorough review, we agree with the trial court's conclusion on this issue as well. ***See*** Trial Ct. Op. at 11-12 (reviewing the law applicable to a prosecutor's statements and concluding that "[u]ncontroverted evidence," including the testimony of the medical examiner, "permitted the jury to make a reasonable inference that [Appellant] struck the decedent three to four times with a baseball bat while using a significant amount of force," that the Commonwealth's demonstration mirrored the evidence at trial, and that there was no basis for a finding of prejudice). We note that in a similar case, ***Commonwealth v. Johnson***, 719 A.2d 778 (Pa. Super. 1998) (*en banc*), ***appeal denied***, 739 A.2d 1056 (Pa. 1999), the defendant was on trial for

committing first degree murder with a baseball bat, and the prosecutor, during his closing statement, struck a cardboard box with a baseball bat. ***Id.*** at 789. There, as here, the trial court denied the defendant's motion for a mistrial, and we affirmed, stating that "the record is insufficient to determine the prejudicial effect, if any, of the baseball bat demonstration, which . . . bore a reasonable relation to the circumstances of the case and to the prosecutor's argument regarding malice." ***Id.*** at 789-90.[5]

Thus, we affirm on the basis of the trial court's opinion, and the parties are instructed to attach a copy of the trial court's opinion of December 9, 2016, to any future filing that references this Court's decision.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/27/2017

[5] In ***Johnson***, we also noted that "[a]ny prejudice was speculative and certainly cured by the court's instruction" to the jury, which was: "insofar as [the prosecutor] attempted to demonstrate the noise of the bat, that is not evidence in this case and also must be stricken." 719 A.2d at 789-90. Although here, no instruction was given in response to the demonstration, we note that the jury was instructed that the closing statement of the prosecutor was not to be construed as evidence. ***See*** N.T., 9/29/16, at 13, 100.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0000654-2015

v.

MATTHEW CORDERO

OPINION

McDermott, J. **December 9, 2016**

Procedural History

On October 14, 2014, the Defendant, Matthew Cordero, was arrested and charged with Murder and related offenses. On September 26, 2016, the Defendant appeared before this Court and elected to be tried by a jury. On September 30, 2016, the jury convicted the Defendant of First-Degree Murder, Robbery, Conspiracy to Commit Robbery, and Possession of an Instrument of Crime ("PIC"). On that same date, this Court imposed the mandatory sentence of life imprisonment without parole for First-Degree Murder, and concurrent sentences of five to ten years each for Robbery and Conspiracy, and one to two years for PIC, for a total sentence of life imprisonment.[1]

On October 22, 2016, the Defendant filed a timely Notice of Appeal. On October 25, 2016, this Court ordered the Defendant to submit a Statement of Matters Complained of on

[1] This Court imposed the instant sentence consecutive to the thirteen to twenty-seven year term of imprisonment the Defendant was serving for Attempted Murder and Robbery in CP-09-CR-0005278-2014. The Defendant did not file a post-sentence motion.

Appeal pursuant to Pa.R.A.P. 1925(b). On October 26, 2016, the Defendant filed a timely 1925(b) Statement.

Facts

In August 2013, the Defendant, Matthew "Shark" Cordero,[2] visited his paramour Krista McDevitt at a Bucks County rehab facility, where she was recieving court-ordered treatment. The Defendant convinced her to leave and travel to the Frankford neighborhood of Philadelphia with him. Over the next month, the Defendant and McDevitt lived homeless on the streets of Frankford and frequently used marijuana and PCP. N.T. 9/28/2016 at 6–19.

In September of 2013, desperate for money, the Defendant and McDevitt concocted a scheme to rob McDevitt's former acquaintances by contacting them via Facebook and luring them to Frankford.[3] McDevitt contacted numerous acquaintances, each of whom ignored her, until the decedent, McDevitt's former paramour Joseph Britton, responded on September 13, 2016. In a Facebook message, McDevitt told the decedent that she suffered from heroin withdrawal and begged him to meet her in Frankford. The decedent, a heroin user, sent McDevitt his phone number and agreed to meet her in Frankford late in the evening. *Id.* at 19–25.

At approximately 8:30 p.m. on September 13, Howard Hilgendorff agreed to pick up the decedent, his roommate, from a church service in New Jersey. During the drive back to their apartment in Levittown, the decedent answered a phone call from McDevitt and told her that he would be there in shortly. At 11:20 p.m., after Hilgendorff and the decedent arrived home, the

[2] Prior to trial, the Defendant indicated that his real name was Matthew Miller. Because the Bills of Information identify the Defendant as Matthew Cordero, this Court will employ that name for the purposes of this opinion.
[3] The Defendant and McDevitt shared the same disposable cell phone throughout the month.

decedent asked to borrow Hilgendorff's blue Hyundai Tiburon and then drove to Frankford. N.T. 9/27/2016 at 79–84.

After calling the decedent, McDevitt met the Defendant on the front porch of thirteen-year old Daquan "Pikachu" Calloway's house, where they discussed their plan to rob the decedent. After this discussion, the Defendant travelled to his friend Ian Pawlowic's house at 6051 Charles Street and asked him for a baseball bat and a pair of socks. The Defendant told Pawlowic that they were going to rob the decedent for heroin money, and Pawlowic provided him with a silver, aluminum Easton bat. From there, the Defendant travelled to Wissinoming Park and waited for McDevitt. *Id.* at 114–120; N.T. 9/28/2016 at 28–29.

In the meantime, McDevitt waited at the corner of Bridge and Pratt Streets in Frankford, where the decedent picked her up in Hilgendorff's blue Hyundai. The pair then travelled to a nearby Wawa, where the decedent and McDevitt each shot heroin. During the ensuing conversation, the decedent attempted to convince McDevitt to return to Bucks County, where she faced an absconder's warrant. McDevitt told the decedent that she would, and then convinced him to drive her to Wissinoming Park, to supposedly retrieve her belongings. N.T. 9/28/2016 at 25–29.

The decedent parked the Hyundai near the intersection of Charles and Comly Streets, adjacent to the park, where McDevitt left him to meet the Defendant. After McDevitt found the Defendant waiting in the park, the Defendant observed that McDevitt was high and accused her of taking drugs and having sex with the decedent, which she denied. Enraged, the Defendant approached the Hyundai on Charles Street and attacked the decedent as he sat in the driver's seat, striking him four times. *Id.* at 30–34.

The Defendant immediately travelled to Pawlowic's home and told him that he killed the decedent. The two then walked back to the decedent's car where Pawlowic observed the decedent's corpse. The Defendant then ransacked the trunk, the glove compartment, and the decedent's pockets in hopes of finding cash or heroin. The Defendant recovered only a single dollar bill from the decedent's pocket. The Defendant then threw the Hyundai's keys down a storm drain and walked back to Calloway's house. N.T. 9/27/2016 120–128; 9/28/2016 at 37–44.

At Daquan Calloway's house, the Defendant encountered McDevitt and Nakia "Duck" Calloway, Daquan Calloway's mother. As Daquan Calloway listened from inside the house, the Defendant announced to all present that he murdered the decedent. Upset, McDevitt told the Defendant that he was only supposed to rob the decedent and not kill him. The Defendant again accused McDevitt of having sex with the decedent, and an argument between the two ensued. Shortly thereafter Nakia Calloway took Daquan to the Hyundai to observe the body, whereupon the Defendant called Nakia Calloway to warn her not to get him arrested. Thereafter, Nakia Calloway called 911 and told operators that four males, two African-American, one Caucasian, and one Latino, assaulted the decedent and fled the scene in a brown Crown Victoria. N.T. 9/27/2016 at 230–236, 260–282, 290 –296; N.T. 9/28/2016 at 33–36.

At 1:19 a.m. Officers Bakos and Manes responded to a radio call describing a group of males assaulting another male at the intersection of Comly and Tackawanna Streets. On location, the Officers discovered the decedent slumped in the driver's seat of his blue Hyundai, bleeding from the back of his head and clutching a cell phone in his right hand. The decedent was unresponsive, and medics declared him dead at 1:26 a.m. N.T. 9/27/2016 at 50–56, 309–310.

At trial, Deputy Chief Medical Examiner Dr. Albert Chu, an expert in forensic pathology, testified that the decedent suffered four distinct impacts to his head and neck, including lacerations to his left forehead and behind the left ear and two contusions to his upper neck. The impacts to the decedent's forehead and left ear area each tore the decedent's scalp and caused internal bleeding, while the blow to the forehead fractured his skull. The injuries to the decedent's forehead and spinal cord were immediately incapacitating, and either injury could have caused immediate death. Each injury was consistent with having been caused by an aluminum baseball bat. Dr. Chu concluded that the manner of death was homicide, caused by blunt impact trauma. N.T. 9/27/2016 at 90–105.

A few days after the murder, the Defendant returned the baseball bat to Pawlowic, who in turn left the bat at 4077 Higbee Street, his friend Jake's house. Philadelphia police detectives Bamberski and Graf interviewed Pawlowic on April 18, 2014, who confessed to his role in the homicide and gave police the location of the baseball bat. That same day, police recovered two baseball bats from the basement of 4077 Higbee Street.[4] *Id.* at 131–145, 210–222.

On September 19, 2013, six days after the murder, the Bucks County Sheriff's Office arrested McDevitt on her absconder's warrant. On September 21, 2013, Philadelphia Homicide Detectives Harkins and Burns interviewed McDevitt, who told them that she got high with the decedent on the night of the murder, but was not otherwise involved in his killing. On April 18, 2014, police told McDevitt that they spoke to Pawlowic who told them the truth. McDevitt then gave police a second statement wherein she stated that the Defendant killed the decedent. N.T. 9/28/2016 at 43–52.

[4] The police furnished a DNA report for each of the bats, but the DNA sample for the silver bat was inconclusive, while the DNA sample on the second bat excluded the Defendant, McDevitt, and Britton as originators. N.T. 9/28/2016 at 240–245.

On June 24, 2014, McDevitt signed a memorandum of agreement to testify against the Defendant and pled guilty to Third-Degree Murder, Conspiracy, and Robbery. On September 11, 2014, Pawlowic pled guilty to Robbery and Conspiracy and agreed to testify against the Defendant.[5] N.T. 9/27/2016 at 140–142, 156, 188; N.T. 9/28/2016 at 57–58, 80.

Discussion

The Defendant raises two issues for review and argues that: (1) the evidence was insufficient to support the verdict; and (2) this Court erred when it denied the Defendant's motion for mistrial concerning prosecutorial misconduct during closing argument.

Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the Commonwealth as verdict winner, the evidence and all reasonable inferences drawn therefrom support the jury's finding of all the elements of an offense beyond a reasonable doubt. *Commonwealth v. Mattison*, 82 A.3d 386, 392 (Pa. 2013) (*citing Commonwealth v. Montalvo*, 956 A.2d 926, 932 (Pa. 2008)). In applying this standard, Pennsylvania courts acknowledge that "the Commonwealth may sustain its burden by means of wholly circumstantial evidence." *Montalvo*, 956 A.2d at 932 (*citing Commonwealth v. Diggs*, 949 A.2d 873, 877 (Pa. 2008)). The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence, as any doubts regarding a defendant's guilt may be resolved by the fact finder unless the evidence is so inconclusive that, as a matter of law, no probability of guilt may be drawn. *Commonwealth v. Devine*, 26 A.3d 1139, 1145 (Pa. Super. 2011) (*quoting Commonwealth v. Jones*, 874 A.2d 108, 120–121 (Pa. Super. 2005)). The fact finder is free to believe all, part, or none of the evidence. *Id.*

[5] On October 24, 2016 the Honorable Kathryn Streeter Lewis sentenced McDevitt to seven and one-half to fifteen years imprisonment for Third-Degree Murder and imposed no further penalty on the remaining charges. On that same date, Judge Streeter-Lewis sentenced Pawlowic to concurrent four to eight year periods imprisonment for Robbery and Conspiracy. *See* CP-51-CR-0005890-2014; CP-51-CR-0005891-2014.

First Degree Murder is any unlawful killing committed with malice and the specific intent to kill. 18 Pa.C.S. § 2502(a); *Commonwealth v. Johnson*, 615 Pa. 354, 42 A.3d 1017, 1025 (2012). Evidence is sufficient to sustain a First-Degree Murder conviction if the Commonwealth established, beyond a reasonable doubt, that (1) a person was unlawfully killed; (2) the defendant killed the person; and (3) the defendant acted with a specific intent to kill. *Commonwealth v. Buford*, 101 A.3d 1182, 1186 (Pa. Super. 2014) (*citing Commonwealth v. Ramos*, 827 A.2d 1195, 1196 (Pa. 2003)). An intentional killing is a "willful, deliberate, and premeditated killing." 18 Pa.C.S. § 2502(d). Malice and the specific intent to kill may both be inferred from a defendant's use of a weapon on a vital part of the victim's body. *Buford*, 101 A.2d at 1186; *Commonwealth v. Thomas*, 54 A.3d 332, 335-36 (Pa. 2012). The Commonwealth may establish that a defendant intentionally killed the victim wholly through circumstantial evidence. *Commonwealth v. Chambers*, 980 A.2d 35, 44 (Pa. 2009) (*citing Commonwealth v. Rivera*, 773 A.2d 131, 135 (Pa. 2001)).

The Commonwealth presented ample evidence to prove that the Defendant murdered the decedent with malice and the specific intent to kill. The Defendant ambushed the unsuspecting decedent as he waited in his car and employed a deadly weapon, an aluminum baseball bat, to strike him in his vital head and neck three to four times, killing him instantly. N.T. 9/27/2016 at 98–99, 104–105, 118. McDevitt testified that immediately before the killing, the Defendant flew into a rage after finding her intoxicated, accused her of having sex with the decedent, and travelled to the decedent's location. N.T. 9/28/2016 at 30–32. Shortly after the murder, the Defendant boasted to Pawlowic, McDevitt, Nakia Calloway, and Daquan Calloway that he had murdered the decedent. *Id.* at 33; N.T. 9/27/2016 at 117, 121–122, 229–235. This evidence

clearly establishes the premeditation, malice, and specific intent to kill elements sufficient to sustain a First-Degree Murder conviction.

To sustain a conviction for Conspiracy to Commit Robbery, the Commonwealth must establish that the Defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy. *Commonwealth v. McCall*, 911 A.2d 992, 996 (Pa. Super. 2006) (*citing Commonwealth v. Hennigan*, 753 A.2d 245, 253 (Pa. Super. 2000)). An explicit or formal agreement to commit crimes can seldom, if ever, be proved, but a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation. *Commonwealth v. Perez*, 931 A.2d 703, 708–709 (Pa. Super. 2007); *Commonwealth v. Jones*, 874 A.2d 108, 121–122 (Pa. Super. 2005).

The Superior Court has identified four factors to be considered in determining the sufficiency of the evidence supporting the existence of a conspiracy: "(1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy." *Commonwealth v. Lambert*, 795 A.2d 1010, 1016 (Pa. Super. 2002).

Throughout September 2013, the Defendant and McDevitt, both drug addicts, lived a homeless, nomadic lifestyle in Frankford, Philadelphia. McDevitt testified that, during this time period, she and the Defendant concocted a scheme to support their drug habits by luring her former friends and paramours to Philadelphia and robbing them. N.T. 9/28/2016 at 19–22. To this effect, McDevitt contacted the decedent and invited him to Philadelphia, where the Defendant would ambush and rob him. *Id.* at 23–25. On the day of the murder, the Defendant

told Pawlowic that he was going to rob a bundle of heroin from someone, and acquired a bat for that purpose. N.T. 9/27/2016 at 115–116. On the night of the murder, McDevitt met with the decedent and directed him to Wissinoming Park, where the Defendant lie in wait. N.T. 9/28/2016 at 27–30. This evidence is sufficient to support the Defendant's conspiracy conviction.

To sustain a robbery conviction, the Commonwealth must prove that, in the course of committing a theft, the defendant either inflicted serious bodily injury upon another, committed any felony of the first or second degree, or physically removed property of another by force. 18 Pa.C.S. § 3701(a)(1)(i)–(v). A defendant acts "in the course of committing a theft" when the act occurs during (1) an attempt to commit theft; (2) the commission of theft; or (3) flight after the attempt or commission. 18 Pa.C.S. § 3701(a)(2); *Commonwealth v. Alford*, 880 A.2d 666, 677 (Pa. Super. 2005). "It is immaterial that the intent to kill preceded the intent to rob since the force resulting in death is the force used to accomplish the robbery." *Commonwealth v. Butcher*, 304 A.2d 150, 153 (Pa. 1973); *see also Commonwealth v. Ford*, 650 A.2d 433, 438 (Pa. 1994) (the factfinder could reasonably conclude that the force used to commit the robbery was the force used to commit the murder.) A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof. 18 Pa.C.S. § 3921(a).

As the above facts indicate, the Defendant manifested his intent to rob the decedent by obtaining a baseball bat and lying in wait to ambush the decedent outside Wissinoming Park. Upon suspecting that McDevitt had sex with the decedent, the Defendant formed the specific intent to kill and beat the decedent to death with the bat. The Defendant clearly attacked the decedent with the dual intent to murder him and rob him of his belongings. The force that the

Defendant employed to strike and kill the decedent was the same force used to rob the decedent. After the murder, the Defendant recruited his accomplice Pawlowic at his home and returned to ransack the vehicle. There, the Defendant took control of the decedent's car keys and a single one-dollar bill, completing the robbery.

In order to secure a PIC conviction, the Commonwealth must prove that the Defendant possessed an instrument of crime with the intent to employ it criminally. 18 Pa.C.S. § 907(a). An instrument of crime is "[a]nything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have." 18 Pa.C.S. § 907(d)(2); *see also Commonwealth v. Robertson*, 874 A.2d 1200, 1208–1209. (Pa. Super. 2005).

The Defendant employed a baseball bat with the intent to rob and murder the decedent. On the day of the murder, the Defendant acquired the baseball bat from Pawlowic and a pair of socks he used as gloves. N.T. 9/27/2016 at 117–120. After McDevitt informed the Defendant of the decedent's location, the Defendant struck the decedent with the bat three to four times with the intent to kill him for taking drugs and having sex with McDevitt and to rob him of any money or drugs he had on his person. *Id.* at 98–99; N.T. 9/28/2016 at 29–32. The evidence is sufficient to sustain the Defendant's convictions for each charge.

The Defendant argues that the prosecutor committed misconduct by striking a file storage box with a baseball bat during his closing argument. To succeed in a prosecutorial misconduct claim, a defendant must prove that he was denied a fair trial. *Commonwealth v. Sneed*, 45 A.3d 1096, 1109 (Pa. 2012) (*citing Commonwealth v. LaCava*, 666 A.2d 221, 231 (Pa. 1995)). "A prosecutor is free to present his argument with logical force and vigor so long as there is a reasonable basis in the record for the prosecutor's remarks." *Commonwealth v. Reid*, 99 A.3d 470, 507 (Pa. 2014) (*citing Commonwealth v. Tedford,* 960 A.2d 1, 32 (Pa. 2008)). Reversible

error arises from a prosecutor's comments only where the unavoidable effect is to prejudice the jurors, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict. *Id.* Comments grounded upon the evidence or reasonable inferences are not objectionable, nor is a prosecutor's mere oratorical flair. *Commonwealth v. Hutchinson*, 25 A.3d 277, 307 (Pa. 2011). Appellate courts review allegedly improper remarks in context of the closing argument as a whole. *Sneed*, 45 A.3d at 1110.

The Defendant avers that by striking the box during his closing argument, the prosecutor improperly introduced new evidence concerning the amount of force used to strike the decedent at the time of the murder. During closing argument, the prosecutor struck a cardboard filing box resting on the prosecutor's table four times with a baseball bat, warping and slightly cracking the top of the box. After the Defendant moved for mistrial, trial counsel argued that the prosecutor's behavior was inappropriate for a courtroom setting, as his act of striking the box in front of the jury was excessive and unnecessary. N.T. 9/29/2016 at 94. During this discussion, this Court reasoned that uncontroverted evidence showed that the decedent was struck three to possibly four times with the bat, and that this Court stopped the prosecutor's demonstration upon reaching four strikes. *Id.* at 95.

The Defendant's argument that no expert or lay testimony established the amount of force used to strike the victim must fail. At trial, Dr. Chu testified that the decedent died from blunt impact trauma to his head and neck. N.T. 9/27/2016 at 97. Dr. Chu further described an injury to the left-side of the decedent's skull that caused laceration of the skin and a fracture of the decedent's skull. *Id.* at 98. The other strikes caused laceration of the skin and contusions in the head and neck area, respectively. *Id.* at 99. Dr. Chu's testimony permitted the jury to make a

reasonable inference that the Defendant struck the decedent three to four times with a baseball bat while using a significant amount of force.

The Defendant further fails to demonstrate prejudice. As this Court stated at the conclusion of closing arguments, the prosecutor could have struck a mannequin with a significant amount of force instead, and the demonstration would still be proper. N.T. 9/29/2016 at 95. Moreover, the location of the prosecutor's table with respect jurors, box prevented the jury from observing any damage the prosecutor inflicted. The Defendant's claim has no merit.

For the foregoing reasons, the Defendant's judgment of sentence should be affirmed.

BY THE COURT,

Barbara A. McDermott, J.

Commonwealth v. Matthew Cordero, **CP-51-CR-0000654-2015**

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing filing upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114:

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Dated: December 9, 2016

Joseph R. Duffy
Law Clerk to the
Honorable Barbara A. McDermott