

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
	:	
V.	:	
	:	
LONNIE GREEN,	:	
	:	
Appellant	:	No. 1396 WDA 2012

Appeal from the Judgment of Sentence entered on October 25, 2011
in the Court of Common Pleas of Allegheny County,
Criminal Division, No. CP-02-CR-0016537-2009

BEFORE: FORD ELLIOTT, P.J.E., OTT and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED AUGUST 29, 2013

Lonnie Green ("Green") appeals from the judgment of sentence entered after he was convicted of robbery and firearms not to be carried without a license.¹ We affirm.

The charges arise from an incident that took place on the evening of October 14, 2009, in the Hill District section of the City of Pittsburgh. Several weeks prior, Jaquaia Brown ("Brown") had met Green for the first time at a corner store located in the Hill District, and they exchanged telephone numbers. N.T., 7/26-29, at 108. On the day of the incident, Brown encountered Green standing outside of that same corner store. *Id.* Green started talking to Brown and eventually asked her if she knew anyone who would sell him a quantity of heroin. *Id.* at 108-09. In response, Brown called her boyfriend, Rodriguez Simmons ("Simmons" or "the victim"), who

¹ 18 Pa.C.S.A. §§ 3701(a)(1), 6106(a)(1).

was a drug dealer, and asked him if he was interested in selling heroin to Green. ***Id.*** at 109-10. Simmons replied in the affirmative, after which Brown telephoned Green and informed him that the quantity of heroin requested by Green would cost \$2,800. ***Id.*** at 111. After Green indicated his willingness to pay that amount, Brown set up a time for the drug transaction to occur later that day at her residence, where she lived with her two young children. ***Id.*** at 111, 113.

Simmons arrived at Brown's house at approximately 5:00 p.m. ***Id.*** at 113. When Green arrived shortly thereafter, Brown answered the door and discovered that Green was accompanied by an unexpected second man. ***Id.*** at 115. Brown let the two men inside, and they proceeded into the kitchen to meet with Simmons. ***Id.*** at 117. Brown remained in the living room and sat down on the couch with her infant daughter. ***Id.***

At some point, Brown noticed someone sitting at the top of the steps to the basement. ***Id.*** at 119. Thinking that it was her four-year-old son, Brown went to investigate and saw that it was actually Green sitting on the steps. ***Id.*** Brown noticed that Green "was ... fiddling with something, something black in his hand[,] but Brown was unable to identify the object. ***Id.*** at 121. Green then went back into the kitchen and Brown returned to the living room sofa. ***Id.*** A few seconds later, when Brown heard a scuffle, she looked up into a mirror that hung between the kitchen and living room. ***Id.*** at 122-23. In the mirror, Brown saw that Green had one of his arms extended and was holding a dark colored handgun. ***Id.*** Brown then

overheard Green say, "if you fucking move." *Id.* The unidentified male was standing behind Simmons, and Green was facing Simmons. *Id.* at 123-24. Frightened, Brown grabbed her baby and went to the front door in order to flee the house. *Id.* at 125, 127. Upon reaching the front door, Brown heard gunfire in the kitchen and saw the flash of a muzzle. *Id.* at 127-28. Brown immediately fled and used a neighbor's phone to call 911. *Id.* at 128.

Shortly after their arrival on the scene, police discovered Simmons's body inside of Brown's house. *Id.* at 33-34. Simmons had been shot several times and died from his wounds. *Id.* at 231-33. During a search of Brown's residence, officers discovered a total of 250 small packets of heroin. *Id.* at 58-59. Collectively, the heroin weighed 11.34 grams. *Id.* at 227.

Later that same evening, an unidentified male dropped Green off at a local hospital. *Id.* at 224-25. Green sustained a gunshot wound to his left hand and left leg. *Id.* at 244. After tending to Green's wounds, hospital authorities contacted the police, and at 7:30 p.m., a Pittsburgh Police Officer administered a gunshot residue test on Green's right hand. *Id.* at 225-26. The test revealed the presence of gunshot residue. *Id.* at 216-17, 222. Subsequently, police discovered traces of the victim's blood in the treads of Green's shoes. *Id.* at 229-31.

After Green's arrest, the Commonwealth charged him with criminal homicide, robbery, and firearms not to be carried without a license. Notably, regarding the robbery charge, the Commonwealth charged Green under two separate sub-sections of the robbery statute, 18 Pa.C.S.A.

§ 3701(a)(1)(i) (providing that “[a] person is guilty of robbery if, in the course of committing a theft, he ... inflicts serious bodily injury upon another”), and under 18 Pa.C.S.A. § 3701(a)(1)(ii) (providing that “[a] person is guilty of robbery if, in the course of committing a theft, he ... threatens another with or intentionally puts him in fear of immediate serious bodily injury”).²

The matter proceeded to a jury trial, at the close of which the jury acquitted Green of the homicide charge, but found him guilty of robbery³ and firearms not to be carried without a license. Thereafter, the trial court imposed a mandatory sentence on the robbery conviction of five to ten years in prison. Regarding Green’s conviction of firearms not to be carried without a license, the trial court imposed a consecutive sentence of one to two years in prison. Green subsequently filed a post-sentence Motion challenging the weight and sufficiency of the evidence supporting his convictions. The trial court denied Green’s Motion, after which he filed a timely Notice of appeal.

On appeal, Green raises the following questions for our review:

1. Did the trial court err in denying [Green’s] Post Sentence Motion when [Green’s] conviction on both the charges of

² Both sub-sections in question are graded as a first degree felony, and thus have the same maximum sentence of 20 years in prison. **See** 18 Pa.C.S.A. § 1103(1).

³ Regarding the robbery offense, the trial court charged the jury that it could find Green guilty of this offense if it found that the Commonwealth had proven the elements of sub-section 3701(a)(1)(i) or sub-section 3701(a)(1)(ii). **See** N.T., 7/26-29, at 301, 304-05. The jury returned a guilty verdict on the robbery charge, but the jury did not specify under which sub-section it found Green guilty. ***Id.*** at 318.

robbery and carrying a firearm without a license were against the sufficiency of the evidence?

2. Did the trial court err in denying [Green's] Post Sentence Motion when [Green's] conviction on both the charges of robbery and carrying a firearm without a license were against the weight of the evidence?

Brief for Appellant at 3 (issues renumbered).

Green first argues that his convictions cannot stand since the Commonwealth failed to present sufficient evidence to establish the requisite elements of the offenses of which he was convicted. **See id.** at 10-11, 15.

Our standard of review of a sufficiency of the evidence claim is well settled:

We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact-finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Mobley, 14 A.3d 887, 889-90 (Pa. Super. 2011) (citation omitted).

We will first address Green's sufficiency claim as it pertains to his robbery conviction. There are two requisite elements to this offense:⁴ (1) the actor was in the course of committing a theft (hereinafter referred to as "the theft element"); and (2) the actor inflicted serious bodily injury upon another or threatened another with or intentionally put him in fear of immediate serious bodily injury. **See** 18 Pa.C.S.A. § 3701(a)(1)(i), (a)(1)(ii). According to Green, the Commonwealth failed to meet its burden of proof as to both of these elements. **See** Brief for Appellant at 10-12, 14-15.

Regarding the theft element, Green alleges that "the prosecutors involved with the case relied on a theory that a theft was committed because this was a drug deal gone bad. However, the facts presented to the jury fail to establish that any property was stolen from the [victim]." ***Id.*** at 11. Additionally, according to Green, "[t]he evidence only shows that these men were in the kitchen conducting a heroin sale. ... Detective Satler testified that 250 packets of heroin were recovered in the case. The record fails to establish that [Green] stole from the [victim]. The heroin was left in the kitchen." ***Id.*** at 12 (citation omitted).

It is undisputed that Green was at Brown's residence along with an unidentified male, ostensibly to purchase heroin from the victim. The

⁴ Since the jury failed to specify whether it found Green guilty of robbery under sub-section 3701(a)(1)(i) or sub-section 3701(a)(1)(ii) of the Crimes Code, we will consider both sub-sections in addressing Green's sufficiency challenge.

evidence, viewed in a light most favorable to the Commonwealth as the verdict winner, established that (1) a large amount of heroin was involved and was on display in Brown's kitchen; (2) after hearing a scuffle, Brown saw that Green had one of his arms extended and was holding a dark colored handgun; (3) Brown overheard Green say, "if you fucking move"; and, (4) the \$2,800 that Green was supposed to pay for the heroin was not found in Brown's kitchen or on the victim's person. From this evidence, the jury could reasonably infer from Green's words and actions in pointing a gun at the victim and threatening him that Green intended to steal the victim's heroin.

Furthermore, it is irrelevant that Green failed to take the heroin with him when he fled. Proof of an *attempted* theft is sufficient to meet the theft element of the offense. **See** 18 Pa.C.S.A. § 3701(a)(2) (providing that "[a]n act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit theft or in flight after the attempt or commission."); **see also Commonwealth v. Austin**, 906 A.2d 1213, 1221 (Pa. Super. 2006) (observing that "robbery does not require the completion of the predicate offense, theft[.]")

Green also argues that the Commonwealth failed to present sufficient evidence to establish the second element of the offense of robbery, *i.e.*, that he inflicted serious bodily injury upon the victim or that he threatened the victim with or intentionally put him in fear of immediate serious bodily injury. **See** Brief for Appellant at 10, 13-14. Green asserts that,

[i]mportantly, although [] Brown testified that she saw [Green] point a gun at the victim, heard gunfire[,] and saw light from the gun[,] the jury rejected her testimony and found [Green] not guilty of the homicide charge. The jury's rejection of [] Brown's testimony with respect to the homicide charge shows that her testimony is insufficient to meet the Commonwealth's burden of proof on the robbery charge.

Id. at 13-14.

This Court has stated that

[f]or the purposes of subsection 3701(a)(1)(ii), the proper focus is on the nature of the threat posed by an assailant and whether he reasonably placed a victim in fear of "immediate serious bodily injury." The threat posed by the appearance of a firearm is calculated to inflict fear of deadly injury, not merely fear of "serious bodily injury." A factfinder is entitled to infer that a victim was in mortal fear when a defendant visibly brandished a firearm.

Commonwealth v. Hopkins, 747 A.2d 910, 914-15 (Pa. Super. 2000)

(citations omitted).

Here, the evidence of record established that (1) while the drug deal was underway in Brown's kitchen, Green drew a handgun, pointed it at the victim, and threatened him, stating, "if you fucking move"; (2) mere moments thereafter, Brown heard gunfire erupting from the kitchen; and, (3) the victim was shot to death, subsequent police testing revealed that Green had the victim's blood on the bottom of his shoes, and Green's right hand tested positive for gunshot residue. This evidence was amply sufficient to support a finding that Green threatened the victim with or intentionally put him in fear of immediate serious bodily injury, thus meeting the requirements of 18 Pa.C.S.A. § 3701(a)(1)(ii).

Furthermore, even assuming that the jury found Green guilty under sub-section 3701(a)(1)(i) of the robbery statute, *i.e.*, by finding that he had inflicted serious bodily injury upon the victim during the course of the theft, the evidence is sufficient to support this conviction. Although a finding of guilt under this sub-section may be inconsistent with the jury's acquittal of Green on the criminal homicide charge, it is well-settled that inconsistent verdicts are permissible in Pennsylvania. ***Commonwealth v. Rose***, 960 A.2d 149, 158 (Pa. Super. 2008).

Inconsistent verdicts, while often perplexing, are not considered mistakes and do not constitute a basis for reversal. Rather, the rationale for allowing inconsistent verdicts is that it is the jury's sole prerogative to decide on which counts to convict in order to provide a defendant with sufficient punishment. When an acquittal on one count in an indictment is inconsistent with a conviction on a second count, the court looks upon the acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity. Thus, this Court will not disturb guilty verdicts on the basis of apparent inconsistencies as long as there is sufficient evidence to support the verdict.

Id. (citation omitted).

In the instant case, the propriety of a conviction for robbery under 18 Pa.C.S.A. § 3701(a)(1)(i) cannot be undermined solely on the basis that this verdict may be facially inconsistent with the jury's verdict on the homicide charge. ***See Rose, supra.*** Contrary to Green's assertion, acquittal on the homicide charge is not a specific finding that Green did not cause the victim serious bodily injury. ***See Commonwealth v. Campbell***, 651 A.2d 1096, 1100 (Pa. 1994) (stating that "an acquittal cannot be interpreted as a

specific finding in relation to some of the evidence."); **see also** *Commonwealth v. Frisbie*, 889 A.2d 1271, 1274 (Pa. Super. 2005) (holding that the appellant's acquittal of third-degree murder was not a specific finding by the jury that the appellant did not act with malice in causing the victim serious bodily injury, a requisite element to sustain the appellant's conviction of aggravated assault).

We next address Green's sufficiency claim as it pertains to his conviction of firearms not to be carried without a license. Green argues that since the jury acquitted him of the homicide charge, the Commonwealth presented insufficient evidence to support a finding that Green possessed a firearm on the night of the shooting. Brief for Appellant at 15.

Green's instant claim fails because the mere fact that the jury acquitted Green of the homicide charge is irrelevant to whether the Commonwealth proved the requisite elements of the offense of firearms not to be carried without a license.⁵ The evidence unequivocally established that Green pointed a handgun at the victim during the course of the theft, and Green did not have a license to carry a firearm.

Finally, Green contends that he is entitled to a new trial since the jury's verdict was against the weight of the evidence. *Id.* at 16-17.

⁵ The offense is statutorily defined as follows: "[A]ny person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree." 18 Pa.C.S.A. § 6106(a)(1).

Our standard in reviewing a weight of the evidence claim is well established:

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One 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 and that a new trial should be granted in the interest of justice.

Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (emphasis and citations omitted).

Green's claim focuses upon his challenge to Brown's credibility. **See** Brief for Appellant at 17. This Court has stated that where

the challenge to the weight of the evidence is predicated on the credibility of trial testimony, our review of the trial court's decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review.

Commonwealth v. Gibbs, 981 A.2d 274, 282 (Pa. Super. 2009) (citation omitted).

In the instant case, it was the sole province of the jury, as the fact-finder, to assess Brown's credibility and to determine the weight to be given her testimony and resolve any conflicts in her testimony. **See id.** at 282 (stating that "[i]t is for the fact-finder to make credibility determinations, and the finder of fact may believe all, part, or none of a witness's

testimony." (citation omitted)). Although there were some minor conflicts between Brown's account of the shooting given at trial and in her initial police statement, the jury determined the weight to be given to these conflicts in rendering its verdict finding Green guilty of robbery and firearms not to be carried without a license, and not guilty of criminal homicide. We decline Green's invitation to assume the role of the fact-finder and to supplant its credibility determinations on appeal. Accordingly, we discern no abuse of discretion by the trial court in rejecting Green's challenge to the weight of the evidence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Nicholas V. Caselli".

Deputy Prothonotary

Date: 8/29/2013