NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. BRANDON JOHNSON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1867 EDA 2012

Appeal from the Judgment of Sentence March 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0015920-2010

BEFORE: BOWES, LAZARUS, and WECHT, JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 04, 2013**

Brandon Johnson appeals from the judgment of sentence of life imprisonment that was imposed after he was convicted of numerous offenses, including first degree murder. We affirm.

Appellant's convictions arose from his participation in a shooting spree that occurred on September 25, 2010, in which Tawayne Foster was killed. At the time of the incident, Mr. Foster was with his friends William Brown, James Marshburn, and Amanda Alston, all of whom testified at trial on behalf of the Commonwealth. Mr. Brown, who was licensed to carry a concealed weapon, returned fire during the episode and was struck in the hip with a bullet. Mr. Foster also was licensed to carry a gun but never retrieved his weapon before he was shot. When the shooting started, Mr. Foster was located in the driver's seat of his Cadillac, which was idling on 65th Steet and

Chester Avenue, Philadelphia, and he died from gunshot wounds to the chest.

Ms. Alston had been Appellant's girlfriend prior to the shooting episode, but they were no longer a couple on September 25, 2010. She testified as follows. Appellant and Donte Jones, who was Appellant's co-defendant at trial, were friends. In the early morning hours of September 25, 2010, Mr. Foster, Mr. Brown, and Mr. Marshburn went to Ms. Alston's apartment, where a party was transpiring. Ms. Alston reported that Jones attended the gathering; Appellant did not. After spending a few minutes in Ms. Alston's apartment, Mr. Foster and his two friends left the party, and Ms. Alston went down to the street after them to speak with Mr. Foster.

When Ms. Alston arrived on the street in front of her residence, Appellant was there. He approached Ms. Alston and told her to pick up her children from the home of his aunt, who was babysitting them during the festivities. Ms. Alston telephoned Appellant's aunt, who stated that she did not want to become involved in the controversy and confirmed that she wanted the children retrieved. Ms. Alston then asked Mr. Foster for a ride. Mr. Foster, Ms. Alston, Mr. Brown and Mr. Marshburn drove to the home of Appellant's aunt, retrieved the children, and transported them to their grandmother's home. The four individuals then returned to Ms. Alston's apartment.

Mr. Foster, who was driving, stopped his car on 65th Street and Chester Avenue, and Ms. Alston exited it and began to speak with Mr. Foster through the driver's side window. Mr. Foster was giving Ms. Alston a telephone number, which she was programming into her telephone, when Appellant and Jones, who was directly behind Appellant, approached Ms. Alston. Appellant was angry about the fact that Ms. Alston was entering the telephone number and asked her if Mr. Foster was her new boyfriend. She responded that Mr. Foster was not her boyfriend and explained that he was the father of her best friend's children. Appellant then grabbed the cell phone from Ms. Alston's hand, and she snatched it back. Jones then joined the conversation by asking if there was a problem. Ms. Alston retorted, "There is no problem . . . [, Jones], go home." N.T. Trial (Jury), Vol. 4, 2/10/12, at 38.

At that point, Appellant began to insist that Mr. Foster exit the car, but Ms. Alston urged him to leave the area. Mr. Foster began to drive away. At that moment, Ms. Alston "heard [Jones] say f__ it and he pulled out the gun and started shooting" into Mr. Foster's car. ***Id***. at 39. Ms. Alston fled, but, after a few moments, she turned around and observed Mr. Brown returning fire in the direction of Appellant and Jones. Jones was shot in the leg and went to the hospital.

Mr. Marshburn testified as follows. On the night in question, he, Mr. Foster, and Mr. Brown went to Ms. Alston's apartment briefly to use the

bathroom during the party. Once they arrived, Mr. Marshburn saw Jones, whom Mr. Marshburn described as tall and wearing an orange shirt and his hair in braids. Mr. Marshburn confirmed that, after he and his two companions left Ms. Alston's apartment, Ms. Alston came onto the street, conversed with Appellant, and approached Mr. Foster to request a ride to pick up her children. After retrieving the children and transporting them to their grandmother's residence, the four adults then returned to the street outside of Ms. Alston's home. Ms. Alston exited the car and walked around to the driver's side to obtain a telephone number from Mr. Foster.

At that point, Appellant, who was accompanied by Jones, approached the car and started to yell at Ms. Alston because she was transcribing the telephone number. Ms. Alston replied that Mr. Foster was a friend, but Appellant started "yelling and telling [Mr. Foster] to get out of the vehicle." N.T. Trial (Jury), Vol. 2, 2/8/12, at 102. When Mr. Marshburn saw Appellant take the cell phone from Ms. Alston's hand, he told Mr. Foster to leave. As Mr. Foster, Mr. Marshburn, and Mr. Brown "were about to pull off, that is when the first shot was fired." ***Id***. at 103. Mr. Marshburn reported that Appellant retrieved a gun from his waistband and shot first at Mr. Foster, who immediately slumped over the steering wheel. Mr. Marshburn related that Jones then joined in his friend's actions by retrieving a gun and shooting at the car.

Mr. Marshburn crouched down in the back seat, and the Cadillac crashed into another car. After a few moments, Mr. Marshburn peered from the vehicle and saw Mr. Brown outside returning fire at Appellant and Jones. Mr. Brown was struck by bullets and was taken to the hospital while Mr. Marshburn, who was uninjured, was interviewed by police. Mr. Marshburn was later transported to the hospital, where he identified Jones as one of the shooters.

Mr. Brown confirmed the preceding events by testifying as follows. He, Mr. Foster, and Mr. Marshburn stopped by Ms. Alston's apartment on the night in question so that Mr. Brown and Mr. Foster could use the bathroom. After the three men left and returned to the street, Ms. Alston asked for a ride to obtain her children. After performing that task, the four friends returned to Ms. Alston's apartment. While Ms. Alston was obtaining a telephone number from Mr. Foster, Mr. Brown saw Appellant and Jones approach the car together. N.T. Trial (Jury), Vol. 3, 2/9/12, at 26. Appellant began to argue with Ms. Alston while Jones stood three or four feet behind Appellant. Mr. Brown saw Appellant take the telephone from Ms. Alston's hand, and he told Mr. Foster that they should leave.

As Mr. Foster placed the car in drive, Mr. Brown heard multiple shots. ***Id***. at 31. Mr. Brown related that after hearing the shots, "I turned and looked to my left and I see the guy in the orange shirt [*i.e.*, Jones], the gun in his hand pulling it out and continuing to shoot, shoot, shoot, shoot." ***Id***.

at 32. At that point, Jones was located three to four feet away from the driver's side car door. ***Id***. at 33-34. Mr. Brown testified that "when the guy with the orange shirt [, Jones,] opened fire, the other guy [, Appellant,] backed up. And as I got out of the car, [Appellant] started shooting." ***Id***. at 37. After the car crashed, Mr. Brown exited it and started shooting at Appellant and Jones while they continued to shoot at him. Mr. Brown was struck by bullets in the hip and below the ribcage.

Based on this evidence, Appellant was convicted of first-degree murder in connection with Mr. Foster's death, attempted murder and aggravated assault as to Mr. Brown, attempted murder and aggravated assault with respect to Mr. Marshburn, conspiracy, carrying an unlicensed weapon, and possession of an instrument of crime. He was sentenced to life imprisonment and filed the present appeal from the imposition of judgment of sentence. Appellant raises these issues on appeal:

> I. Is the Appellant entitled to an arrest of judgment on the charge of Murder in the First Degree, Criminal Conspiracy and all related offenses because the evidence is insufficient to support the verdict?
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> II. Is the Appellant entitled to a new trial on the charges of Murder in the First Degree, Criminal Conspiracy and all related charges because the verdict is against the greater weight of the evidence?
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> III. Did the Trial Court err when it failed to grant a mistrial after Detective Watkins testified that Appellant failed to give an out-of-court statement after he was arrested?

Appellant's brief at 3. While Issues I and II suggest that Appellant is challenging all of his convictions, in the body of his brief, he challenges only the sufficiency of the evidence supporting the conspiracy and first-degree murder offenses. Appellant's brief at 12-16. Hence, we only consider whether the proof was adequate to establish those crimes.

In assessing the sufficiency of the evidence,

> we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (Pa. 2000). "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." ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa.Super. 2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." ***Id.; see also Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa.Super. 2000) ("The facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence."). 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. ***See Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super. 2001).
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> The Commonwealth may sustain its burden by means of wholly circumstantial evidence. ***See Brewer***, 876 A.2d at 1032. Accordingly, "the fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence." ***Id.*** (quoting ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038–39 (Pa.Super. 2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a

> reasonable doubt, the appellant's convictions will be upheld. ***See Brewer***, 876 A.2d at 1032.

Commonwealth v. Lynch, 72 A.3d 706, 707-08 (Pa.Super. 2013) (citation omitted).

We first address the sufficiency of the evidence to establish conspiracy since it is settled that, even "if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators in furtherance of the conspiracy." ***Commonwealth v. Nypaver***, 69 A.3d 708, 715 (Pa.Super. 2013) (citation omitted). Accordingly, if Appellant is guilty of conspiracy, he is responsible for all crimes that he and Appellant committed in furtherance of the conspiracy. The crime of conspiracy is set forth in 18 Pa.C.S. § 903(a):

> A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
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> > (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
> >
> > (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Under this provision, the Commonwealth must prove that "1) the defendant entered into an agreement with another to commit or aid in the commission of a crime; 2) he shared the criminal intent with that other person; and 3) an overt act was committed in furtherance of the

conspiracy." ***Nypaver***, ***supra*** at 715 (citation omitted). We utilize four factors "in deciding if a conspiracy existed. Those factors are: '(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.'" ***Id***. at 715 (partially quoting ***Commonwealth v. Feliciano***, 67 A.3d 19, 25 (Pa.Super. 2013)).

Herein, there was a strong association between Appellant and Jones. They were friends, and Jones was at the party when Mr. Foster spoke with Ms. Alston. Even though he was not at the party, Appellant appeared on the street outside of Ms. Alston's apartment immediately after Mr. Foster and Ms. Alston conversed, and Appellant demanded that Ms. Alston retrieve her children from his aunt's house. Appellant's aunt then told Ms. Alston that she did not want to become involved in the situation. This series of events created an inference that Jones informed Appellant of the association between Mr. Foster and Ms. Alston at the party.

Jones remained with Appellant outside of the apartment while Ms. Alston transferred custody of her children. After the other four people returned to the apartment, Appellant and Jones jointly approached the Cadillac occupied by the victims, and Jones remained closely behind Appellant as Appellant and Ms. Alston argued. Appellant then actively

participated in the crime in question when he shot at the Cadillac together with Jones.

This evidence was sufficient to establish a conspiracy in that there was an association between Appellant and Jones, Appellant had knowledge of the crime and was present at the scene, and Appellant actively participated in the object of the conspiracy by firing bullets at the car occupied by the three victims. Thus, regardless of who fired the bullets, Appellant was equally responsible for the death of Mr. Foster.

Appellant claims that a conspiracy was not proven in that there was "no evidence of any communication, spoken or tacit, between appellant and Jones before, during, or after the incident." Appellant's brief at 13. As we noted in ***Commonwealth v. Smith***, 69 A.3d 259, 263 (Pa.Super. 2013) (citation omitted):

> The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, 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.

The circumstances at issue herein evidence the existence of a criminal partnership. As outlined above, the relation between Appellant and Jones and their conduct and the circumstances surrounding the crimes was

sufficient to prove the formation of a criminal confederation between them. We also note our disagreement with Appellant's assertion that the proof established nothing more than that he and Jones merely "took independent actions at the same time." Appellant's brief at 14. Rather, the facts were sufficient to sustain the jury's finding that Appellant entered a conspiracy.

Additionally, contrary to Appellant's assertion, the evidence supported the jury's determination that Appellant and Jones shared a specific intent to commit first-degree murder.

> To sustain a conviction for first-degree murder, the Commonwealth must establish beyond a reasonable doubt that: (1) a human being was unlawfully killed; (2) the defendant was responsible for the killing; and (3) the defendant acted with malice and the specific intent to kill. 18 Pa.C.S.A. § 2502(a); ***Commonwealth v. Laird***, 605 Pa. 137, 149, 988 A.2d 618, 624–25 (2010). The Crimes Code defines an intentional killing as a "willful, deliberate and premeditated killing." 18 Pa.C.S.A. § 2502(d). It is well settled that the Commonwealth may prove malice and specific intent to kill by means of wholly circumstantial evidence, including the use of a deadly weapon on a vital part of the victim's body. . . .

Commonwealth v. Parrish, 2013 WL 5354336, 3 (Pa. 2013). Specific intent to kill "is gauged at the moment of the killing and may be formed in a split second." ***Commonwealth v. Johnson***, 42 A.3d 1017, 1026 (Pa. 2012) (citation omitted).

The Commonwealth's proof was that, acting in concert, Appellant and Jones shot at the three victims after Appellant had a personal issue with one of them. Appellant and Jones, who knew about the dispute, were friends. Mr. Foster was shot in the chest, which is a vital part of the body. While

Appellant's actions were the result of the escalation of his argument with Mr. Foster and Ms. Alston that occurred contemporaneously with the shooting, the specific intent to kill can be formed in a split second. Appellant's actions of deliberately pointing his gun at the car containing three men and firing at it demonstrates that he had the specific intent to kill. Hence, we reject his assertion that the evidence was insufficient to sustain the verdicts as to conspiracy and murder.

Appellant also challenges the weight of the evidence.

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. ***Commonwealth v. Widmer****,* 560 Pa. 308, 319, 744 A.2d 745, 751–52 (2000); ***Commonwealth v. Brown****,* 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994). . . . It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." ***Brown****,* 538 Pa. at 435, 648 A.2d at 1189.
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> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:
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> > 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***.* ***Brown****,* 648 A.2d at 1189. 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. ***Commonwealth v. Farquharson****,* 467 Pa. 50, 354 A.2d 545 (Pa. 1976). 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.

Widmer, 560 Pa. at 321–22, 744 A.2d at 753.

Commonwealth v. Clay, 64 A.3d 1049, 1054-55 (Pa. 2013) (emphasis in original).

In connection with this argument, Appellant first maintains that Mr. Brown and Ms. Alston "did not identify appellant as shooting a gun or even possessing a weapon at the scene." Appellant's brief at 18. Appellant is mistaken as to Mr. Brown. While Ms. Alston never said that Appellant shot at the car, Mr. Brown testified as follows. "[W]hen the guy with the orange shirt [, who was consistently identified as all three eyewitnesses as Jones,] opened fire, the other guy [, who was fingered as Appellant,] backed up. And as I got out of the car, [Appellant] started shooting." N.T. Trial (Jury), Vol. 3, 2/9/12, 37. Thus, while Mr. Brown indicated that Jones initiated the shooting, his testimony also established that Appellant joined in his friend's actions and shot his weapon. Additionally, Mr. Marshburn clearly testified that Appellant shot at the car containing the three men. While Appellant suggests that Mr. Marshburn was not worthy of belief, the factfinder is vested with the function of determining the credibility of the witnesses. ***Commonwealth v. Rushing***, 71 A.3d 939, 967 (Pa.Super. 2013) ("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").

Hence, we conclude that the trial court did not abuse its discretion in rejecting Appellant's weight challenge.

Appellant's final position is that the trial court should have granted a mistrial because a detective "improperly commented on Appellant's pre-trial silence." Appellant's brief at 22. "A trial court is required to grant a mistrial only where the alleged prejudicial event may reasonably be said to have deprived the defendant of a fair and impartial trial." ***Commonwealth v. Fortenbaugh***, 69 A.3d 191, 193 (Pa. 2013) (citation omitted). Additionally,

> It is well-settled that the review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will discretion is abused. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict.

Id. (citation omitted).

In this case, Appellant maintains that during the following exchange, Philadelphia Detective Carl Watkins improperly stated that Appellant had invoked his right to remain silent and that a mistrial should have been granted:

> Q. And if you can, why did you obtain the arrest warrant a month after the incident?
>
> A. I continued the investigation of Brandon Johnson from the original information. I believe he was the originator of the

> problem at the location. I had one confirmed identification of him firing a weapon.
>
> Q. From James Marshburn?
>
> A. Yes, I was hoping I would be able to get another identification and be able to bring him in and get a statement from him.

N.T. Trial (Jury), 2/14/12, at 8.

As we observed in ***Commonwealth v. Moury***, 992 A.2d 162, 175-176 (Pa.Super. 2010) (footnote omitted):

> The accused in a criminal proceeding has a legitimate expectation that no penalty will attach to the lawful exercise of his constitutional right to remain silent. Consequently, this Court held in [***Commonwealth v. Turner***, 454 A.2d 537 (Pa. 1982)] that a defendant cannot be impeached by use of the inconsistency between his silence at the time of his arrest and his testimony at trial.
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> Following ***Turner***, this Court has been consistent in prohibiting the post-arrest silence of an accused to be used to his detriment. However, not all references to post-arrest silence were found to be detrimental to the accused so as to fall within the ambit of the rule of ***Turner***.
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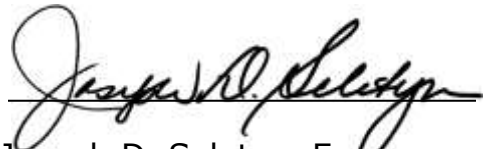
> ***Commonwealth v. Mitchell***, 576 Pa. 258, 277, 839 A.2d 202, 212-13 (2003). . . . "To run afoul of the rule in ***Turner***, it must be clear that the testimonial reference is to post-arrest silence." [***Commonwealth v. Mitchell***, 839 A.2d 202, 212-13 (Pa. 2003).].

In this case, the reference failed to indicate that Appellant invoked his right to remain silent to police. Detective Watkins stated that he was hoping to obtain another identification and to be able to question Appellant. There was no indication that either of those events occurred, and no implication

that Appellant refused to speak with police. As the response in question did not remotely suggest to the jury that Appellant invoked his right to remain silent during police questioning, the event in question did not deprive Appellant of a fair and impartial trial. Therefore, the trial court did not abuse its discretion in refusing to grant a mistrial.

Judgment of sentence affirmed.

Judgment Entered.



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Prothonotary

Date: 12/4/2013