NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DARRYL McQUEEN,	:	
	:	
Appellant	:	No. 3357 EDA 2011

Appeal from the Judgment of Sentence November 15, 2011,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0011738-2009

BEFORE: DONOHUE, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED AUGUST 13, 2013**

Appellant, Darryl McQueen ("McQueen"), appeals from the judgment of sentence dated November 15, 2011, following his convictions for aggravated assault, 18 Pa. C.S.A. § 2702, robbery, 18 Pa. C.S.A. § 3701, conspiracy, 18 Pa. C.S.A. § 903, carrying a firearm without a license, 18 Pa. C.S.A. § 6106, carrying a firearm on a public street in Philadelphia, 18 Pa. C.S.A. § 6108, and possession of an instrument of crime, 18 Pa. C.S.A. § 907. We affirm.

In its written opinion, the trial court aptly summarized the detailed factual background of this case as follows:

> The victim in this case was Christopher Urrutia, ["Urrutia"], who at the time of this incident, was an 18-year-old high school graduate and an aspiring tattoo artist. In Philadelphia "tattoo parties" are a common occurrence. At such events the host invites a tattoo artist to give tattoos to paying guests, and in return, the host receives a free tattoo.

> On the evening of September 2, 2008 and into the early morning hours of September 3, 2008, a party of this nature was held at 2705 Ruby Terrace, Apartment 3-B, in Philadelphia. The host was Vincent Thomas (aka "P-Sanity"). [Urrutia] was the invited tattoo artist. (N.T. 8/17/2011, p. 111, also pp. 178-179). Among those in attendance at this party were: [McQueen] (aka "G-Zee " or "Jeezy "); Lawrence Mangrum, (aka "L-Boogy " or "L"); Lawrence's brother Malik Mangrum, (aka "Fat Boy "); Kelly Parker, (aka "K-Dot"); and Dwayne Handy, (aka "Wayne"). (N.T. 8/17/2011, p. 111, N.T. 8/18/2011, pp. 42-45).
>
> [McQueen] drove himself, Lawrence, Malik, Kelly, and Dwayne to the party in a mini-van. At the party, Kelly, Dwayne, and Lawrence had received tattoos from Christopher. The Appellant did not receive a tattoo. (N.T. 8/18/2011, p. 46). At about 1:00 AM these five men left the party and returned to the mini-van, which was parked in a lot approximately one block away from the apartment. [Urrutia] left the party and went out to the van purportedly to receive payment from Lawrence for the tattoo that Lawrence received. Within seconds of [Urrutia's] arrival at the van, shots rang out. [Urrutia] was shot point blank in the head, and after falling to the ground he was shot two more times. (N.T. 8/17/2011, pp. 112-113).
>
> Philadelphia Police Officers Miller and Schaeffer were on patrol a few blocks from the scene when they received a radio call about the shooting. They responded to the scene and found [Urrutia] lying in the parking lot, bleeding profusely from his head. Rather than wait for an ambulance, they immediately placed [Urrutia] into their patrol car and raced him to the emergency room at the Hospital of the University of Pennsylvania. (N.T. 8/17/2011, pp. 63-68).
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> While these actions most likely saved [Urrutia's] life, the injuries to [Urrutia's] brain were catastrophic and

caused permanent and profound physical and cognitive impairments. To this day, [Urrutia] is unable to voluntarily perform any basic human functions, including swallowing, eating, talking, or moving any of his limbs. He no longer understands his world, and his communication abilities are at the most rudimentary level. He suffers from frequent infections that increase the likelihood of his early death. After the shooting, [Urrutia] was in the hospital for one month at which time he was transferred to the Moss Rehabilitation Center. After a lengthy stay at the rehabilitation facility, [Urrutia], still a teenager, was forced to live in a nursing home where he continued to reside at the time of trial. (N.T. 8/19/2011, pp. 10-17, N.T. 11/15/2011, pp. 9-15).

Immediately after the shooting, police officials learned about the tattoo party and went to 2705 Ruby Terrace, Apartment 3-B where the host Vincent Thomas (P-Sanity) was interviewed. He provided the police with the names of various people who attended the party.

Following up on leads provided by Vincent Thomas, Philadelphia Detectives interrogated Kelly Parker on 9/5/08, Dwayne Handy and Malik Mangrum on 9/6108, and [McQueen] on 4/28/09. Prior to each of these interrogations, the suspects received and waived their ***Miranda*** rights. Each interrogation was recorded into written statements which were reviewed and signed by the four men. Each of the four statements were introduced and moved into evidence during the jury trial.

In several key areas, these statements are consistent. [McQueen], Kelly, [] Dwayne, and Malik all admitted that they drove to and from the tattoo party together in [McQueen's] minivan and that [McQueen] was the driver. They each admitted that they attended the tattoo party and that several of them got tattoos from [Urrutia]. [McQueen] did not get a tattoo. All of these statements were rich with

details and specificity as to how the evening unfolded.

[McQueen] and Kelly both admitted that when [Urrutia] walked up to the van, [McQueen] was in the driver's seat, Dwayne and Malik were seated inside the mini-van, and Lawrence and Kelly were outside the vehicle. [McQueen] and Kelly Parker each admitted to knowing that [Urrutia] was shot and immediately after the shots rang out, Lawrence and Kelly then jumped into the mini-van, and [McQueen] drove everyone away from the scene.

In his statement, Kelly Parker provided the following additional information which directly implicated [McQueen] in the advance planning and participation of this robbery:

> Q. Kelly, tell us what you know about the shooting of [Urrutia] on 9/3/08.
>
> A. I didn't even wanna go with these niggas. On the ride there, G-Zee [McQueen] was, like: 'We gonna jam him'. G-Zee says: 'Who's strapped?' L [Lawrence Mangrum] was like: 'You know I always got my strap on me.' I said it's a tattoo john. Niggas was like, 'Alright, whatever.' I didn't say too much, cause I didn't want to look like a bitch. Cause I don't know them like that.
>
> Q. When G-Zee [McQueen] said that they were 'Gonna jam him', what did you think they were talking about?
>
> A. Jam? Rob. That's slang for rob. I didn't think they were gonna shoot him. They didn't even try to take his money. They didn't say 'Get down'. They didn't even try to go through his pockets.

> Q. Who was in the van when G-Zee [McQueen] said that they were going to rob [Urrutia]?
>
> A. Me, Wayne, L.

(N. T. 8/17/11, p.147, 8/18/2011, p.28).

In his statement, [McQueen] further admitted that he heard Lawrence Mangrum say something about robbing [Urrutia] while they were at the tattoo party:

> Q. Tell us what you know about the incident.
>
> A. We was driving to the tattoo party. When we was there, Lawrence was talking about how he was gonna get him...after they got their tattoos, we got into my ear. Lawrence started shooting. Lawrence and the other guy got in the car and we drove off.
>
> Q. How long have you known the Mangrum brothers?
>
> A. I met Malik at Glenn Mills. I know "L" to be his brother. I met the other two guys for about a month before this incident occurred.
>
> Q. How did you know about the tattoo party?
>
> A. The Mangrum brothers told me about it.
>
> Q. You mentioned that Lawrence said he was gonna get the tattoo guy, what does that mean?
>
> A. Rob him I guess.

> In Malik's formal statement, Malik states that Kelly Parker shot Christopher and that his brother Lawrence was already in the van when the shooting occurred. In Dwayne's formal statement, Dwayne indicated that he heard shots after everyone was already in the car and they had begun driving away — completely contradicting even [McQueen's] and Kelly Parker's statements acknowledging that Lawrence Mangrum shot [Urrutia], and Malik's statement that Kelly shot [Urrutia].
>
> In all of their statements however, [McQueen], Kelly, Dwayne, and Malik disavowed any planning or participation in the robbery and shooting of [Urrutia], pointing fingers at one another and deflecting blame whenever possible.
>
> The Commonwealth called Kelly Parker as a witness during the trial. At that time, Kelly Parker was himself in state prison on an unrelated Attempt Murder case. (N.T. 8/17/11, p. 92). At trial, Kelly testified that he went to the tattoo party and received a tattoo. Beyond that however, the nature and scope of Kelly Parker's recantation of his original 2008 statement was astonishing. With the exception of attending the tattoo party and getting the tattoo, Kelly professed total amnesia to nearly everything related to the incident or even giving the statement. (N.T. 8/17/11, pp. 92-155).
>
> The Commonwealth also called Dwayne Handy as a witness at trial. Dwayne was obviously evasive during the direct examination. He too recanted much of his original statement to police detectives and further indicated that he never met [McQueen] in his life nor did he recall [McQueen] driving the van. For the first time at trial Dwayne indicated that he was slapped and tasered by the Detectives during the interrogation. (N.T., 8/18/11, pp. 99-146). The Commonwealth offered into evidence a photo of Dwayne that was taken at the time of his interview that showed him casually sitting on a chair, smoking a cigarette in what appears to be common work area

> of the police station — not any type of isolated room. (Commonwealth Exhibit C-5 and N.T. 8/18/2011, p. 166).
>
> The Defense called Malik Mangrum as a witness at trial. Like the other witnesses. Malik's recantation from his original 2008 statement to the Detectives was sweeping. In fact, Malik testified that the statement was almost entirely fabricated by the Detectives and that his signatures and initials on the statements and photos were not his. (N.T. 8/19/11, pp. 27-61).

Trial Court Opinion, 12/4/2012, at 2-6.

In August 2011, a jury found McQueen guilty of the above-referenced offenses. The trial court sentenced him to a term of incarceration of from 11 to 22 years. This timely appeal followed, in which McQueen raises the following three issues for our consideration and determination.

1. Whether the adjudication of guilt is based upon insufficient evidence where the inference that [McQueen] conspired or aided to rob, assault or possess firearms was not a reasonable inference.

2. Whether the adjudication of guilt is against the weight of the evidence where there was little credible evidence that [McQueen] had planned, agreed or participated in a robbery and assault and where there was credible evidence that [McQueen] was merely present when others committed the crimes.

3. Whether the Court's sentence was excessive without sufficient reasons and justification given the facts adduced at trial that [McQueen] was not the shooter, that [McQueen] did not know that a co-defendant would shoot the victim and given the recent reformation of [McQueen's] character prior to sentencing.

McQueen's Brief at 6.[1]

For his first issue on appeal, McQueen contends that the evidence presented was insufficient to sustain his convictions. The trial court found that McQueen was an accomplice and a co-conspirator, and thus responsible for all of the crimes committed on the night in question. McQueen argues that there was insufficient evidence to support any "reasoned or logical inferences" to establish that he aided and abetted the crimes or was a co-conspirator with those committing them.

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

> The standard we apply in reviewing the sufficiency of the 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 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 finder of

[1] We have modified the order of the issued presented for ease of analysis.

> 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. Nypaver, __ A.3d __, 2013 WL 3008713, at *5 (Pa. Super. June 18, 2013) (quoting ***Commonwealth v. Fabian***, 60 A.3d 146, 150–51 (Pa. Super. 2013)).

By statute, an accomplice is someone who "solicits another person to commit an offense, or aids or agrees or attempts to aid such other person in planning or committing it." 18 Pa. C.S.A. § 306(c)(1). To be subject to accomplice liability, there must be evidence that the person (1) intended to aid or promote the underlying offense, and (2) actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. ***Commonwealth v. Rega***, 593 Pa. 659, 690, 933 A.2d 997, 1015 (2007); ***Commonwealth v. Murphy***, 577 Pa. 275, 286, 844 A.2d 1228, 1234 (2004). These two elements may be proven by circumstantial evidence, but mere knowledge or the crime and presence at the scene, without more, do not establish accomplice liability. ***Murphy***, 577 Pa. at 286, 844 A.2d at 1234 (citing ***Commonwealth v. Wagaman***, 627 A.2d 735, 740 (1993)).

Section 903 of the Criminal Code defines a criminal conspiracy as follows:

> **§ 903. Criminal conspiracy**
>
> **(a) Definition of conspiracy.--**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:

> (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.
>
> * * *
>
> **(e) Overt act.** No person may be convicted of conspiracy to commit a crime unless an overt act in pursuant of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

18 Pa. C.S.A. § 903(a), (e). To prove the existence of a conspiracy, the Commonwealth must prove that the defendant entered into an agreement with another to commit or aid in the commission of a crime, that he shared criminal intent with that person, and that an overt act was committed in furtherance of the conspiracy." ***Commonwealth v. Knox***, 50 A.3d 749, 755 (Pa. Super. 2012), *appeal granted*, __ Pa. __, 68 A.3d 323 (2013). As this Court has explained:

> 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 conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. 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. McCall, 911 A.2d 992, 996–97 (Pa. Super. 2006) (citation omitted). The overt act need not be committed by the defendant, and may instead have been committed by a co-conspirator. ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038 (Pa. Super. 2002).

Viewing the evidence admitted at trial in the light most favorable to the Commonwealth as the verdict winner, sufficient evidence existed to enable the jury to find that McQueen was an accomplice and a conspirator. With respect to accomplice liability, the written statement of Kelly Parker established that on the way to the tattoo party, McQueen acknowledged that "We gonna jam [rob] him" and confirmed that at least one member of the group (Lawrence Mangrum) had a gun on his person. This evidence demonstrated that McQueen, at the very least, knew and understood that members of the group would be committing an armed robbery at the tattoo party, and could also be fairly construed as an implicit approval and encouragement of those plans. In this regard, after confirming that an armed robbery would be taking place upon arrival, McQueen expressed no reluctance or disagreement, and instead continued to drive the group to the

tattoo party. Most importantly, after Urrutia had been shot multiple times in the head, McQueen (with knowledge of what had just occurred) directly aided and assisted in the commission of the crime by driving the mini-van from the scene, permitting the group to flee before the police arrived.

The same evidence supports McQueen's status as a co-conspirator. His statement that "We gonna jam him" provides strong circumstantial evidence of the existence of an agreement between members of the group to rob Urrutia while at the tattoo party. By confirming that at least one member of the group was carrying a weapon, McQueen's own statements further established that it would be an armed robbery. By driving the group to the tattoo party, and then away from it immediately after the planned crime had occurred, McQueen committed overt acts in furtherance of the conspiracy. As a result, the jury was clearly within its province to decide not only that a conspiracy to commit armed robbery existed among members of the group, but also that McQueen was a willing and active participant in it.

For his second issue on appeal, McQueen argues that his convictions are against the weight of the evidence. Our standard of review is as follows:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is

> not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Taylor, 63 A.3d 327, 330 (Pa. Super. 2013) (quoting ***Commonwealth v. Shaffer***, 40 A.3d 1250, 1253 (Pa. Super. 2012)).

McQueen argues that the jury should not have relied upon the written statement of Kelly Parker. According to McQueen, at trial Kelly Parker was "evasive, uncooperative and forgetful," and he had a motive to lie since one other member of the group (Malik Magnum) had identified him as the shooter. McQueen's Brief at 15. As the trial court recognized and the transcript confirms, however, all of the members of the group who testified at trial were similarly "evasive, uncooperative and forgetful," requiring the jury to rely in substantial part on prior written statements. Our standard of review reflects that the jury was "free to believe all, part, or none of the evidence," and thus we take no exception to the decision to find Kelly Parker's rendition of events to be the most credible. The jury heard all of the written statements, and given the various inconsistencies therein, had the difficult job of separating the "wheat from the chaff" to determine what actually occurred on the night in question. While it is true that Kelly Parker had motivations to fabricate, the jury was aware of them when deciding to find his written statement to be the most credible. It is the jury's role, as the finder of fact, to make credibility determinations, and this Court cannot,

and will not, substitute its judgment for that of the jury in this regard. The jury's verdict does not shock one's sense of justice, and we find no basis on which to conclude that the trial court abused its discretion in denying McQueen's weight claim.

For his third and final issue on appeal, McQueen contends that his sentence was "manifestly harsh, unreasonable and without sufficient justification." McQueen's Brief at 16. Specifically, McQueen argues that the trial court focused too much on the seriousness of the offense, the nature of Urrutia's injuries, and sympathy for Urrutia's family. ***Id.*** at 16-17. According to McQueen, during sentencing the trial court should also have considered his history with alcohol, his placement in the delinquent system, his subsequent obtaining of a GED and gainful employment, and his expressions of remorse to Urrutia's family. ***Id.*** at 16.

There is no automatic right to appeal from the discretionary aspects of sentencing. ***Commonwealth v. Clarke***, __ A.3d __, __, 2013 WL 3679425 at *5 (Pa. Super. July 16 ,2013) (quoting ***Commonwealth v. Mastromarino***, 2 A.3d 581, 585 (Pa. Super. 2010)). Before we may reach the merits of this issue, we must first engage in a four part analysis to determine: (1) whether the appeal is timely; (2) whether Appellant preserved his issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise

statement raises a substantial question that the sentence is appropriate under the sentencing code. ***Commonwealth v. Malovich***, 903 A.2d 1247, 1250 (Pa. Super. 2006). All four requirements must be satisfied before we may proceed to decide the substantive merits of the issue. ***Id.***

In ***Commonwealth v. Fisher***, 47 A.3d 155 (Pa. Super. 2012), this Court defined "substantial question" in this context as follows:

> A substantial question requires a demonstration that 'the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process.' ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005). This Court's inquiry 'must focus on the reasons for which the appeal is sought, in contrast to the facts underlying the appeal, which are necessary only to decide the appeal on the merits.' ***Id.*** Whether a substantial question has been raised is determined on a case-by-case basis; the fact that a sentence is within the statutory limits does not mean a substantial question cannot be raised. ***Commonwealth v. Titus***, 816 A.2d 251, 255 (Pa. Super. 2003). However, a bald assertion that a sentence is excessive does not by itself raise a substantial question justifying this Court's review of the merits of the underlying claim. ***Id.***

Id. at 159.

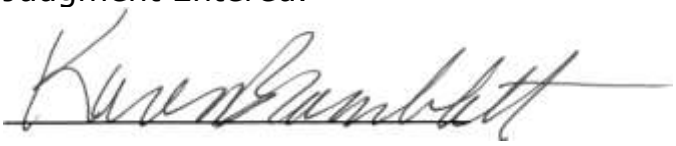
In this case, we conclude that McQueen has not presented a substantial question for our consideration. "An argument that the sentencing court failed to adequately consider mitigating factors in favor of a lesser sentence does not present a substantial question appropriate for our review." ***Commonwealth v. Ratushny***, 17 A.3d 1269, 1273 (Pa. Super.

2011); ***Commonwealth v. Hanson***, 856 A.2d 1254, 1257–1258 (Pa. Super. 2004); ***Commonwealth v. McNabb***, 819 A.2d 54, 57 (Pa. Super. 2003). As this Court explained in ***Commonwealth v. Williams***, 562 A.2d 1385 (Pa. Super. 1989) (*en banc*), a claim that the trial court did not adequately consider various factors is, in effect, a request that this Court substitute its judgment for that of the trial court in fashioning the defendant's sentence.

Because McQueen has failed to present a substantial question for our review, we may not address his third issue on its merits.

Judgment of sentence affirmed.

Judgment Entered.



Prothonotary

Date: 8/13/2013