

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CORTEZ CULMER

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1092 EDA 2012

Appeal from the Judgment of Sentence February 3, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007885-2008

BEFORE: BOWES, J., GANTMAN, J., and MUSMANNNO, J.

MEMORANDUM BY GANTMAN, J.:

Filed: March 5, 2013

Appellant, Cortez Culmer, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial convictions for second-degree murder, robbery, and criminal conspiracy.¹ We affirm.

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them. We add only that the trial court sentenced Appellant on February 3, 2012, to incarceration for life without the possibility of parole for second-degree murder, and to a concurrent term of ten (10) to twenty (20) years' incarceration for criminal conspiracy. Appellant filed post-sentence

¹ 18 Pa.C.S.A. §§ 2502(b), 3701, and 903, respectively.

motions on February 8, 2012,. The court denied Appellant's post-sentence motions on February 29, 2012. On March 28, 2012, Appellant timely filed a notice of appeal. The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant complied.

Appellant raises the following issues for our review:

IS [APPELLANT] ENTITLED TO AN ARREST OF JUDGMENT ON ALL CHARGES WHERE THE VERDICT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE?

IS APPELLANT ENTITLED TO A NEW TRIAL WHERE, AS HERE, THE VERDICT IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

IS APPELLANT ENTITLED TO A NEW TRIAL AS THE RESULT OF PROSECUTORIAL MISCONDUCT IN CLOSING WHERE THE PROSECUTOR VOUCHERED FOR THE WITNESS; WHERE THE COURT FAILED TO GRANT A MISTRIAL AS A RESULT OF THE MISCONDUCT; AND WHERE THE COURT FAILED TO GIVE A CURATIVE INSTRUCTION REGARDING THE MISCONDUCT EVEN THOUGH THE PROSECUTOR CONCEDED TO SAID INSTRUCTION?

(Appellant's Brief at 3).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Jeffrey P. Minehart, we conclude Appellant's issues merit no relief. (**See** Trial Court Opinion, filed September 11, 2012, at 3-9) (finding: (1) Appellant failed to articulate insufficiency of evidence claim with particularity; thus, issue is waived; moreover, Appellant discussed plan with third party before and after robbery, two individuals witnessed Appellant participate in robbery,

Appellant and co-defendant acted pursuant to plan, entered restaurant with intent to commit robbery, and during commission of robbery, Victim was shot and killed; therefore, evidence was sufficient to support Appellant's convictions for second-degree murder and conspiracy; (2) Appellant was implicated by third party and two witnesses to robbery and murder; therefore, guilty verdict does not shock one's sense of justice and is supported by greater weight of evidence; (3) defense counsel challenged credibility of witnesses; prosecutor's assertion that witnesses did not lie amounted to fair response to defense argument and did not constitute improper vouching; further, defense counsel did not request cautionary instruction and cannot argue for it for first time on appeal; therefore, issue is waived). Accordingly, we affirm on the basis of the trial court's opinion.

Judgment of sentence affirmed.

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

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	OF PHILADELPHIA
VS.	:	CRIMINAL TRIAL DIVISION
	:	CP-51-CR-0007885-2008
	:	
CORTEZ CULMER	:	

OPINION

PROCEDURAL HISTORY

Under Docket No. CP-51-CR-0007885, defendant, Cortez Culmer, was charged, *inter alia*, with Murder, Generally, Robbery, Criminal Conspiracy, and Possession of Instrument of Crimes. All charges arise from the same incident in which defendant and co-defendant, Malik Howie, engaged in a robbery which resulted in the murder of Ronald Coleman.

Defendant was tried before this Court and a jury in January and February of 2012. At the conclusion of the trial, the jury found defendant guilty of Second-Degree Murder, Robbery and Criminal Conspiracy. On February 3, 2012, this Court sentenced defendant to life without parole on the Second-Degree Murder charge and ten to twenty years on the Criminal Conspiracy charge, which sentences were ordered to be served concurrently. Following the imposition of sentencing, defendant filed a post-sentence motion and when that was denied a timely notice of appeal as well as a requested Pa.R.A.P. 1925(b) statement.



FACTS

At approximately 5:30 a.m. on July 15th, 2004, defendant and co-defendant approached a restaurant called the Munchie Shop located on Croskey Street between Indiana and Cambria Streets in North Philadelphia. Inside the restaurant was the proprietor, Mr. Coleman, as well as his two guests, Valerie Meadows and Carolyn Collins. Defendant, who was acquainted with Mr. Coleman, knocked on the front door, which was locked, in an effort to gain entrance into the restaurant. After identifying defendant, Ms. Meadows opened the door at which point defendant entered the restaurant. Co-defendant subsequently entered the restaurant wearing a ski mask and armed with a handgun and ordered everyone to the ground. Mr. Coleman, Ms. Meadows, and Ms. Collins all complied with co-defendant's request. Defendant also got on the ground in order to create the impression that he was also a victim in the robbery. Co-defendant demanded that Mr. Coleman give him money. Before Mr. Coleman could comply with this demand, he was shot in the back by co-defendant. Co-defendant immediately fled the premises. Shortly thereafter, defendant also fled the premises and told Ms. Meadows and Ms. Collins not to tell anyone that he was ever there. Police responded to a report of shots fired and found Mr. Coleman lying face down on the floor bleeding. Mr. Coleman was transported to Temple University Hospital where he was pronounced dead shortly thereafter. Ms. Meadows and Ms. Collins initially denied any knowledge regarding the circumstances of Mr. Coleman's death.

In July of 2007, Detective Vivarino of the Homicide Division of the Philadelphia Police Department was informed that an individual serving a federal prison sentence, Hassan East, had information pertaining to a 2004 attempted robbery which resulted in a homicide. Mr. East informed police that in the days preceding the murder of Mr. Coleman, defendant had informed him of a plan to rob Mr. Coleman. Mr. East further stated that the day after Mr. Coleman was

killed, defendant approached him informed him that the robbery had “gone bad” and that Mr. Coleman was dead.

In August of 2007 and February of 2009, Ms. Collins and Ms. Meadows respectively gave statements to police wherein they indicated that defendant was one of the two people involved in the robbery that occurred at the Munchie shop in July of 2004. Both women indicated that they earlier failed to cooperate with the investigation because they were afraid of being harmed.

DISCUSSION

In his 1925(b) statement, defendant first asserts that the evidence was insufficient to sustain his convictions because the Commonwealth failed to prove beyond a reasonable doubt that he was a principal, conspirator or accomplice with respect to the crimes he was convicted of committing.

With respect to defendant’s claim that the evidence was insufficient because the Commonwealth failed to present evidence proving the defendant’s guilt or the essential elements comprising the crimes defendant was convicted of committing, no relief is due on this claim because defendant failed to articulate why he believes the evidence failed to prove his guilt and the elements of the crimes he believes were not proved beyond a reasonable doubt. Defendant’s failure to set forth with particularity the failings of the evidence or the elements to which he refers requires, it is suggested, a finding that review of this issue has been waived. The law is clear that issues raised in a 1925(b) that are phrased generally and fail to provide the reviewing court with sufficient information to enable it to address the claims raised therein are waived. Commonwealth v. Lemon, 804 A.2d 34, 38 (Pa. Super. 2002); Commonwealth v. Holmes, 461 A.2d 1268 (Pa. 1983). See also Commonwealth v. Gibbs, 981 A.2d 274, 281 (Pa. Super. 2009)

(finding 1925(b) statement inadequate where it contained a boiler-plate statement that the evidence was insufficient to support the verdict); Commonwealth v. Williams, 959 A.2d 1252, 1257 (Pa. Super. 2008) (same). Although defendant should be deemed to have waived review of this claim, a brief review follows.

In assessing the sufficiency of evidence, the court must view the evidence in the light most favorable to the verdict winner – in this case, the Commonwealth. Commonwealth v. Boczkowski, 846 A.2d 75, 80 (Pa. 2004). Both direct and circumstantial evidence, along with all reasonable inferences arising therefrom from which the finder of fact could properly have based its verdict, must be accepted as true and sufficient to support the challenged conviction. Commonwealth v. Perez, 931 A.2d 703, 706-7 (Pa. Super. 2007); Commonwealth v. Johnson, 719 A.2d 788 (Pa. Super. 1998), *appeal denied*. The finder of fact may believe all, part, or none of the evidence regarding the question of whether reasonable doubt existed, and the facts and circumstances need not be incompatible with the defendant's innocence. Commonwealth v. Derr, 841 A.2d. 558, 559 (Pa. Super. 2004). An appellate court may only award a new trial if the evidence was so unreliable and contradictory that it would be incapable of supporting a guilty verdict. Commonwealth v. Karkaria, 625 A.2d 1167, 1167 (Pa. 1993).

Second-degree murder is a criminal homicide committed while the defendant was engaged as a principal or an accomplice in the perpetration of a felony. 18 Pa.C.S. § 2502(b). For this purpose, “perpetration of a felony” means “[t]he act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.” 18 Pa.C.S. § 2502(d). To be guilty of second-degree murder,

the conduct causing the victim's death must have been in furtherance of the underlying felony. Commonwealth v. Waters, 418 A.2d 312, 316 (Pa. 1980).

A person is an accomplice of another person if, with the intent of promoting or facilitating the commission of a crime, he or she aids, or agrees, or attempts to aid, the other person in planning or committing the crime. 18 Pa.C.S. § 306(c); Commonwealth v. Murphy, 844 A.2d 1228, 1234 (Pa. 2004). The degree of assistance necessary to make a defendant an accomplice need not be substantial so long as it was offered to the principal to help him or her in committing or attempting to commit a crime. Id. at 1234.

Section 3701 of the Crimes Code defines the crime of robbery, graded as a felony of the first degree as follows:

§ 3701. Robbery

(a) Offense defined.—

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

(ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;

(iii) commits or threatens immediately to commit any felony of the first or second degree;

* * *

(2) An 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. 18 Pa.C.S.A. § 3701(a)(1)(ii), (a)(2).

In order to convict a defendant of the crime of Criminal Conspiracy the Commonwealth must prove beyond a reasonable doubt that the defendant (1) entered an agreement to commit or aid in an unlawful act with another person (2) with a shared criminal intent and, (3) an overt act was done in furtherance of the conspiracy. 18 Pa. C.S.A. § 903. A conspiracy is almost always

proved through circumstantial evidence. Commonwealth v. Swerdlow, 636 A.2d 1173, 1176 (Pa. Super. 1994). Factors such as an association between the alleged conspirators, knowledge of the commission of the crime, presence at the scene of the crime, and participation in the object of the conspiracy should be considered in the context of the crime to establish proof of a conspiracy. Id. at 1777.

The basic principle of conspirator liability is that once a conspiracy has been shown, each conspirator is liable for acts of co-conspirators in furtherance of the conspiracy. Commonwealth v. Stocker, 622 A.2d 333, 343-44 (Pa. Super. 1993). In the context of murder, for example, even if an individual co-conspirator did not contemplate murder, where such a killing is a natural and probable consequence of a co-conspirator's conduct, murder is not beyond the scope of the conspiracy. Commonwealth v. La, 640 A.2d 1336 (Pa. Super. 1994), appeal denied, 655 A.2d 986 (Pa. 1994).

Instantly, the evidence was more than sufficient to establish each element of the crimes set forth above. It proved beyond a reasonable doubt that defendant and his co-defendant, clearly acting pursuant to a plan, entered the restaurant to rob the victim and that during the commission of that crime, the victim was shot and killed. Evidence included statements of two witnesses to the robbery as well as a third party that was consulted by defendant about the conspiracy both before and after the robbery. Clearly, this claim should be rejected because the evidence was more than sufficient to support the charges.

Defendant next asserts that the verdicts were against the weight of the evidence because the greater weight of the evidence does not support a finding that defendant acted as a principal, conspirator or accomplice. A claim that the verdict is against the weight of the evidence asserts that the verdict shocks one's sense of justice. Commonwealth v. Vandivner, 599 Pa. 617, 962

A.2d 1170, 1177 (Pa. 2009). “A motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict; thus the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner.” Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (citation omitted). “An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court.” Id. at 751-752. Finally, it is exclusively for the finder of fact to determine the credibility of witnesses, and he may believe all, part, or none of the evidence presented. Commonwealth v. Dreibelbis, 493 Pa. 466, 469, 426 A.2d 1111, 1113 (1981).

Instantly, this claim should be rejected because the verdict does not shock the conscience. Defendant was implicated by two individuals that witnessed the robbery as well as a third party with whom defendant consulted both before and after the robbery. Accordingly, it is suggested that no relief be granted on this claim.

Defendant next asserts that the prosecutor engaged in prosecutorial misconduct when the prosecutor vouched for the credibility of the Commonwealth’s witnesses during closing argument. A prosecutor is generally given reasonable latitude in presenting his or her version of the case to the jury. Commonwealth v. Bullock, 384 Pa.Super. 269, 558 A.2d 535, 539 (1989). A statement may also be proper if it fairly rebuts arguments made by the defense during summation, even if it deals with matters of credibility. Commonwealth v. Johnson, 527 Pa. 118, 588 A.2d 1303, 1307 (1991); Commonwealth v. Barren, 501 Pa. 493, 462 A.2d 233, 235 (1983).

Instantly, defense counsel challenged the credibility of the Commonwealth’s witnesses during summation: “These are people...that I submit to you are willing to lie at the drop of a hat if it will in anyway benefit them.” (N.T. 2/2/12, 131). The prosecutor’s assertion that the witnesses had not lied amounted to fair response to the arguments presented by defense counsel

and did not constitute improper vouching. Johnson, supra; Barren, supra. Accordingly, it is suggested that no relief be granted on this claim.

Defendant next asserts that this Court erred by failing to give a curative instruction following the prosecutor's comment during closing argument regarding the credibility of witnesses. Defense counsel never requested that a cautionary instruction be given and therefore the issue should be waived because the law is clear that claims cannot be raised for the first time on direct appeal. See Pa.R.A.P. 302¹.

Even if this issue is not deemed waived, this Court acted properly in not giving a curative instruction to the jury. In Commonwealth v. Judy 2009 Pa. Super. 148, 987 A. 2d 1015 (Pa. Super. 2009), the defendant alleged that the prosecutor engaged in misconduct during closing argument by misstating the evidence and misleading the jury. Although the Court found the allegation to be without merit, it added that misconduct such as that raised by the defendant would not require a curative instruction since the trial court instructed the jury prior to closing arguments that those closing arguments were not evidence and that the jurors should use their own recollection when deciding the case. Instantly, this Court similarly instructed the jury and thus, a subsequent curative instruction was not required. As such, it is suggested that no relief be granted on this claim. (N.T. 2/2/12, 91).

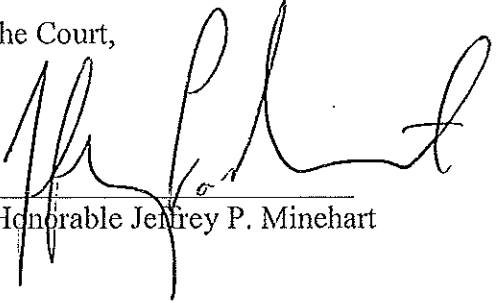
¹ When the prosecutor objected to defense counsel's motion for a mistrial, she indicated that she would not object to a curative instruction. When this Court decided against giving a curative instruction, defense counsel was silent on the matter. (N.T. 2/2/12, 160).

CONCLUSION

For the forgoing reasons, defendant's assertions of error should be dismissed for lack of merit and the judgment of sentence should be affirmed.

DATE: _____

By the Court,



Honorable Jeffrey P. Minehart