

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

DEXTER L.L. NEWSUAN

Appellant

No. 136 EDA 2012

Appeal from the Judgment of Sentence December 16, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009230-2008
CP-51-CR-0009215-2008

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY LAZARUS, J.

Filed: January 14, 2013

Dexter L.L. Newsuan appeals from the judgment of sentence imposed in the Court of Common Pleas of Philadelphia County after the Honorable Jeffrey P. Minehart, in a bench trial, convicted him of two counts of first-degree murder, two violations of the Uniform Firearms Act (VUFA) and possession of instruments of crime (PIC). Upon review, we affirm.

This case stems from an incident in which Newsuan shot and killed two young men over a drug dispute. Although there were no eyewitnesses to the crime, Newsuan later confessed what he had done to two individuals, one of whom had lent Newsuan a .9 mm firearm on the day of the shooting. The cartridge casings found at the scene were determined to have come from .9 mm bullets, all fired from the same gun.

On December 16, 2011, Judge Minehart found Newsuan guilty of the above crimes and immediately sentenced him to consecutive terms of life imprisonment for the murders,¹ as well as 3½ to 7 years' incarceration for carrying a firearm without a license,² 2½ to 5 years' incarceration for carrying a firearm on a public street in Philadelphia³ and 2½ to 5 years' incarceration for PIC.⁴ The VUFA and PIC sentences were imposed to run concurrently to Newsuan's first life sentence. Newsuan did not file post-sentencing motions; he filed a notice of appeal to this Court on December 19, 2011. Judge Minehart directed Newsuan to file a concise statement of matters raised on appeal pursuant to Pa.R.A.P. 1925(b), which he did on February 21, 2012. Judge Minehart filed an opinion pursuant to Pa.R.A.P. 1925(a) on May 11, 2012.

In his Rule 1925(b) statement and in his appellate statement of questions involved, Newsuan frames his claim as one raising the sufficiency of the evidence. However, a review of his argument reveals that his claim actually addresses the weight of the evidence. Specifically, Newsuan calls into question the credibility of the witnesses who testified against him at

¹ 18 Pa.C.S.A. § 2502(a).

² 18 Pa.C.S.A. § 6106(a)(1).

³ 18 Pa.C.S.A. § 6108.

⁴ 18 Pa.C.S.A. § 907(a).

trial. Such an argument is more properly characterized as a challenge to the weight of the evidence, as opposed to a challenge to the sufficiency of the evidence. *In the Interest of D.S.*, 39 A.3d 968, 972 (Pa. 2012). A claim that the verdict was against the weight of the evidence must be raised with the trial judge in a motion for a new trial prior to sentencing or in a post-sentence motion. Pa.R.Crim.P. 607(A). As Newsuan failed to properly preserve his weight claim, it is deemed waived.⁵ *Commonwealth v. Sherwood*, 982 A.2d 483 (Pa. 2009).

Judgment of sentence affirmed.

⁵ Newsuan also claims that the Commonwealth failed to prove either the element of malice, i.e. specific intent to kill, or motive. These issues, as well as a general discussion of the sufficiency of the evidence, are addressed in Judge Minehart's Rule 1925(a) opinion, which we incorporate herein by reference. The parties are directed to attach a copy of that opinion in the event of further proceedings in this matter.

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

COMMONWEALTH OF PENNSYLVANIA

vs.

DEXTER L. NEWSUAN,
Defendant

COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY
:

: NO.: CP-51-CR-0009215-2008

: NO.: CP-51-CR-0009230-2008
:
:

OPINION

PROCEDURE HISTORY

The defendant, Dexter L. Newsuan, was charged as of Bill of Information No. CP-51-CR-0009215-2008, with *inter alia*, murder, generally, and as of CP-51-CR-0009230-2008, with murder generally, and various weapons offenses. These charges stemmed from an incident that occurred on December 10, 2006, during which the defendant shot and killed eighteen year old James Harris, III and eighteen year old Donald Johnson, Jr., inside of 3412 E Street.

Defendant was tried before this Court, sitting without a jury, in December of 2011. On December 16, 2011, defendant was convicted of two counts of first-degree murder, carrying a firearm without a license, carrying a firearm on a public street, and possessing instruments of crime, generally. Following the recording of the verdict, this Court imposed consecutive life sentences on the two first-degree murder convictions as

well as concurrent terms of incarceration of varying lengths on the weapons offenses. Defendant thereafter filed a notice of appeal and a requested 1925(b) statement.¹

FACTUAL HISTORY

On December 10, 2006, the bodies of eighteen year old James Harris, III and eighteen year old Donald Johnson, Jr., the victims herein, were found inside of 3412 E Street in Philadelphia. Both individuals had been shot numerous times.²

According to Michael Bucci, who testified under a grant of immunity, a couple of weeks prior to the date of the killing, he had a conversation with defendant during which defendant complained that he was having problems with some guys over his sale of marijuana in the area of E and Ontario Streets.³ Because of these difficulties, defendant asked Bucci to loan him a gun, which Bucci did on numerous occasions including the day the victims were killed.

On the day the victims were shot, defendant came to Bucci's residence at about 11:00 a.m., and he and Bucci smoked some marijuana and defendant swapped some marijuana with Bucci after Bucci indicated that he did not like the marijuana he had. After the swap, defendant asked Bucci if he again could borrow Bucci's gun, a .9 millimeter Taurus Millennium Pro handgun, because he was having some problems and he needed it for protection. Bucci gave defendant the weapon. Defendant then left Bucci's residence.

¹ Defendant's notice of appeal failed to include CP-51-CR-0009230-2008. After defendant filed a motion to amend the notice of appeal, the Superior Court issued an order permitting the amendment.

² An autopsy of the body of James Harris revealed that he died as a result of the combined effects of six gunshot wounds. Donald Johnson's autopsy showed that he died as a result of a gunshot to the head. In both instances, that manner of death was deemed to be homicide.

³ Bucci met defendant a couple of weeks prior to the incident herein after he purchased marijuana from defendant.

Less than an hour later, defendant returned to Bucci's residence and told Bucci that he shot "two N--as in the head." Bucci ordered defendant to leave after he described what he had just done. After defendant left, Bucci saw several police officers in the area of the residence where the victims were killed.

Later that day and over the next several days and weeks, defendant called Bucci numerous times to explain why he killed the victims. Defendant indicated that he killed them because a girl named Beth Berstecher told him that the victims had burglarized his home, had keys to his residence, and were planning to return. Defendant gave Beth drugs in exchange for the information. According to Bucci, defendant stated that he shot both victims while they were sleeping and that he did not know one of the victims.

Bucci eventually met with police and gave them a statement wherein he told police that defendant admitted to him that he had killed two men. In that statement, Bucci did not tell police that he gave a gun to defendant just before he killed the victims and instead told them that he sent defendant to someone else for the gun.

Subsequent thereto, Bucci was housed in the same prison as defendant. While there, defendant threatened to kill Bucci if he testified against defendant.

Thomas Koufie, a cousin of victim Johnson, knew defendant from having seen him in the area where the incident occurred. Koufie also knew a girl named Beth Berstecher who resided in the 3400 block of E Street, with whom he went on a date with the night prior to the murders. Koufie dropped Beth at the site of the murders early on December 10, 2005, and went to pick up a motorcycle. He later learned that his cousin and victim Harris had been shot.

Subsequent thereto, Koufie spoke to defendant after Koufie had defendant's cousin, Kalil Hall, call defendant.⁴ Defendant told Koufie that he shot the victims but that he did not mean to shoot Johnson. Approximately fifteen minutes after the phone call ended, defendant called Kalil back and accused Kalil of setting him up. Defendant then told Kalil that he was not really his cousin and threatened to kill him.

An examination of the scene resulted in the recovery of thirteen pieces of ballistic evidence consisting of seven .9 millimeter fired cartridge cases, five spent .9 millimeter bullets, and one bullet fragment. Testing revealed that the seven fired cartridge cases were fired in the same weapon. However, because the bullets had numerous distortions, it could not be determined whether they had been fired from the same weapon.

DISCUSSION

Defendant argues that the evidence was insufficient to support the verdict finding him guilty of all of the charges he was convicted of committing because it is predicated on testimony unworthy of belief and the Commonwealth failed to present any physical evidence connecting defendant to the crime. According to defendant, Bucci's testimony is unworthy of belief because he, in actuality, was an accomplice of defendant, who was a paid informant who lied to police. He also asserts that the evidence is insufficient because Koufie denied speaking to defendant and telling the police that defendant admitted that he killed the victims. Defendant sums up his claim as follows:

The Commonwealth's case was merely based upon words allegedly spoken by the defendant. There was no eyewitness testimony presented. Moreover, the Commonwealth failed to present any physical evidence to

⁴ At trial, Koufie denied speaking to defendant. When Koufie refused to acknowledge that he had spoken to defendant, the Commonwealth introduced in evidence a statement Koufie gave to police on January 26, 2007, and questioned Koufie using that statement. On the day he testified, Koufie was in custody awaiting resolution of assault charges filed against him.

corroborate the testimony of its witnesses. In fact, ballistics experts could not testify that the recovered fired cartridge casings were all fired from the same weapon or that the victims were killed with the recovered weapon. Moreover the Commonwealth failed to proffer any motive for the defendant to kill the victims. Testimony failed to show that defendant had the specific intent to kill, malice, that the defendant displayed ill-will toward the victim, a wickedness, hardness of heart or a mind regardless of the value of human life or that the defendant acted with premeditation or deliberation.

Defendant's 1925(b) statement, 2-3.

The standard of review where an Appellant challenges the sufficiency of the evidence is well-settled:

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 factfinder. 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 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. Estepp, 17 A.3d 939, 943-44 (Pa. Super. 2011) (citing Commonwealth v. Brooks, 7 A.3d 852, 856-57 (Pa. Super. 2010)) (emphasis added).

Defendant's attacks on the verdict premised on the reliability and credibility of the testimony presented by the Commonwealth do not raise questions involving the sufficiency of the evidence but rather challenge its weight. In Commonwealth v. DeJesus, 860 A.2d 102 (Pa. 2004), the Court was faced with a claim similar to that presented here, namely, that the evidence was insufficient because the testimony of the two witnesses who identified the appellant was replete with inconsistencies and the witnesses first identified the accused only after they had been accused of committing serious crimes. The Supreme Court rejected the claim stating:

Appellant's claim challenges the weight, not the sufficiency, of the evidence. The weight of the evidence is exclusively for the finder of fact, which is free to believe all, part, or none of the evidence, and to assess the credibility of the witnesses. Commonwealth v. Johnson, 542 Pa. 384, 668 A.2d 97, 101 (Pa. 1995). [***8] Questions concerning inconsistent testimony and improper motive go to the credibility of the witnesses. Commonwealth v. Boxley, 575 Pa. 611, 838 A.2d 608, 612 (Pa. 2003). This Court cannot substitute its judgment for that of the jury on issues of credibility. Commonwealth v. Pronkoskie, 498 Pa. 245, 445 A.2d 1203, 1206 (Pa. 1982).

DeJesus, 860 A.2d at 107. Given that defendant's current claim is also predicated on challenges to the reliability and credibility of the Commonwealth's witnesses, it clearly lacks merit and should be rejected.

Although defendant did not provide any authority to support claim alleging that the evidence was so contradictory that it cannot stand as a matter of law, there is a body of law recognizing that when the evidence is so contradictory and or unreliable and unsupported by physical evidence, a verdict premised thereon cannot be permitted to stand. See Commonwealth v. Farquharson, 354 A.2d 545, 550 (Pa. 1976) (holding that "where evidence offered to support a verdict of guilt is so unreliable and/or contradictory

as to make any verdict based thereon pure conjecture, a jury may not be permitted to return such a finding.") The holding of Farquarson does not apply here because the testimony of the two persons who stated that defendant admitted that he killed the victims was credible and contained sufficient indicia of reliability to base a conviction thereon. Bucci indicated that he gave defendant a .9 millimeter weapon and the ballistic evidence showed that a .9 millimeter weapon was used to kill the victim. In addition, defendant told both Bucci and Koufie that he did not intend to kill one of the victims. In view of the fact that there was no evidence presented indicating that Bucci and Koufie discussed the case with each other, lends an aura of credibility to their testimony. Given the foregoing, it is clear that the verdict does not implicate due process concerns and thus, defendant's challenge to the reliability of the verdict should be rejected.

In his second attack on the sufficiency of the evidence, defendant asserts that the evidence failed to prove that he committed the killings and that they were committed with the specific intent to kill or malice. Defendant also asserts that the Commonwealth failed to prove that he had a motive to kill the victim.

To obtain a first-degree murder conviction, the Commonwealth must demonstrate that a person was unlawfully killed, the defendant perpetrated the killing, and the defendant acted with malice and a specific intent to kill. See 18 Pa.C.S. §2501, 2502(a); Commonwealth v. Ramon Sanchez, 907 A.2d 477, 486 (2006). The element that distinguishes first-degree murder from all other degrees of murder is the intent to kill, *i.e.*, the presence of a willful, deliberate, and premeditated killing. 18 Pa.C.S. § 2502(a), (d); Commonwealth v. Wilson, 543 Pa. 429, 672 A.2d 293, 297 (Pa. 1996), cert. denied, 519 U.S. 951 (1996). The fact-finder may infer the intent to kill based upon the accused's use

of a deadly weapon on a vital part of the victim's body. Commonwealth v. Abraham Sanchez, 36 A.3d 34, 37 (Pa. 2011). Malice is defined as:

[A] "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured....["] [M]alice may be found where the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause serious bodily injury.

Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001), quoting Commonwealth v. Cottam, 616 A.2d 988, 1004 (1992). Malice may be inferred by considering the totality of the circumstances. Commonwealth v. Thomas, 440 Pa. Super. 564, 656 A.2d 514, 516 (Pa. Super. 1995).

Finally, the law is clear that the Commonwealth is not required to prove motive to obtain a first-degree murder conviction. Commonwealth v. Briggs, 12 A.2d 291, 340 (Pa. 2011).

Instantly, the evidence showed that defendant told two persons that he killed the victim. According to Bucci, defendant stated that he did so because they had burglarized his residence and were planning to do so again. In addition, defendant, who did not identify the parties with whom he was having problems over his selling of marijuana, told Bucci that he was having such difficulties and as a result thereof he borrowed a .9 millimeter weapon from Bucci on several occasions, including just prior to the time the murders occurred. Defendant also admitted to Koufie that he shot the victims.

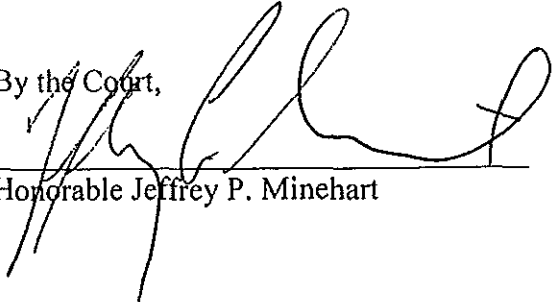
In addition, ballistic evidence showed that the victims, both of whom were shot in vital parts of their bodies, were killed by someone using a .9 millimeter weapon. This evidence was more than sufficient to support the defendant's first-degree murder

convictions, and therefore, it is suggested that defendant's claim regarding the sufficiency of the evidence be denied.

CONCLUSION

Based on the foregoing, the judgments of sentence entered against defendant should be affirmed.

DATE: 5/11/12

By the Court,


Honorable Jeffrey P. Minehart