NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. WILLIAM EARL SMITH, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1393 WDA 2012

Appeal from the Judgment of Sentence August 17, 2012
In the Court of Common Pleas of Fayette County
Criminal Division at No.: CP-26-CR-0000917-2012

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: March 12, 2013

Appellant, William Earl Smith, appeals from the judgment of sentence entered on August 17, 2012, following his convictions for aggravated assault and related charges. We affirm.

The facts and procedural history of this matter are taken from the trial court's October 3, 2012 opinion.

> On August 7, 2012, [Appellant] was convicted in a jury trial of numerous charges which included two counts of Aggravated Assault, Possession of Firearm Prohibited, and Firearms Not to Be Carried Without a License, as the result of actions that took place on January 16, 2012 in the parking lot of a Walgreens store in the city of Uniontown, Fayette County, Pennsylvania and on Pennsylvania Avenue, also in Uniontown. Commonwealth witness Dorian M. Harris told the jury that he purchased a few items in the Walgreens store, and when he

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* Retired Senior Judge assigned to the Superior Court.

> went to the parking lot where his fiancée, Amber Sloan, was waiting in the car, [Appellant] followed him. [Appellant] then pulled out a black revolver with a brown handle and placed it up against Mr. Harris's body, telling Mr. Harris not to move or [Appellant] would blow his brains out. [Appellant] took one hundred sixty-five dollars ($165.00) and a VISA gift card out of Mr. Harris's wallet, as well as the few items that Mr. Harris had just purchased in the store. This confrontation occurred next to the vehicle that Mr. Harris's fiancée was driving, and Mr. Harris then got into the car on the passenger side. Whereupon Ms. Sloan pulled out of the lot, with [Appellant] following behind in the vehicle he was driving.
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> Ms. Sloan drove through red lights at several intersections in Uniontown before turning left onto Pennsylvania Avenue, while [Appellant] pursued her vehicle. As the vehicles were traveling on Pennsylvania Avenue, [Appellant] fired several shots towards the victims' vehicle as he was driving behind it. Although Mr. Harris admitted during his trial testimony that he did not actually see [Appellant] pull the trigger, he saw flashes emanating from the barrel of [Appellant]'s gun and simultaneously heard the sound of gunfire. Another Commonwealth witness, specifically Amber Sloan, also heard the gun shots and saw the flashes. While being pursued by [Appellant] the victims called 9-1-1 to alert the Uniontown Police about the situation.
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> Sergeant Jonathon S. Grabiak of the Uniontown Police Department subsequently undertook an investigation which led him to 81 Dunlap Street, Uniontown, near where the van driven by [Appellant] that evening was parked. [Appellant] eventually exited the residence and was arrested. The lessee of the residence at 81 Dunlap Street is Shantell Randolph, and she consented to a search of the premises. During his search of the premises, Sergeant Grabiak went into a baby's bedroom, and therein discovered a brown sweatshirt matching the description of [Appellant]'s clothing given by the victims and the firearm hidden in a mattress in the baby's room.

(Trial Court Opinion, 10/03/12, at 1-3) (record citations omitted).

On August 7, 2012, a jury convicted Appellant of two counts each of aggravated assault[1] and simple assault,[2] possession of a firearm prohibited,[3] firearms not to be carried without a license,[4] terroristic threats,[5] and two counts of recklessly endangering another person.[6] The jury acquitted Appellant of robbery,[7] two counts of attempted aggravated assault,[8] and impersonating a public servant.[9] On August 17, 2012, the trial court sentenced Appellant to an aggregate term of incarceration of not less than seven nor more than twenty years. Appellant filed the instant, timely appeal.[10]

On appeal, Appellant raises the following issues for our review:

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[1] 18 Pa.C.S.A. § 2702(a)(4).

[2] 18 Pa.C.S.A. § 2701(a)(2).

[3] 18 Pa.C.S.A. § 6105(a)(1).

[4] 18 Pa.C.S.A. § 6106(a)(1).

[5] 18 Pa.C.S.A. § 2706(a)(1).

[6] 18 Pa.C.S.A. § 2705.

[7] 18 Pa.C.S.A. § 3701(a)(1)(ii).

[8] 18 Pa.C.S.A. § 901(a).

[9] 18 Pa.C.S.A. § 4912.

[10] Appellant filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court issued an opinion. ***See*** Pa.R.A.P. 1925.

1. Did the Commonwealth fail to prove that the Appellant possessed the firearm in the instant case?

2. Did the Commonwealth fail to prove that the Appellant discharge[d] the firearm in the instant case?

3. Did the Commonwealth fail to prove that the Appellant had any intent to casuse [sic] any injury to the victim in the instant case?

(Appellant's Brief, at 7).

On appeal, Appellant challenges the sufficiency of the evidence. (***See*** Appellant's Brief, at 9). Our standard for reviewing the sufficiency of the evidence is well-settled.

> The standard we apply when 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 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. Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
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> However, the inferences must flow from facts and circumstances proven in the record, and must be of such volume

> and quality as to overcome the presumption of innocence and satisfy the jury of an accused's guilt beyond a reasonable doubt. The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail even under the limited scrutiny of appellate review.

Commonwealth v. Bostick, 958 A.2d 543, 560 (Pa. Super. 2008), *appeal denied*, 987 A.2d 158 (Pa. 2009) (quoting ***Commonwealth v. Smith***, 956 A.2d 1029, 1035-36 (Pa. Super. 2008) (*en banc*), *appeal denied*, 989 A.2d 917 (Pa. 2010)).

This Court has repeatedly stated that, when challenging the sufficiency of the evidence on appeal, the Appellant's 1925 statement must "specify the element or elements upon which the evidence was insufficient" in order to preserve the issue for appeal. ***Commonwealth v. Williams***, 959 A.2d 1252, 1257 (Pa. Super. 2008) (quoting ***Commonwealth v. Flores***, 921 A.2d 517, 522-23 (Pa. Super. 2007)). Such specificity is of particular importance in cases where, as here, the Appellant was convicted of multiple crimes against two victims; and each of the crimes contains numerous elements that the Commonwealth must prove beyond a reasonable doubt. ***See id.*** at 1258 n.9. In the instant matter, while Appellant appears to have specified certain elements that he wished to challenge, he does not connect them to any particular crime. (***See*** Concise Issue, 9/20/12, at 1). It is thus impossible to determine from Appellant's vague 1925(b) statement, which convictions he seeks to challenge. Accordingly, we find Appellant's sufficiency of the evidence claims waived.

Further, even if his claims were not subject to waiver for the reasons discussed above, Appellant's sufficiency of the evidence arguments are underdeveloped. Appellant does not set forth the elements of the crimes he was convicted of and does not specify which convictions he seeks to challenge. (***See*** Appellant's Brief, at 10-12). While Appellant does set out the standard of review for sufficiency of the evidence claims, (although he seems to conflate it with the standard of review for weight of the evidence claims), his argument is otherwise without citation to any legal authority. ***See id.*** Accordingly, Appellant has waived his sufficiency of the evidence claims. ***See Commonwealth v. Liston***, 941 A.2d 1279, 1285 (Pa. Super. 2008) (*en banc*), *affirmed in part and vacated in part*, 977 A.2d 1089 (Pa. 2009).

Even if this claim were not waived for the reasons discussed above, it would still be subject to dismissal. Appellant's claim is a contention that the jury should not have credited the testimony of the victims. (***See*** Appellant's Brief, at 10-12). However, an argument that the finder of fact should not have credited a witness's testimony goes to the weight of the evidence, not the sufficiency of the evidence. ***See Commonwealth v. W.H.M.***, 932 A.2d 155, 160 (Pa. Super. 2007) (claim that the jury should have believed Appellant's version of the event rather than that of the victim goes to the weight, not the sufficiency of the evidence); ***Commonwealth v. Wilson***, 825 A.2d 710, 713-14 (Pa. Super. 2003) (a review of the sufficiency of the

evidence does not include an assessment of the credibility of testimony; such a claim goes to the weight of the evidence); ***Commonwealth v. Gaskins***, 692 A.2d 224, 227 (Pa. Super. 1997) (credibility determinations are made by the finder of fact and challenges to those determinations go to the weight, not the sufficiency of the evidence).

We have long held that this Court cannot consider, in the first instance, a claim that the verdict is against the weight of the evidence. ***See Commonwealth v. Brown***, 648 A.2d 1177, 1189-91 (Pa. 1994) (weight of evidence claims must first be presented to the trial court); ***Commonwealth v. O'Black***, 897 A.2d 1234, 1239-40 (Pa. Super. 2006) (same). Here, Appellant failed to make an oral motion on the record prior to sentencing and failed to file post-sentence motions raising this issue. ***See*** Pa.R.Crim.P. 607. Thus, the issue is not preserved for our review. ***See Commonwealth v. Burkett***, 830 A.2d 1034, 1036 (Pa. Super. 2003).

Even if we were to the address the merits of Appellant's weight of the evidence claim, it would fail. Appellant essentially asks us to reassess the credibility of the witnesses. However, it is well settled that we cannot substitute our judgment for that of the trier of fact. ***See Commonwealth v. Bowen***, 55 A.3d 1254, 1262 (Pa. Super. 2012). Further, the finder of fact was free to believe the Commonwealth's witnesses and to disbelieve the theories proffered by Appellant. ***See Commonwealth v. Griscavage***, 517 A.2d 1256, 1257 (Pa. 1986) (the finder of fact is free to believe all, none, or

part of the testimony presented at trial). Thus, Appellant's weight of the evidence claim lacks merit.

Judgment of sentence affirmed. Jurisdiction relinquished.