NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. FRANCIS STRAUGHTERS, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1411 WDA 2012

Appeal from the Judgment of Sentence September 4, 2012
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0000423-2012

BEFORE: STEVENS, P.J., BOWES, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.: FILED: May 29, 2013

Francis Straughters, Jr. appeals from the judgment of sentence of seven and one-half to fifteen years imprisonment imposed after a jury convicted him of robbery, aggravated assault, simple assault, terroristic threats, conspiracy, disorderly conduct, and two counts of theft. We affirm.

The trial court extensively outlined the facts underlying Appellant's convictions, and we rely upon it for purposes of this appeal. Trial Court Opinion, 1/30/13, at 2-5. We will summarize that proof. Appellant's co-conspirator, Edith Marie Porterfield, testified against him at trial. The Commonwealth secured her testimony through an agreement that she would receive two to four years imprisonment for her role in the following events, which occurred between the late night hours of February 3, 2012, and the early morning hours of February 4, 2012. During the night of February 3,

2012, Appellant and Porterfield smoked crack cocaine at their apartment on East Green Street, Connellsville. Their drug dealer had refused to give them any more drugs on credit so, after consuming all the crack cocaine in their possession, they decided to obtain money by criminal means in order to purchase the drug. First, the two cohorts went to the home of Porterfield's mother, stole about $150, purchased more crack cocaine, and returned to their apartment to consume it.

Appellant and Porterfield then decided to rob a store to obtain more funds. To that end, they started to drive around Connellsville consuming their remaining crack cocaine. At around 4:00 a.m. on February 4, 2012, they went to a gas station known as the Honey Bear Sunoco, which was located on Memorial Boulevard in Connellsville. Porterfield entered that business wearing sunglasses and a white-hooded sweatshirt. She tried to open the cash register and demanded money from the store clerk, who denied her access to the register. In response, Porterfield threatened to shoot the clerk and left the gas station.

After that unsuccessful attempt to gain money for drugs, at around 6:00 a.m. on February 4, 2012, Appellant and Porterfield robbed the Reddy Mart Gas Station ("Reddy Mart"), which also was located on Memorial Boulevard, Connellsville. Porterfield operated as a lookout and the getaway driver. She entered the establishment, purchased coffee, and left the Reddy

Mart. During her stay, she spoke briefly with a regular customer, Zane Long. Nancy Miller was the only store employee on duty.

Shortly after Porterfield left Reddy Mart, Appellant entered the convenience store carrying a long-handled crescent wrench. He screamed at Mr. Long that he was robbing the store, struck Mr. Long across the face with the wrench, and pushed him into a utility closet. Appellant then approached Ms. Miller and ordered her to give him the store money and not to summon the police. He stole about $500 in cash and several packs of cigarettes from the Reddy Mart. Next, Appellant returned to the utility closet and struck Mr. Long on the head with the wrench two or three more times. Mr. Long fell onto the ground, where Appellant, who was wearing boots, kicked him three times, including once in the head. Due to his injuries, Mr. Long received nine stiches and seventeen staples at a hospital. Porterfield and Appellant then purchased more crack cocaine with the robbery proceeds.

During the ensuing investigation, Connellsville Police Officer Autumn Fike reviewed Reddy Mart's surveillance footage of the incident, which was played for the jury. When watching the tape, Officer Fike immediately recognized both Porterfield and Appellant. Porterfield had no facial covering, and a piece of cloth that Appellant used during the crime to cover his mouth and chin continually slid down so that Officer Fike was able to view Appellant's entire visage. Officer Fike obtained a search warrant for Appellant's residence, and, during its execution, she found clothing worn by

the perpetrator of the Reddy Mart robbery, including a bloodstained shirt. The shirt was submitted to a crime laboratory for DNA testing. Appellant's DNA was on that item, and the blood on the shirt belonged to Mr. Long.

As Officer Fike was executing the warrant, she saw Appellant outside. She exited the residence to arrest Appellant, but he entered his vehicle and fled the area with Porterfield. After being pursued by a nearby patrol car, Appellant and Porterfield surrendered to police.

Based upon these events, Appellant was convicted of robbery, aggravated assault, simple assault, reckless endangerment, terroristic threats, conspiracy, theft by unlawful taking, theft by receiving stolen property, and disorderly conduct. He was acquitted of two counts of criminal conspiracy that were based upon the attempted robbery of Honey Bear Sunoco. In this appeal from the seven-and-one-half-to-fifteen-year judgment of sentence, Appellant raises these issues:

> Issue No. 1. Was the evidence insufficient to find the Appellant guilty beyond a reasonable doubt of the crime[s] charged, specifically robbery, criminal conspiracy to commit robbery, aggravated assault, simple assault, recklessly endangering another person, terroristic threats, theft, receiving and disorderly conduct?
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> Issue No. 2. Did the court err in denying Appellant's omnibus pretrial motions?
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> Issue No. 3. Did the court err in consolidating Appellant's cases at criminal action No. 423 of 2012 and criminal action No. 424 of 2012 for trial since

the incidents were not related to each other and occurred at different locations and time?

Issue No. 4: Did the court err [in] permitting the Commonwealth to make improper statements in closing argument?

Appellant's brief at 8.

Appellant's first averment relates to the sufficiency of the evidence, which we review under the following standard:

> 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 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. Fabian, 60 A.3d 146, 150-51 (Pa.Super. 2013) (quoting ***Commonwealth v. Jones****,* 886 A.2d 689, 704 (Pa.Super. 2005)).

Appellant purports to challenge the sufficiency of the evidence supporting each and every element of all nine of his convictions. Appellant's brief at 11. ("Appellant, in the instant case, respectfully submits that the evidence presented at the trial was insufficient to enable the trier of fact to

find every element of the crimes charged beyond a reasonable doubt.”). However, Appellant neglects to delineate the elements of any of the crimes in question. With limited exceptions discussed *infra*, Appellant also fails to identify in what respect the evidence was deficient as to any element of any crime. Instead, his brief is little more than a repetition of the general principles governing sufficiency claims. Appellant’s brief at 11-17. It is well established that undeveloped arguments will not be considered on appeal. ***E.g., Commonwealth v. Spotz***, 18 A.3d 244, 304 (Pa. 2011).

We have been able to parse some developed arguments capable of review from Appellant’s vague averments that each element of every crime was not proven. We now proceed to examine them. First, Appellant suggests that all of his convictions are infirm because the Commonwealth did not produce the wrench used to attack Mr. Long and the boots that he wore during the crime. He also notes that the Commonwealth did not perform fingerprint analysis of the crime scene. Appellant’s brief at 15. This position fails because it does not comport with our standard of review. As noted, in this context, we view the evidence that was adduced rather than the evidence that was not presented. Porterfield’s testimony established that Appellant committed the crimes in question. Her testimony was supported by that of Officer Fike, who, based upon her examination of the surveillance tape of the crime and knowledge of Appellant’s identity, testified that he was the perpetrator of the robbery and assault at Reddy Mart. N.T.

Trial, 8/6/12, at 66. The clothes worn by the perpetrator were located in Appellant's apartment, and DNA evidence from that clothing linked him to the crime. Appellant's position that there was insufficient evidence to establish that he committed the crimes in question is specious.

Appellant also maintains that Mr. Long did not suffer serious bodily injury, and thus, his conviction of aggravated assault is infirm. Appellant's brief at 15. Under 18 Pa.C.S. § 2702(a)(1) (emphasis added), "A person is guilty of aggravated assault if he . . . **attempts** to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." Serious bodily injury is defined as, "Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S. § 2301. Thus, aggravated assault exists even if the victim does not suffer serious bodily injury where the Commonwealth proves beyond a reasonable doubt that the defendant actually intended to cause such injury. ***Commonwealth v. Guff***, 822 A.2d 773, 777 (Pa.Super. 2003).

Herein, Appellant struck Mr. Long in the head with a wrench at least three times, and, while wearing boots, he then kicked the prone victim three times, including in the head. These actions were sufficient to establish that Appellant intended to cause serious bodily injury to Mr. Long, regardless of

whether Mr. Long's injuries can be characterized as such. ***Commonwealth v. Bruce***, 916 A.2d 657, 663 (Pa.Super. 2007) (evidence sufficient to sustain finding defendant intended to cause victim serious bodily injury when defendant punched victim repeatedly in the head and throat when the victim was unable to defend himself); ***Commonwealth v. Rightley**,* 617 A.2d 1289 (Pa.Super. 1992) (aggravated assault conviction based upon attempt to cause serious bodily injury upheld where defendant swung aluminum bat at victim three times, striking him in the head and shoulder).

Appellant also assails his conspiracy conviction by maintaining that there was no evidence that he and Porterfield entered an actual agreement. Appellant's brief at 16 (emphasis in original) (In a conspiracy, people **agree** to act jointly. The only testimony of an alleged conspiracy case came from co-defendant [sic], Edith Porterfield. Her testimony at the time of trial . . . lacked in what if any agreement [was entered] to act jointly with appellant."). Appellant's argument is misguided because conspiracy can be established without proof of an express agreement. 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:
>
> > (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.

Thus, § 903 mandates that the Commonwealth establish 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." ***Commonwealth v. Knox***, 50 A.3d 749, 755 (Pa.Super. 2012). The Commonwealth does not have to prove that there was an express agreement to perform the criminal act. Rather, a shared understanding that the crime would be committed is sufficient:

> 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.

Id. (emphasis added) (quoting ***Commonwealth v. McCall***, 911 A.2d 992, 996-97 (Pa.Super. 2006)).

In this case, Appellant and Porterfield acted in concert over the course of many hours to obtain money to purchase crack cocaine. Porterfield acted as a lookout and the getaway driver while Appellant was committing the crimes for which he was convicted. They shared in the proceeds of the crime. Appellant's conviction of conspiracy therefore is not infirm.

Appellant's final position regarding the sufficiency of the evidence is that the "[t]estimony of accomplice, Edith Porterfield, was insufficient, so unreliable and contradictory as to make any verdict thereon based obviously on conjecture or sympathy but no[t] reason." Appellant's brief at 17. As noted *supra*, it is entirely within the discretion of the factfinder to credit a witness. The jury was aware that Porterfield was an accomplice and was offered a deal in exchange for her testimony against Appellant. As an appellate court, we are precluded from rejecting her testimony, which was supported by physical evidence found in Appellant's apartment as well as Officer Fike's testimony that she recognized Appellant as the perpetrator from the surveillance tape.

Appellant's second issue pertains to the trial court's denial of his omnibus pretrial motion, which contained a litany of allegations. However, as to this second allegation, there is a disconnect between the facts at issue in this case and the arguments raised on appeal. Appellant's primary position on appeal is that his confession was obtained unconstitutionally and that it should have been suppressed. Appellant's brief at 18-19. Meanwhile,

at the hearing on the pre-trial motion, the trial court specifically noted that Appellant's statement to police was not inculpatory. N.T. Hearing on Omnibus Pre-trial Motion Proceeding, 8/1/12, at 92. In his brief, Appellant does not identify what confession he made, nor does he delineate any facts pertinent to how it was obtained unconstitutionally. Additionally, he does not indicate when it was introduced at trial.

Next, in a single-sentence argument unsupported by reference to legal precedent, Appellant suggests that there was no probable cause for issuance of the search warrant. This suggestion is patently meritless as Officer Fike viewed the videotape of the crime and identified Appellant, whom she knew and whose face she saw in the tape, as the perpetrator. Hence, we reject Appellant's second averment, that his omnibus pre-trial motion was improperly denied.

Appellant also avers that the charges relating to the attempted robbery of the Honey Bear Sunoco should not have been consolidated with the offenses committed during the robbery of Reddy Mart. "The decision to consolidate separate indictments for trial rests with the trial court, and this court will reverse only for a manifest abuse of that discretion." ***Commonwealth v. Janda***, 14 A.3d 147, 155 (Pa.Super. 2011). Pa.R.Crim.P. 582 governs joinder and states:

> (1) Offenses charged in separate indictments or informations may be tried together if:

> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
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> (b) the offenses charged are based on the same act or transaction.

In this case, the trial court concluded that the attempted robbery of Honey Bear Sunoco and the incident at the Reddy Mart were part of the same act or transaction since they involved a continuous criminal episode, occurring within two hours of each other as part of the same scheme to obtain money for drugs, and it noted that the two targets were in proximity on the same road. We concur with this assessment. Where two crimes are part of the same chain of events constituting a single criminal episode, they can be consolidated for trial under Rule 582. ***Commonwealth v. King***, 721 A.2d 763, 772 (Pa. 1998) (interpreting predecessor to Pa.R.Crim.P. 582, which had identical language).

In determining whether joinder is proper because the crimes are part of the same act or transaction, this Court has adopted the following test: "1. the temporal sequence of events; 2. the logical relationship between the acts; and 3. whether they share common issues of law and fact." ***Commonwealth v. Grillo***, 917 A.2d 343, 345 (Pa.Super. 2007) (*en banc*). In this case, the events were temporally related, as they were separated by only two hours, and the co-conspirators were operating together during that entire time. The crimes were physically connected as they occurred within miles of each other along the same stretch of road. There was a logical

relationship between the two criminal incidents as they both involved the cohorts' single conspiracy to obtain money to buy drugs. The two criminal incidents shared common issues of law and fact as they involved the same two perpetrators committing the same crimes of attempting to or succeeding in robbing gas stations. Thus, the court did not abuse its discretion in ordering consolidation herein.

Appellant's final position is that the prosecutor made improper remarks during closing argument that require the grant of a new trial.

> It is well established that in determining the prejudicial effect of an assistant district attorney's comments during closing argument, the comments in question cannot be viewed in isolation but, rather, must be considered in the context in which they were made. A new trial is not required unless the unavoidable effect of the comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward [the defendant], so that they could not weigh the evidence and render a true verdict.

Commonwealth v. Solomon, 25 A.3d 380, 384 (Pa.Super. 2011) (citations and quotation marks omitted).

Appellant first complains about the prosecutor's remark, "Ladies and gentlemen, if you think two to four years in a State Prison is a sweetheart deal you've obviously never visited any prison." N.T. Closing Remarks Jury Trial, 8/6-8/12, at 38. The prosecutor continued that, in prison, Porterfield would be separated from friends and family for a significant period. We first note, "The Commonwealth is entitled to comment during closing arguments on matters that might otherwise be objectionable or even outright

misconduct, where such comments constitute fair response to matters raised by the defense[.]" ***Commonwealth v. Culver***, 51 A.3d 866, 876 (Pa.Super. 2012). In this case, while cross-examining Porterfield, Appellant characterized her arrangement with the Commonwealth as "a pretty sweet deal." N.T. Trial, 8/7/12, at 246. During his closing, Appellant then attacked her veracity by suggesting that she had made a favorable deal with the Commonwealth in terms of sentencing. N.T. Closing Remarks Jury Trial, 8/6-8/12, at 9-10. Hence, the assistant district attorney's remarks were tendered in response to Appellant's suggestion that Porterfield's two-to-four-year sentence was sweet and favorable, and it constituted a fair response.

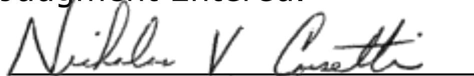
Appellant also objected to these comments by the assistant district attorney: "[Mr. Long] was obviously in fear of death or serious bodily injury as he fell to the ground fearing that this man would continue beating him with his wrench." ***Id***. at 41. Appellant objected to this argument because Mr. Long never testified that he was in fear of death or serious bodily injury when Appellant was assaulting him. ***Id***. at 42. "It is well established that a prosecutor must have reasonable latitude in presenting a case to the jury, and must be free to present arguments with logical force and vigor. Counsel may comment upon fair deductions and legitimate inferences from the evidence presented during the testimony." ***Commonwealth v. Chamberlain***, 30 A.3d 381, 407-08 (Pa. 2011). In this case, the argument in question was a legitimate inference from the evidence presented.

Common sense dictates that anyone being repeatedly struck in the head with a wrench and then kicked with boots in the head and body would be afraid that he was going to die or suffer serious bodily injury. Hence, we reject Appellant's objection to this portion of the closing argument.

Appellant's final position relates to the following. During his closing, Appellant pointed out that the Commonwealth had not recovered the wrench used or boots worn by the perpetrator and had not conducted fingerprinting at the crime scene. In response, the assistant district attorney maintained that those lapses did not establish a reasonable doubt, which he noted was "not beyond all doubt." N.T. Closing Remarks Jury Trial, 8/6-8/12, at 49. The district attorney then continued, "I wish we could have everything tested[.]" ***Id***. Appellant's objection to these comments is unclear. The assistant district attorney did not misstate the definition of reasonable doubt. Next, the prosecutor merely pointed out that he would have liked to obtain testing of everything. Nothing in these remarks strikes this Court as improper. Thus, we reject Appellant's final allegation of error.

Judgment of sentence affirmed.

Judgment Entered.



Deputy Prothonotary

Date: May 29, 2013