NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RODNEY ZELLARS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1545 EDA 2010

Appeal from the Judgment of Sentence January 13, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007396-2008, MC-51-CR-0011622-2008

BEFORE: STEVENS, P.J., BOWES, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J. Filed: March 12, 2013

This is an appeal from the judgment of sentence entered in the Court of Common Pleas of Philadelphia County following Appellant's conviction on the charges of aggravated assault, firearms not to be carried without a license, carrying firearms in public in Philadelphia, and possessing instruments of crime.[1] Appellant contends (1) the jury's verdict was against the weight of the evidence, (2) the evidence was insufficient to sustain his convictions, (3) the trial court abused its discretion in sentencing Appellant, and (4) the trial court erred in charging the jury. After a careful review, we affirm.

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* Former Justice specially assigned to the Superior Court.
[1] 18 Pa.C.S.A. §§ 2702(a), 6106(a)(1), 6108, and 907(a), respectively.

The relevant facts and procedural history are as follows: Appellant was arrested and, on October 10, 2009, represented by counsel, he proceeded to a jury trial. The parties stipulate the notes of testimony from October 10, 2009, as well as October 13, 2009, as it pertains to Appellant's jury trial, are unavailable. Therefore, pursuant to Pa.R.A.P. 1923, the trial court filed an order, indicating the following statement in absence of transcript for October 10 and 13, 2009:

> 1. On September 14, 2007, Complainant Wallace Hill was shot in the jaw while in the 1900 block of 69th Street, Philadelphia, PA. Hill, accompanied by a person identified as 'Star,' was leaving a bar located on 19th Street and as the two began walking on 69th Street, Hill observed a car drive by at a high rate of speed, make a U-turn, circle the block, and stop.
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> 2. After the shooting, Hill and 'Star' were promptly interviewed by Philadelphia police and gave a statement in which they positively identified Appellant Rodney Zellars as the shooter.
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> 3. At trial, Hill and 'Star' stated that they were unable to positively identify the person who did the shooting, whereupon, they were confronted with the statements given to Philadelphia Police positively identifying Appellant. The statements were admitted in substantive evidence[.]
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> 4. Complainant told Philadelphia Police that Appellant held a gun to his head and when Complainant turned his head, Appellant shot him through the mouth.

Trial Court Order pursuant to Pa.R.A.P. 1923, filed 10/19/11, at 1-2.

Regarding the remaining portions of Appellant's jury trial, for which this Court has been provided with transcripts, the record reveals Detective William Knecht testified that, within approximately half an hour of the shooting on September 14, 2007, he went to the hospital to interview Mr.

Hill; however, he was unable to do so because Mr. Hill was undergoing medical tests. N.T. 10/15/09 at 4-6. When Detective Knecht returned to the police station, witness Star Barnum was finishing her interview with Detective Joseph Knoll at approximately 3:00 a.m. N.T. 10/15/09 at 7-8. Detective Knecht testified he read Ms. Barnum's interview, a portion of which provided a description of the shooter. N.T. 10/15/09 at 7. Detective Knecht led Ms. Barnum to a police photo-imaging computer, and she looked through photographs; however, she did not choose a photograph at that time. N.T. 10/15/09 at 8.

A few days later, on September 18, 2007, at approximately 1:00 p.m., Ms. Barnum returned to the police station, and Detective Knecht expanded the search on the police photo-imaging computer. N.T. 10/15/09 at 9. At this time, the police had no suspect or "person of interest" in connection with the shooting. N.T. 10/15/09 at 11. This time, Ms. Barnum, after viewing between 200 to 300 photographs, chose a photograph, indicating the person depicted therein was the shooter. N.T. 10/15/09 at 9-10-12. The photograph was that of Appellant. N.T. 10/15/09 at 12, 29.

On that same day, at approximately 4:45 p.m., Detective Knecht took a photographic array, which contained the photograph chosen by Ms. Barnum, to the hospital to show Mr. Hill, who positively identified Appellant as the shooter. N.T. 10/15/09 at 9-10, 64-65. Subsequently, Mr. Hill

refused to identify Appellant as the shooter; Detective Knecht indicated this "happens a lot of times." N.T. 10/15/09 at 15.

Detective Joseph Knoll, who was Detective Knecht's partner, confirmed he interviewed Star Barnum after the shooting. N.T. 10/15/09 at 33-37. In her statement, which she began making at 2:30 a.m., Ms. Barnum indicated she was with Mr. Hill and they decided to go to a bar. N.T. 10/15/09 at 39. As they walked to the bar, there was a group of men standing outside, and Mr. Hill shook hands with one of the men, who was the one who subsequently shot him. N.T. 10/15/09 at 40. Ms. Barnum and Mr. Hill went inside of the bar, bought a six-pack of beer, and started to walk back to her house. N.T. 10/15/09 at 40. As they did so, the man, with whom Mr. Hill had shaken hands, jumped out of a car, approached Mr. Hill, and asked him why he did not come to his house. N.T. 10/15/09 at 40. Ms. Barnum heard a gunshot and took off running. N.T. 10/15/09 at 40. Ms. Barnum specifically stated the man who shot Mr. Hill was the same man who had shaken Mr. Hill's hand previously. N.T. 10/15/09 at 41. Ms. Barnum provided Detective Knoll with a description of the shooter, and he confirmed Detective Knecht set up the police photo imaging on the computer for Ms. Barnum to view; however, Ms. Barnum did not identify the shooter from the photographs shown to her on September 14, 2007. N.T. 10/15/09 at 37, 41-44. Detective Knoll denied Ms. Barnum appeared to be intoxicated during the interview. N.T. 10/15/09 at 43. Detective Knoll confirmed that, on

September 18, 2007, Ms. Barnum returned to the police station and viewed additional photographs from the police photo-imaging computer. N.T. 10/15/09 at 44-45. This time, Ms. Barnum chose Appellant's photograph as the person who shot Mr. Hill. N.T. 10/15/09 at 45-46.

Detective Knoll testified that, on September 18, 2007, at approximately 4:45 p.m., he and Detective Knecht went to the hospital to interview Mr. Hill. N.T. 10/15/09 at 46-47. After receiving confirmation from the nursing staff that Mr. Hill was coherent, the police entered the room and showed Mr. Hill a photographic array, which contained Appellant's photograph. N.T. 10/15/09 at 47-48. With no hesitation, Mr. Hill chose Appellant's photograph as the shooter. N.T. 10/15/09 at 48-49, 64-65. Mr. Hill then provided a verbal statement describing the shooting. N.T. 10/15/09 at 49-50. Although Mr. Hill knew the person in the photograph had shot him, he did not know the name of the person. N.T. 10/15/09 at 66.

Detective Charles Greblowski testified he processed the crime scene and recovered a .32 caliber fired cartridge casing. N.T. 10/15/09 at 69. He admitted the crime scene log, which was prepared by the first supervising police officer on the scene, indicated that Ms. Barnum provided the police with a description of the shooter and the crime scene log had the name "Shaun" as the suspect's name. N.T. 10/15/09 at 75-76.

At this time, the Assistant District Attorney read to the jury the parties' stipulation that, on September 14, 2007, Appellant did not have a valid

license to carry a firearm in Pennsylvania. N.T. 10/15/09 at 79. The parties also stipulated that, on September 14, 2007, Mr. Hill was taken to a trauma center with a gunshot wound to his face, a fracture to his vertebra in his neck, and a fracture to his left jaw. N.T. 10/15/09 at 80. The parties further stipulated that, on a follow-up hospital visit on November 30, 2007, Mr. Hill testified positive for opiates. N.T. 10/15/09 at 80.

Appellant took the stand in his own defense. Appellant denied being involved in the shooting of Mr. Hill, and in fact, he denied knowing either Mr. Hill or Ms. Barnum. N.T. 10/15/09 at 85-87, 112. Appellant admitted being familiar with the bar, which was located near where the shooting occurred, indicating he had lived in the neighborhood. N.T. 10/15/09 at 88. However, Appellant denied being at the bar or with a group of men on the day of the shooting of Mr. Hill. N.T. 10/15/09 at 88-89. Appellant indicated no one ever called him "Shaun." N.T. 10/15/09 at 89.

Appellant's mother, Delores Smith Hubbard, and his uncle, Gary Zellars, testified Appellant has a reputation in the community for being a peaceful citizen. N.T. 10/15/09 at 115-116, 121.

At the conclusion of all testimony, the jury convicted Appellant of the offenses indicated *supra*,[2] and represented by counsel, Appellant proceeded

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[2] The jury found Appellant not guilty on the charge of attempted murder of the first degree.

to a sentencing hearing on January 13, 2010. The trial court sentenced Appellant as follows:

> As to the aggravated assault, the sentence of the Court is seven to 14 years' incarceration; credit for any time served, followed by six years of state supervised probation.
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> On the remaining offenses running concurrent with each other, but consecutive to the probation on aggravated assault, it is an additional five years of state supervised probation.
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> Mandatory fines and costs.
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> * * *
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> [Appellant] is not RRRI eligible.

N.T. 1/13/10 at 25. Thus, Appellant received an aggregate sentence of seven years to fourteen years in prison, to be followed by eleven years of probation.

On Monday, January 25, 2010, Appellant filed a timely post-sentence motion seeking the reconsideration/modification of his sentence. Therein, Appellant presented discretionary aspects of sentencing issues. On May 26, 2010, the motion was denied by operation of law, and this timely appeal followed. Following the filing of various orders by this Court, the trial court supplemented the record with a Pa.R.A.P. 1923 statement in lieu of missing transcripts, as indicated *supra*, as well as permitted Appellant's counsel to file a Pa.R.A.P. 1925(b) statement. Following the filing of Appellant's Rule 1925(b) statement, the trial court filed a responsive Pa.R.A.P. 1925(a) opinion.

Appellant's first contention is the jury's verdict is against the weight of the evidence. We find this issue to be waived.

Pennsylvania Rule of Criminal Procedure 607 provides, in pertinent part, that a claim that the verdict was against the weight of the evidence "shall be raised with the trial judge in a motion for a new trial: (1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion." Pa.R.Crim.P. 607(A). "The purpose of this rule is to make it clear that a challenge to the weight of the evidence must be raised with the trial judge or it will be waived." ***Commonwealth v. McCall***, 911 A.2d 992, 997 (Pa.Super. 2006).

Instantly, Appellant filed a timely post-sentence motion; however, he did not present therein any claim regarding the weight of the evidence.[3] Additionally, the record reflects that Appellant did not advance any oral or written motion for a new trial, based on the weight of the evidence, prior to sentencing. We, therefore, conclude Appellant has waived his challenge to the weight of the evidence.[4]

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[3] We note that Appellant was specifically informed of his post-sentence and direct appeal rights following the imposition of his sentence. N.T. 1/13/10 at 25-27.

[4] The fact Appellant presented a weight of the evidence claim in his court-ordered Pa.R.A.P. 1925(b) statement does not alter our conclusion that Appellant waived the claim for failing to raise it properly in the trial court pursuant to Pa.R.Crim.P. 607. ***Commonwealth v. Sherwood***, 603 Pa. 92, 982 A.2d 483 (2009). In any event, as the trial court noted in its Pa.R.A.P. 1925(a) Opinion, Appellant's weight claim is meritless. Appellant's weight claim relates to the fact the two witnesses to the shooting refused to identify him at trial. However, inasmuch as the Commonwealth presented evidence the witnesses specifically identified him in the days following the shooting, the jury was free to weigh the evidence. ***Commonwealth v. Galindes***, 786

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Appellant's next claim is the evidence was insufficient to sustain his convictions. Specifically, Appellant contends the evidence was insufficient to demonstrate he was the perpetrator of the crimes.

> In evaluating a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt. We may not weigh the evidence and substitute our judgment for the fact-finder. To sustain a conviction, however, the facts and circumstances which the Commonwealth must prove must be such that every essential element of the crime is established beyond a reasonable doubt. Lastly, the finder of fact may believe all, some or none of a witness's testimony.

Commonwealth v. Bullock, 948 A.2d 818, 823 (Pa.Super. 2008) (citations and quotation omitted).

As indicated *supra*, Appellant's argument is specific in nature. Rather than challenging the sufficiency of the evidence to support any of the applicable elements of the offenses, Appellant contends the evidence was insufficient to prove that he was, in fact, the man who shot Mr. Hill. As such, we need not conduct a thorough review of the evidence to determine whether it can support a finding that all of the elements of the offenses have

(Footnote Continued) ––––––––––––––––––––––

A.2d 1004 (Pa.Super. 2001). The fact the jury apparently credited the evidence, which implicated Appellant as the shooter, does not shock ones sense of justice. ***See id.***

been met. Rather, we will focus on the specific issue raised by Appellant: whether the evidence was sufficient to establish that Appellant was the man who shot Mr. Hill on September 14, 2007. ***See Bullock***, ***supra***.

Here, the Commonwealth offered evidence that, on September 18, 2007, Ms. Barnum, who was an eyewitness, positively chose and identified Appellant as the shooter after viewing approximately 200 to 300 photographs. Additionally, on that same date, the police showed a photo array to the victim, Mr. Hill, who positively chose and identified Appellant as the shooter. Based on this evidence, the jury was free to conclude Appellant was the person who shot Mr. Hill. The fact Ms. Barnum and Mr. Hill subsequently refused to identify Appellant in court as the shooter does not alter our conclusion as the jury was free to weigh the evidence and believe some, all, or none of the testimony presented at trial. ***See Bullock***, ***supra***.

Appellant's next claim is the trial court abused its discretion in imposing Appellant's sentence. Specifically, Appellant contends (1) the trial court failed to state adequate reasons on the record for the sentence imposed, (2) the trial court failed to consider the sentencing guidelines, and (3) the sentence was excessive in that the court failed to consider the particular circumstances of the offense, the rehabilitative needs of Appellant,

and Appellant's character, history, and condition consistent with 42 Pa.C.S.A. §§ 9721(b) and 9781(b).[5]

"A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa.Super 2004).

> To reach the merits of a discretionary sentencing issue, we conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Cook, 941 A.2d 7, 11 (Pa.Super. 2007) (citation omitted).

In the instant case, Appellant filed a timely notice of appeal, preserved his claims in his post-sentence motion,[6] and included a Rule 2119(f) statement in his brief. Additionally, we conclude Appellant's claims present

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[5] Under 42 Pa.C.S.A. § 9721(b), "the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S.A. § 9721(b). Additionally, under 42 Pa.C.S.A. § 9781(b), in reviewing the record, we "shall have regard for" the nature and circumstances of the offense and the history and characteristics of the defendant.

[6] Appellant also presented the issue in his court-ordered Pa.R.A.P. 1925(b) statement.

a substantial question. ***See Commonwealth v. Brooks***, 2013 WL 66474 (Pa.Super. filed 1/7/13) (claim trial court failed to state adequate reasons for sentence raises a substantial question); ***Commonwealth v. Coulverson***, 34 A.3d 135 (Pa.Super. 2011) (claim trial court failed to consider the sentencing guidelines and the factors set forth in 42 Pa.C.S.A. §§ 9721 and 9781 raises a substantial question). Accordingly, we will now address the merits of the sentencing issues raised on appeal, pursuant to the following standard:

> [T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. [A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. In more expansive terms, our Court recently offered: An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

Commonwealth v. Provenzano, 50 A.3d 148, 154 (Pa.Super. 2012) (quotation omitted).

Here, at the sentencing hearing, the Assistant District Attorney and Appellant's counsel specifically informed the trial court of the applicable sentencing guidelines and noted the existence of the pre-sentence investigation report. N.T. 1/13/10 at 3-4, 14, 25. Additionally, Appellant's counsel informed the trial court that the crimes were "out of character of

[Appellant's] background and education," and the trial court heard from numerous witnesses, who attested to Appellant's good character, strong family background, and religious upbringing. N.T. 1/13/10 at 4-13. The Assistant District Attorney, on the other hand, explained Appellant's extensive criminal history, which included eleven arrests from the time Appellant was thirteen years old to his present age of twenty-three years old. N.T. 1/13/10 at 14-17. The Assistant District Attorney reminded the trial court of the nature of the offense. N.T. 1/13/10 at 18-19. Appellant requested leniency and explained the circumstances of his previous arrests. N.T. 1/13/10 at 20-23. The trial court then imposed its sentence. The trial court specifically indicated in its Opinion that "[p]rior to the imposition of sentence, the Court considered the testimony of witnesses presented by Appellant, the arguments of counsel, heard from Appellant, and considered the Presentence and Psychiatric Reports." Trial Court Opinion filed 8/17/12 at 6 (citation to record omitted).

Inasmuch as the record reveals the trial court reviewed a pre-sentence report, we conclude the trial court appropriately weighed the requisite sentencing factors. ***See Commonwealth v. Naranjo***, 53 A.3d 66 (Pa.Super. 2012). Additionally, contrary to Appellant's contention, the trial court was specifically informed of the sentencing guidelines. Since the trial court's sentencing colloquy "shows consideration of [Appellant's] circumstances, prior criminal record, personal characteristics and

rehabilitative potential, and the record indicates that the court had the benefit of the presentence report, an adequate statement of the reasons for the sentence imposed has been given." ***Commonwealth v. Brown***, 741 A.2d 726, 735-36 (Pa.Super. 1999) (*en banc*) (quotation omitted). Therefore, we find no merit to Appellant's contention the trial court abused its discretion in sentencing him.

Appellant's final claim is the trial court erred in charging the jury on consciousness of guilt and motive.[7]

"When reviewing the propriety of a jury charge, an appellate court examines the charge as a whole. The trial court has broad discretion in formulating jury instructions, as long as the law is presented to the jury in a clear, adequate, and accurate manner." ***Commonwealth v. Lukowich***, 875 A.2d 1169, 1174 (Pa.Super. 2005) (citations omitted). "When a court instructs the jury, the objective is to explain to the jury how it should approach its task and the factors it should consider in reaching its verdict. Instructions on defenses or theories of prosecution are warranted when there is evidence to support such instructions." ***Commonwealth v. Chambers***, 602 Pa. 224, 249, 980 A.2d 35, 49 (2009) (quotations, quotation marks, and citation omitted).

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[7] Appellant objected to the trial court giving these instructions, N.T. 10/16/09 at 6, 20, and presented the issue in his court-ordered Pa.R.A.P. 1925(b) statement.

Appellant does not dispute that "[w]hen a person commits a crime, knows that he is wanted therefor, and flees or conceals himself, such conduct is evidence of consciousness of guilt, and may form the basis [of a conviction] in connection with other proof from which guilt may be inferred." ***Commonwealth v. Paddy***, 569 Pa. 47, 800 A.2d 294, 322 (2002) (quotation and quotation marks omitted). He suggests, however, that no such instruction was warranted in this case since there was no evidence supporting the fact he fled or concealed himself from the police in such a manner as to reasonably infer that there was evidence of consciousness of guilt.

We conclude the evidence presented at trial fairly raised the inference that Appellant's actions could be construed as consciousness of guilt. For instance, the Commonwealth offered evidence that, on September 19, 2007, the police went to Appellant's parents' house looking for him in connection with the shooting; however, Appellant was not at home. N.T. 10/15/09 at 101-102. Appellant admitted at trial that he knew, as of Thanksgiving of 2007, the police were looking for him; however, he did not turn himself in to the custody of the police. N.T. 10/15/09 at 102-103. Rather, he remained at large until March 5, 2008, when he was arrested by the police. N.T. 10/15/09 at 105. Based on this evidence, we conclude the record establishes sufficient evidence to support the fact Appellant concealed his

whereabouts from the police in such a manner as to support the trial court's consciousness of guilt instruction. ***Chambers***, ***supra***; ***Paddy***, ***supra***.

With regard to the trial court's instruction on motive, Appellant suggests such an instruction was unnecessary since the standard instruction on the elements of the offenses was sufficient. In this regard, the trial court instructed the jury, in relevant part, that:

> The Commonwealth is not required to prove a motive for the commission of the crimes charged. However, you should consider the evidence of motive or lack of motive. Knowledge of human nature tells us an ordinary person is more likely to commit a crime if he or she has a motive than if he or she has not. You should weigh and consider the evidence showing motive or absence of motive along with all the other evidence in deciding whether the defendant is guilty or not guilty. It's entirely up to you to determine what weight should be given to the evidence concerning motive.

N.T. 10/16/09 at 37-38.

We find the trial court's instruction is an adequate, clear, and correct statement of the law, ***see Chambers***, ***supra***, and in light of Appellant's scant appellate argument with regard to this jury instruction, we decline to address it further.

For all of the foregoing reasons, we affirm.

Affirmed.