NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MARIO COURTLIN PARKER,	:	No. 1612 WDA 2010
Appellant	:	

Appeal from the Judgment of Sentence, September 20, 2010,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0007624-2009

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND DONOHUE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 5, 2013

Mario Courtlin Parker appeals from the judgment of sentence of September 20, 2010, following his conviction of two counts of first-degree murder and other charges. We affirm.

The trial court has summarized the facts of this matter as follows:

> On May 1, 2009, Michael Morrison (Morrison) and Laron Thornton (Thornton) were visiting ("partying") at the residence of Rachel and Daneen Robinson in the Hazelwood section of the City of Pittsburgh, Allegheny County. (T.T. 199-210) [Footnote 8] At approximately 2:30 a.m. Morrison and Thornton went outside to retrieve some items from Morrison's vehicle which was parked on Flowers Avenue near the front of the residence. (T.T. 124-130, 204-210, 289-293)
>
> As the two men were at the vehicle Appellant and a second actor approached the two men from the side of the Robinson house. (T.T. 212, 224, 321-322) Appellant and the second actor were both armed and

had attempted to cover their faces with hooded sweatshirts and/or a mask. (T.T. 212-213, 253-254, 372-373) Morrison and Thornton were ordered to empty their pockets and get on the ground. (T.T. 224, 299-300) As this was occurring, DeAndre Freeman (Freeman), who lived several houses away from the Robinson residence, was walking on the sidewalk opposite the confrontation toward his residence. (T.T. 225, 301, 357-358, 407) Freeman was approached by the second actor and knocked to the ground by being struck on the back of the head with the butt of a gun. (T.T. 360)

Appellant and the second actor then ordered Morrison, Thornton, and Freeman onto the front porch of the Robinson residence. (T.T. 228, 299-301, 365, 482-483) Once there, Appellant and the second actor held the three men at gunpoint and inquired as to who was in the house. (T.T. 228, 299-301, 365) They were informed that it was the two women and their children. (T.T. 228, 300-301, 365, 406) At that point the door to the residence was kicked open and the two women were brought onto the porch. (T.T. 304, 368, 374) When Appellant came back onto the porch he had partially lifted up his ski mask, and Freeman recognized him as someone he knew from the Hazelwood neighborhood. (T.T. 362, 406-407, 419-420, 482-483) The women asked Appellant and the second actor whether they were going to hurt their children or their friends. The two actors answered no. (T.T. 374-375) However when asked whether they were going to hurt them (the two women), Appellant and the second actor indicated that they did not know. (T.T. 375, 407) The women were ordered back inside the house and the three men were ordered to leave the area. (T.T. 239-241, 375-378, 407)

Morrison and Thornton got into Morrison's vehicle and left the area. (T.T. 238-241, 377) Freeman left the porch and walked toward his nearby residence. As he did so he heard multiple gunshots coming from the Robinson residence. (T.T. 376-380, 407) Freeman called 911 to report the incident, and he

> spoke with the initial officers who arrived on Flowers Avenue shortly thereafter. (T.T. 409, 496) Freeman directed the police to the Robinson residence. (T.T. 409, 496)
>
> Officers proceeded to the residence to find 32 year old Rachel Robinson inside the entryway of the home shot eighteen times - nine times in the trunk and nine times in her extremities. (T.T. 100-116, 498-503) Daneen Robinson, 21 years old, was found in the same area. She was shot eleven times - twice in the head, seven times in the trunk, and twice in her extremities. (T.T. 71-99) Given the unsettled and potentially dangerous situation both women were moved to the sidewalk by SWAT team members to receive medical attention and to allow the police to search the residence for possible actors. (T.T. 140-141, 498-503)
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> DeAndre Freeman was formally interviewed by homicide detectives several hours later at which time he identified Appellant as one of the two actors, detailed Appellant's actions, provided a recorded statement and identified Appellant in a photo array. (T.T. 401-422, 477-493) Laron Thornton also identified Appellant as one of the two actors involved and picked him out of a photo array latter [sic] that day. (T.T. 344-348) The second actor was never identified.
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> [Footnote 8] "T.T." refers to the Trial Transcript of June 2[9]-July 2, 2010.

Trial court opinion, 5/23/12 at 5-7.

Following a jury trial, appellant was found guilty of two counts of first-degree murder, burglary, possession of a firearm prohibited, five counts of unlawful restraint, and criminal conspiracy to commit homicide. On September 20, 2010, appellant was sentenced to two life sentences for

murder and 20 to 40 years' imprisonment on the remaining counts. This timely appeal followed.

Appellant has raised the following issues for this court's review:

> I. Did the lower court err when it failed to suppress the identification made pre-trial, and all subsequent in-court identifications as well, that were made by the witness, Laron Thornton?
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> II. Did the lower court err in permitting Detective Leheny to testify regarding a prior identification made by Laron Thornton?
>
> III. Was the evidence sufficient in this case to support the guilty verdicts as the identification of the perpetrator was not proven beyond a reasonable doubt?

Appellant's brief at 7.

In his first issue on appeal, appellant argues that Thornton's pre-trial identification of appellant as one of the gunmen should have been suppressed. Appellant argues that Thornton could not identify anyone right away, was prompted by the detective to identify appellant, and later recanted. Appellant claims that Thornton's identification was not reliable.

> The role of this Court in reviewing the denial of a suppression motion is well-established:
>
> > An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Since the prosecution prevailed in the suppression

> court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.
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> ***Commonwealth v. Stevenson***, 894 A.2d 759, 769 (Pa.Super.2006) (citation omitted). Although we are bound by the factual and the credibility determinations of the trial court which have support in the record, we review any legal conclusions ***de novo***. ***Commonwealth v. George***, 878 A.2d 881, 883 (Pa.Super.2005), ***appeal denied***, 586 Pa. 735, 891 A.2d 730 (2005).

Commonwealth v. Wells, 916 A.2d 1192, 1194-1195 (Pa.Super. 2007).

> As both the Pennsylvania Supreme Court and this Court have recognized, the suggestiveness of police tactics in the identification process is one factor to consider in determining whether to admit identification evidence, but suggestiveness alone will not necessarily cause the evidence to be excluded. ***See Commonwealth v. Ransome***, 485 Pa. 490, 495, 402 A.2d 1379, 1382 (1979) ("Suggestiveness alone does not warrant exclusion. Instead '[i]t is the likelihood of misidentification which violates a defendant's right to due process, and it is this which [is] the basis of the exclusion of evidence.'" (citations omitted)); ***Commonwealth v. Johnson***, 301 Pa.Super. 13, 446 A.2d 1311 (1982) (accord), ***aff'd in part***, ***vacated in part*** 499 Pa. 380, 453 A.2d 922 (1982). The United States Supreme Court has stated that a pre-trial identification will not be suppressed unless it can be shown that the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Simmons v. U.S.***, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968); ***see Commonwealth***

> ***v. Johnson***, 301 Pa.Super. 13, 15, 446 A.2d 1311, 1312 (1982).

Commonwealth v. Vanderlin, 580 A.2d 820, 824 (Pa.Super. 1990). "[T]he reliability of an identification is the linch pin [sic] in determining whether the identification testimony is admissible. Courts must look to the totality of the circumstances to determine whether an identification is reliable." ***Id.***, citing ***Manson v. Brathwaite***, 432 U.S. 98, 114 (1977).

A hearing on appellant's pre-trial suppression motion was held on February 18, 2010. Detective Thomas Leheny testified that on the afternoon of May 1, 2009, the day of the shooting, he was interviewing Thornton at police headquarters. (Notes of testimony, 2/18/10 at 46.) Detective Leheny showed Thornton a photo array of eight individuals including appellant. (***Id.*** at 47.) Initially, Thornton indicated that no one looked familiar. (***Id.*** at 48.) At that point, Detective Leheny had to step out of the room for a few minutes, leaving the photo array with Thornton. (***Id.*** at 49.) Detective Leheny testified that he was gone no more than three minutes. (***Id.*** at 50.) When he came back, Thornton stated that he was "pretty sure" that appellant was one of the men who had robbed him. (***Id.***) Thornton circled appellant's photograph and initialed it. (***Id.***) Detective Leheny testified that he never suggested to Thornton which, if any, photograph he should pick out. (***Id.***)

The trial court made the following findings of fact and conclusions of law with respect to Thornton's identification:

> As to the second photographic array that was shown by Detective Thomas Leheny on May 1st, 2009, to one potential witness, Laron Thornton, the witness and victim who had provided a description of probable actors in this matter. A photo array was generated by Detective Leheny, which included the photograph of the actor, the suspect defendant in this matter, Mario Parker. The instructions given to the witness at that juncture by Detective Leheny were to the effect if he recognized anyone in the array to point him out. The witness initially did not make an identification in the presence of Detective Evans [sic]. He stated he wasn't sure. Excuse me. Detective Leheny. Detective Leheny then left the room to attend to another matter summoned by a fellow officer. He returned several minutes, approximately three in number, later, the witness having been left alone with the photo array and no other materials. When Leheny came back into the room, the witness gratuitously remarked that he had a chance to look over the array and he was pretty sure that the person who robbed him was the Mario Parker, again depicted in the lower right-hand corner, what I will refer to as Exhibit No. 8. It was signed and dated by that particular witness, Mr. Thornton.
>
> The Court finds in terms of the identification process that there is no infirmity in terms of taint or suggestiveness, that the photographic array is one of integrity. And what I mean by integrity in terms of substantially similar persons, height and – not necessarily height, but weight, body build, facial hair, skin color and hair length. And consistent with cases like Commonwealth versus Moore, the Court finds that there is no likelihood of misidentification by the process or the array itself.

Id. at 61-63.

A second evidentiary hearing on appellant's suppression motion was held on May 24, 2010. This second hearing was based on a May 5, 2010

interview with Thornton in which he alleged that when Detective Leheny reentered the room, he suggested that Thornton pick out a particular photograph and circle it. (Appellant's brief, Appendix D.) According to Thornton, he was told that police already had a witness who identified one of the men in the photo array and they needed a second person to make an identification. (***Id.***)

Detective Leheny specifically denied that he told Thornton to select appellant's photograph. (Notes of testimony, 5/24/10 at 7-8.) He reiterated that when he left the room for a few minutes, Thornton requested that the photo array be left with him. (***Id.*** at 6.) Thornton wanted more time to study the array. (***Id.*** at 11.) When he returned, Thornton indicated that he was pretty sure he could identify an individual in the array. (***Id.*** at 6.) Thornton then circled and initialed appellant's photograph. (***Id.*** at 8.) Detective Leheny also testified that Thornton had expressed apprehension about testifying in this matter. (***Id.*** at 9.)

Thornton testified at the May 24 hearing that the initials "LT" were his handwriting, but he could not remember picking out appellant's photograph. (***Id.*** at 24.) In fact, Thornton testified that he remembers very little about the interview. (***Id.*** at 21-23.) According to Thornton, he began abusing alcohol after the incident and was intoxicated. (***Id.*** at 20.) Thornton testified that he cannot identify anyone from the night of the shooting. (***Id.***

at 23.) Following the hearing, the trial court again denied appellant's motion to suppress identification. (***Id.*** at 28.)

The trial court's findings are fully supported by the record. There is no indication the identification process was impermissibly suggestive or tainted. The photo array included eight black males of similar physical characteristics including appellant. (Trial court opinion, 5/23/12 at 9.) According to Thornton, one of the perpetrators was wearing a dark colored "hoody" which only partially covered his face. (Notes of testimony, 2/18/10 at 52.) While initially Thornton was unable to make a positive identification, when Detective Leheny returned to the interview room after approximately three minutes, Thornton indicated that he was "pretty sure" appellant was the individual wearing the hoody. (***Id.*** at 54-55.) Thornton then proceeded to circle appellant's photograph and placed his initials, "LT" underneath it. (***Id.*** at 48.) The trial court found Detective Leheny's testimony to be credible and rejected the allegation that he had told Thornton to pick out appellant's photograph. As the trial court states, to the extent Thornton later retracted his identification or claimed not to remember, it really goes to the weight to be accorded the identification, not its admissibility. (Trial court opinion, 5/23/12 at 10.) The trial court did not err in denying appellant's motion to suppress pre-trial identification.

In his second issue on appeal, appellant contends that the trial court erred in permitting Detective Leheny to testify at trial regarding Thornton's

pre-trial identification of appellant. Appellant argues that this was inadmissible hearsay. "The admission of evidence is in the sound discretion of the trial judge, and will not be disturbed on appeal absent a manifest abuse marked by an error of law." ***Commonwealth v. Brown***, 911 A.2d 576, 584 (Pa.Super. 2006), ***appeal denied***, 591 Pa. 722, 920 A.2d 830 (2007), quoting ***Commonwealth v. Brennan***, 696 A.2d 1201, 1203 (Pa.Super. 1997) (citations omitted).

At trial, Thornton testified that he could not identify either of the perpetrators, including appellant. Thornton testified that he could not recall the interview with Detective Leheny. (Notes of testimony, 6/29-7/2/10 at 311.) According to Thornton, his drinking affects his memory. (***Id.*** at 269-270.) Thornton testified that he could not recall looking at the photo array. (***Id.*** at 326-327.) The Commonwealth introduced Thornton's May 24, 2010 testimony wherein he admitted that the initials underneath appellant's photograph were in his handwriting. (***Id.*** at 322.) The Commonwealth also recalled Detective Leheny to testify regarding Thornton's prior out-of-court identification. (***Id.*** at 914.)

In ***Commonwealth v. Doa***, 553 A.2d 416 (Pa.Super. 1989), the victims identified the defendants in a pre-trial photographic array. ***Id.*** at 417. However, at trial, they were unable or unwilling to identify the defendants, perhaps out of fear of retaliation. ***Id.*** at 418, 422. The Commonwealth called the police detective who showed the photographs to

the victims to testify to the prior identifications made by the victims. ***Id.*** at 420. This court held that the prior identifications were admissible as an exception to the hearsay rule, where the witnesses were present in court and available for cross-examination. In so holding, we relied, in part, on the seminal case of ***People v. Gould***, 54 Cal.2d 621, 631, 354 P.2d 865, 870 (1960):

> The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination.

Id. at 421-422 (citations omitted). In ***Gould***, as in the instant case, an eyewitness identified the defendant from a photographic array, but failed to identify him at trial. A police officer subsequently testified that the eyewitness had previously identified the defendant. ***Id.*** at 421. ***See also Commonwealth v. Ly***, 528 Pa. 523, 532, 599 A.2d 613, 617 (1991) ("where witnesses are in court and subject to cross-examination, a police officer may testify concerning pre-trial identification by the witness") (citation omitted).

Here, Thornton identified appellant in a photographic array, but failed to identify him at trial. Thornton claimed a faulty memory caused by excessive alcohol use but the trial court found it more likely that he feared retribution. (Trial court opinion, 5/23/12 at 14 n.11.) Whatever the reason,

the trial court did not err in permitting Detective Leheny to testify regarding Thornton's prior identification. Thornton testified at trial and was available for cross-examination on the issue. ***Doa, supra***.

Finally, appellant argues that the evidence was insufficient to support the jury's verdict. Specifically, appellant contends that the Commonwealth failed to prove that he committed the murders.[1]

> The standard we apply in reviewing the sufficiency of 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 that of 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.

[1] The Commonwealth argues appellant's sufficiency claim is waived where he fails to set forth which elements of which crimes were not satisfied. (Commonwealth's brief at 21.) However, appellant's sufficiency claim is more general in nature, pertaining to a purported lack of identification evidence. Appellant argues that there was insufficient evidence to prove that he was the perpetrator.

Commonwealth v. Johnson, 833 A.2d 260, 262-263 (Pa.Super. 2003), quoting ***Commonwealth v. Lambert***, 795 A.2d 1010, 1014-1015 (Pa.Super. 2002) (internal citations and quotation marks omitted).

Here, besides Thornton's prior identification, which appellant attacks as unreliable, DeAndre Freeman also identified appellant as one of the gunmen. Freeman identified appellant at trial and testified that he had seen him prior to that night. (Notes of testimony, 6/29-7/2/10 at 372-373.) Freeman testified that he used to see appellant driving around the neighborhood on occasion, and knew where he stayed. (***Id.*** at 373-374.) In fact, appellant lived just down the street from Freeman. (***Id.*** at 390.) Freeman also testified that he recognized appellant's voice when he told them to leave. (***Id.*** at 376-377.) Freeman also identified appellant on the date of the incident, in a photographic array. (***Id.*** at 394.)

Appellant points to several alleged inconsistencies in Freeman's testimony; however,

> The law is well settled that a sufficiency argument that is founded upon a mere disagreement with the credibility determinations made by the fact finder, or discrepancies in the accounts of the witnesses, does not warrant the grant of appellate relief, for [i]t is within the province of the fact finder to determine the weight to be accorded each witness's testimony and to believe all, part, or none of the evidence introduced at trial.

Commonwealth v. Johnson, 910 A.2d 60, 65 (Pa.Super. 2006) (internal quotation marks and citations omitted). Appellant also attacks Freeman's

identification as unreliable. Appellant argues that Freeman's vision was limited because the perpetrators were wearing black hoodies or masks. (Appellant's brief at 31.) However, "[A]ny uncertainty in an eyewitness's identification of a defendant is a question of the weight of the evidence, not its sufficiency." ***Commonwealth v. Cain***, 906 A.2d 1242, 1245 (Pa.Super. 2006), ***appeal denied***, 591 Pa. 670, 916 A.2d 1101 (2007), citing ***Commonwealth v. Minnis***, 458 A.2d 231, 233 (Pa.Super. 1983).

Appellant also complains that the Commonwealth failed to establish motive. Appellant argues that there was no evidence of a prior dispute or that appellant even knew the victims. (Appellant's brief at 30-31.)

> Motive, while sometimes relevant factually, is not an element of the crime charged which the Commonwealth must prove. If the Commonwealth presents sufficient evidence concerning the elements of the crimes charged, its failure to offer evidence of motive does not, as a matter of law, raise a reasonable doubt.

Commonwealth v. Holland, 480 Pa. 202, 219, 389 A.2d 1026, 1034 (1978), citing ***Commonwealth v. Novak***, 395 Pa. 199, 150 A.2d 102 (1959). Lack of motive is not dispositive.

Similarly, appellant argues that there was no DNA evidence, fingerprints, hair or fiber samples, ***etc.***, linking him to the crimes. (Appellant's brief at 29.) The Commonwealth did not have to introduce physical evidence to establish appellant's guilt of the crimes charged. Freeman, who knew appellant from the neighborhood, identified him as one

of the perpetrators in a photographic array and again at trial. As the trial court observes, Freeman was unequivocal and unwavering in his identification of appellant. (Trial court opinion, 5/23/12 at 19.) If believed by the jury, as apparently he was, Freeman's testimony alone was sufficient to establish appellant's identity as one of the two gunmen. Appellant's sufficiency claim fails.

Judgment of sentence affirmed.