NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TERRANCE L. MCMULLEN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1740 MDA 2012

Appeal from the Judgment of Sentence September 22, 2010
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0002283-2010

BEFORE: SHOGAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.: **FILED MAY 21, 2013**

Appellant, Terrance L. McMullen, appeals, *nunc pro tunc*, from the September 22, 2010 aggregate judgment of sentence of seven to 14 years' imprisonment, imposed after he was found guilty of persons not to possess firearms and two counts of reckless endangerment.[1] After careful review, we affirm.

The relevant facts and procedural history have been summarized by the trial court as follows.

> Appellant was charged with attempted murder, persons not to possess a firearm, carrying a firearm without a license, and two counts of recklessly

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 6105 and 2705, respectively.

endangering another person [following an incident on August 3, 2009]. Following a jury trial which began on August 9, 2010, Appellant was found guilty of persons not to possess a firearm and the two counts of reckless endangerment. On September 22, 2010, [the trial court] sentenced Appellant as follows:

> Count I: Attempted Murder — Acquitted;
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> Count II: Persons not to possess a firearm — Five (5) to ten (10) years in a State Correctional Institution, a fine of $500, and the costs of the proceedings;
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> Count III: Carrying a firearm without a license —Withdrawn by the Commonwealth.
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> Count IV: Recklessly endangering another person — One (1) to two (2) years in a State Correctional Institution to run consecutive to Count II, a fine of $250, and the costs of the proceedings;
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> Count V: Recklessly endangering another Person — One (1) to two (2) years in a State Correctional Institution to run consecutive to Count IV, a fine of $250, and the costs of the proceedings.

[The trial court] granted Appellant time credit from August 3, 2009 to September 22, 2010. It was [the trial court]'s intention that Appellant serve an aggregate term of imprisonment of seven (7) to fourteen (14) years.

Appellant filed a post-sentence motion to modify his sentence on September 29, 2010. [The trial court] denied that motion on October 4, 2010. On November 4, 2010, Appellant filed a notice of appeal. [The trial court] ordered Appellant to file a Statement of Errors Complained of on Appeal on January 5, 2011. Appellant complied on January 20, 2011. On August 29, 2011, the Superior Court of

> Pennsylvania quashed the appeal in this matter because Appellant failed to file a Notice of Appeal within 30 days of Appellant's Motion to Modify Sentence. Thereafter, Appellant filed a Post Conviction Relief Act (PCRA) petition on July 10, 2012 in which he asserted that his appellate counsel was ineffective for failing to timely file his appeal. [The trial court] then appointed William M. Shreve, Esquire to represent Appellant on his first PCRA petition on July 10, 2012. Petitioner subsequently motioned [the trial court] to reinstate his appellate rights under the PCRA on August 10, 2012 and the Commonwealth responded on September 4, 2012 concurring with Appellant's motion. [The trial court] then granted Appellant's requested relief in his PCRA petition on September 10, 2012. Appellant then filed a Notice of Appeal on October 2, 2012. On October 4, 2012, [the trial court] ordered Appellant to file a Concise Statement of Errors Complained of on Appeal and Appellant filed a timely Statement of Errors on October 18, 2012.

Trial Court Opinion, 11/26/12, 1-2 (footnotes omitted).

On appeal, Appellant raises the following issue for our review.

> The evidence presented at trial was insufficient to support the jury's verdict of guilty of the charges of persons not to possess a firearm and two counts of recklessly endangering another person.

Appellant's Brief at 8.

Although Appellant purports to challenge the sufficiency of the evidence, the argument section of his brief avers that the elements of both statutes were not met because "[t]he Commonwealth failed to present any *credible* evidence to link [Appellant] to this incident or to establish that he committed the crimes with which he was charged." ***Id.*** at 13-14 (emphasis added). In support of this averment, Appellant argues that the testimony of

the four eyewitnesses on the night of the incident was not credible, and that "[a]ll reasonable inferences from the evidence presented, would lead to the reasonable inference that [Appellant] was not the individual who fired the gun that night." ***Id.*** at 14-16. A challenge that the testimony of witnesses was not credible implicates weight, rather than sufficiency of the evidence. ***See Commonwealth v. Montalvo***, 956 A.2d 926, 932 n.6 (Pa. 2008) (holding that a claim that the evidence is insufficient because the witness was not credible "challenges the weight, and not the sufficiency, of the evidence"). Accordingly, we review Appellant's claim as a challenge to the weight of the evidence.

We review claims that the verdict was against the weight of the evidence for an abuse of discretion. ***Commonwealth v. Kane***, 10 A.3d 327, 332 (Pa. Super. 2010), *appeal denied*, 29 A.3d 796 (Pa. 2011). When applying this standard, we are mindful that "the initial determination regarding the weight of the evidence was for the factfinder." ***Id.*** (citation omitted). "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." ***Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003) (citations omitted), *cert. denied*, ***Champney v. Pennsylvania***, 542 U.S. 939 (2004). Further, we must not reverse a verdict based on a weight claim unless the "verdict was so contrary to the

evidence as to shock one's sense of justice." ***Kane***, ***supra*** at 333 (citation omitted).

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 has failed to preserve a weight of the evidence claim. A review of the certified record and transcripts reveal that at no point prior to, or at sentencing, was a challenge to the weight of the evidence raised. Likewise, although Appellant filed a motion for modification of sentence, therein he made no mention of weight or sufficiency of the evidence. Rather, his motion merely asserted the trial court failed to consider certain mitigating sentencing factors. Accordingly, Appellant's challenge to the weight of the evidence is waived.

Nevertheless, even if Appellant's claim were preserved, the trial court's comprehensive 13-page opinion properly disposes of Appellant's challenge to the weight of the evidence.[2] Specifically, the trial court noted the following.

> At trial, Attorney Paul Kovatch repeatedly attacked the credibility of the Commonwealth's witnesses. However, as finders of fact, the jury was free to believe or not believe their testimony. The jury's decision to believe the testimony of Sharp, Wong, Hall and Hughes, who claimed they witnessed the shooting and saw Appellant with the gun does not shock the conscience. The testimony presented by these four women were all consistent and corroborated each other's testimony.
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> …
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> This eyewitness testimony was further supported by the testimony of Detective Rivera, who discussed Appellant's confession, as well as the testimony of the other officers and witnesses involved in the trial. While there is no physical evidence to support the eyewitness accounts of Appellant's offenses, Appellant's confession and the numerous and consistent eyewitness accounts clearly support the jury's verdict of guilt.

Trial Court Opinion, 11/26/12, at 10-12.

Accordingly, we conclude that Appellant has failed to preserve a weight of the evidence claim. Further, if Appellant had preserved his challenge to the weight of the evidence, we agree with the trial court that the verdict was

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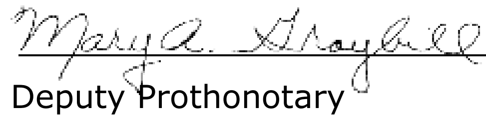
[2] Additionally, after addressing Appellant's claim as a challenge to the weight of the evidence, the trial court opinion addresses the sufficiency of the evidence and concludes that sufficient evidence was presented to convict Appellant of each of the crimes for which he was convicted. ***See*** Trial Court Opinion, 11/26/12, at 10-13.

not against the weight of the evidence. Therefore, we affirm Appellant's September 22, 2010 judgment of sentence.

Judgment of sentence affirmed.

Judge Colville concurs in the result.

Judgment Entered.



Deputy Prothonotary

Date: 5/21/2013