

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

TIMOTHY L. GAINES,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1807 EDA 2009

Appeal from the Judgment of Sentence June 17, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1208141-2005

BEFORE: BOWES, MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.:

FILED AUGUST 13, 2013

Timothy L. Gaines appeals from the judgment of sentence of life imprisonment that was imposed after a jury convicted him of first degree murder, conspiracy, and retaliation against a witness. We affirm.

The Commonwealth's evidence established that Appellant and his co-defendant Tamir Turner shot and killed Robert Edwards after Mr. Edwards witnessed Turner shoot and kill a rival drug dealer, Kevin Andrews, on September 14, 2005. After seeing Turner shoot Andrews, Mr. Edwards went to the police and gave a written statement naming Turner as the perpetrator of Andrews's murder. Mr. Edwards also informed the authorities that, on two occasions, he overheard Appellant tell Andrews to cease selling drugs on

* Former Justice specially assigned to the Superior Court.

Cecil Street, Philadelphia. On October 2, 2005, Appellant and Turner shot and killed Mr. Edwards and was witnessed by Albert Newsome. Mr. Edward's police statement was subsequently introduced as substantive evidence to establish that he was a witness to Turner's prior crime and to establish the motive for his murder.¹

Appellant raises five questions for our review:

I. Whether the Trial Court committed error when it denied the Appellant's Motion for Severance.

II. Whether the evidence was insufficient to sustain the guilty verdict.

III. Whether the verdict was against the weight of the evidence.

IV. Whether the trial court erred in denying the Appellant's Motion to change venue.

V. Whether the trial court erred in sentencing the Appellant under the third strike statute, 42 Pa.C.S.A. [§] 9714(a) (2).

Appellant's brief at 4.

Initially, we observe that Appellant fails to advance the final two arguments in the argument portion of his brief. Indeed, it appears that the fifth issue was mistakenly inserted in the statement of questions involved in this appeal because Appellant was sentenced based upon his conviction of

¹ The statement was permitted into evidence pursuant to the hearsay exception outlined in Pa.R.E. 804(b)(6) (revised January 17, 2013), forfeiture by wrongdoing. That rule permits the introduction of a "statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

first degree murder rather than upon application of the recidivist statute. Therefore, we do not consider Appellant's final two claims. ***Commonwealth v. Spatz***, 18 A.3d 244 (Pa. 2011) (undeveloped arguments will not be considered on appeal).

Next, we note that since Appellant's second issue, concerning the sufficiency of the evidence, would entitle him to discharge, we address it first. We utilize this standard in assessing Appellant's position.

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)).

The trial court extensively outlined the evidence presented against Appellant and his co-defendant:

Officer Mark Moore testified for the Commonwealth that on September 21st 2005, he was investigating potential witnesses to the murder of Kevin Andrews. He testified that information led him to interview Robert Edwards who was also known as "Dundee". Officer Moore testified that Mr. Edwards told him that he was there the day of the incident and was within three feet of the murder and blood from the actual shooting got onto his clothing, and face. Officer Moore testified that Mr. Edwards told him he was in the area for a narcotics purchase and that the shooting was in relationship to a dispute over money for crack cocaine. He further noted that Mr. Edwards told him that the victim had been shot three times in the head.

Special Agent Lawrence McGuffin testified that he was a detective assigned to the homicide division during the time when the incident occurred. . . . He interviewed Mr. Edwards on September 21, 2005 at 5:30 a.m. Agent McGuffin read the statement of Mr. Edwards to the jury and Mr. Edwards indicated that he often bought cocaine from the victim Mr. Andrews. Mr. Edwards stated that he was at Cecil Street and Baltimore Avenue purchasing cocaine from the victim Mr. Andrews and he saw a white car drive past. He noticed the car made a U-turn and stopped right by them and he began to run and Mr. Andrews got onto his bicycle but the chain malfunctioned. He stated that one of the three men pursuing them began to shoot and hit Mr. Andrews in the head. Mr. Edwards testified that he then ran towards the Kentucky Fried Chicken and jumped over the fence.

Mr. Edwards in his statement then identified . . . Tamir Turner from a photo array of eight black males as the man who shot Mr. Andrews. Mr. Edwards was then shown several other photo arrays and identified Aaron Jones and Hakeem Whitehead as individuals he recognized but was not certain they were part of the group of three men pursuing [Mr. Andrews]. Mr. Edwards testified that the shooting was about a dispute where a group of individuals told Mr. Andrews not to sell narcotics on Cecil Street. Mr. Edwards then identified Appellant . . . as the individual [who] he observed telling Mr. Andrews not to sell narcotics on Cecil Street.

Agent McGuffin testified that [on October 3, 2005,] he received a phone call from Mr. Edwards at approximately 9:30 p.m. He said Mr. Edwards told Agent McGuffin that "they were going to kill him." Agent McGuffin offered to have

Mr. Edwards picked up but Mr. Edwards said he would come to the police station himself. On October 3, 2005, Agent McGuffin reported for work and learned that Mr. Edwards had been murdered.

. . . .

Brother Brian Henderson testified for the Commonwealth and is the director of Saint Gabriel's Hall, a residential treatment facility for juvenile delinquent boys. Mr. Henderson testified that in the spring of 2005, he confiscated several letters from a resident named Philip Hummel. He indicated that he turned the letters over to police once he had opened them.

. . . .

Detective Donald Marano testified for the Commonwealth that he assisted in the investigation of a letter submitted by Brother Brian Henderson. The letters were identified by handwriting comparison as being from . . . Tamir Turner and were addressed to Philip Hummel. The letters indicated that . . . Turner believed somebody had told on him about the murder . . . [of] Mr. Andrews and he attached the statements of the cooperating witness.

Trial Court Opinion, 1/26/11 at unnumbered pages 2-6 (citations to record omitted). Trial Court Opinion, 1/26/11 at unnumbered pages 2-6 (citations to record omitted). Additionally, Albert Newsome described the following events, which occurred at approximately midnight on October 3, 2005, in the parking lot of a store in the 5700 block of Baltimore Avenue, Philadelphia. Appellant and Turner approached Mr. Edwards and held him in between them. Appellant told Mr. Newsome that he should not become involved in the matter. Mr. Newsome turned away, but he overheard Appellant tell Mr. Edwards that "it would come to this." N.T. Trial, 4/23/09, at 106-07. Then, Mr. Newsome heard a single gunshot. Mr. Newsome

turned around and saw Appellant and Turner dragging Mr. Edwards's body toward a parked car.

This proof was sufficient beyond a reasonable doubt to establish that Turner and Appellant entered into a conspiracy to shoot Mr. Edwards to prevent him from testifying against Turner as to the shooting of the rival drug dealer, Andrews. We conclude that Appellant's convictions of first degree murder, conspiracy, and retaliation against a witness therefore are not infirm. 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.

Pursuant to § 903, the Commonwealth must 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), *appeal granted on other grounds*, 2013 WL 2451355 (Pa. 2013). 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. **Id.** This Court has indicated that four factors are to be utilized "in deciding if a conspiracy existed. Those factors [are]: '(1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy.'" **Commonwealth v. Feliciano**, 2013 WL 1971946, 4 (Pa.Super. 2013) (quoting **Commonwealth v. Lambert**, 795 A.2d 1010, 1016 (Pa.Super. 2002)).

In the present case, the evidence establishes that Turner and Appellant entered a conspiracy to murder Mr. Edwards. The association between Turner and Appellant in Turner's drug enterprise was established by Appellant's statements to Andrews to cease his drug-related activities in the territory claimed by Turner. Further, Appellant and Turner acted in concert to kill Mr. Andrews, and Mr. Newsome overheard Appellant state to the victim that he had been warned that he would be harmed for aiding the police in connection with Andrews's murder. Hence, Appellant was present during and had knowledge of Mr. Edwards's murder. He also participated in Mr. Edwards's murder by holding Mr. Edwards before the shot and then dragging his body to the car. Since Appellant entered a conspiracy with Turner to murder Mr. Edwards to prevent him from being a witness against Turner, Appellant is criminally responsible for killing Mr. Edwards to prevent his testimony regardless of whether he or Turner fired the shot.

Commonwealth v. Smith, 2013 WL 1840358, 3 (Pa.Super. 2013) (“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.”). Thus, it is clear that Appellant’s convictions are not infirm.

Appellant also claims that the trial court erred in denying his motion to sever his trial from that of Turner. Initially, we observe, “The decision to grant or deny a motion for severance is committed to the sound discretion of the trial court, reversal of which is proper only in the event of an abuse of that discretion.” **Commonwealth v. Hetzel**, 822 A.2d 747, 763 (Pa.Super. 2003), *criticized on other grounds*, **Gillard v. AIG Insurance Co.**, 15 A.3d 44, 57 (Pa. 2011). Pennsylvania Rule of Criminal Procedure 582 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

(b) the offenses charged are based on the same act or transaction.

Pa.R.Crim.P. 582(A)(1)(a)- (b) However, where, as in the present case,

the crimes charged against each defendant arise out of the same facts and virtually all of the same evidence is applicable to both defendants, this Court, as well as the United States Supreme Court, have indicated a preference to encourage joint trials to conserve resources, promote judicial economy, and enhance fairness to the defendants:

It would impair both the efficiency and the fairness of the criminal justice system to require . . . that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability.

Commonwealth v. Travers, 564 Pa. 362, 768 A.2d 845, 847 (2001) (quoting ***Richardson [v. Marsh]***, 481 U.S. [200,] 210 [(1987)]). Given this preference, the burden is on defendants to show a real potential for prejudice rather than mere speculation. . . . “Separate trials of co-defendants should be granted only where the defenses of each are antagonistic to the point where such individual differences are irreconcilable and a joint trial would result in prejudice.” ***Commonwealth v. Lambert***, 529 Pa. 320, 603 A.2d 568, 573 (1992).

Commonwealth v. Rainey, 928 A.2d 215, 231-32 (Pa. 2007). ***Accord Commonwealth v. Serrano***, 61 A.3d 279, 285 (Pa.Super. 2013) (citation and quotation marks omitted) (“[I]t is well established that the law favors a joint trial when criminal conspiracy is charged.”).

In this case, Appellant does not suggest that his defense was antagonistic with that of Turner. Rather, he claims prejudice due to the admission of the letters that Turner wrote to Hummel. Those letters indicated that Turner was aware of the identity of the witness to Turner’s murder of Andrews. Even though the letters may not have been admissible against Appellant at a separate trial, Appellant’s knowledge that Mr. Edwards was cooperating with police was independently established by his statement

to Mr. Edwards when that victim was murdered that he had been warned he was going to be shot. Hence, the fact that those documents were introduced into evidence against Turner did not constitute the type of prejudice necessary to warrant severance.

Appellant also complains about the fact that Turner's prior bad act of murdering Andrews was introduced at trial. He suggests that such proof constituted improper prior bad act evidence prohibited under Pa.R.E. 404. That rule of evidence provides in pertinent part:

(b) Crimes, Wrongs or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

Pa.R.E. 404(b).

Thus, under subsection (b)(2), prior bad acts can be admitted "to demonstrate the defendant's motive for committing the crime charged." ***Commonwealth v. Collins***, 2013 WL 3270834, 5-6 (Pa.Super. 2013) (quoting ***Commonwealth v. Paddy***, 800 A.2d 294, 307 (Pa 2002)). The fact that Mr. Edwards witnessed Mr. Andrews's murder was the reason that

Turner and Appellant shot him. Hence, evidence of Andrews's murder by Turner was properly introduced at trial. Additionally, the evidence established that Appellant was a participant in Turner's drug operation and aided Turner in silencing Mr. Edwards. Thus, Turner's murder of Andrews also established Appellant's motive to kill Mr. Edwards. As Appellant's claims of prejudice are insufficient to overcome the preference for joint trials of co-actors in the same criminal episode, the trial court did not abuse its discretion in refusing to grant Appellant's request to sever his trial from that of Turner.

Appellant's final position is that the verdict is against the weight of the evidence. Initially, we note that it is unclear from the record that this issue was preserved during the trial court proceedings. The docket does not contain a notation of a filed post-sentence motion, and the sentencing transcript is not included in the record so we cannot ascertain if the position was raised orally at that proceeding. **See** Pa.R.Crim.P. 607 (weight-of-the-evidence claim must be preserved by written or oral motion during trial court proceedings).

Additionally, we have reviewed Appellant's 1925(b) statement, and the contention was not presented therein. Hence, it is waived for that reason. Pa.R.A.P. 1925(b)(4)(vii) ("Issue not included in the Statement and/or not raised in accordance with the provision of this paragraph (b)(4) are waived."); **Commonwealth v. Hill**, 16 A.3d 484, 494 (Pa. 2011) ("any

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issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule's terms").

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 8/13/2013