NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MARQUIS MOIE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 183 EDA 2012

Appeal from the Judgment of Sentence November 4, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0014038-2010;
CP-51-CR-0014050-2010

BEFORE: GANTMAN, J., ALLEN, J., and OTT, J.

MEMORANDUM BY GANTMAN, J.: **FILED MAY 02, 2013**

Appellant, Marquis Moie, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial convictions for two (2) counts of criminal conspiracy and one (1) count of robbery.[1] We affirm.

The relevant facts and procedural history of this appeal are as follows. On October 13, 2010, Angel Cruz and his wife, Isabel Castro, attended a family gathering on the 500 block of West Somerset Street in Philadelphia. At approximately 12:30 a.m. on October 14, 2010, Mr. Cruz and Ms. Castro prepared to depart the gathering. Mr. Cruz exited the residence and spotted

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[1] 18 Pa.C.S.A. §§ 903, 3701, respectively.

an acquaintance named "Javier" walking down the street. Mr. Cruz approached Javier and engaged him in a conversation. Ms. Castro exited the residence to start her vehicle, which she had parked across the street. After starting the vehicle, Ms. Castro reentered the residence to retrieve something.

At that point, a burgundy Buick drove slowly down the block, at approximately two miles per hour, and contained three people. The Buick pulled up at a stop sign at the end of the block, and Appellant's co-defendants, Todd Hall and Jonathan Moore, exited. Appellant, the driver, remained inside the Buick. Mr. Hall and Mr. Moore brandished firearms, approached Mr. Cruz and Javier, and warned the victims not to run. Mr. Moore pressed his firearm into Mr. Cruz's stomach and checked his pockets for valuables. Mr. Hall pointed his firearm at Javier and checked Javier's pockets. After about thirty seconds, Mr. Hall and Mr. Moore backed away, jumped into the Buick, and fled the scene.

Someone inside the residence informed Ms. Castro about the robbery, and she rushed to the front doorway. Ms. Castro saw her husband on the street and asked him who had committed the robbery. Mr. Cruz indicated that the robbers had fled in the Buick, which was still in sight. Ms. Castro immediately entered her vehicle and pursued the Buick. During the pursuit, Ms. Castro used her cell phone to call a 911 dispatcher. Ms. Castro informed the dispatcher of her location and provided a description of the Buick, its

occupants, and the license plate. As the vehicles approached the intersection of Sixth and Diamond Streets, Mr. Hall reached out and fired at Ms. Castro's vehicle. Ms. Castro ended the pursuit shortly thereafter, parked her vehicle, flagged down Police Officer Mark Cruz, and described the entire incident to him.

Within minutes, police discovered the Buick, which the perpetrators had abandoned on the 1700 block of North Fourth Street. Police Officer Thomas Anderosky received a call about the abandoned Buick over police radio and headed toward the scene. Approximately one-half block from the Buick, Officer Anderosky encountered Appellant and his co-defendants, who matched the description of the robbery suspects, and stopped them. Police Officer Daniel Martinez arrived as backup and held the three suspects while Officer Cruz transported Ms. Castro to the scene for identification. Ms. Castro identified Appellant and Mr. Hall. Officer Cruz and Ms. Castro then picked up Mr. Cruz and transported him to the scene. Mr. Cruz subsequently identified Mr. Hall and Mr. Moore as the gunmen from the robbery.

On November 17, 2010, the Commonwealth charged Appellant with multiple offenses at two separate docket numbers. Prior to trial, Mr. Moore's counsel moved to suppress the witnesses' pretrial identifications. Specifically, counsel argued as follows:

> Mr. Moore was held by the police and the victim was brought and he was identified on the street by the victim, the circumstances being in police custody, not being free

> to leave, the presence of police were highly suggestive in that identification.

(N.T. Hearing, 9/12/11, at 3). Appellant's and Mr. Hall's counsel joined the motion. On September 13, 2011, the court conducted a suppression hearing and denied relief.

Following a joint trial, a jury found Appellant guilty of two counts of conspiracy and one count of robbery. On November 4, 2011, the court sentenced Appellant to an aggregate term of twelve (12) to twenty-four (24) years' imprisonment. Appellant timely filed a motion for reconsideration of sentence on November 14, 2011. In it, Appellant stated, "[Appellant] is respectfully requesting that Your Honor reconsider this sentence for various reasons which will be set forth in further detail by new counsel at a hearing."[2] (Post-Sentence Motion, filed 11/14/11, at 2). Appellant did not subsequently file a supplemental post-sentence motion providing a more specific challenge to the sentence, and the court did not conduct a hearing on the matter. On December 2, 2011, the court denied Appellant's post-sentence motion.

Appellant timely filed a notice of appeal on December 20, 2011. On February 2, 2012, the court ordered Appellant to file a concise statement of

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[2] Trial counsel filed the post-sentence motion on Appellant's behalf, but played no further part in Appellant's representation. New counsel entered his appearance on November 8, 2011, but did not amend the post-sentence motion.

errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on February 23, 2012.

Appellant raises five issues for our review:

> WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S POST-SENTENCE MOTIONS IN THAT THE SENTENCE IMPOSED WAS HARSH AND UNREASONABLE.
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> WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.
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> WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT RELIEF BECAUSE THE VERDICT WAS CONTRARY TO LAW ON THE CHARGES OF ROBBERY AND TWO COUNTS OF CRIMINAL CONSPIRACY (ROBBERY AND AGGRAVATED ASSAULT).
>
> WHETHER THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION.
>
> WHETHER THE TRIAL COURT IMPROPERLY CHARGED THE JURY ON MERE PRESENCE.

(Appellant's Brief at 5).

In his first issue, Appellant asserts the Commonwealth offered him a plea deal with an aggregate sentence of five (5) to ten (10) years' imprisonment. Appellant contends the court imposed a longer aggregate sentence following trial as a punishment for passing up the plea deal. Moreover, Appellant emphasizes that he merely drove the car during the criminal episode, and the jury found him not guilty of certain firearms offenses. Appellant concludes the sentence imposed is manifestly excessive and constitutes too severe a punishment. Appellant's challenge is to the

discretionary aspects of his sentence. ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

> [W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** 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. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted). Objections to the discretionary aspects of a sentence are generally waived if they are not raised at the sentencing hearing or raised in a motion to modify the sentence imposed at that hearing. ***Commonwealth v. Mann***, 820 A.2d 788 (Pa.Super. 2003), *appeal denied*, 574 Pa. 759, 831 A.2d 599 (2003).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing

Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases." ***Commonwealth v. Phillips***, 946 A.2d 103, 112 (Pa.Super. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 2450, 174 L.Ed.2d 240 (2009) (emphasis in original) (internal quotation marks omitted).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Sierra, supra*** at 912-13. A claim that a sentence is manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627.

Instantly, Appellant's post-sentence motion did not include any of the

allegations set forth in the Rule 2119(f) statement. Appellant also failed to raise these arguments at the sentencing hearing. Instead, Appellant asserts the claims for the first time on appeal. Thus, the claims are waived. ***See Mann, supra***.

In his second and third issues, Appellant avers the police did not discover car keys on his person at the time of arrest. Appellant contends a subsequent investigation revealed that the Buick was not registered in his name, and the police did not recover his fingerprints from the Buick or the firearms found in and around the vehicle. Appellant maintains the Commonwealth failed to offer any evidence of an association or shared criminal intent among the co-defendants. Appellant emphasizes that the Commonwealth failed to present evidence showing that the co-defendants even knew each other. Absent more, Appellant argues the evidence did not support his convictions.

Appellant further argues Ms. Castro's testimony identifying Appellant as the driver of the Buick was incredible. Appellant claims Ms. Castro saw the driver as the Buick proceeded down the block for approximately five seconds, from a distance of fifteen feet, at 12:30 a.m. Moreover, Appellant insists the driver wore a hoody, slouched in his seat, and kept his left hand in front of his face. Under these circumstances, Appellant reasons Ms. Castro could not have positively identified the driver with any reliability. Appellant concludes the Commonwealth presented insufficient evidence to

support his convictions, and the convictions are against the weight of the evidence. We disagree.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

> 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 [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.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, 613 Pa. 642, 32 A.3d 1275 (2011) (quoting ***Commonwealth v. Jones***, 874 A.2d 108, 120-21 (Pa.Super. 2005)).

The following principles apply to our review of a weight of the evidence claim:

> 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. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the…verdict if it is so contrary to the evidence as to shock one's sense of justice.
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> ***Commonwealth v. Small***, 559 Pa. 423, [435,] 741 A.2d 666, 672-73 (1999). Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003), *cert. denied*, 542 U.S. 939, 124 S.Ct. 2906, 159 L.Ed.2d 816 (2004) (most internal citations omitted).

The Crimes Code defines the offense of conspiracy as follows:

> **§ 903. Criminal conspiracy**
>
> **(a) Definition of conspiracy.—**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.

18 Pa.C.S.A. § 903(a).

> To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared

> criminal intent and (3) an overt act was done in furtherance of the conspiracy.

Commonwealth v. Hennigan, 753 A.2d 245, 253 (Pa.Super. 2000) (quoting ***Commonwealth v. Rios***, 546 Pa. 271, 283, 684 A.2d 1025, 1030 (1996), *cert. denied*, 520 U.S. 1231, 117 S.Ct. 1825, 137 L.Ed.2d 1032 (1997)).

> 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.

Commonwealth v. McCall, 911 A.2d 992, 996 (Pa.Super. 2006) (quoting ***Commonwealth v. Johnson***, 719 A.2d 778, 784-85 (Pa.Super. 1998) (*en banc*), *appeal denied*, 559 Pa. 689, 739 A.2d 1056 (1999)).

> Circumstantial evidence may provide proof of the conspiracy. The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. Additionally:
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> > An agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

Jones, supra at 121-22 (internal citations and quotation marks omitted).

Additionally, Section 3701 provides:

> **§ 3701. Robbery**
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> **(a) Offense defined.—**
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> (1) A person is guilty of robbery if, in the course of committing a theft, he:
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> * * *
>
> (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
>
> * * *

18 Pa.C.S.A. § 3701(a)(1)(ii).

A person may be convicted as an accomplice if: (1) there is evidence the defendant intended to aid or promote the commission of the underlying offense; and (2) the defendant actively participated in the crime by soliciting, aiding, or agreeing to help the principal. 18 Pa.C.S.A. § 306; ***Commonwealth v. Brewer***, 876 A.2d 1029 (Pa.Super. 2005), *appeal denied*, 585 Pa. 685, 887 A.2d 1239 (2005). "While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene." ***Id.*** at 1033 (quoting ***Commonwealth v. Murphy***, 577 Pa. 275, 286, 844 A.2d 1228, 1234 (2004)). "There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so."

Brewer, supra at 1033 (quoting ***Murphy, supra*** at 286, 844 A.2d at 1234).

Instantly, Ms. Castro first noticed Appellant and the Buick when she exited her relative's home to start her own vehicle. Ms. Castro observed the Buick travelling down the block at a remarkably slow speed. Ms. Castro looked inside the vehicle and saw the faces of the driver, whom she identified at trial as Appellant, and the front seat passenger, whom she identified as Mr. Hall. (***See*** N.T. Trial, 9/14/11, at 112.) Ms. Castro could not see whether the vehicle contained additional passengers.

When Appellant pulled the Buick over, Mr. Hall and Mr. Moore exited. Mr. Hall and Mr. Moore brandished firearms, warning Mr. Cruz and his friend not to run away. After searching the victims' pockets, Mr. Hall and Mr. Moore reentered the Buick. Serving as the getaway driver, Appellant quickly whisked the perpetrators away from the scene. Ms. Castro pursued the perpetrators in her vehicle. During the pursuit, Appellant proceeded through red lights and tried to evade Ms. Castro. Ms. Castro also described how Appellant's driving enabled Mr. Hall to fire the shots at her vehicle:

> I remember them slowing down their car, the brake lights came on. So at this particular moment I threw my brakes on. At that particular time there's a…little street that goes down. At that time I [saw] the car like turn over a little and that's when I [saw] the gentleman fire at me.

Police stopped the perpetrators minutes later. Ms. Castro arrived at the

scene shortly and positively identified Appellant as the driver. (***Id.*** at 120-27).

Here, the evidence demonstrated that Appellant acted in concert with others to rob Mr. Cruz, and to fire at Ms. Castro during the flight from the scene. Appellant served as the getaway driver, maneuvering the vehicle in a manner to allow Mr. Hall to open fire at Ms. Castro. These facts supported the jury's conclusion that Appellant intended to aid in the crimes and was an active participant. ***See Brewer, supra***. The coalescence of the circumstantial evidence established a conspiratorial agreement beyond a reasonable doubt. ***See Jones, supra***. Viewed in the light most favorable to the Commonwealth as verdict winner, sufficient evidence supported the verdict. ***See Hansley, supra***. To the extent Appellant also argues that Ms. Castro's identification was unreliable, the trial court concluded the jury's verdict was not contrary to the weight of the evidence. (***See*** Trial Court Opinion at 15.) Based upon the foregoing, we see no abuse of discretion in the court's decision to deny relief on Appellant's weight claim. ***See Champney, supra***. Therefore, Appellant is not entitled to relief for his second and third issues.

In his fourth issue, Appellant asserts Ms. Castro did not have an adequate opportunity to view the driver of the Buick on the night in question. Appellant maintains the driver covered his face with a hoody and his hand, and Ms. Castro saw the driver for approximately five seconds, from

a distance of fifteen feet, after dark. Appellant insists no one could provide an accurate identification under those conditions, and Ms. Castro's identification is unreliable. Appellant also argues that the witnesses' positive identifications resulted from the unduly suggestive procedures utilized by the police. Appellant emphasizes that police forced him to stand in a lineup in front of a police vehicle, while additional officers and vehicles surrounded him. Appellant complains, "Almost anyone in that situation would have identified at least one person because most people would infer that the people in the lineup must have committed the crime, or else police would not have stopped them." (Appellant's Brief at 29). Appellant concludes that, under the totality of the circumstances, the witnesses' identifications were unreliable and should have been suppressed. We disagree.

We review the denial of a suppression motion as follows:

> Our 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.
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> > [W]e 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 findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Williams, 941 A.2d 14, 26-27 (Pa.Super. 2008) (*en banc*) (internal citations and quotation marks omitted).

"When analyzing the admission of identification evidence, a suppression court must determine whether the challenged identification has sufficient *indicia* of reliability." ***Commonwealth v. Sanders***, 42 A.3d 325, 330 (Pa.Super. 2012) (internal citation and quotation marks omitted). "This question is examined by focusing on the totality of the circumstances surrounding the identification." ***Id.***

"The purpose of a 'one-on-one' identification is to enhance reliability by reducing the time elapsed after the commission of the crime." ***Commonwealth v. Wade***, 33 A.3d 108, 114 (Pa.Super. 2011), *appeal denied*, ___ Pa. ___, 51 A.3d 839 (2012) (quoting ***Commonwealth v. Moye***, 836 A.2d 973, 976 (Pa.Super. 2003), *appeal denied*, 578 Pa. 694, 851 A.2d 142 (2004)).

> Suggestiveness in the identification process is but one factor to be considered in determining the admissibility of such evidence and will not warrant exclusion absent other factors. As this Court has explained, the following factors are to be considered in determining the propriety of admitting identification evidence: the opportunity of the witness to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the perpetrator, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation. The corrupting effect of the suggestive identification, if any, must be weighed against these factors. Absent some special element of unfairness, a prompt "one-on-one" identification is not so suggestive as to give rise to an irreparable likelihood of misidentification.

Wade, supra at 114 (quoting ***Moye, supra*** at 976) (internal citations and quotation marks omitted).

Instantly, the trial court described the circumstances surrounding the identifications as follows:

> At Appellant's pretrial suppression hearing, the evidence established that on October 14, 2010, at approximately 12:30 a.m., police radio broadcast flash information concerning [a] robbery. At approximately 12:45 a.m., police had apprehended Appellant and his cohorts on the 1700 block of North 3rd Street. Within two minutes, Officer Cruz transported Ms. Castro to that location, where she positively identified Appellant and Co-Defendant Hall. Neither male was handcuffed at the time and no guns were drawn. Officer Cruz then transported Ms. Castro to the scene of the robbery to pick up her husband, Mr. Cruz. Officer Cruz instructed Ms. Castro and Mr. Cruz not to speak to each other. Both Ms. Castro and Mr. Cruz specifically testified that they complied with the officer's instructions and did not speak with one another about the crime or their identifications. Mr. Cruz was then transported to the scene, where he positively identified Co-Defendants Hall and Moore. There were multiple police officers and vehicles at the location, which was well lit due to additional commercial lighting from an adjacent factory. Both sets of identifications occurred within twenty (20) minutes of the initial crime.
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> * * *
>
> Based on the totality of the circumstances, [the suppression court] found that the identifications were not unduly suggestive. Indeed, the evidence reflected a standard operating procedure for an on-the-scene identification.

(***See*** Trial Court Opinion at 19, 20-21.) Because multiple police officers and vehicles were necessary to locate and stop the three suspects, this factor alone was not dispositive in determining suggestiveness. (***Id.*** at 20). The record supports the court's decision that, under the totality of these circumstances, the police did not employ a suggestive identification

procedure, and the witnesses provided reliable identifications. ***See Wade, supra***. ***See also Moye, supra*** (rejecting defendant's arguments that identification process was unduly suggestive or created likelihood of misidentification just because (a) he was displayed to victims in handcuffs and alone in police cruiser, (b) victims identified defendant in each other's presence, and (c) defendant's identification was influenced by off-hand remarks). Thus, Appellant is not entitled to relief on his fourth claim.

In his fifth issue, Appellant contends the jury submitted a question during deliberations regarding accomplice liability. In light of the jury's question, Appellant asserts the court should have provided a "mere presence" instruction. Appellant acknowledges the court's subsequent instruction to the jury mentioned the concept of "mere presence," but Appellant insists the instruction was inadequate. Specifically, Appellant complains the court did not inform the jury that it must find a defendant guilty beyond a reasonable doubt. Appellant concludes he is entitled to a new trial on this basis. We disagree.

The trial court is not required "to instruct the jury pursuant to every request made to the court." ***Commonwealth v. Newman***, 555 A.2d 151, 158-59 (Pa.Super. 1989), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995). In reviewing a court's decision to deny a requested jury instruction, "we must determine whether the court abused its discretion or committed an error of law." ***Commonwealth v. DeMarco***, 570 Pa. 263, 271, 809 A.2d

256, 260-61 (2002).

A jury charge is erroneous only if the charge as a whole is inadequate, unclear or has a tendency to mislead or confuse, rather than clarify, a material issue. ***Commonwealth v. Baker***, 963 A.2d 495 (Pa.Super. 2008), *appeal denied*, 606 Pa. 644, 992 A.2d 885 (2010). "Jury instructions must be supported by the evidence of record as instructions regarding matters that are not before the court serve no purpose but to confuse the jury." ***Commonwealth v. Bruce***, 717 A.2d 1033, 1037 (Pa.Super. 1998), *appeal denied*, 568 Pa. 643, 794 A.2d 359 (1999).

Further, "The law is clear that a defendant cannot be convicted of a crime where the only evidence to connect him with the crime is 'mere presence' at or near the scene." ***Commonwealth v. La***, 640 A.2d 1336, 1344 (Pa.Super. 1994), *appeal denied*, 540 Pa. 597, 655 A.2d 986 (1994).

> The converse is that something more than "mere presence" at the scene of the crime must be shown to convict one of the participants in the commission of the crime. It does not follow, as a corollary of this rule, that the jury must be instructed in every case that "mere presence" is insufficient to convict. Where a jury is fully and adequately instructed on the elements of a crime, and where it appears that a charge on "mere presence" is not essential to their understanding of the case, the trial court may refuse to issue a specific instruction on mere presence.

Id. (internal citations omitted).

Instantly, the jury submitted the following question to the court during deliberations: "Do all three defendants get charged with assault together if

we think one is guilty?" (***See*** N.T. Trial, 9/19/11, at 4). The court discussed the matter with the parties, at which point Appellant requested a "mere presence" instruction. The court denied the request, electing instead to re-instruct the jury on the definitions of conspiracy and accomplice liability. Significantly, the court stated:

> [Y]ou may, if you think it proper, infer that there was a conspiracy from the relationship, the conduct, the acts of the defendants and their alleged co-conspirators, and the circumstances surrounding their activities. However, this evidence must support your conclusion beyond a reasonable doubt.
>
> And, finally, a defendant cannot be convicted because he was present with others or even because he knew what the others planned or were doing. There must be proof of an agreement between the defendant and the other people or persons to form or continue a conspiracy.
>
> * * *
>
> It's important for you to understand that a person is not an accomplice merely because he is present when a crime is committed or knows that a crime is being committed. A person who is an accomplice will be responsible for a crime if and only if the person, meaning the defendant, before the other person commits the crime either stops his own efforts to promote or facilitate the commission of the crime and either wholly deprives his previous efforts and effectiveness in the commission of the crime, or gives timely warning to law enforcement authorities, or otherwise makes a proper effort to prevent the commission of the crime.

(***Id.*** at 14, 16).

Contrary to Appellant's argument, the court instructed the jury on the "beyond a reasonable doubt" standard. Further, the charge was accurate,

supported by the record, and not misleading or confusing. ***See Baker, supra***. Thus, we see no abuse of discretion in the court's decision to deny Appellant's request for a separate charge on the concept of "mere presence." ***See DeMarco, supra***; ***Newman, supra***. Accordingly, we affirm.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/2/2013