NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KELVIN JARLEE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1926 EDA 2011

Appeal from the Judgment of Sentence Entered June 22, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003781-2010

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY BENDER, J.: Filed: January 24, 2013

Appellant, Kelvin Jarlee, appeals from the judgment of sentence of six to twenty-three months' incarceration, followed by six years' probation, imposed after he was convicted of burglary, receiving stolen property (RSP), conspiracy, criminal trespass, theft by unlawful taking, and criminal mischief. Appellant challenges the sufficiency of the evidence to sustain his convictions. We affirm.

Appellant was convicted on November 18, 2010, following a non-jury trial, of the above-stated offenses based on his participation in the burglary of Abu Abdo's Philadelphia home. He was sentenced on June 22, 2011, to six to twenty-three months' imprisonment and six years' probation.

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* Retired Senior Judge assigned to the Superior Court.

Appellant filed a timely appeal, as well as a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). In his Rule 1925(b) statement, Appellant presented, *inter alia*, the following challenge to the sufficiency of the evidence:

> (a) The trial court erred when it found that the evidence was sufficient to support the conviction of burglary, criminal conspiracy, receiving stolen property, criminal trespass, theft by unlawful taking and criminal mischief. The evidence failed to establish that the defendant was guilty beyond a reasonable doubt of any of the above stated charges.

Pa.R.A.P. 1925(b) Statement, 10/31/11, at 1 (unnumbered pages). Now, on appeal, Appellant states his sufficiency issue as follows:

> 1. Was not the evidence insufficient to convict appellant of burglary, criminal conspiracy, receiving stolen property, criminal trespass, theft by unlawful taking and criminal mischief where the Commonwealth did not prove beyond a reasonable doubt that [A]ppellant acted in [a] conspiracy to commit these charged offenses[?]

Appellant's Brief at 3.

We are compelled to conclude that Appellant's Rule 1925(b) statement, and the phrasing of his issue in his appellate brief, waive his challenge to the sufficiency of the evidence.

> In … ***Commonwealth v. Williams***, 959 A.2d 1252 (Pa. Super. 2008), this Court reiterated that when challenging the sufficiency of the evidence on appeal, the [a]ppellant's 1925 statement must "specify the element or elements upon which the evidence was insufficient" in order to preserve the issue for appeal. ***Williams***, 959 A.2d at 1257 (quoting ***Commonwealth v. Flores***, 921 A.2d 517, 522–23 (Pa. Super. 2007)). Such specificity is of particular importance in cases where, as here, the [a]ppellant was convicted of multiple crimes each of which

> contains numerous elements that the Commonwealth must prove beyond a reasonable doubt. ***Id.,*** at 1258 n. 9. Here, [the] [a]ppellant not only failed to specify which elements he was challenging in his 1925 statement, he also failed to specify which convictions he was challenging. While the trial court did address the topic of sufficiency in its opinion, we have held that this is "of no moment to our analysis because we apply Pa.R.A.P.1925(b) in a predictable, uniform fashion, not in a selective manner dependent on an appellee's argument or a trial court's choice to address an unpreserved claim." ***Id.*** at 1257 (quoting ***Flores*** at 522–23).

Commonwealth v. Garang, 9 A.3d 237, 244 (Pa. Super. 2010) (quoting ***Commonwealth v. Gibbs***, 981 A.2d 274, 281 (Pa. Super. 2009), *appeal denied*, 3 A.3d 670 (Pa. 2010)).

Based on our reasoning in ***Flores***, which was reiterated in ***Williams***, ***Garang***, and ***Gibbs***, we are compelled to conclude that Appellant's Rule 1925(b) statement is inadequate to preserve his sufficiency of the evidence claim. Appellant was convicted of six different offenses, each with multiple elements, yet his Rule 1925(b) statement does not specify which element(s) of his convictions the Commonwealth failed to prove. Instead, he merely lists each of the offenses of which he was convicted, and states, in boilerplate fashion, that the Commonwealth failed to prove his guilt beyond a reasonable doubt. Moreover, to compound the inadequacy of his Rule 1925(b) statement, in his brief to this Court, Appellant alters his sufficiency issue by claiming that the Commonwealth failed to prove the conspiracy charge, rendering the evidence insufficient to support his other convictions. Because this assertion was not specifically set forth in his Rule 1925(b) statement, and still fails to indicate which *precise element* of the crime of

conspiracy the Commonwealth failed to establish, we conclude that Appellant's sufficiency challenge is waived on this basis, as well. ***See*** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.").

Nevertheless, even if Appellant had properly preserved the argument he raises herein, *i.e.* that the Commonwealth did not prove the elements of criminal conspiracy, we would conclude that this issue is meritless. In ***Commonwealth v. Troy***, 832 A.2d 1089 (Pa. Super. 2003), we explained:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all 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 the witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Id. at 1092 (citations omitted).

This Court has discussed the elements the Commonwealth must prove to convict a person of criminal conspiracy as follows:

> 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. "This overt act need not be committed by the defendant; it need only be committed by a co-conspirator."
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> As our Court has further explained with respect to the agreement element of conspiracy:
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> 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. The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. 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.

Commonwealth v. McCall, 911 A.2d 992, 996-97 (Pa. Super. 2006) (citations omitted).

Here, at Appellant's non-jury trial, the Commonwealth presented the following evidence to demonstrate Appellant's participation in a conspiracy. First, the Commonwealth called to the stand the homeowner, Mr. Abdo, who testified that he lived at 1920 South 69th Street in Philadelphia on September 18, 2009. N.T. Trial, 11/18/10, at 8. At around 11:00 a.m. that day, as Mr. Abdo and his live-in girlfriend were getting ready to go shopping,

Appellant knocked on Mr. Abdo's door and asked for "James." ***Id.*** at 8-9. Mr. Abdo told Appellant that no one by that name lived there. ***Id.*** at 9. Appellant turned and relayed this information to a group of five or six young men standing on Mr. Abdo's lawn. ***Id.*** at 9-10. When Mr. Abdo left his home a short time later, Appellant and the other young men were still standing outside his residence. ***Id.*** at 12-13.

Mr. Abdo testified that while he was out shopping at about 1:00 p.m., he received a call informing him that his home had been burglarized. ***Id.*** at 13, 15. When he returned to his residence, he found police officers at the scene and his home "torn up," with items scattered about and doors and windows broken. ***Id.*** at 13-15. Additionally, Mr. Adbo testified that jewelry, clothing, two televisions, two laptop computers, and several DVD players were missing. ***Id.*** at 17-18, 29-30. The day after his home was burglarized, Mr. Abdo identified Appellant from a photographic array as the person who knocked on his door shortly before the break-in. ***Id.*** at 23, 25.

Next, the Commonwealth called Philadelphia Police Officer Morris Lopez to testify. Officer Lopez stated that at approximately 1:20 p.m. on September 18, 2009, he and his partner responded to a report that a group of young men were carrying two televisions in the 1700 block of Avondale Street, which is approximately five blocks away from Mr. Abdo's residence. ***Id.*** at 43, 49. When the officers arrived at that location, they "observed a group of males scatter from where these televisions and [other] items were placed behind 1725 Avondale [Street]." ***Id.*** at 44. It was later discovered

that Appellant resided at that address. ***Id.*** at 54. Officer Lopez testified there were approximately six or seven young men in the group, and several of them were wearing Bartram High School uniforms. ***Id.*** at 44-45. Officer Lopez and other responding officers were able to apprehend three of the young men at the scene, but Appellant was not one of the suspects arrested that day. ***Id.*** at 45-46, 48.

Officer Lopez testified that the items discovered behind the home at 1725 Avondale Street included two televisions and several laptop computers. ***Id.*** at 46. Two backpacks were also found at the scene, one of which contained a laptop computer and another which contained jewelry. ***Id.*** at 47. Inside one of those backpacks, officers also discovered a notebook and schoolwork bearing Appellant's name. ***Id.*** Mr. Abdo later identified the televisions, laptops, and jewelry as belonging to him. ***Id.*** at 26. Additionally, Officer Lopez testified that one of the three young men arrested at the scene that day was found in possession of a bill with Mr. Abdo's address on it. ***Id.*** at 48.

After Officer Lopez testified, the Commonwealth rested. Appellant then called Aritha Jarlee, Appellant's mother, to the stand. Ms. Jarlee testified that she lived at 1725 Avondale Street with Appellant. ***Id.*** at 61. She stated that at approximately 9:00 a.m. on September 18, 2009, she drove Appellant to school at Bartram High School. ***Id.*** at 63-64. Ms. Jarlee further testified that she talked to Appellant later that day, around 3:00 p.m., and he told her he was in school. ***Id.*** at 63-64, 75.

We conclude that evidence presented by the Commonwealth proved, beyond a reasonable doubt, that Appellant participated in a conspiracy to burglarize Mr. Abdo's home. Appellant was identified by Mr. Abdo as the person who knocked on his door shortly before his home was broken into. Mr. Abdo stated that Appellant was with a group of young men, and when Mr. Abdo left his home to go shopping, Appellant and his cohorts were still standing outside. A short time later, Officer Lopez observed a group of young men in possession of items later identified as belonging to Mr. Abdo. Those young men were standing behind the home where Appellant lived, which was five blocks away from Mr. Abdo's residence. While Appellant was not apprehended that day, officers recovered a backpack from the scene which contained Mr. Abdo's property, as well as a notebook and schoolwork bearing Appellant's name. This evidence, albeit circumstantial, adequately demonstrated that Appellant and his cohorts entered into an agreement to burglarize Mr. Abdo's home, and that they carried out that plan.

We note that despite this evidence, Appellant argues that his mother's testimony established that he was in school on the day of the burglary. However, the trial court was free to disbelieve Ms. Jarlee's claims. ***Troy***, 832 A.2d at 1092. Moreover, Ms. Jarlee merely stated that she took Appellant to school at 9 a.m. and spoke to him at 3 p.m., at which time he told her he was in school. This testimony hardly proves Appellant's whereabouts between 11 a.m. and 1:30 p.m., when Mr. Abdo's home was burglarized. Additionally, Appellant contends that Mr. Abdo varied in his

identification of the person who knocked on his door, which should call into question his credibility. Our review of the record indicates that any inconsistencies in Mr. Abdo's identification of Appellant were minor. Therefore, Appellant's arguments attacking the sufficiency of the evidence to sustain his conspiracy conviction are unconvincing, and even had he preserved this issue for our review, we would conclude that it is meritless.

Judgment of sentence affirmed.

Judge Colville concurs in the result.