J-S72004-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GABRIEL MORAN,	:	
	:	
Appellant	:	No. 1935 MDA 2012

Appeal from the Judgment of Sentence May 10, 2012,
Court of Common Pleas, Bradford County,
Criminal Division at No. CP-08-CR-0000732-2011

BEFORE: DONOHUE, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED DECEMBER 23, 2013**

Gabriel Moran ("Moran") appeals from the May 10, 2012 judgment of sentence entered by the Court of Common Pleas, Bradford County, following his conviction of one count each of burglary, criminal trespass, theft by unlawful taking, and criminal mischief.[1] Upon review, we affirm.

Pennsylvania State Police arrested Moran for two burglaries that occurred on May 5, 2011 at Wagner's Convenience Store ("Wagner's") and July 30 or 31, 2011 at the Warren Center Municipal Building ("the Municipal Building"), respectively. On February 14, 2012, Moran filed a motion *in limine* seeking to sever the charges relating to the two burglaries, which the trial court denied on March 19, 2012.

[1] 18 Pa.C.S.A. §§ 3502(a)(4), 3503(a)(1)(ii), 3921(a), 3304(a)(5).

A jury trial ensued on March 20, 2012. Moran's ex-girlfriend, Whitney Cranmer, testified that Moran admitted to committing the Wagner's burglary and showed her the items he stole. Duston Brown ("Brown"), a friend of Moran's brother, was called by the Commonwealth to testify about the Municipal Building burglary. Although he had given a statement to police and testified at the preliminary hearing indicating that Moran told him he took a golf cart and money from the Municipal Building and that Moran had spray painted items inside of the building, Brown denied this during his testimony, stating instead that he had heard that information from someone else, but not Moran. Brown explained that he changed his story because he initially felt "pressured into" giving the statement and providing the preliminary hearing testimony that he did. N.T., 3/20/12, at 113.

After a one-day trial, a jury convicted Moran of the charges related to the Municipal Building burglary and acquitted him of all charges related to the burglary of Wagner's. On May 10, 2012, the trial court sentenced him to one to three years of incarceration.

On May 18, 2012, Moran filed a post-sentence motion challenging the sufficiency of the evidence to convict him, seeking a motion for a new trial based upon after-discovered evidence (in the form of a letter signed by Brown), and claiming trial court error for failing to sever the charges related to the two separate burglaries. The trial court held a hearing on the motion on August 3, 2012. In the letter and at that hearing, Brown testified as he

did at trial – that he felt "pressured into" saying what he did when he spoke to police and testified at the preliminary hearing. N.T., 8/3/12, at 3; Defense Exhibit, 8/3/12. He said that when he testified at the preliminary hearing, he said "what they wanted to hear," but that he testified to "the truth" and to "what actually happened" when he testified at trial. N.T., 8/3/12, at 3, 6; Defense Exhibit, 8/3/12. By order filed on October 30, 2012, the trial court denied Moran's post-sentence motion.[2]

This timely appeal follows, wherein Moran raises three issues for our review:

> I. Did the trial court err in denying the motion for dismissal because the evidence presented at trial was insufficient to support conviction?
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> II. Did the trial court commit reversible error by failing to grant [Moran's] motion for a new trial based upon after-discovered evidence?
>
> III. Did the trial court err in denying the motion for severance of the cases?

Moran's Brief at 3.

In his first issue on appeal, Moran purports to challenge the sufficiency of the evidence to support his convictions. All of the arguments raised, however, challenge the weight of the evidence, *i.e.*, that Brown's testimony was the only evidence tying him to the burglary of the Municipal Building

[2] In the certified record on appeal, we were provided with only an excerpt of the post-sentence motion proceeding relating to Brown's testimony. The certified record contains no further information regarding the arguments raised in support of the other issues raised in the post-sentence motion.

and his testimony was not worthy of belief. ***Id.*** at 9; ***see Commonwealth v. Bowen***, 55 A.3d 1254, 1262 (Pa. Super. 2012), *appeal denied*, __ Pa. __, 64 A.2d 630 (2013) (credibility determinations go to the weight, not the sufficiency of the evidence). As the arguments raised in support of this issue on appeal mirror those raised in his post-sentence motion, and the trial court tangentially addressed the weight claim in its 1925(a) opinion, we find his weight claim was properly preserved, and thus can address it on its merits. ***See*** Pa.R.Crim.P. 607(A); ***Commonwealth v. Griffin***, 65 A.3d 932, 938 (Pa. Super. 2013) (failure to raise a weight of the evidence claim before the trial court results in waiver on appeal), *appeal denied*, __ Pa. __, 76 A.3d 538 (2013).

When considering a challenge to the weight of the evidence, we are mindful of the following:

> The weight given to trial evidence is a choice for the fact[-]finder. If the fact[-]finder returns a guilty verdict, and if a criminal defendant then files a motion for a new trial on the basis that the verdict was against the weight of the evidence, a trial court is not to grant relief unless the verdict is so contrary to the evidence as to shock one's sense of justice.
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> * * *
>
> When a trial court denies a weight-of-the-evidence motion, and when an appellant then appeals that ruling to this Court, our review is limited. It is important to understand we do not reach the underlying question of whether the verdict was, in fact, against the weight of the evidence. We do not decide how we would have ruled on the motion and then simply replace our own judgment for that of the

> trial court. Instead, this Court determines whether the trial court abused its discretion in reaching whatever decision it made on the motion, whether or not that decision is the one we might have made in the first instance.

Commonwealth v. Stays, 70 A.3d 1256, 1267-68 (Pa. Super. 2013) (internal citations omitted).

In support of his argument, Moran asserts that the only evidence linking him to the burglary of the Municipal Building was Brown's testimony, which was not worthy of belief. Moran's Brief at 9. Moran states that because Brown's testimony was not consistent with statements he previously made to the police and provided conflicting testimony at trial, "[t]he jury could only convict if they wholly disregarded the problems with Brown's credibility." ***Id.*** According to Brown, because the jury "disregard[ed] evidence, it [was] an abuse of the trial court's discretion in not finding the verdict against the weight of the evidence." ***Id.*** (citing ***Commonwealth v. Coyle***, 154 A.2d 412 (Pa. Super. 1959) and ***Commonwealth v. Murray***, 597 A.2d 111 (Pa. Super. 1991)).

The trial court acknowledged that Brown gave testimony that contradicted his prior statement to police that Moran admitted taking the golf cart from the Municipal Building. Nevertheless, because the jury was informed of his prior statement, it found the jury was "free to conclude that [Moran] had confessed to the crimes and that his confession was truthful." Trial Court Opinion, 2/26/13, at 2. We agree.

It is not uncommon for a witness who previously gave a statement to police implicating a person as the perpetrator of a crime to later recant when testifying. ***See, e.g., Stays***, 70 A.2d at 1260 (witness who had previously given detailed information identifying the defendant as the shooter, provided "vastly different" testimony, wherein he denied that he knew the defendant, that he had seen anyone at the time of the shooting, or that he previously identified the defendant in a photo array). This does not render a conviction against the weight of the evidence. ***See id.*** at 1268 (stating that the jury was free to believe the witness' original statement to police was truthful, notwithstanding his attempt to recant while testifying).

This is a far different situation than was present in ***Coyle***. In that case, the defendant was on trial for bastardy. In convicting the defendant, the jury ignored unchallenged expert testimony from a pathologist that blood tests "excluded the defendant as a possible father of the child," which, according to both medical and legal authorities, made it "biologically impossible" for the defendant to be the child's father. ***Coyle***, 154 A.2d at 413. Despite this uncontested evidence from a witness whose credibility was not questioned, the jury convicted the defendant, and the trial court denied the defendant's request for a new trial. On appeal, this Court reversed, finding: "It is our opinion that the jury capriciously disregarded the undisputed evidence of the blood grouping tests in this case, and that the verdict is clearly against the weight of the evidence. The court below,

therefore, abused its discretion in failing to grant the defendant a new trial." ***Id.*** at 416.

In the case at bar, Brown's trial testimony that Moran never admitted his involvement in the burglary was not unchallenged. Rather, Brown challenged his own credibility by testifying differently from his prior statement to the police. The jury, which was aware that Brown previously told police that Moran admitted that he stole the golf cart and money from the Municipal Building, was free to disregard Brown's attempt at recantation and find his statement to police was more worthy of belief. We therefore find no abuse of discretion in the trial court's denial of his weight of the evidence claim.

As his second issue on appeal, Moran argues that the trial court erred by denying his request for a new trial based upon after-discovered evidence. Moran's Brief at 10. After trial concluded, Moran states that he received a letter from Brown in which he "repeatedly disavows his previous testimony and states that Moran was not involved in the burglary at the [M]unicipal [B]uilding." ***Id.*** Moran appears to acknowledge that at least "some of the contents of the letter were consistent with portions of Brown's trial testimony," but states, without citation, that "[t]he power of the written word over the spoken word is well known," and thus the letter recantation entitled him to a new trial. ***Id.*** at 11.

We review the trial court's grant or denial of a new trial on the basis of after-discovered evidence for an abuse of discretion or error of law. ***Commonwealth v. Padillas***, 997 A.2d 356, 361 (Pa. Super. 2010). To be entitled to a new trial based on after-discovered evidence, the defendant must show that the evidence: "(1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted." ***Id.*** at 363 (citation omitted).

Detailing Brown's testimony at trial and at the post-sentence motion hearing, in its written opinion the trial court found that Brown's trial testimony comported with the information contained in the letter and the testimony he provided at the post-sentence motion hearing. Trial Court Opinion, 2/26/13, at 4-9. The trial court thus concluded:

> Both [Brown's] post[-]trial letter and his testimony at the hearing on [Moran's] post[-]sentence motion are nothing more than reiterations of his trial testimony wherein he recanted his statement to the police and his preliminary hearing testimony. This evidence was not merely capable of being discovered before or during trial, it was discovered at trial. It is not only cumulative; it is repetitive.

Id. at 9-10.

Our review of the record comports with that of the trial court. The fact that Brown wrote down his recantation, as opposed to testifying to it as he

did at trial, does not satisfy the requirements of after-discovered evidence. The information contained in the letter is nearly identical to the information Brown testified to at trial, and is thus wholly corroborative and cumulative of the testimony already provided. As such, we find no abuse of discretion in the trial court's denial of his request for a new trial on this basis.

As his final issue on appeal, Moran asserts that the trial court erred by denying his pre-trial motion to sever the charges relating to the burglary of the Municipal Building and those relating to the burglary of Wagner's. Moran's Brief at 11-13. "Whether to join or sever offenses for trial is within the trial court's discretion and will not be reversed on appeal absent a manifest abuse thereof, or prejudice and clear injustice to the defendant." ***Commonwealth v. Wholaver***, 605 Pa. 325, 351, 989 A.2d 883, 898 (2010), *cert. denied,* __ U.S. __, 131 S. Ct. 332 (2010). The Rule relating to severance of criminal offenses states: "The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. 583. Our Supreme Court set forth a three-part test to assist the trial court in deciding a motion to sever:

> (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, (3) whether the defendant will be unduly prejudiced by the consolidation of offenses.

Commonwealth v. Jordan, __ Pa. __, 65 A.3d 318, 328 n.2 (2013) (quoting ***Commonwealth v. Collins***, 550 Pa. 46, 703 A.2d 418 (1997)).

Assuming for the sake of this argument that Moran is correct that the trial court erred by denying his motion for severance, the record reflects that this error was harmless beyond a reasonable doubt, as he was acquitted of all charges related to the burglary of Wagner's, and thus he suffered no prejudice. ***See Commonwealth v. Petroll***, 558 Pa. 565, 586, 738 A.2d 993, 1005 (1999) (stating that a trial court's error is harmless if, *inter alia*, "the error did not prejudice the defendant or the prejudice was de minimis"); ***see also Commonwealth v. Washington***, 547 Pa. 550, 557, 692 A.2d 1018, 1021 (1997) (applying a harmless error analysis to the trial court's denial of a motion to sever). Thus, this argument merits no relief.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2013