NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DONTE JONES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1940 EDA 2012

Appeal from the Judgment of Sentence March 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0015919-2010

BEFORE: BOWES, LAZARUS, and WECHT, JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 04, 2013**

Donte Jones appeals from the judgment of sentence of life imprisonment that was imposed after he was convicted of numerous offenses, including first degree murder. We affirm.

Appellant's convictions arose from his participation in a shooting spree that occurred on September 25, 2010, in which Tawayne Foster was killed. At the time of the incident, Mr. Foster was with his friends William Brown, James Marshburn, and Amanda Alston, all of whom testified at trial on behalf of the Commonwealth. Mr. Brown, who was licensed to carry a concealed weapon, returned fire during the episode and was struck in the hip with a bullet. Mr. Foster was also licensed to carry a gun but never retrieved his weapon before he was shot. When the shooting started, Mr. Foster was located in the driver's seat of his Cadillac, which was idling on 65th Steet and

Chester Avenue, Philadelphia, and he died from gunshot wounds to the chest.

Ms. Alston had been the girlfriend of Brandon Johnson, Appellant's co-defendant, prior to the shooting episode, but they were no longer a couple on September 25, 2010. She testified as follows. Appellant and Johnson were friends. In the early morning hours of September 25, 2010, Mr. Foster, Mr. Brown, and Mr. Marshburn went to Ms. Alston's apartment, where a party was transpiring. Ms. Alston reported that Appellant, whom she knew, attended the gathering; Johnson did not. After spending a few minutes in Ms. Alston's apartment, Mr. Foster and his two friends left the party, and Ms. Alston went down to the street after them to speak with Mr. Foster.

When Ms. Alston arrived on the street in front of her residence, Johnson was there. He approached Ms. Alston and told her to pick up her children from the home of his aunt, who was babysitting them during the festivities. Ms. Alston telephoned Johnson's aunt, who stated that she did not want to become involved in the controversy and confirmed that she wanted the children retrieved. Ms. Alston then asked Mr. Foster for a ride. Mr. Foster, Ms. Alston, Mr. Brown and Mr. Marshburn drove to the home of Johnson's aunt, retrieved the children, and transported them to their grandmother's home. The four individuals then returned to Ms. Alston's apartment.

Mr. Foster, who was driving, stopped his car on 65th Street and Chester Avenue, and Ms. Alston exited it and began to speak with Mr. Foster through the driver's side window. Mr. Foster was giving Ms. Alston a telephone number, which she was programming into her telephone, when Johnson and Appellant, who was directly behind Johnson, approached Ms. Alston. Johnson was angry about the fact that Ms. Alston was entering the telephone number and asked her if Mr. Foster was her new boyfriend. She responded that Mr. Foster was not her boyfriend and explained that he was the father of her best friend's children. Johnson then grabbed the cell phone from Ms. Alston's hand, and she snatched it back. Appellant joined the conversation by asking if there was a problem. Ms. Alston retorted, "There is no problem . . . [, Appellant], go home." N.T. Trial (Jury), Vol. 4, 2/10/12, at 38.

At that point, Johnson began to insist that Mr. Foster exit the car, but Ms. Alston urged him to leave the area. Mr. Foster began to drive away. At that moment, Ms. Alston "heard [Appellant] say f__ it and he pulled out the gun and started shooting" into Mr. Foster's car. ***Id***. at 39. Ms. Alston fled, but, after a few moments, she turned around and observed Mr. Brown returning fire in the direction of Johnson and Appellant. Appellant was shot in the leg and went to the hospital.

Mr. Marshburn testified as follows. On the night in question, he, Mr. Foster, and Mr. Brown went to Ms. Alston's apartment briefly to use the bathroom during the party. Once they arrived, Mr. Marshburn saw

Appellant, whom Mr. Marshburn described as tall and wearing an orange shirt and his hair in braids. Mr. Marshburn confirmed that, after he and his two companions left Ms. Alston's apartment, Ms. Alston came onto the street, conversed with Johnson, and approached Mr. Foster to request a ride to pick up her children. After retrieving the children from a woman standing on the street and transporting them to their grandmother's residence, the four adults then returned to the street outside of Ms. Alston's home. Ms. Alston exited the car and walked around to the driver's side to obtain a telephone number from Mr. Foster.

At that point, Johnson, who was accompanied by Appellant, approached the car and started to yell at Ms. Alston because she was transcribing a telephone number. Ms. Alston replied that Mr. Foster was a friend, but Johnson started "yelling and telling [Mr. Foster] to get out of the vehicle." N.T. Trial (Jury), Vol. 2, 2/8/12, at 102. When Mr. Marshburn saw Johnson take the cell phone from Ms. Alston's hand, he told Mr. Foster to leave. As Mr. Foster, Mr. Marshburn, and Mr. Brown "were about to pull off, that is when the first shot was fired." ***Id***. at 103. Mr. Marshburn reported that Johnson retrieved a gun from his waistband and shot first at Mr. Foster, who immediately slumped over the steering wheel. Mr. Marshburn related that Appellant then joined in his friend's actions by retrieving a gun and shooting at the car.

Mr. Marshburn crouched down in the back seat, and the Cadillac crashed into another car. After a few moments, Mr. Marshburn peered from

the vehicle and saw Mr. Brown outside returning fire at Appellant and Johnson. Mr. Brown was struck by bullets and was taken to the hospital while Mr. Marshburn, who was uninjured, was interviewed by police. Mr. Marshburn was later transported to the hospital, where he identified Appellant as one of the shooters.

Mr. Brown confirmed the preceding events by testifying as follows. He, Mr. Foster, and Mr. Marshburn stopped by Ms. Alston's apartment on the night in question so that Mr. Brown and Mr. Foster could use the bathroom. After the three men left and returned to the street, Ms. Alston asked for a ride to obtain her children. After performing that task, the four friends returned to Ms. Alston's apartment. While Ms. Alston was obtaining a telephone number from Mr. Foster, Mr. Brown saw Appellant and Johnson approach the car together. N.T. Trial (Jury), Vol. 3, 2/9/12, at 26. Johnson began to argue with Ms. Alston while Appellant stood three or four feet behind Johnson. Mr. Brown saw Johnson take the telephone from Ms. Alston's hand, and he told Mr. Foster that they should leave.

As Mr. Foster placed the car in drive, Mr. Brown heard multiple shots. ***Id***. at 31. Mr. Brown related that after hearing the shots, "I turned and looked to my left and I see the guy in the orange shirt [*i.e.*, Appellant], the gun in his hand pulling it out and continuing to shoot, shoot, shoot, shoot." ***Id***. at 32. At that point, Appellant was located three to four feet away from the driver's side car door. ***Id***. at 33-34. Mr. Brown testified that "when the guy with the orange shirt [, Appellant,] opened fire, the other guy

[, Johnson,] backed up. And as I got out of the car, [Johnson] started shooting." ***Id***. at 37. After the car crashed, Mr. Brown exited it and started shooting at Johnson and Appellant while they continued to shoot at him. Mr. Brown was struck by bullets in the hip and below the ribcage.

Based on this evidence, Appellant was convicted of first-degree murder in connection with Mr. Foster's death, attempted murder and aggravated assault as to Mr. Brown, attempted murder and aggravated assault with respect to Mr. Marshburn, conspiracy, carrying an unlicensed weapon, and possession of an instrument of crime. He was sentenced to life imprisonment and filed the present appeal from the imposition of judgment of sentence. Appellant raises these issues on appeal:

> I. Is the defendant entitled to an arrest of judgment on the charge of Murder in the First Degree, Criminal Conspiracy and all related offenses because the evidence is insufficient to support the verdict?
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> II. Is the Defendant entitled to a new trial on the charges of Murder in the First Degree, Criminal Conspiracy and all related charges because the verdict is against the greater weight of the evidence?

Appellant's brief at 3. While Issues I and II suggest that Appellant is challenging all of his convictions, in the body of his brief, he challenges only the sufficiency of the evidence supporting the conspiracy and first-degree murder offenses. Appellant's brief at 10-14. Hence, we only consider whether the proof was adequate to establish those crimes.

In assessing the sufficiency of the evidence,

> we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (Pa.2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa. Super. 2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." ***Id.***; ***see also Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa.Super. 2000) ("The facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence."). Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. ***See Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super. 2001).
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> The Commonwealth may sustain its burden by means of wholly circumstantial evidence. ***See Brewer***, 876 A.2d at 1032. Accordingly, "the fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence." ***Id.*** (quoting ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038–39 (Pa.Super. 2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld. ***See Brewer***, 876 A.2d at 1032.

Commonwealth v. Lynch, 72 A.3d 706, 707-08 (Pa.Super. 2013) (citation omitted).

We first address the sufficiency of the evidence to establish conspiracy since it is settled that, 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. Nypaver***, 69 A.3d 708, 715 (Pa.Super. 2013) (citation omitted). Accordingly, if Appellant is guilty of conspiracy, he is responsible for all crimes that he and Johnson committed in furtherance of the conspiracy. 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:
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> > (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.

Under this provision, the Commonwealth must prove 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." ***Nypaver***, ***supra*** at 715 (citation omitted). We utilize four factors "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.'" ***Nypaver***, ***supra*** at 715 (partially quoting ***Commonwealth v. Feliciano***, 67 A.3d 19, 25 (Pa.Super. 2013)).

Herein, there was a strong association between Appellant and Johnson. They were friends, and Appellant was at the party when Mr. Foster spoke with Ms. Alston. Although he was not at the party, Johnson appeared on the street outside of Ms. Alston's apartment immediately after Mr. Foster and Ms. Alston conversed, and Johnson demanded that Ms. Alston retrieve her children from his aunt's house. Johnson's aunt then told Ms. Alston that she did not want to become involved in the situation. This series of events created an inference that Appellant informed Johnson of the association between Mr. Foster and Ms. Alston at the party.

Appellant remained with Johnson outside of the apartment while Ms. Alston transferred custody of her children. After the other four people returned to the apartment, Johnson and Appellant jointly approached the Cadillac occupied by the victims, and Appellant remained closely behind Johnson as Johnson and Ms. Alston argued. Appellant then actively participated in the crime in question when he shot at the Cadillac together with Johnson. Indeed, Ms. Alston and Mr. Brown both testified that Appellant initiated the shooting spree.

This evidence was sufficient to establish a conspiracy in that there was an association between Appellant and Johnson, Appellant had knowledge of the crime and was present at the scene, and Appellant actively participated in the object of the conspiracy. Thus, regardless of who fired the bullets, Appellant was equally responsible for the death of Mr. Foster. We note our

disagreement with Appellant's assertion that the proof established nothing more than that he and Johnson merely happened to be in the same location and independently decided to shoot at the Cadillac containing the three men. Rather, the facts were sufficient to sustain the jury's finding that Appellant entered a conspiracy and was liable for the crimes in question.

Additionally, the evidence supported the jury's determination that Appellant and Johnson shared a specific intent to commit first-degree murder.

> To sustain a conviction for first-degree murder, the Commonwealth must establish beyond a reasonable doubt that: (1) a human being was unlawfully killed; (2) the defendant was responsible for the killing; and (3) the defendant acted with malice and the specific intent to kill. 18 Pa.C.S.A. § 2502(a); ***Commonwealth v. Laird***, 605 Pa. 137, 149, 988 A.2d 618, 624–25 (2010). The Crimes Code defines an intentional killing as a "willful, deliberate and premeditated killing." 18 Pa.C.S.A. § 2502(d). It is well settled that the Commonwealth may prove malice and specific intent to kill by means of wholly circumstantial evidence, including the use of a deadly weapon on a vital part of the victim's body. *. . .*

Commonwealth v. Parrish, 2013 WL 5354336, 3 (Pa. 2013). Specific intent to kill "is gauged at the moment of the killing and may be formed in a split second." ***Commonwealth v. Johnson***, 42 A.3d 1017, 1026 (Pa. 2012) (citation omitted).

The Commonwealth's proof was that, acting in concert, Appellant and Johnson shot at the three victims after Johnson had a personal issue with one of them. Johnson and Appellant, who knew about the dispute, were friends. Mr. Foster was shot in the chest, which is a vital part of the body.

While Appellant's actions were the result of the escalation of the argument between Mr. Foster and Johnson that occurred contemporaneously with the shooting, the specific intent to kill can be formed in a split second. Appellant's actions of deliberately pointing his gun at the car containing three men and repeatedly firing at it demonstrates that he had the specific intent to kill. Hence, we reject his assertion that the evidence was insufficient to sustain the verdicts on the offenses of conspiracy and first-degree murder.

Appellant also challenges the weight of the evidence.

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. ***Commonwealth v. Widmer,*** 560 Pa. 308, 319, 744 A.2d 745, 751–52 (2000); ***Commonwealth v. Brown,*** 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994). . . . It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." ***Brown,*** 538 Pa. at 435, 648 A.2d at 1189.
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> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:
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>> Appellate review of a weight claim **is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence**. ***Brown,*** 648 A.2d at 1189. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. ***Commonwealth v. Farquharson,*** 467

> Pa. 50, 354 A.2d 545 (Pa. 1976). One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

***Widmer**,* 560 Pa. at 321–22, 744 A.2d at 753

Commonwealth v. Clay, 64 A.3d 1049, 1054-55 (Pa. 2013) (emphasis in original).

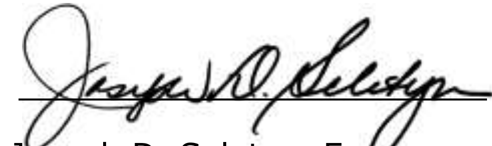
In this portion of his brief, Appellant claims that "the greater weight of the evidence only established that young people were arguing; tensions escalated; that young people on 'both sides' of the argument in question had weapons and that individuals on both sides of the argument were on the public streets shooting at one another at almost the exact same moment." Appellant's brief at 16. He maintains that he was merely "caught up in a situation as everyone else was and multiple people were firing weapons, and all about the same time." ***Id***.

We reject Appellant's characterization of the Commonwealth's proof. That evidence established that Johnson was angry with Mr. Foster because he believed that Mr. Foster was involved romantically with Johnson's former girlfriend. Appellant told Johnson about the association between Mr. Foster and Ms. Alston and then waited with him at Ms. Alston's apartment for her to return with Mr. Foster and his two companions. Then Johnson, who was accompanied by Appellant, initiated a verbal confrontation with Mr. Foster. When Mr. Foster attempted to leave the area, Appellant and Johnson, in

synchrony, began to fire their weapons into his car. Mr. Foster immediately slumped over the steering wheel and his car collided with another one. At that point, Mr. Brown, who was licensed to carry a gun, retrieved his weapon and returned fire in self-defense. Based on this proof, we conclude that the trial court did not abuse its discretion in rejecting Appellant's challenge to the weight of the evidence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013