NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ANTHONY PAUL WHITE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1962 MDA 2012

Appeal from the Judgment of Sentence October 22, 2012
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0001280-2012

BEFORE: BOWES, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.: **FILED DECEMBER 02, 2013**

Anthony Paul White appeals from the judgment of sentence imposed on October 22, 2012, in the Court of Common Pleas of York County. On September 13, 2012, a jury convicted White of murder of the second degree and burglary.[1] White was sentenced to a term of life imprisonment. On appeal, he challenges the court's denial of his motion to suppress and the sufficiency of the evidence. Contemporaneous with this appeal, White's counsel has filed an application to withdraw. Upon review, we affirm the judgment of sentence and deny counsel's application to withdraw.

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 2502(b) and 3502(a), respectively.

The facts and procedural history are as follows. On December 10, 2011, a woman, Julie Ann Wolpert, walked to a corner store located at the intersection of College Street and Penn Street in York, Pennsylvania. She observed people on the corner, who did not make her feel "comfortable." N.T., 9/10/2012-9/13/2012 at 77. She called a friend, "Will," who picked her up in his vehicle and dropped her off a half-block from her home, located at 315 South Penn Street. She also called her boyfriend, Roy Swaney, to come escort her home. When she got out of the car, she realized a male individual had followed her. She described the person as a "[t]all black guy, he had all black on, and his eyes [were] piercing[.]" ***Id.*** at 84. She stated he also had two gold teeth and a black piece of material on his head. ***Id.*** at 85. She met up with Swaney at the rear of the residence, but the man continued to follow them, saying that he wanted them to stop and he wanted to talk to them. ***Id.*** at 83. When Wolpert and Swaney got into the house, they closed the door. Swaney went to call 9-1-1 while Wolpert grabbed her cats to remove them from harm's way. The perpetrator then kicked in the door and aimed a silver automatic pistol at Wolpert's cat, but the gun jammed. Another resident of the house, Christopher Armagost, came down the stairs, pushed the man out of the home, and shut the door. From outside, the perpetrator fired multiple shots through the door and windows of the residence, killing Armagost.

On December 12, 2011, Detectives Travis A. Sowers and Jeffrey Spence of the York City Police Department showed a photo line-up to Wolpert and Swaney separately. The line-up included a picture of White and seven other individuals. Both witnesses used a piece of paper to cover up the top portion of each person's head on the line-up because the suspect was wearing a black hoodie or skull cup at the time of the shooting. Both Wolpert and Swaney positively identified White as the shooter.

During the investigation, the investigating officers removed a wooden piece of the door from the home, approximately 19 inches by 11 inches, which contained a shoe impression on it. Sergeant Daryl Van Kirk analyzed the piece of wood in comparison with two Polo Ralph Lauren boots, size 8-and-a-half D, which belonged to White and were confiscated at the time of his arrest. After examining the evidence, Sergeant Van Kirk concluded "that the questioned shoe impression from the door could have been made by the left Polo Ralph Lauren shoe that was committed to [Sergeant Van Kirk] or another shoe with the same characteristics." ***Id.*** at 314. The police also seized a set of gold front teeth from White's right front pants pocket. ***Id.*** at 353.

White was arrested and charged with first-degree murder, second-degree murder, third-degree murder, and burglary. On April 19, 2012, White filed an *omnibus* pre-trial motion to suppress, claiming the photo line-up identification was unduly suggestive. A suppression hearing was held on

May 29, 2012. That same day, the trial court denied the motion to suppress.

The case proceeded to trial, which was held from September 10, 2012 to September 13, 2012. The jury found White guilty of second-degree murder and burglary, and not guilty of first-degree murder and third-degree murder. On October 22, 2012, the court imposed a term of life imprisonment on the murder conviction.[2] White did not file a post-sentence motion, but did file this timely appeal.

On November 15, 2012, the trial court ordered White to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) within 21 days. White complied 42 days later, on December 27, 2012. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) that same day.[3]

In White's first argument, he claims the trial court erred in failing to suppress identification evidence, which was the result of an impermissibly suggestive photo line-up because his "photograph is the only one in which the person has bangs; it is the only one where the person's head is tilted

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[2] The burglary offense was merged for sentencing purposes.

[3] White's concise statement was untimely filed. Formerly, this would have resulted in waiver of White's issues. ***Commonwealth v. Castillo***, 888 A.2d 775 (2005). However, due to subsequent changes to Rule 1925(b) and case law, we are permitted to review the issues. ***See Commonwealth v. Thompson***, 39 A.3d 335, 340 (Pa. Super. 2012) ("When counsel has filed an untimely Rule 1925(b) statement and the trial court has addressed those issues we need not remand and may address the merits of the issues presented.").

forward; there are various different colored backgrounds; and the heights of the various people in the line-up appear to be varied." White's Brief at 8. Relying on ***Commonwealth v. Jarecki***, 609 A.2d 194 (Pa. Super. 1992) and ***Commonwealth v. Kendricks***, 30 A.2d 499 (Pa. Super. 2011), White states the "photographs in the array should all be the same size and should be shot against similar backgrounds," and the persons in the photographs "must all exhibit similar facial features and must not stand out in any way from each other." White's Brief at 9-10 (footnotes omitted).

Our standard of review regarding the denial of a motion to suppress is well-settled:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth 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 suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where … the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Farnan, 55 A.3d 113, 115 (Pa. Super. 2012) (citation omitted). Moreover, we are mindful that "[q]uestions of the admission and exclusion of evidence are within the sound discretion of the trial court and

will not be reversed on appeal absent an abuse of discretion." ***Kendricks***, 30 A.3d at 503 (citation omitted).

"A photographic identification is unduly suggestive if, under the totality of the circumstances, the identification procedure creates a substantial likelihood of misidentification." ***Commonwealth v. DeJesus***, 860 A.2d 102, 112 (Pa. 2004). Further,

> [w]e will not suppress such identification unless the facts demonstrate that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
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> ***Commonwealth v. Burton***, 2001 PA Super 62, 770 A.2d 771, 782 (Pa. Super. 2001) (citations and quotations omitted). The variance between the photos in an array does not necessarily establish grounds for suppression of a victim's identification. ***Id.*** "Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics." ***Commonwealth v. Fisher***, 564 Pa. 505, 769 A.2d 1116, 1126 (Pa. 2001). "[E]ach person in the array does not have to be identical in appearance." ***Burton***, 770 A.2d at 782. The photographs in the array should all be the same size and should be shot against similar backgrounds. ***Commonwealth v. Thomas***, 394 Pa. Super. 316, 575 A.2d 921 (Pa. Super. 1990).

Kendricks, 30 A.3d at 504.

Here, the record reveals the following. At the suppression hearing, held on May 29, 2012, Detective Travis Sowers testified that he was the lead investigator in the case and he created the photo line-up on December 12, 2011. He then explained the process for creating the line-up, stating that it is computer-generated by using the Commonwealth Photo Imagery Network

("Web CPIN"), a part of the Justice Network System ("JNET System"). N.T., 5/29/2012, at 7. Detective Sowers picked a recent booking picture of White. ***Id.*** Using the computer system, he entered White's picture as the "candidate" and then hit "similar images." ***Id.*** at 8. He testified the computer generates eight pictures and then he scrolled through "pages and pages of similar pictures to compare" to White, looking for similar pictures that had "his type of hairstyle … and facial structure[.]" ***Id.*** The detective testified, "You don't like to have exact pictures in there because you never want anyone to have a misidentification of a person to either lead you into making a bad arrest or lead you to stray in the investigation." ***Id.*** at 9.

Detectives Sowers and Spence then went to the 315 South Penn Street residence to speak with Wolpert and Swaney. They showed the lineup to both witnesses separately, with Swaney going first, because they "didn't want to taint the lineup at all by having another person standing right there with [Swaney] saying that is him, that is him, and making [Swaney] make a suggestive move of the two witnesses." ***Id.*** at 10.

Detective Sowers then testified:

> We had [Swaney] look at it. He looked at it for, I want to say, 30, 35, 40 seconds. He looked at each picture probably around five seconds. He studied each one. We told him the person may or may not be in this lineup. We said only pick the person if you're a hundred percent sure.
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> . . . .
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> Mr. Swaney looked at it … for five seconds, each picture. He then, without me telling him to or without Detective Spence

> telling him to, he said he had something on his head at the time. I believe he said it was a hood.
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> So he picked up this little piece of paper that was sitting right beside him, and he covered up the top of the head above his eyebrows; and as he was doing that, he covered up everybody. Then he said, "There. That is him," and he pointed to Anthony White.
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> . . . .
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> At that time, we did not have him mark anything. Myself and Spence had one photo lineup that we wanted to show two people, so we had him point out Anthony White, which he pointed out Anthony White. We saw that. We told him then to go outside. We sent him out the front door. We said you can go out the front door to smoke a cigarette. We asked [Wolpert] to take a look at the photo lineup when she came downstairs.
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> At the time she looked at it, no marks, no circles, no initials, no anything on the photo lineup.
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> . . . .
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> She came to look at the photo lineup and she picked up the same piece of paper and she put it over everyone's head the same way as he did. She said, "That is him right there." And I believe one of her statements was, "That is the same way he looked at me the night of the shooting."
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> . . . .
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> We then had Mr. Swaney come back in, and Ms. Wolpert still had – was standing right there by the picture []. I gave her a pen, and I said, "Okay. Circle the picture of the person who you just identified." I told it to both of them, actually. She circled it. She initialed it. He grabbed a pen, and he just initialed right beside the picture he picked out, also. It was Anthony White.

Id. at 10-11, 13-15.

At the conclusion of the motion to suppress hearing, the trial court explained its decision to deny White's motion to suppress the identification evidence:

> The photo identification that was made, we note that it has been placed in the record, and other than our DA, who happens to be in the courtroom, I guess I'm older than both counsel and maybe both counsel don't remember the days when we didn't have computer-generated photographs and actually if you wanted a lineup you had to go out to the jail and try to find people who looked similar to the Defendant.
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> This current system is certainly better than the old system we had where there are literally thousands of photos that can be computer selected to match a description.
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> We have reviewed the eight photos that were selected in this case; and in our opinion, none of them particularly stick out. There are at least four other people in the photos who have dreadlocks, if not more; and while it's true that the picture of the Defendant in his picture, there are a couple of dreadlocks strands hanging in his face, we wouldn't necessarily call that bangs; and as indicated by the detective, the individuals placed a sheet of paper across the top of the forehead portion of the individuals when they made the identification.
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> Accordingly, we don't find the identification was unduly suggestive or that the photo lineup was improper; and we also then, therefore, believe that the identification made at the preliminary hearing should not be suppressed, so we will deny Defendant's motion to suppress.

N.T., 5/29/2012, at 27-29.

Our review of the record leads us to agree with the trial court's ruling that based on the totality of the circumstances, the identification procedure did not create "a substantial likelihood of misidentification." ***DeJesus***, 860 A.2d at 112. The array contains eight photographs of men who appear to be

of the same race as White, all are of the same age, with similar facial characteristics. White's picture appears in the number two position on the array. The photographs were all the same size and with the exception one picture, the remaining seven photos appear to have been taken against similar backgrounds.[4] To the extent that he argues he was the only one with bangs, we find this argument is unavailing as both witnesses used a piece of paper to cover up the top part of the individuals' heads in the pictures. Likewise, with respect to his claim that he was the only one leaning forward and that the heights of the individuals were varied, we note that Detective Sowers testified he had no control over an individual's body position in the picture because that is "how the person posed when they had their booking picture taken." N.T., 5/29/2012, at 20. We agree with the trial court that his picture does not standout more than those of the others. Furthermore, it bears emphasis that White does not argue that the procedure employed by the detectives in administering the array was improper or inappropriate. Accordingly, we conclude White has failed to establish that the trial court abused its discretion in denying his motion to suppress.

In White's second argument, he contends there was insufficient evidence to convict him of second-degree murder and burglary. First, he

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[4] Seven pictures, including White's, were taken against a blue background while one was taken against white background.

asserts that the sole dispute at trial was the identity of the perpetrator. White's Brief at 12. White states:

> [t]he only identifying information that the police received about the suspect was that he was a black male, with a hood over his head, and two gold teeth. The police also recovered a shoe print from the door that . . . was similar to the tread of the boot [White] was wearing when he was arrested a few hours later.

Id. (footnote omitted). He claims that Wolpert had a known acquaintance, who had dropped her off at the residence on the night in question, and this individual "fit the description of the perpetrator but was never questioned by police." ***Id.*** (footnote omitted). He also states that none of the people who were at the street corner by the store where Wolpert went to were questioned by police. Second, White argues "there was no evidence that the perpetrator intended to commit a crime when he, or she, entered the residence." ***Id.*** He states that Wolpert did not see how the door was opened and there was no testimony regarding any evidence of forced entry into the residence, any intent to commit a crime, and that any crime was being committed inside the residence. ***Id.*** at 12-13.

Our well-settled standard of review:

> 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. Brooks, 7 A.3d 852, 857 (Pa. Super. 2010) (citation omitted).

> "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." ***Commonwealth v. Small***, 559 Pa. 423, 741 A.2d 666, 681 n.19 (Pa. 1999); 18 Pa.C.S. § 2502(b). The term "perpetration of a felony" is defined as "the act of … engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit … burglary …." 18 Pa.C.S. § 2502(d). Finally, a person commits burglary if he "enters a building or occupied structure … with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." 18 Pa.C.S. § 3502.

Commonwealth v. Montalvo, 956 A.2d 926, 934 (Pa. 2008).

Here, the record reveals the following: White followed Wolpert to the 315 South Penn Street residence. He kicked in the door and aimed a silver automatic pistol at Wolpert's cat, but the gun jammed. Armagost then came down the stairs, pushed White out of the home, and shut the door. From outside, White fired multiple shots through the door and windows of the residence, killing Armagost.

The trial court found there was sufficient evidence to convict White of second-degree murder and burglary based on the following evidence: (1) both Wolpert and Swaney identified White as the gunman who attempted to break into the house; (2) the evidence demonstrated that the boot White was wearing at the time of his arrest matched the shoeprint on the door, which White had kicked when he entered the residence; (3) the Commonwealth introduced video surveillance at trial at the corner store immediately before and after the shooting.[5] ***See*** Trial Court Opinion, 12/27/2012, at 1-2.

Viewing this evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences therefrom, we agree with the trial court's determination. With respect to White's identification argument, he ignores the evidence that Wolpert's description of the shooter matched White's appearance at the time of his arrest, including his gold teeth. Likewise, as analyzed above, both Wolpert and Swaney positively identified White as the perpetrator. Therefore, this argument is unavailing.

Moreover, with regard to his claim that there were other individuals that could have been the shooter, we find that this argument goes to the weight of the evidence rather than the sufficiency of the evidence. Defense counsel presented evidence to the jury that there were other individuals that

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[5] N.T., 9/10/2012-9/13/2012 at 373, 381-384.

matched the description of the shooter; however, they chose to believe Wolpert's and Swaney's identifications. ***See Commonwealth v. Rodriquez***, 989 A.2d 29, 31 (Pa. Super. 2010) ("[T]he 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.").

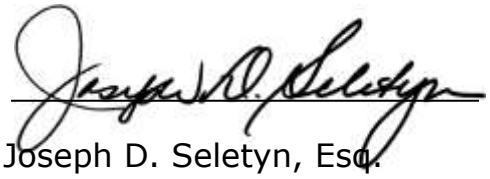
Lastly, to the extent that White argues there was no evidence that the perpetrator intended to commit a crime when he entered the residence, we disagree. White followed Wolpert to her place of residence. After she and Swaney had closed the door, White kicked the door in, aimed a gun at Wolpert's cat, and attempted to fire the weapon but it apparently jammed. Therefore, based on the totality of the circumstances, one could reasonably infer that White intended to commit a burglary where he entered the residence, which he was not licensed or privileged to do so, intending to commit a crime, as evidenced by his aiming the gun at the cat and attempting to fire the weapon. ***See*** 18 Pa.C.S. § 3502. Furthermore, based on the burglary and the shooting that resulted in Armagost's death, there was sufficient evidence to support the second-degree murder conviction. Accordingly, White's sufficiency claim fails.

In a related matter, we note that on April 29, 2013, counsel filed a petition to withdraw as counsel with this Court, stating that White has sent several letters to him, raising issues concerning counsel's ineffectiveness. Because White may be prejudiced if he is without counsel during the period

for filing a petition for allowance of appeal, we deny counsel's petition to withdraw as counsel, without prejudice, to renew his request with the appropriate court.[6]

Judgment of sentence affirmed. Petition to withdraw as counsel denied.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/2/2013

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[6] Upon review of White's claims raised in his March 25, 2013 letter that was attached to counsel's petition, White may raise these claims pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.