

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

BUTCHIE LONG,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1793 EDA 2013

Appeal from the Judgment of Sentence of May 17, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003619-2012

BEFORE: FORD ELLIOTT, P.J.E., OLSON AND STABILE, JJ.

MEMORANDUM BY OLSON, J.:

FILED JULY 09, 2014

Appellant, Butchie Long, appeals from the judgment of sentence entered on May 17, 2013, as made final by the denial of Appellant's post-sentence motion on May 21, 2013. We affirm.

The trial court has ably summarized the underlying facts and procedural posture of this case. As the trial court explained:

On the night of November 10, 2011, Rashan Gaffney, Ercel Butts-Stern, and some of their friends were at a store located on 57th and Walnut Street[, in Philadelphia]. An unidentified man came up to Gaffney and after they exchanged words, the man took a swing at Gaffney, but missed him. Gaffney pulled out a gun and fired it at the ground, telling the man that they were not looking for any trouble. Gaffney and his friends left the store and walked towards 55th and Pine Streets.

While they were walking, Gaffney noticed that people were following him. In the area of Malcolm and Frazier Streets, two men started chasing and shooting at them from behind. Butts-Stern was shot and fell to the ground at the corner of

57th and Willows Street while Gaffney hid under a car [35] to [50] feet north on 57th Street. Gaffney saw [Appellant], wearing a black and white hoodie, stand over Butts-Stern and shoot him in the head. [Appellant] then ran towards 57th and Whitby Streets.

On November 10, 2011, [at] around 6:30 p.m., Hazel Matthias and Tracie Hunter were traveling southbound on 57th Street when a group of four or five young men coming from the 5600 block of Hadfield Street ran in front of Matthias' car and headed west towards Willows Avenue. Matthias and Hunter heard a loud pop and saw one of the young men, later identified as Butts-Stern, fall to the ground. Both Matthias and Hunter testified that one of the men from the group then stood over Butts-Stern, who was lying in the street, and shot him again. While neither Matthias nor Hunter identified [Appellant], they both described the shooter as wearing a dark hoodie with a white stripe on it.

On November 10, 2011, at about 6:30 p.m., Ebony Mitchell was at her home [on] Hadfield Street when she heard gunshots. When Mitchell walked to her door and looked outside she saw three men running near 57th and Hadfield Streets. The first male, a heavy set African American with braids wearing an Adidas track jacket, was standing at the store located at 57th Street and Hadfield Street. The second male, an African American wearing a red shirt and dark pants, was running north on 57th Street. The third man, an African American with a little cut and wearing all dark clothes, was running south on 57th Street. Mitchell found Butts-Stern shot and lying in the street and she sat with him until the police arrived.

On November 10, 2011, at approximately 6:39 p.m., when Police Officer Kevin Klein responded to the area of 57th and Willows Streets[,] he found Butts-Stern lying in the street. Butts-Stern was immediately transported to the University of Pennsylvania Hospital, where he died at 6:57 p.m. According to Dr. Edward Lieberman, the Assistant Medical Examiner for Philadelphia County, Butts-Stern suffered five gunshot wounds and blunt force trauma to the pelvis and hands. Butts-Stern suffered one shot to the top of the back of the head that exited the back, right side of the head; one

shot to the left back, which hit a kidney and the vena cava, and exited through the liver; one shot to the left buttock that exited through the groin; and one shot that was a through and through to the outside of the pelvis. All of the gunshot wounds were sustained from distance range.

From the area of 57th and Willows, officers recovered three nine-millimeter fired cartridge casings on 57th Street and three nine-millimeter fired cartridge casings from in front of 5662 Hadfield Street, 5652 Hadfield Street, and 5648 Hadfield Street[,] respectively. According to Police Officer Ronald Weitman, an expert in firearms identification, all six nine-millimeter fired cartridge casings recovered from the area of 57th and Willows Streets were fired from the same firearm.

On November 22, 2011, Detective Thorsten Lucke recovered surveillance video comprising four different views from the MJ Mini-Market located at 5603 Market Street. At about 5:02 p.m., the video shows [Appellant] wearing a dark jacket with a white stripe enter and later exit the store. The video shows a heavy set African American man with braids, later identified as Justin Swan, present at the store talking on the phone around the same time as [Appellant]. At about 6:02 p.m., [Butts-Stern] and Gaffney arrive at the store. At around 6:10 p.m., the video shows Gaffney pull out and shoot a firearm at the unidentified man in a red hoodie. After the shooting, the video shows Gaffney and Butts-Stern cross over Walnut Street towards South Philadelphia.

On December 30, 2011, at 5:54 p.m., Gaffney gave a statement to police wherein he identified [Appellant] from a photo array as the man in the black and white jacket that shot Butts-Stern. Gaffney then identified [Appellant] from a still photo taken from the surveillance video from 56th and Walnut Streets as the man who shot Butts-Stern. On March 21, 2012, Gaffney testified at a preliminary hearing and identified [Appellant] as the shooter. After failing to identify [Appellant] at trial, Gaffney explained that he only identified [Appellant] previously because the police showed him the surveillance video and he actually did not see the face of the man who shot Butts-Stern.

On January 19, 2012, at about 1:00 a.m., [Appellant] was arrested inside a third floor bedroom of 5612 Walnut Street. During a subsequent search of the bedroom, officers recovered a Hoppe's Gun Cleaning Kit for a nine-millimeter size gun and various identification cards for [Appellant].

. . .

On May 13, 2013, [Appellant] appeared before [the trial c]ourt and elected to be tried by a jury. On May 17, 2013, the jury found [Appellant] guilty of [first-degree murder, carrying a firearm without a license, and possession of an instrument of crime.¹]. Following the verdicts and upon a waiver of [Appellant's] right to a pre-sentence investigation, [the trial c]ourt sentenced [Appellant] to life imprisonment without the possibility of parole on the [first-degree murder conviction, and concurrent terms of imprisonment for the remaining convictions].

Trial Court Opinion, 7/23/13, at 1-5 (internal citations omitted).

On May 20, 2013, Appellant filed a post-sentence motion, wherein Appellant claimed that his convictions were against the weight of the evidence. The trial court denied Appellant's motion the next day and Appellant filed a timely notice of appeal.

Appellant has raised two claims to this Court:

[1.] Whether the evidence was insufficient to support [Appellant's] conviction for the offense of [first-degree murder] due to the Commonwealth's failure to prove beyond a reasonable doubt that [Appellant] was the shooter and responsible for the victim's death?

[2.] Whether the trial court abused its discretion in denying a defense motion for a new trial on the grounds that the verdict of guilty was against the weight of the evidence?

¹ 18 Pa.C.S.A. §§ 2502(a), 6106(a)(1), and 907(a), respectively.

Appellant's Brief at 4.²

Appellant first claims that the evidence was insufficient to support his murder conviction. This claim fails.

We review Appellant's sufficiency of the evidence claim under the following standard:

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 [that of] 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.

² The trial court ordered Appellant to file and serve a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant complied and, within his Rule 1925(b) statement, Appellant listed the claims he currently raises on appeal.

Commonwealth v. Brown, 23 A.3d 544, 559-560 (Pa. Super. 2011) (*en banc*), quoting **Commonwealth v. Hutchinson**, 947 A.2d 800, 805-806 (Pa. Super. 2008).

According to Appellant's first claim, the evidence was insufficient to support his murder conviction because the "identification evidence linking [] Appellant to the crime [was] so tenuous and patently unreliable . . . that the jury was forced to engage in surmise and conjecture in arriving at [its] verdict." Appellant's Brief at 15. In other words, Appellant claims that the Commonwealth's identification evidence was "so weak and inconclusive that as a matter of law no probability of fact [could have been] drawn from the combined circumstances." **Brown**, 23 A.3d at 559-560 (internal quotations and citations omitted). It is a meritless claim. As the trial court explained:

On December 30, 2011, in his statement to police[, eyewitness Rashan] Gaffney identified [Appellant] from a photo array as the man in the black and white jacket that shot Butts-Stern. Gaffney also identified [Appellant] from a still photo of the surveillance video taken at 56th and Walnut Streets as the man who shot Butts-Stern. On March 21, 2012, Gaffney testified at the preliminary hearing and identified [Appellant] as the shooter. The surveillance video showed [Appellant] wearing a dark jacket with a white stripe present in the area of 5603 Walnut Street about an hour prior to the time of the murder. Two [other] eyewitnesses, Hazel Matthias and Tracie Hunter, described the shooter as wearing similar clothing to the dark hoodie with a white stripe the surveillance video showed [Appellant] to be wearing that night. This evidence is sufficient to identify [Appellant] as the man who shot and killed Butts-Stern.

Trial Court Opinion, 7/23/13, at 6 (internal citations omitted).

We agree with the trial court. Therefore, Appellant's first claim on appeal fails.³

For Appellant's final argument on appeal, Appellant claims that the trial court erred in denying his post-trial motion, wherein Appellant claimed that the jury's verdict was against the weight of the evidence. This claim also fails.

Our Supreme Court has explained:

a verdict is against the weight of the evidence only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. It is well established that a weight of the evidence claim is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. Rather, the role of the trial court is to determine that notwithstanding all the evidence, certain facts are so clearly of greater weight that to ignore them, or to give them equal

³ Within Appellant's brief to this Court, Appellant also claims that Gaffney's identification was "patently unreliable" because: the photo array was unduly suggestive; the identification was induced by police coercion; and, when describing Appellant's appearance, Gaffney "never described [Appellant's] face or indicated any descriptive markers." Appellant's Brief at 15-20. These claims challenge either the admissibility of Gaffney's prior identification or the weight of the evidence at issue – and do not constitute a proper challenge to the sufficiency of the evidence. **Brown**, 23 A.3d at 559-560 ("in reviewing the sufficiency of the evidence . . . we may not weigh the evidence and substitute our judgment for [that of] the fact-finder") (internal quotations and citations omitted). To the extent these claims may be construed as a sufficiency of the evidence challenge, we again note that the identification evidence was not "so tenuous and patently unreliable . . . that the jury was forced to engage in surmise and conjecture in arriving at [its] verdict." Appellant's Brief at 15. Appellant's sufficiency of the evidence claim thus fails.

weight with all the facts, is to deny justice. A motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict; thus the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner.

Significantly, in a challenge to the weight of the evidence, the function of an appellate court on appeal is to review the trial court's exercise of discretion based upon a review of the record, rather than to consider *de novo* the underlying question of the weight of the evidence. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion. It is for this reason that the trial court's denial of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings.

Commonwealth v. Rivera, 983 A.2d 1211, 1225 (Pa. 2009) (internal quotations and citations omitted). "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record."

Commonwealth v. Serrano, 61 A.3d 279, 290 (Pa. Super. 2013) (internal quotations and citations omitted).

According to Appellant, the verdict was against the weight of the evidence because "there was no physical evidence tying [] Appellant to the shooting" and Gaffney's identification of Appellant was a product of coercion. Appellant's Brief at 21-24.

Appellant is incorrect to claim that "there was no physical evidence tying [] Appellant to the shooting." Indeed, the Commonwealth presented:

video evidence that, less than two hours prior to the shooting, Appellant was wearing a “dark jacket with a white stripe” – which is the same type of jacket that the shooter was described as wearing; evidence that all fired cartridge casings came from the same nine-millimeter firearm; and, evidence that, when Appellant was arrested, there was a “Hoppe’s Gun Cleaning Kit for a nine-millimeter size gun” in Appellant’s room. Further, and added to this physical evidence, the Commonwealth presented identification evidence that unequivocally branded Appellant as the shooter.

Simply stated, the trial court did not abuse its discretion when it refused to grant Appellant a new trial, based upon Appellant’s mistaken claim that there was “no physical evidence tying [] Appellant to the shooting.” Appellant’s Brief at 22.

With respect to Appellant’s claim that the verdict was against the weight of the evidence because Gaffney’s identification of Appellant was a product of coercion, the trial court explained:

[Appellant] is incorrect in his assertion that [the] eyewitness identification was the product of coercive circumstances. When Gaffney identified [Appellant] in his police statement[, Gaffney] was interviewed at a desk at [the] police [h]omicide [u]nit, given his **Miranda** [w]arnings, and then released. Further, when Gaffney identified [Appellant] at the preliminary hearing[, Gaffney] had been given immunity. The evidence establishes that [Appellant] followed Butts-Stern for over a mile from the store at 56th and Walnut Streets and chased Butts-Stern[, shooting at him for three blocks. [Appellant] shot Butts-Stern four times and then stood over a fallen Butts-Stern and shot him again in the head. The [trial c]ourt’s

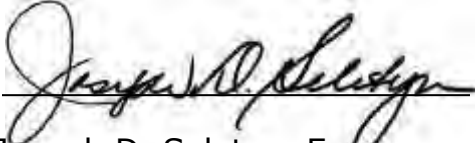
conscience is not shocked where the evidence so strongly established [Appellant's] guilt.

Trial Court Opinion, 7/23/13, at 9.

Again, the trial court did not abuse its discretion when it denied Appellant's weight of the evidence challenge. **Rivera**, 983 A.2d at 1225. As such, Appellant's second claim on appeal fails.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014