J-S18009-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DASHINE G. TUCKER,	:	
	:	
Appellant	:	No. 1841 EDA 2013

Appeal from the Judgment of Sentence Entered January 17, 2013,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0006551-2009.

BEFORE: SHOGAN, JENKINS and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED MAY 30, 2014**

Appellant, Dashine G. Tucker, appeals from the judgment of sentence entered on January 17, 2013. We affirm.

The trial court summarized the facts of the crime as follows:

> On September 20, 2008, Michael Walker (Walker) met his cousin, Charnissa Plowden (Plowden), at Eddie's Bar on the corner of S. 65th Street and Dicks Avenue in Southwest Philadelphia. Notes of Testimony (N.T.) 11/16/2012 at 23-24. At some point while Walker and Plowden were at the bar, four men began talking to and grabbing the arm of Sonora Pin (Pin). N.T. 11/15/2012 at 70-71. Pin alerted her boyfriend, Kevin Johnson (Johnson). ***Id***. at 71. Johnson asked the men to stop touching and talking to Pin. ***Id.*** at 72-73. They did, and the confrontation subsided briefly. ***Id.*** at 74.
>
> After last call, the bar emptied and the four men approached Johnson outside where, after an exchange of words, a physical alteration began. ***Id.*** at 76. The fight ensued on 65th Street; during the fight, Plowden saw the defendant holding a gun in his hand. N.T. 11/16/2012 at 44. The defendant then stood over Walker, who had fallen to the ground during a fight

*Retired Senior Judge assigned to the Superior Court.

> with Small, and the defendant fired his gun twice. The defendant then said, "Slam somebody else, you bitch-ass nigger." ***Id.***

Trial Court Opinion, 9/23/13, at 1–2.

Appellant was charged with homicide and related offenses as a result of this incident. On September 18, 2012, Appellant filed a motion to suppress asserting, *inter alia*, that the identification of Appellant was unduly suggestive. Suppression motion, 9/18/12, at ¶ 8. The trial court denied the motion on September 20, 2012, following a hearing on September 19 and 20, 2012. A multi-day jury trial ensued, during which the trial court granted Appellant's motion for judgment of acquittal with respect to the charge of criminal conspiracy on November 19, 2012. Appellant was convicted of carrying firearms on public streets or property on November 27, 2012; the jury was unable to reach a verdict with respect to murder and aggravated assault. On January 17, 2013, the trial court sentenced Appellant to eighteen to forty months of imprisonment. This timely appeal followed the May 21, 2013 denial of Appellant's January 17, 2013 post-sentence motion. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant raises the following two issues on appeal:

> I. Is the appellant entitled to an arrest of judgment with regard to his conviction for carrying a firearm in public in Philadelphia since the evidence is insufficient to sustain this conviction as the Commonwealth failed to sustain its burden of proving the appellant's guilt beyond a reasonable doubt?

> II. Is the appellant entitled to a new trial as a result of the pretrial court's denial of the motion to suppress identification?

Appellant's Brief at 4.

When an appellant raises both a sufficiency-of-the-evidence issue and a suppression issue, we address the sufficiency of the evidence supporting the conviction first, and we do so without a diminished record:

> We are called upon to consider all of the testimony that was presented to the jury during the trial, without consideration as to the **admissibility of that evidence**. The question of sufficiency is not assessed upon a diminished record. Where improperly admitted evidence has been allowed to be considered by the jury, its subsequent deletion does not justify a finding of insufficient evidence. The remedy in such a case is the grant of a new trial.

Commonwealth v. Stanford, 863 A.2d 428, 431–432 (Pa. 2004) (emphasis in original). Thus, we begin by addressing the sufficiency of the evidence, as "[t]he Double Jeopardy Clause bars retrial after a defendant's conviction has been overturned because of insufficient evidence." ***Commonwealth v. Mullins***, 918 A.2d 82, 85 (Pa. 2007) (citations omitted).

In reviewing a sufficiency challenge, "we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense." ***Commonwealth v. Cox***, 72 A.3d 719, 721 (Pa. Super. 2013) (quoting ***Commonwealth v.***

Koch, 39 A.3d 996, 1001 (Pa. Super. 2011)). When performing this review, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. ***Commonwealth v. Hansley***, 24 A.3d 410, 416 (Pa. Super. 2011). The trial court, sitting as the finder of fact, is free to believe some, all, or none of the evidence. ***Commonwealth v. Cousar***, 928 A.2d 1025 (Pa. 2007). Moreover, the Commonwealth may sustain its burden of proof by wholly circumstantial evidence. ***Commonwealth v. Diggs***, 949 A.2d 873 (Pa. 2008).

In order to obtain a conviction under 18 Pa.C.S.A. § 6108, the Commonwealth must prove beyond a reasonable doubt, in pertinent part, as follows:

> **§ 6108. Carrying firearms on public streets or public property in Philadelphia**
>
> No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless:
>
> (1) such person is licensed to carry a firearm;
>
> (2) such person is exempt from licensing under section 6106(b) of this title (relating to firearms not to be carried without a license).

Thus, a person violates section 6108 if he carries a firearm, rifle, or shotgun upon the public streets or public property in the City of Philadelphia[1] unless he has a license to do so or is exempt from the licensing requirements of the

[1] Philadelphia is the only city of the first class in the Commonwealth. ***See Blount v. Philadelphia Parking Authority***, 965 A.2d 226, 228 (Pa. 2009).

Act. 18 Pa.C.S.A. § 6108. Lack of a license is not an element of this statutory provision. ***Commonwealth v. Hopkins***, 747 A.2d 910 (Pa. Super. 2000.)

Appellant asserts that the evidence was insufficient to convict him of the firearm offense because he was not convicted of murder, contending, "In a certain sense, the doctrine of collateral estoppel applies." Appellant's Brief at 14. He maintains that the "jury's inability to reach a verdict as to the homicide and other charges is an indication that the factual issue with regard to [A]ppellant's possession of a weapon was not resolved in the Commonwealth's favor." ***Id***. at 17.

There is no merit to this claim. First, the collateral estoppel doctrine is wholly irrelevant here. Collateral estoppel, also known as issue preclusion, "means that when an issue of law, evidentiary fact, or ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future lawsuit. ***Commonwealth v. States***, 891 A.2d 737, 742 (Pa. Super. 2005) (citing ***Commonwealth v. Holder***, 805 A.2d 499, 502 (Pa. 2002)) (footnotes omitted). Appellant has stood trial only once; this appeal constitutes the same "lawsuit," not a future one.

Second, the jury's inability to agree on the murder charge does not preclude a conviction for carrying a firearm on a public street. Contrary to

Appellant's claim, the jury **did** resolve the factual issue regarding the weapon in the Commonwealth's favor—it unanimously convicted Appellant of possessing a firearm.

Moreover, Appellant's judgment of acquittal on the conspiracy charge does not entitle him to relief. Appellant suggests that the trial court's conclusion that the evidence was insufficient to prove that Appellant and his co-defendant, Yusef Small, were co-conspirators "resolves the issue with regard to [A]ppellant's possession of a weapon since [Appellant] and Small could not have possessed the same weapon." Appellant's Brief at 17. He further proposes that Small's entry of a guilty plea to weapons offenses during jury deliberations precludes a finding that Appellant carried a gun. Appellant's logic is faulty. Eyewitness Charnissa Plowden testified that Appellant and Small were each holding a gun. N.T., 11/16/12, at 52. Thus, each of them was guilty of carrying a firearm, albeit not the same one, in Philadelphia. The trial court, in its determination that there was insufficient evidence of a conspiracy to kill Michael Walker, by virtue of its grant of Appellant's motion for judgment of acquittal with respect to the charge of criminal conspiracy on November 19, 2012, made no statement concerning the factual question of whether Appellant was carrying a gun. N.T., 11/19/12, at 56.

In ***Commonwealth v. Monroe***, 422 A.2d 193 (Pa. Super. 1980), this Court held that the victim's testimony detailing that, after he sustained a gunshot in his back, he saw the appellant holding a gun, whereupon the victim sustained a second gunshot, was alone sufficient to prove that the appellant was guilty of this firearm offense. We explained therein that the shooting occurred on a public street in Philadelphia. We reiterated that the Commonwealth was not required to prove non-licensure. Similarly here, an eyewitness observed Appellant holding and shooting a gun on South 65th Street in Southwest Philadelphia. The evidence was sufficient, and this issue has no merit.

Appellant also argues that the trial court abused its discretion in admitting eyewitness Charnissa Plowden's pretrial identifications of Appellant, thereby denying his motion to suppress. We reject this contention.

In reviewing the denial of a motion to suppress,[2] we must determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings.

[2] Recently, in ***In re L.J.***, 79 A.3d 1073 (Pa. 2013), our Supreme Court prospectively applied a new rule regarding the scope of review in suppression matters, clarifying that an appellate court's scope of review in suppression matters includes the suppression hearing record and not evidence elicited at trial. As the litigation in this case commenced prior to ***L.J.***, it has no bearing on the instant case. ***Commonwealth v. Hale***, 85 A.3d 570, 574 (Pa. Super. 2014).

Commonwealth v. Harrell, 65 A.3d 420, 433 (Pa. Super. 2013) (citation omitted). Where the suppression court finds in favor of the prosecution:

> [o]ur scope of review is limited; we may consider only the evidence of the prosecution 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 record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Wormley, 949 A.2d 946, 948 (Pa. Super. 2008) (quoting ***Commonwealth v. Reppert***, 814 A.2d 1196, 1200 (Pa. Super. 2002) (*en banc*)). It is a well-settled principle that appellate courts must defer to the credibility determinations of the trial court, which observed the demeanor of the witnesses and heard them testify. ***Commonwealth v. Khalifah****,* 852 A.2d 1238, 1240 (Pa. Super. 2004).

"Out-of-court identifications are relevant to our review . . . particularly when they are given without hesitation shortly after the crime while memories were fresh." ***Commonwealth v. Orr***, 38 A.3d 868, 874 (Pa. Super. 2011) (emphasis added). In evaluating whether an out-of-court identification should be suppressed as unduly suggestive, this Court has consistently explained:

> "Suggestiveness in the identification process is but one factor to be considered in determining the admissibility of such evidence and will not warrant exclusion absent other factors." ***McElrath*** [***v. Commonwealth***], 592 A.2d [740] at 742 [(Pa. Super. 1991)]. As this Court has explained, the following factors are to be considered in determining the propriety of admitting identification evidence: "the opportunity of the witness to view

> the perpetrator at the time of the crime, the witness'[s] degree of attention, the accuracy of his prior description of the perpetrator, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation." ***McElrath***, 592 A.2d at 743 (citation omitted). The corrupting effect of the suggestive identification, if any, must be weighed against these factors. ***Commonwealth v. Sample***, 321 Pa. Super. 457, 468 A.2d 799 (1983). Absent some special element of unfairness, a prompt "one on one" identification is not so suggestive as to give rise to an irreparable likelihood of misidentification. ***Commonwealth v. Brown***, 417 Pa. Super. 165, 611 A.2d 1318 (1992).

Commonwealth v. Wade, 33 A.3d 108, 114 (Pa. Super. 2011) (quoting ***Commonwealth v. Moye***, 836 A.2d 973 (Pa. Super. 2003)); ***Hale***, 85 A.3d at 574.

The trial court sufficiently and carefully addressed this issue in its Pa.R.A.P. 1925(a) opinion, and we adopt the court's reasoning as our own. The trial court stated as follows:[3]

> In the instant case, on the night of the crime, Plowden told investigators that there were two perpetrators. N.T., 9/19/12, at 15. Plowden told Philadelphia Police Officer Joseph Bamberski that one of the attackers was named Yusef Small; Plowden then identified Small in a photo array. ***Id***. at 16. Plowden told Bamberski that she did not know the other man's name, but she described him as a "black male, five-foot nine, medium build, white V-neck undershirt, dark skin, bald head, 30–32. ***Id***. at 15. Eleven days later, on October 1, 2008, the police executed a search warrant at a house which had been previously associated with Yusef Small. ***Id***. at 17. The police seized a packet of photographs from the house. ***Id***. at 18. [Appellant] appeared in four of those photographs—sometimes alone, sometimes in a group, and at least once with Yusef Small. ***Id***. at 21–22. On November 10, 2008, the police showed Plowden the packet of

[3] We note that the suppression judge was different from the trial judge. Trial Court Opinion, 9/23/13, at 6 n.3.

photographs; she identified [Appellant] as the shooter. N.T., 9/19/12 at 22.

The police then used facial recognition software to determine that the man Plowden identified in the photographs — who at the time was unknown to her and the police — was [Appellant]. ***Id***. at 22–24. On December 8, 2012, [Appellant] was transported to the homicide division where a photo was taken of him. ***Id***. at 26. That photo was placed in a photo array with seven other black, bald men. ***Id***. at 27-28. When showed the photo array on December 19, 2008, Plowden again identified [Appellant] as the man she had seen holding a gun on September 21, 2008. ***Id***. at 28. Plowden identified [Appellant] as the shooter once more at trial. N.T., 11/16/12, at 42.

In ruling on the defense's motion to suppress identification evidence, the suppression court made the following findings of fact: the police obtained a cache of private photographs, at least four of which displayed [Appellant]. N.T., 9/20/12, at 28. Police showed many of these photographs to Plowden, including, but not limited to, the four depicting [Appellant]. ***Id***. at 28. Plowden stated, while observing the photos of [Appellant], that he "closely resembles the shooter." ***Id.*** at 28-29. Further police investigation led to the identification of the man in the photo as [Appellant]; a recent photo was taken and was placed in a photo array. ***Id***. Once presented with the new eight-person photo array, Plowden again identified [Appellant] as the shooter. ***Id***. at 29. As enumerated above, the record supports these findings, and thus the propriety of the suppression court's denial of [Appellant's] motion to suppress turns on whether the suppression court's legal conclusions were erroneous.

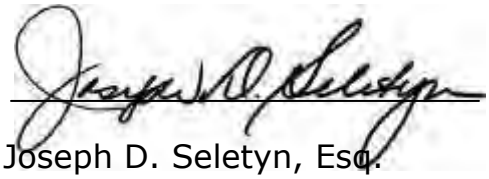
The suppression court examined the totality of the circumstances and found that at least two of the factors recited in [***Commonwealth v.***] ***Armstrong***, [74 A.3d 228 (Pa. Super. 2013)] — the accuracy of the witness'[s] prior description of the perpetrator and the witness's level of certainty — were particularly persuasive. The suppression court noted that Plowden's prior description of the perpetrator was an "uncanny match of [Appellant's] actual physical appearance." ***Id***. at 30-31. Additionally, the suppression court was persuaded by the fact that Plowden aptly chose [Appellant] when confronted with an eight-person photo array of individuals, each of whom bore a

> "remarkable resemblance to [Appellant]." N.T., 9/20/12, at 31. The suppression court found that the identification procedures employed here were not unduly suggestive. Even though [Appellant] appeared in multiple photos shown to Plowden, others did as well, and [Appellant's] likeness was not emphasized by the police. When Plowden was shown a photo array, each person depicted possessed remarkably similar facial characteristics.
>
> As the suppression court's factual findings were supported by the record, and the legal conclusions drawn therefrom were accurate, the suppression court did not err in denying [Appellant's] motion to suppress his identification. As the identification evidence was properly admitted, [Appellant's] claim fails.

Trial Court Opinion, 9/23/13, at 5–7 (footnote omitted). Accordingly, we conclude that Appellant's issues lack merit, and we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/30/2014