NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MALIK CARTER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2017 EDA 2013

Appeal from the Judgment of Sentence September 6, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012444-2010

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.: **FILED JULY 01, 2014**

Appellant, Malik Carter, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial convictions of third degree murder, firearms not to be carried without a license, carrying firearms on public streets in Philadelphia, and possessing an instrument of crime.[1] We affirm.

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.[2]

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[1] 18 Pa.C.S.A. §§ 2502(c), 6106(a)(1), 6108, and 907(a), respectively.

[2] We observe Appellant's Rule 1925(b) statement was untimely. Nevertheless, we decline to waive Appellant's issue because the trial court
(Footnote Continued Next Page)

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*Former Justice specially assigned to the Superior Court.

Appellant raises the following issue for our review:

> WHETHER THE VERDICT WAS AGAINST THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE WHEN THERE WAS NO PHYSICAL EVIDENCE AGAINST APPELLANT, THERE WAS AN ALIBI DEFENSE, THREE OF THE COMMONWEALTH WITNESSES RECANTED THEIR WRITTEN STATEMENTS AT TRIAL, AND THE OTHER COMMONWEALTH WITNESSES DID NOT SEE THE SHOOTER.

(Appellant's Brief at 4).

After a thorough review of the record, Appellant's brief, the applicable law, and the well-reasoned opinion of the Honorable Glenn B. Bronson, we conclude Appellant's issue merits no relief. The trial court opinion comprehensively discusses and properly disposes of the question presented. (***See*** Trial Court Opinion, filed September 23, 2013, at 4-8) (finding: witnesses had known Appellant for years, identified him to police as shooter, and picked his photograph out of photo array; witness identified Appellant as shooter at preliminary hearing; witnesses' prior statements to police were admissible at trial as prior inconsistent statements because witnesses signed and adopted statements; jury was free to believe all, part, or none of witnesses' prior statements when witnesses recanted statements at trial; witnesses' recanted statements did not render evidence insufficient to support convictions because evidence was enough to allow reasonable fact

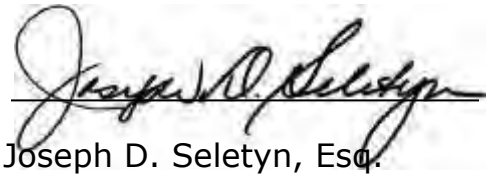
(Footnote Continued) _____

received the statement and addressed Appellant's issue in a written opinion. ***See Commonwealth v. Burton***, 973 A.2d 428 (Pa.Super. 2009) (*en banc*) (allowing for immediate review under these circumstances).

finder to conclude Appellant was individual who shot victim; Appellant's sufficiency of evidence claim should be rejected; jury, as fact finder, was free to find Appellant's alibi witnesses' testimony incredible and to credit Commonwealth's compelling evidence; physical evidence supported Commonwealth's strong eyewitness testimony; medical examiner's testimony that victim's wounds were not inflicted at close range supported witnesses' accounts of shooting; trial evidence established Appellant committed crimes and likewise fully sustained verdict, so court properly rejected Appellant's motion for new trial). The record supports the trial court's decision; therefore, we see no reason to disturb it. Accordingly, we affirm on the basis of the trial court's opinion.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0012444-2010

v.

MALIK CARTER

OPINION

BRONSON, J. September 23, 2013

On July 20, 2012, following a jury trial before this Court, defendant Malik Carter was convicted of one count of murder of the third degree (18 Pa.C.S. § 2502(c)), one count of carrying a firearm without a license (18 Pa.C.S. § 6106(a)(1)), one count of carrying a firearm on a public street in Philadelphia (18 Pa.C.S. § 6108), and one count of possessing an instrument of crime (18 Pa.C.S. § 907(a)).[1] Sentencing was deferred to September 6, 2012, so that a pre-sentence report could be prepared. On that date, the Court imposed an aggregate sentence of 28 ½ to 57 years incarceration in state prison. Defendant filed post-sentence motions on September 13, 2012. Defendant was represented by Joseph Santaguida, Esquire, at trial and sentencing.

On September 18, 2012, Mr. Santaguida withdrew from representation of defendant. On September 25, 2012, Earl G. Kauffman, Esquire, entered his appearance. The Court denied defendant's post-sentence motions on December 19, 2012. Thereafter, Mr. Kauffman inadvertently failed to file a notice of appeal on behalf of defendant. On May 29, 2013, Mr. Kaufman filed a petition under the Post-Conviction Relief Act, requesting reinstatement of

[1] Defendant was acquitted of one count of murder of the first degree (18 Pa.C.S. § 2502(a)) and two counts of attempted murder (18 Pa.C.S. §§ 901 & 2502(a)). Defendant was also charged with one count of possession of a firearm by a prohibited person (18 Pa.C.S. § 6105), for which the Court entered a judgment of acquittal. N.T. 7/20/2012 at 26-28.

defendant's appellate rights *nunc pro tunc*. The Commonwealth did not oppose the petition, and on July 10, 2013, this Court reinstated defendant's right to a direct appeal.

Defendant has now appealed from the judgment of sentence entered by the Court on the grounds that:1) the evidence was not sufficient to support the verdict; 2) the verdict was against the weight of the evidence; and 3) the Court erred in denying defendant's Motion for Extraordinary Relief. Statement of Errors Complained of on Appeal ("Statement of Errors") at ¶¶ 1-2. For the reasons set forth below, defendant's claims are without merit and the judgment of sentence should be affirmed.

I. FACTUAL BACKGROUND

At trial, the Commonwealth presented the testimony of Amber Paige, Rashanda Jones, Carleton Henderson, Jonathan Dunston, Shakur Burgess, Dr. Gary Lincoln Collins, Philadelphia Police Officers Lamont Fox, Lee Cannady, John Crawford, and Lawrence Flagner, and Philadelphia Police Detectives Joseph Bamberski, Howard Peterman, and Carl Watkins. Defendant presented the testimony of Cynthia Washington, Laura Henley Day, Amber Joe, and Gerald Joe. Viewed in the light most favorable to the Commonwealth as the verdict winner, their testimony established the following.

On June 19, 2010, at approximately 12:30 a.m., 18-year-old Shakuwrah Muhammad and her friend Amber Paige were walking down the 7500 block of Rugby Street in Philadelphia. N.T. 7/16/2012 at 76-77. The two women had just attended a nearby jazz festival, and Ms. Muhammad had offered to walk Ms. Paige to the bus stop. N.T. 7/16/2012 at 76-77. As they walked, Ms. Muhammad and Ms. Paige encountered two men, later identified as Shakur Burgess and Carleton Henderson, who began talking to the women. N.T. 7/16/2012 at 77-78. Unbeknownst to Ms. Muhammad and Ms. Paige, Mr. Burgess and Mr. Henderson were members

of a gang called "BI," or "Bad Influence." N.T. 7/17/2012 at 62, 177. The BI gang had been fighting with another group called the "1-4" gang for three to four years as of the night of June 19, 2010. N.T. 7/17/2012 at 64, 94, 177-178, 200-201.

Ms. Muhammad began talking with Mr. Burgess, while Ms. Paige talked with Mr. Henderson. N.T. 7/16/2012 at 78-79. As they were doing so, the bus that Ms. Paige had intended to take drove by. N.T. 7/16/2012 at 78-79. Ms. Paige told Mr. Henderson that she needed to go to the bus stop around the corner and catch the next bus. N.T. 7/16/2012 at 79. She asked him to come with her. N.T. 7/16/2012 at 79. Mr. Henderson told Ms. Paige that he could not go around the corner to where the bus stop was, because of a "beef" he had with people on that street. N.T. 7/16/2012 at 79; 7/17/2012 at 45-46, 67. Ms. Muhammad and Ms. Paige then began walking towards the bus stop, while Mr. Henderson and Mr. Burgess stayed behind. N.T. 7/16/2012 at 79-80.

As the two women crossed Rugby Street, defendant, a member of the "1-4" gang, pulled out a black handgun and shot it nine times from approximately one block away, striking Ms. Muhammad twice. N.T. 7/17/2012 at 89, 102, 198; 7/18/2012 at 40. Mr. Henderson and Mr. Burgess, who were uninjured, ran away. N.T. 7/17/2012 at 49. Defendant also fled the scene. N.T. 7/17/2012 at 90, 111-112. After a few moments of running, Mr. Burgess returned to the scene, found that Ms. Muhammad had been shot, and called 911. N.T. 7/17/2012 at 183-184, 197.

Ms. Muhammad was transported to Albert Einstein Medical Center, where she was pronounced dead. N.T. 7/17/2012 at 36-37, 166-167. She had been shot once in the chest and once in the back. N.T. 7/17/2012 at 167-169. Nine fired cartridge casings were recovered from the scene of the shooting. N.T. 7/17/2012 at 14-15, 38. Mr. Henderson gave a statement to the

police in which he identified defendant as the shooter, and chose defendant's photograph from a photo array. N.T. 7/17/2012 at 80-81, 91-92. Mr. Henderson also testified at the preliminary hearing and again identified defendant as the shooter. N.T. 7/17/2012 at 96-98. Mr. Burgess gave a statement to the police in which he identified defendant as the shooter, and identified defendant from a photo array. N.T. 7/17/2012 at 189-193. Another man, Jonathan Dunston, who had been sitting in a car nearby at the time of the shooting, also gave a statement to police in which he identified defendant as the shooter and identified him from a photo array. N.T. 7/17/2012 at 125-130, 143. Defendant was arrested.

II. DISCUSSION

A. Sufficiency of the Evidence

Defendant's Statement of Errors combines in one paragraph claims regarding sufficiency and weight of the evidence without specifying which averments pertain to sufficiency and which to weight. The averments may be summarized as follows: (1) the identification evidence was infirm because three eyewitnesses who identified the shooter recanted; (2) two witnesses who saw the shooting did not see the shooter; (3) the defense presented alibi witnesses; and (4) there was no physical evidence in the case. Attempting to decipher defendant's Statement of Errors, the Court assumes that averment number one goes to sufficiency and weight, while averment numbers two, three, and four go to weight only. To the extent that this is incorrect, defendant's claims are waived. *Commonwealth v. Cannon*, 954 A.2d 1222, 1228 (Pa. Super. 2008), *appeal denied*, 964 A.2d 893 (Pa. 2009) (where a defendant makes a vague and generalized objection on appeal that leaves the trial court to guess at his claims, those claims are deemed to have been waived). The Court first addresses sufficiency, and will then turn to weight.

In considering a challenge to the sufficiency of the evidence, the Court must decide whether the evidence at trial, viewed in the light most favorable to the Commonwealth, together with all reasonable inferences therefrom, could enable the factfinder to find every element of the crimes charged beyond a reasonable doubt. *Commonwealth v. Walsh*, 36 A.3d 613, 618 (Pa. Super. 2012) (quoting *Commonwealth v. Brumbraugh*, 932 A.2d 108, 109 (Pa. Super. 2007)). In making this assessment, a reviewing court may not weigh the evidence and substitute its own judgment for that of the factfinder, who is free to believe all, part, or none of the evidence. *Commonwealth v. Ramtahal*, 33 A.3d 602, 607 (Pa. 2011). "[A] mere conflict in the testimony of the witnesses does not render the evidence insufficient..." *Commonwealth v. Montini*, 712 A.2d 761, 767 (Pa. Super. 1998). The Commonwealth may satisfy its burden of proof entirely by circumstantial evidence. *Ramtahal*, 33 A.3d at 607. "If the record contains support for the verdict, it may not be disturbed." *Commonwealth v. Adams*, 882 A.2d 496, 499 (Pa. Super. 2005) (quoting *Commonwealth v. Burns*, 765 A.2d 1144, 1148 (Pa. Super. 2000), *appeal denied*, 782 A.2d 542 (Pa. 2001)).

Defendant's sufficiency claim is apparently premised upon his contention that the identification evidence was legally insufficient to establish that he was the shooter. The standard governing such claims is well-established: absent a tainted identification procedure, "the Commonwealth's burden is simply to introduce evidence solid enough to avoid conjecture." *Commonwealth v. Hurd*, 407 A.2d 418, 422 (Pa. Super. 1979). Identification testimony need not be positive, and indefiniteness or uncertainty in the testimony goes to its weight and not its sufficiency. *Commonwealth v. Hickman*, 309 A.2d 564, 566 (Pa. 1973); *Commonwealth v. Cain*, 906 A.2d 1242, 1245 (Pa. Super. 2006), *appeal denied*, 916 A.2d 1101 (Pa. 2007); *Commonwealth v. Mason*, 236 A.2d 548 (Pa. Super. 1967). The test is whether the evidence,

viewed in the light most favorable to the Commonwealth, and accepting all reasonable inferences therefrom, could enable the factfinder to conclude that the defendant was the perpetrator. *Hickman*, 309 A.2d at 566.

Here, there was ample evidence from which the jury could conclude that defendant was the perpetrator. Three witnesses, Carleton Henderson, Jonathan Dunston, and Shakur Burgess, all of whom had known defendant for years, identified defendant as the shooter to the police and picked his photograph out of a photo array. N.T. 7/17/2012 at 80-81, 91-92, 189-193. Carleton Henderson also identified defendant as the shooter at a preliminary hearing. N.T. 7/17/2012 at 96-98. All of this was compelling evidence from which a reasonable factfinder could conclude that defendant was the person who shot Shakuwrah Muhammad.

It is true that at trial, Mr. Henderson disavowed the portions of his statement to the police in which he inculpated defendant in the shooting. N.T. 7/17/2012 at 85. However, Mr. Henderson's signed statement was admitted as evidence at trial through the testimony of Detective Howard Peterman. N.T. 7/18/2012 at 29-37. Mr. Dunston also claimed at trial that he did not tell the police that defendant was the shooter. N.T. 7/17/2012 at 130. Mr. Dunston's signed statement was admitted as evidence at trial through the testimony of Detective Carl Watkins. N.T. 7/18/2012 at 43-53. Similarly, Mr. Burgess, in his testimony at the preliminary hearing, claimed that he lied when he inculpated defendant. N.T. 7/17/2012 at 208. His signed statement to detectives was elicited through the testimony of Detective Joseph Bamberski. N.T. 7/18/2012 at 9-19. These statements were admissible for their truth as prior inconsistent statements that were signed and adopted by the declarants. *See* Pa.R.E. 803.1(1)(b).

Moreover, it is well-established that where a witness at trial recants a statement he made to police, the fact-finder is "free to evaluate both the [witness's] statement to police as well as his

testimony at trial recanting that statement, and [is] free to believe all, part, or none of the evidence." *Commonwealth v. Hanible*, 836 A.2d 36, 40 (Pa. 2003) (citing *Commonwealth v. Pitts*, 404 A.2d 1305, 1306 (Pa. 1979)). Such recantations are "notoriously unreliable," *Commonwealth v. Johnson*, 966 A.2d 523, 541 (Pa. 2009) (quoting *Commonwealth v. D'Amato*, 856 A.2d 806, 825 (Pa. 2004)), and "the mere fact that [an eyewitness] recanted a statement he had previously made to the police certainly does not render the evidence insufficient to support [the] conviction." *Hanible*, 836 A.2d at 40. In addition, a conviction may rest entirely on prior inconsistent statements of witnesses who testify at trial, and such statements "must...be considered by a reviewing court in the same manner as any other type of validly admitted evidence when determining if sufficient evidence exists to sustain a criminal conviction." *Commonwealth v. Brown*, 52 A.3d 1139, 1171 (Pa. 2012).

Accordingly, defendant's sufficiency of the evidence claim should be rejected.

B. Weight of the Evidence

Defendant claims that the verdict was against the weight of the evidence. He apparently premises this argument on his contentions that the eyewitnesses recanted, that two of the witnesses to the shooting did not see the shooter, that he presented four alibi witnesses, and that there was no physical evidence in the case that linked defendant to the shooting. *See* footnote 2, *supra*. This claim is without merit.

It is well-established that a new trial may only be granted by the trial court where the verdict was so contrary to the weight of the evidence as to "shock one's sense of justice." *Commonwealth v. Rossetti*, 863 A.2d 1185, 1191 (Pa. Super. 2004), *appeal denied*, 878 A.2d 864 (Pa. 2005) (quoting *Commonwealth v. Hunter*, 554 A.2d 550, 555) (Pa. Super. 1989)). Moreover, credibility determinations are solely within the province of the fact-finder, and "an

appellate court may not reweigh the evidence and substitute its judgment for that of the finder of fact." *Commonwealth v. Taylor*, 63 A.3d 327 (Pa. Super. 2013) (quoting *Commonwealth v. Shaffer*, 40 A.3d 1250, 1253 (Pa. Super. 2012)). In considering a claim that the trial court erred in refusing to find that a verdict was against the weight of the evidence, "appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." *Taylor*, 63 A.3d at 327 (quoting *Shaffer*, 40 A.3d at 1253).

The evidence outlined above plainly established that defendant committed the crimes of which he was convicted. Although defendant presented alibi witnesses who claimed that defendant was at home at the time of the murder, the jury, as finder of fact, was entitled to find their testimony incredible and to credit the compelling evidence presented by the Commonwealth. That two other witnesses could not identify the shooter is irrelevant. Three separate witnesses, albeit in statements to the police, identified defendant as the shooter. N.T. 7/17/2012 at 80-81, 91-92, 189-193, 125-130, 143. Similarly, the lack of physical evidence to establish identification does not negate the strong eyewitness evidence presented by the Commonwealth.

Further, the only physical evidence in the case supported the witnesses' version of the events. All three witnesses told the police that defendant shot Ms. Muhammad from approximately one block away, on the 7600 block of Rugby Street. A crime scene investigator testified that nine fired cartridge casings were discovered at that location. N.T. 7/18/2013 at 81-82. In addition, the medical examiner testified that Ms. Muhammad's wounds were not inflicted at close range, supporting the witnesses' accounts of the shooting.

Because the evidence fully supported the verdict, the Court did not abuse its discretion in denying defendant's motion for a new trial.

C. Motion for Extraordinary Relief

Defendant claims that the Court erred in denying defendant's Motion for Extraordinary Relief, because "[a]ll the testimony did not place the defendant at the scene of the crime, did not identify his as the shooter, and there was no physical evidence to tie the defendant to the shooting." Statement of Errors at ¶ 2. This is, apparently, a mere restatement of defendant's claim that the verdict was against the weight of the evidence. For the reasons stated above, no relief is due on this claim.

III. CONCLUSION

For all of the foregoing reasons, the Court's judgment of sentence should be affirmed.

BY THE COURT:

GLENN B. BRONSON, J.