

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

RAFIQ DIXON

Appellant

No. 2215 EDA 2012

Appeal from the Judgment of Sentence July 25, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0011476-2011

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

MEMORANDUM BY JENKINS, J.:

FILED JULY 01, 2014

Appellant Rafiq Dixon appeals the judgment of sentence imposed on July 25, 2012, following his conviction for murder of the first degree.¹ After careful review, we affirm.

The trial court summarized the facts and trial testimony as follows:

Dr. Aaron Rosen testified that on April 28, 2011, he performed an autopsy on Joseph Pickney, Jr., hereinafter referred to as the decedent. He opined that the cause of death was multiple gunshot wounds to the torso and extremities and that the manner of death was homicide.

Dr. Rosen testified that the decedent sustained seven (7) gunshot wounds, none of which were consistent with a contact or close contact wound which means that the gun was fired from more than two (2) feet away from the decedent's body. Two (2)

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S. § 2502(a).

bullet specimens were recovered from the decedent's body and turned over to the police.

Detective Philip Nordo testified that after seeing that the corner store where the decedent's body was found had a video camera, he called Detective Dunlap to recover the video from the camera. After watching the video, he sought out information as to the identity of the two males depicted in the video talking to the decedent outside the corner store. On May 8, 2011, Edwin Roew was interviewed. He identified Devon Collins and Shaquil Gressom as the two males depicted in the video. Collins and Gressom were subsequently interviewed. Based on the statements from Gressom and Collins, an arrest warrant was issued for [Appellant] on June 3, 2011.

Devon Collins testified at trial, that on April 27, 2011, at approximately 8:00 P.M., he was walking in the area of 51st and Race Streets with Shaquil Gressom. They were stopped by the decedent, who asked them if they wanted to buy some pills. Collins told him that he wanted to buy Xanax. Gressom was standing right next to him. After exchanging telephone numbers with the decedent, Collins gave the decedent money for the pills. Before the decedent could turn over the pills, [Appellant], known to him as "Feek", came around the corner with a gun in his hand. He heard a "click" that sounded like the gun jammed. The decedent started to run down Race Street, with [Appellant] running after him. Collins ran across the street and heard more gunshots. When the gunshots stopped, he started to walk back toward his house. He saw the decedent running back towards the corner store at 51st and Race Streets. He walked over to the store and saw the decedent lying on the floor of the store bleeding from his hand. He knew [Appellant] for several years from around the area. At trial, he pointed to [Appellant] as the person he knows as "Feek". He did not call the police because he did not have anything to do with the shooting.

On May 16, 2011, Collins was taken to police headquarters where he gave a statement to homicide detectives. In his statement, he acknowledged that he knew it was [Appellant] approaching the decedent pointing a gun, because he knew [Appellant] for four (4) years and he knew [Appellant] was from 51st and Haverford Avenue. When [Appellant] came around the corner towards the decedent, he had a shirt wrapped around his mouth and forehead, with his eyes and nose exposed. The shirt fell down from his face as he approached the decedent while

pointing the gun at the decedent's chest area. He saw the decedent reach out his arm and try to grab the gun. He described "Feek" as approximately 5'4", and brown skinned. The detectives retrieved [Appellant's] number from his cell phone. He identified [Appellant's] photo from a photo array that he circled and signed.

Collins testified further that he was shown a video that was recorded at the time of the incident by the store owner before he was brought in for questioning. He was shown the video at trial and identified himself, Gressom, [Appellant] and the decedent as appearing in the video. He identified the decedent as the person he bought the pills from; Gressom as the person standing on his left side; and "Feek" ([Appellant]), as the person shown on the video pulling out a gun, whom he could identify when the shirt covering his face fell down.

On redirect examination, Collins testified that at the preliminary hearing, in response to the question of whether he could see the face of the shooter, he testified that he could see the shooter's face because the scarf covering his face fell down off his face. He testified further that his statement to police and his testimony at trial was based on what he had seen the night of the shooting and not from what he saw on the video.

Police Officer Marvin Ruley testified that on April 27, 2011 at 8:15 P.M. he was on regular patrol when a radio call of [a] shooting at 51st and Race Streets came over police radio. When he arrived at the scene, a large crowd was standing in front of a corner variety store at 5101 Race Street. A black male was laying in the doorway of the store with gunshot[] wounds to his chest and head.

Zelenia Lomax testified that she knew the decedent through his cousin and knows [Appellant]. She was aware that there was a dispute between [Appellant] and the decedent that involved the decedent pulling a gun on [Appellant's] mother. She went to [Appellant's] house to confront [Appellant] about the dispute. [Appellant] told her that if he killed the decedent no one would know because the decedent "burnt so many people in the neighborhood". A week or two later, the decedent was shot. She gave a statement to the police wherein she described [Appellant] and gave them his address. She identified photos of the decedent and of [Appellant].

Detective Michael Walter, assigned to the fugitive squad testified that on June 3, 2011, Detective Nordo obtained an arrest [warrant] for [Appellant]. After an unsuccessful attempt to serve the warrant on [Appellant] at his residence, he turned the warrant over to the fugitive squad. [Appellant] was taken into custody on July 7, 2011.

Shaquil Gressom testified that on April 27, 2011 at 8:15 P.M., he was going to the corner store at 51st and Race Streets with Devon Collins. Collins was talking to the decedent about buying pills. A person came around the corner waving a gun. The person approached the decedent, pointed a gun at him and started arguing with him. The decedent was yelling, "stop, chill, don't, don't". The person fired the gun at the decedent. As Gressom was running away, he heard four (4) more gunshots. The person he saw coming around the corner waving a gun did not have anything covering his face. He had never seen the person with the gun before that day.

Detective Jenkins interviewed Shaquil Gressom on May 22, 2011, at approximately 5:25 P.M. During that interview, Gressom described the shooter and identified [Appellant] from a photo array. Gressom did not indicate in his statement that the shooter had his face covered.

Gressom's testimony at [Appellant's] preliminary hearing held on October 5, 2011, was inconsistent with his statement to detectives in that he testified at the [p]reliminary [h]earing that the shooter had his face covered and that he could not identify the shooter. However, he testified at trial that he recanted his identification at the preliminary hearing because he was nervous, did not want to be in court and that he was concerned about his welfare and the welfare of his family. He testified at trial that he saw the shooter's face at the time of the incident and identified [Appellant] at trial in the court room as the shooter.

On re-direct examination, Gressom testified that when the shooter came around the corner, he could see half of the shooter's face. The shooter was holding his shirt over his nose with one hand and a gun with the other hand. The shooter's shirt came down off his face for a second when the shooter first turned the corner.

Detective Jenkins testified that he was present at [Appellant's] preliminary hearing on October 5, 2011, and that

Gressom told him that he was afraid to testify because of the people in the courtroom that were from the neighborhood.

. . . [D]uring defense counsel's cross-examination of Detective Jenkins as to his testimony that Gressom never told him that the shooter had a sheet covering his face, defense counsel blurted out that Detective Jenkins was a liar. The court excused the jury from the room and addressed defense counsel regarding his behavior in calling Detective Jenkins a liar. The [c]ourt advised defense counsel that it would keep defense counsel's contemptuous behavior under advisement.

Trial Court 1925(a) Opinion, May 24, 2013 ("1925(a) Opinion"), pp. 2-6 (record citations omitted).

The jury convicted Appellant of murder of the first degree on July 25, 2012. The trial court sentenced Appellant to life imprisonment without the possibility of parole on the same day.² Appellant did not file post-sentence motions, and instead filed a notice of appeal on July 31, 2012. The trial court ordered Appellant to file a Pa.R.A.P. 1925(b) statement of matters complained of on appeal and Appellant timely complied. The trial court filed its 1925(a) Opinion on May 24, 2013.

Appellant raises the following issues for our review:

- I. Was the evidence sufficient to support the identification of Appellant as the person who shot and killed the deceased beyond a reasonable doubt?
- II. Did the court violate due process of law when it excused the jury and made it clear that defense counsel's conduct in cross-

² The trial court also imposed a concurrent 2½ to 5 year sentence of incarceration on Appellant's conviction for carrying firearms on public property in Philadelphia in violation of 18 Pa.C.S. § 6108. Appellant does not challenge the judgment of sentence for this conviction.

examining Detective Jenkins was contemptuous and kept under advisement what sanctions, if any, it would apply creating a structural error in the trial that requires reversal without any proof of prejudice?

Appellant's Brief, p. 5 (all capitals omitted).

Appellant first argues the Commonwealth failed to prove he committed the crime of murder of the first degree. Specifically, Appellant contends the Commonwealth failed to prove Appellant was the person who shot the victim. Appellant argues that the testimony of witnesses who saw the assailant with a partially covered face for a short period of time was insufficient to identify him as the assailant. **See** Appellant's Brief, pp. 12-19. This claim lacks merit.

When examining a challenge to the sufficiency of evidence:

[W]e evaluate the record in the light most favorable to the Commonwealth as verdict winner, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. 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. However, the Commonwealth need not establish guilt to a mathematical certainty, and it may sustain its burden by means of wholly circumstantial evidence. Moreover, this Court may not substitute its judgment for that of the fact finder, and where the record contains support for the convictions, they may not be disturbed. Circumstantial evidence itself can be sufficient to prove any element or all of the elements of a criminal homicide. Also, we have held that circumstantial evidence is reviewed by the same standard as direct evidence—that is, that a decision by the trial court will be affirmed so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. Lastly, we note that the finder of fact is free to believe some, all, or none of the evidence presented.

Commonwealth v. Santiago, 980 A.2d 659, 662 (Pa.Super.2009) (internal quotations and citations omitted).

“[T]o prove first degree murder, the Commonwealth must demonstrate that a human being was unlawfully killed, that the defendant did the killing, and that the killing was done in an intentional, deliberate and premeditated manner.” **Santiago**, 980 A.2d at 662. Eyewitness testimony can circumstantially prove a defendant’s identity as a shooter. **See Commonwealth v. Collins**, 70 A.3d 1245 (Pa.Super.2013) (identification sufficient where two witnesses who knew defendant testified that they saw defendant and another person walking towards scene of crime, the other person had a gun, and the defendant and the other person later ran from the scene); **Commonwealth v. Roney**, 866 A.2d 351 (Pa.2005) (witnesses identified defendant as the tall individual in vicinity of murder scene before and after the crime and stood near front door where victim was shot). That a witness may only briefly observe a defendant, or that the defendant’s face may have been partially covered, will not necessarily negate an eyewitness identification. **See Commonwealth v. Johnson**, 910 A.2d 60 (Pa.Super.2006) (identification testimony not incredible because witnesses had only seconds to see the defendant’s partially covered face that was in constant motion where the witnesses observed the defendant at close range, in a well-lit area, and knew and immediately recognized the defendant).

Here, the Commonwealth presented the testimony of Devon Collins and Shaquil Gressom. Collins was standing at the corner of 51st and Race

Streets directly next to the victim attempting to purchase drugs when Appellant came around the corner holding a gun and shouting threats. Collins observed Appellant shove the gun in the victim's chest, and then chase the victim. He heard the gunshots and observed the injured victim thereafter. Although Appellant's face was partially covered, Collins knew him as "Feek", an acquaintance of several years from the area. Collins identified Appellant in a surveillance video, a photo array, and in court. Shaquil Gressom was with Devon Collins on his way to the store at 51st and Race Streets when Appellant approached. Gressom testified he saw Appellant come around the corner, watched the interaction between the victim and Appellant, and heard the gunshots after Appellant chased the victim. Gressom had never seen Appellant before that day, but later identified him from a photo array and in court at trial. This evidence, viewed in the light most favorable to the Commonwealth as verdict winner, proved that Appellant did the killings and sufficiently supported the conviction for murder of the first degree.³

³ Appellant also argues that inconsistencies in the witnesses' prior testimony rendered their identifications infirm. **See** Appellant's Brief, pp. 17-19. Challenges to credibility of the evidence go to weight of the evidence, not sufficiency. **See, e.g., Commonwealth v. Boxley**, 838 A.2d 608, 612 (Pa.2003) (claims that testimony was contradictory and that witness had motive to testify against appellant went to the weight of the evidence, not sufficiency); **Commonwealth v. Small**, 741 A.2d 666, 672 (Pa.1999) (claim that testimony of witnesses was inconsistent is properly a challenge to the weight of the evidence). A weight of the evidence claim cannot be raised for the first time on appeal and, if not properly raised in the trial (*Footnote Continued Next Page*)

Appellant next argues that this Court should reverse his judgment of sentence because a “structural defect” was created when the trial court admonished defense counsel and advised him that it would keep his conduct under advisement for possible future sanctions. **See** Appellant’s Brief, pp. 19-24. This claim also lacks merit.

As this Court recently explained:

Structural defects are a class of constitutional error. **See *United States v. Gonzalez-Lopez***, 548 U.S. 140, 148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Structural defects “defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself.” ***Id.*** (internal quotation marks, brackets and citation omitted). Few constitutional errors qualify as structural defects. In *Gonzalez-Lopez*, the Supreme Court identified these as the complete “denial of counsel, the denial of the right of self-representation, the denial of the right to public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction.” ***Id.***, at 149, 126 S.Ct. 2557 (internal citations omitted). The Supreme Court named a new structural defect claim in *Gonzalez-Lopez*: the erroneous disqualification of a criminal defendant's choice of retained counsel. *See id.*, at 150, 126 S.Ct. 2557.

Commonwealth v. Sandusky, 77 A.3d 663, 671 (Pa.Super.2013).

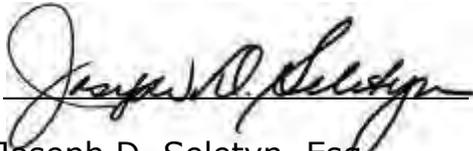
(Footnote Continued) _____

court, it will be deemed waived. Pa.R.A.P. 302(a); **see also** Pa.R.Crim.P. 607(A) (“A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial: (1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion.”). Appellant waived his weight of the evidence claims by not preserving or raising them at sentencing or in post-trial motions. Accordingly, we will not address this portion of Appellant’s argument.

Here, the trial judge admonished defense counsel for calling a witness a "liar". This admonition did not deny Appellant counsel or erroneously disqualify his choice of retained counsel. The court simply verbalized its displeasure with counsel's conduct and advised counsel that the improper conduct may have future consequences. The issuance of such a warning was within the court's discretion. Further, the admonition occurred outside the presence of the jury, which was the finder of fact. In short, the court's admonition of defense counsel did not create a "structural defect" in the prosecution of this case. This claim 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: 7/1/2014