

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
SHYKIR CREW,	:	
	:	
Appellant	:	No. 1979 EDA 2014

Appeal from the Judgment of Sentence entered on June 20, 2014
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No. CP-51-CR-0002711-2012

BEFORE: DONOHUE, OLSON and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED MARCH 09, 2015

Shykir Crew (“Crew”) appeals from the judgment of sentence entered following his conviction of robbery, aggravated assault, carrying a loaded firearm in Philadelphia, possession of a firearm by a minor, and possession of an instrument of crime.¹ We affirm.

During the evening of June 23, 2011, Crew approached the victim, Eric Johnson (“Johnson”), who had just parked his vehicle on the 5300 block of Girard Avenue in Philadelphia. From a distance of about two and one-half feet, Crew pointed a gun at Johnson’s head and stated, “Give it up, old head.” Johnson recognized Crew as the son of his neighbor, Sakina Crew (“Ms. Crew”). Johnson tried to wrestle the gun from Crew. Upon regaining control of the firearm, Crew shot Johnson and then fled.

¹ 18 Pa.C.S.A. §§ 3701, 2702, 6108, 6110, 907.

At the hospital, Johnson identified the perpetrator as the teenage son of Ms. Crew. Johnson described his assailant as a 5'4" black male of about 130 pounds. Johnson told police that Crew lives at 5312 Poplar Street in Philadelphia. Later that day, Johnson positively identified Crew from photographs provided by police officers. Ultimately, Crew was arrested.

A jury subsequently convicted Crew of the above-described charges. The trial court sentenced Crew to an aggregate prison term of 16 years, 10 months, to 47 years. Crew filed a post-sentence Motion, which the trial court denied. Thereafter, Crew filed the instant timely appeal.

Crew presents the following claim for our review:

Was the evidence insufficient to find [Crew] guilty of the offense of aggravated assault as a first[-]degree felony because the *mens rea* element of this offense was not proved beyond a reasonable doubt?

Brief for Appellant at 2.

Crew challenges the sufficiency of the evidence underlying his conviction of aggravated assault as a first-degree felony. ***Id.*** at 6. Crew asserts that there was no showing that he acted intentionally, knowingly or recklessly, under circumstances manifesting an extreme indifference to the value of human life. ***Id.*** According to Crew, "the evidence showed that the incident was a robbery gone bad[,]" where the victim was shot once after an altercation over the gun. ***Id.*** Crew argues that, although the Commonwealth might have established the intent necessary for robbery, it did not prove the necessary intent to establish aggravated assault. ***Id.***

We review a challenge to the sufficiency of the evidence under the following, well-settled standard of review:

A claim challenging the sufficiency of the evidence presents a question of law. ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (Pa. 2000). We must determine “whether the evidence is sufficient to prove every element of the crime beyond a reasonable doubt.” ***Commonwealth v. Hughes***, 521 Pa. 423, 555 A.2d 1264, 1267 (Pa. 1989). We “must view evidence in the light most favorable to the Commonwealth as the verdict winner, and accept as true all evidence and all reasonable inferences therefrom upon which, if believed, the fact finder properly could have based its verdict.” ***Id.***

Our Supreme Court has instructed 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. 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.

Commonwealth v. Thomas, 65 A.3d 939, 943 (Pa. Super. 2013) (citation omitted).

The Crimes Code defines the crime of aggravated assault as follows:

(a) Offense defined.—A person is guilty of aggravated assault if he:

(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life[.]

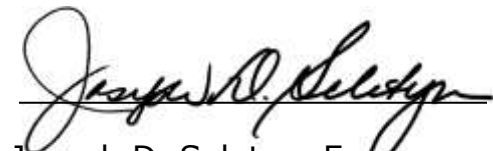
J-S14031-15

18 Pa.C.S.A. § 2702(a)(1).

In its Opinion, the trial court addressed Crew's claim and concluded that it lacks merit. Trial Court Opinion, 10/7/14, at 3-13. Upon review, we agree with the sound reasoning of the trial court, as expressed in its Opinion, and affirm on this basis. ***See id.***

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: 3/9/2015

FILED

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA OCT 07 2014

Criminal Appeals Unit
First Judicial District of PA

COMMONWEALTH OF PENNSYLVANIA :
 : CP-51-CR-0002711-2012
 :
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 v. :
 : SUPERIOR COURT
 : 1979 EDA 2014
 SHYKIR CREW :
 :
 :

O P I N I O N

CHRIS R. WOGAN, J.

Procedural Posture

From February 7, 2014 through February 12, 2014, the defendant appeared for a jury trial before the Honorable Chris R. Wogan.¹ On February 18, 2014, the jury found the defendant guilty of robbery, aggravated assault, carrying a loaded firearm in Philadelphia, possession of a firearm by a minor, and possession of an instrument of crime. On April 8, 2014, the defendant was sentenced as follows: ninety-six (96) to two hundred and thirty-four (234) months incarceration for robbery; eighty-four (84) to two hundred twenty-eight (228) months incarceration for aggravated assault; twelve (12) to forty-eight (48) months incarceration for carrying a firearm in Philadelphia; four (4) to twenty-four (24) months incarceration

¹Defendant's attorney at the time of trial was Jeremy Marcus Walker, Esq.

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for possession of a firearm by a minor; and six (6) to thirty (30) months incarceration for possession of an instrument of crime.

On April 11, 2014, the defendant filed a Motion to Proceed In Forma Pauperis. On April 14, 2014, the defendant filed a post sentence motion requesting the verdict be vacated for insufficiency of the evidence. On April 30, 2014, this Court vacated the defendant's sentence in order to preserve his appellate rights. On May 13, 2014, this Court allowed trial counsel to withdraw from representation of the defendant. On May 15, 2014, this Court appointed John P. Cotter, Esq. to represent the defendant.

On June 20, 2014, this Court imposed the same sentences imposed on February 18, 2014. On July 10, 2014, Mr. Cotter filed the defendant's Notice of Appeal. On July 16, 2014, this Court ordered the defendant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). On July 28, 2014, the defendant's 1925(b) Statement of Errors Complained of on Appeal was filed. No relief is due.

Discussion

A. Defendant's errors complained of on appeal are: "The evidence was insufficient to identify the defendant as the perpetrator of the crimes of robbery, aggravated assault, Violations of the Uniform Firearms Act (2 Counts), and possession of an instrument of crime." The Defendant also argues "The evidence was insufficient to establish that the defendant had the *mens rea* for the offense of Aggravated Assault."

The evidence at trial was more than sufficient to convict defendant of aggravated assault, robbery, violations of the Uniform Firearms Act, and possession of an instrument of crime beyond a reasonable doubt.

Sufficiency of evidence law is described:

In reviewing a claim regarding the sufficiency of the evidence, an appellate court must determine whether the evidence was sufficient to allow the fact finder to find every element of the crimes charged beyond a reasonable doubt. In doing so, a reviewing court views all the evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. Furthermore, in applying this standard, the Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence. When performing its review, an appellate court should evaluate the entire record and all evidence received is to be considered, whether or not the trial court's rulings thereon were correct. Additionally, we note that the trier of fact, while passing on the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence.

Commonwealth v. Burton, 2 A.3d 598, 601 (Pa. Super. Ct. 2010) (citations omitted).

Eric Johnson testified that on the evening of June 23, 2011, he parked his car on the 5300 block of Girard Avenue, exited the car and was approached by a black male. From about

two and a half feet away the male pointed a gun at Mr. Johnson's head and said to him "Give it up, old head." Having grown up in West Philadelphia, Mr. Johnson understood the words "Give it up, old head" along with the pointing of the gun to mean he was being robbed and to empty his pockets. At this point Mr. Johnson recognized the male to be his neighbor Sakinah Crew's son, the defendant. Mr. Johnson attempted to wrestle the gun from the defendant but failed to disarm him. When the defendant regained control of the gun he backed up and fired at Mr. Johnson striking him in his side. The defendant fled the scene and Mr. Johnson fell into the street. N.T. 2/7/14 pg. 80-155.

On several occasions Mr. Johnson identified the defendant, and only the defendant, as the man who shot him. Philadelphia Police Corporal Anthony Wilkins was the first to interview Mr. Johnson at the hospital in the early hours of June 23rd. Mr. Johnson told the officer that his neighbor's son was the person who shot him and provided a description of a 5'4, black male, 130lbs. Mr. Johnson elaborated by saying it was his neighbor Kay's son, and they lived at 5312 Poplar Street. N.T. 2/7/14 pg. 52-79. Mr. Johnson was interviewed at the hospital later that day by detective Mullen and gave a similar description, again saying it was his neighbor Kay's teenage son who shot him. Mr. Johnson also positively identified Kay (Sakinah Crew) and the defendant using photographs supplied by Detective Mullen. Mr.

Johnson has known and lived by Ms. Crew and her family for over 5 years prior to the shooting. A month later Mr. Johnson again stated it was the defendant who shot him when Detective Mullen informed Mr. Johnson that the defendant was apparently at a DHS facility on the night of the shooting. Mr. Johnson did not change his story and insisted the defendant was the individual who shot and robbed him. N.T. 2/7/14 pg. 80-155; N.T. 2/11/14 pg. 113-218.

Mr. Johnson testified that the bullet that the defendant shot him with is still lodged in his body, between his T-8 and T-12 spinal cord. Doctors do not want to remove the bullet because of possible serious health risks. Mr. Johnson cannot walk on his own unsupervised and uses either a wheel chair or a walker. He required a urinary bag for over two years and now has to urinate every hour to hour and a half. Mr. Johnson has not been able to work since the incident. N.T. 2/7/14 pg. 80-155.

The defendant introduced an alibi defense of being at a DHS facility, Devereux in Chester County, the night of the shooting. However, testimony revealed that Devereux is not a secure facility, the staff does not sufficiently supervise the residents over night, and the defendant had a history of going AWOL from the facility. Testimony further revealed that doors at Devereux are locked only from the outside, the defendant's room is located on the ground floor, and there are no alarms on the

windows. Byron Lee, a manager of operations and staff at Devereux, testified that there is nothing stopping a juvenile from going out a window and down to one of the roads to be picked up by a motor vehicle. Mr. Lee also testified that in May of 2013, the defendant was caught going AWOL from his room, presumably through his window undetected, and later that night he was caught climbing back through the same window. N.T.

2/10/14 pg. 167-210; N.T. 2/11/14 pg. 6-23. Steven Rose, a staff member at Devereux who worked the overnight shift on June 22, 2011 even stated "kids get out of the facility a lot and they get in trouble a lot." N.T. 2/12/14 pg. 21.

Mr. Lee testified Devereux staff perform checks every fifteen minutes overnight to confirm all juveniles are still in their rooms. However, when police asked for the logs documenting these checks, Devereux staff was not able to provide them. When these logs were finally turned over to State Police on July 28th, 2011, only day logs were provided, approximately one third of which did not have the requisite signatures indicating a juvenile was in fact at Devereux. The overnight logs were never provided to the police. Contrary to Mr. Lee's testimony about the checks every fifteen minutes, State Police Officer Curtis Matthews testified that he recalled Mr. Lee informing him frequent overnight checks are not necessary because the kids are sleeping. Mr. Lee testified that he is aware Devereux would be

liable if found to be negligent if a juvenile went AWOL and committed a criminal act. N.T. 2/10/14 pg. 167-210; N.T. 2/11/14 pg. 6-23.

On July 28, 2011, Detective Mullen executed a search of the defendant's room at Devereux. Detective Mullen recovered the following: an ipod/pad/phone charger but no ipod/pad/phone; a letter dated May 24, 2011, from a female commit discussing going AWOL, specifically "you're talking about AWOL. I'm AWOLing this weekend...See if you can get a car (underlined)"; two more letters that mention going AWOL and that the defendant intends to AWOL. N.T. 2/11/14 pg. 113-218.

Sakinah Crew, mother of the defendant who goes by the name "Kay" and has two convictions for crimes of dishonesty,² attempted to draw the attention away from her son by approaching police at the scene of the crime and telling them she was a witness. Officer Michael Carey testified that a female identified herself as "Kay" and said she saw two males fleeing the scene of the incident. Officer Carey stated that in his 17 plus years as an officer in West Philadelphia, working approximately 100 shooting scenes, he has never been approached by someone saying I'm an eyewitness, take me down to the detectives, other than Ms. Crew. N.T. 2/11/14 pg. 58-79. Ms.

²Two convictions for retail theft committed in Delaware County. N.T. 2/10/14 pg. 27.

Crew went to the Southwest Detectives in the early morning hours of June 23rd to provide information about the shooting. N.T. 2/10/14 pg. 4-116. Detective Pearson talked to Ms. Crew at Southwest Detectives and stated she only wanted to be identified as "Kay." She refused to provide a date of birth, address, phone number, employment, contact information of a close relative, or any other identifying information. Detective Pearson said based on his twenty years of experience, a witness coming forward but refusing to provide any information was unusual. N.T. 2/11/14 pg. 80-99, 113-218.

Ms. Crew told Detective Pearson that she heard what sounded like fire crackers, looked out her window and saw two black males running down the street. She said she can identify one of the guys involved in the shooting, the taller one who was 6'1" to 6'3" with facial hair. When showed photos of black males matching the description, Ms. Crew picked out one for a Malik Davis and stated that she is 100% sure this is the guy she saw. However, Malik Davis, whom Ms. Crew identified as the shooter in a photo lineup, was incarcerated at SCI Houtzdale, in Clearfield County Pennsylvania, over 220 miles from Philadelphia on the date Mr. Johnson was shot. N.T. 2/11/14 pg. 80-99, 113-218.

In addition, Jelani Abdu attempted to corroborate Ms. Crew's fabricated story of what occurred on June 23, 2013. Mr. Abdu pulled Mr. Johnson out of the street after he had been

shot. Mr. Abdu claims he witnessed the shooting from his window, approximately 120 to 140 feet from the incident, and saw two young men fleeing. Mr. Abdu informed police that, as he was pulling Mr. Johnson out of the street, Mr. Johnson told him two young boys shot him. When interviewed by Detective Mullen on the morning of June 23, Mr. Abdu gave similar yet slightly contradictory descriptions of these two males when compared with Ms. Crew's descriptions. Both Ms. Crew and Mr. Abdu described two males as one being around 6'1" with a "thin beard" wearing "Adidas Shelltop shoes" and one shorter heavier one. However, Mr. Abdu says the taller male had a white Adidas t-shirt and khaki shorts, and the shorter heavier one had an orange shirt and khaki pants. Ms. Crew said the taller one had an orange shorts and white t-shirt. N.T. 2/10/14 pg. 117-165

The introduction of cellular phone records showing numerous calls between Ms. Crew and Mr. Abdu minutes after the shooting and throughout the early morning, Mr. Abdu told Detective Mullen that he had not talked to Ms. Crew on June 23rd. Ms. Crew does acknowledge these numerous calls but claims to not recall what they talked about, and further testified that they did not talk about the shooting. However, when confronted in court with phone logs showing his calls to/from Ms. Crew right after the shooting, Mr. Abdu acknowledged the calls, stating he and Ms. Crew talked about what happened and what they saw. He

acknowledges a call at 3:18AM where Ms. Crew told him about going to the police station and looking at photo lineups. N.T. 2/10/14 pg. 4-165; N.T. 2/11/14 pg. 80-99, 113-218.

Mr. Abdu's motive to support Ms. Crew's story covering up her son's involvement in the shooting derives from an apparent relationship with Ms. Crew, romantic or not. Ms. Crew testified that Mr. Abdu is a close friend whom she has known for eight years. Despite Mr. Abdu's testimony that he and Ms. Crew were not in a romantic relationship, Ms. Crew stated Mr. Abdu was sending her text messages on the day of the shooting about "perverted stuff" that was not for everybody to hear, implying he was proposing some sort of romantic interaction with Ms. Crew. N.T. 2/10/14, pg. 66-68. N.T. 2/10/14 pg. 117-165. Furthermore, Mr. Johnson explained that prior to the incident Mr. Abdu was friendly towards him but after, it appeared that Mr. Abdu was avoiding him. N.T. 2/7/14 pg. 80-155.

On June 24, 2011, at approximately 7:00AM, police executed a search warrant at Ms. Crew's residence. Ms. Crew did not answer the door and police resorted to forced entry. Ms. Crew testified she was asleep and did not hear police knocking. However, phone records show she was sending text messages and using the internet on her phone a few minutes prior to police's arrival that indicate she was awake. Ms. Crew also called Mr. Abdu at 7:52AM after the police had left, then again numerous

times throughout the morning. Ms. Crew testified again she doesn't remember what they talked about. Ms. Crew informed police there she had a .380 handgun in the closet of her bedroom, which she had seen there as recently as three days prior. However, the gun was not located where Ms. Crew said it would be. Police did find the .380 caliber handgun with nine live rounds in a safe behind a TV stand in the same bedroom. N.T. 2/10/14 pg. 4-116. N.T. 2/7/14 pg. 155-179.

Based on the above testimony, there was sufficient evidence to find the defendant guilty of aggravated assault and related offenses. The defendant approached the victim, pointed a gun at him from less than three feet away and attempted to rob him. The victim positively identified the defendant, whom he has known for several years as his neighbor's son, on numerous occasions to police. The victim insisted the defendant was the man who shot him even when police informed him that the defendant was apparently residing at a DHS facility the night of the shooting. However, testimony indicated that the defendant could easily leave the facility undetected during the night through the window in his room, and has a history of doing so. Furthermore, the facility was unable to provide any documentation that the defendant was in fact at the facility the night of the shooting. It is also apparent that the defendant displayed the requisite mens rea for the offense of aggravated assault, stemming from

his actions of wrestling the gun from the victim, stepping back, and then shooting him, causing a bullet to be lodged in the victim's spine.

Lastly, the defendant's own mother and her friend fabricated a clearly fictitious and deceitful story about two unknown men shooting the victim in an obvious attempt to cover up her son's involvement in the crime. Both Ms. Crew and Mr. Abdu were caught in several lies about talking on the phone the morning of the incident, and even mixed up the overly specific descriptions of the alleged males involved in the shooting. In addition, Ms. Crew told police she was 100% sure of a photo identification she made, which in fact was of an individual incarcerated in a state correctional facility hours from Philadelphia. There was sufficient evidence at trial to discredit their story and entire testimony.


See *Commonwealth v. Bruce*, 207 Pa. Super. 4 (2007) ("Where...the victim suffered serious bodily injury, the Commonwealth may establish the mens rea element of aggravated assault with evidence that the assailant acted either intentionally, knowingly, or recklessly...In determining whether intent was proven from such circumstances, the fact finder is free to conclude "the accused intended the natural and probable consequences of his actions to result therefrom."); *Commonwealth v. Orr*, 38 A.3d 868, 872, 874-876 (Pa. Super. 2011) ("The

Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. ... [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"; "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the...verdict if it is so contrary to the evidence as to shock one's sense of justice").

Conclusion

For all of the above reasons, the claims defendant raises on appeal should provide no relief. Defendant's sentences should, therefore, stand.

BY THE COURT:



CHRIS R. WOGAN,
J.