

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
DYAIR JAMES	:	
	:	
Appellant	:	No. 2225 EDA 2018

Appeal from the Judgment of Sentence Entered July 13, 2018  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0002966-2017

BEFORE: OTT, J., DUBOW, J., and STRASSBURGER\*, J.

MEMORANDUM BY OTT, J.:

**FILED MAY 1, 2019**

Dyair James appeals from the judgment of sentence imposed on July 13, 2018, in the Court of Common Pleas of Philadelphia County, following his conviction by a jury on the charges of first-degree murder, conspiracy to commit murder and possession of an instrument of crime (PIC).<sup>1</sup> James received a mandatory sentence of life imprisonment and a concurrent term of 15-30 years' incarceration for conspiracy to commit murder.<sup>2</sup> In this timely appeal, James claims there was insufficient evidence to support the conviction, the verdict was against the weight of the evidence, and the trial court erred

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> **See** 18 Pa.C.S. §§ 2502(a), 903, and 907, respectively.

<sup>2</sup> No additional sentence was imposed on the PIC conviction. Given our disposition of the other issues, we need not discuss this conviction.

in failing to grant a mistrial after the Commonwealth improperly implied he was involved in gang activity. Counsel has filed an **Anders**<sup>3</sup> brief, asserting he has reviewed the record and determined there are no non-frivolous issues. Counsel has also filed a motion to withdraw as counsel and has complied with all other **Anders** requirements.<sup>4</sup> After a thorough review of the **Anders** brief,

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<sup>3</sup> **Anders v. California**, 386 U.S. 738 (1967).

<sup>4</sup> The Anders requirements are:

The request by appointed counsel to withdraw pursuant to **Anders** triggers specific requirements, certain of which apply to appointed counsel and others to the court to which appointed counsel makes his or her request for withdrawal. These requirements and the significant protection they provide to an **Anders** appellant arise because a criminal defendant has a constitutional right to a direct appeal and to counsel on that appeal. **Commonwealth v. Woods**, 939 A.2d 896, 898 (Pa. Super. 2007). This Court has summarized these requirements as follows:

Direct appeal counsel seeking to withdraw under **Anders** must file a petition averring that, after a conscientious examination of the record, counsel finds the appeal to be wholly frivolous. Counsel must also file an **Anders** brief setting forth issues that might arguably support the appeal along with any other issues necessary for the effective appellate presentation thereof.

**Anders** counsel must also provide a copy of the **Anders** petition and brief to the appellant, advising the appellant of the right to retain new counsel, proceed *pro se* or raise any additional points worthy of this Court's attention.

**Id.** (citations omitted).

There are also requirements as to the precise content of an **Anders** brief:

relevant law, and the certified record, we affirm and grant counsel's motion to withdraw.

As part of an ongoing dispute between two groups from adjacent neighborhoods in Philadelphia, Dyaire James and another male shot and killed Leonard Boyer. An eyewitness, Wanda Scott, identified James as one of the men running from the scene, getting into a car and fleeing. She also saw James carrying a handgun as he ran. James voluntarily went to the police

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[T]he **Anders** brief that accompanies court-appointed counsel's petition to withdraw ... must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

[**Commonwealth v. Santiago**, 978 A.2d [349 (Pa. 2009)] at 361. If counsel has met these obligations, "it then becomes the responsibility of the reviewing court to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." **Id.** at 354 n. 5.

...  
We now turn to this Court's role in the **Anders** procedure: the independent review of the record. Binding precedent from the Pennsylvania Supreme Court and this Court requires that an independent review of the record include the review of the entire record for any non-frivolous issues.

**Commonwealth v. Flowers**, 1246, 1248-49 (Pa. 2015).

We note that James has not filed a *pro se* response.

department to be interviewed. While there, he also allowed the police to look at his cell phone. The police found a text message on his phone, sent fifteen minutes after the shooting that read, "Up 1, bro." The message was sent to an individual, Robert "Quack" Emily. Emily was known to the police as a person associated with one of the feuding areas.<sup>5</sup> When asked about the message, James claimed it related to a video game, and then ended the interview. However, he agreed to leave his phone with the police.

A forensic review of the phone led the police to conclude James had been in the immediate area of the shooting at the time of the shooting, and that just prior to and after the shooting, he had been in the neighborhood of one of the feuding groups.

Although the murder weapon was never located, the police found messages of James inquiring about purchasing a Smith & Wesson semi-automatic handgun. The picture of the gun showed either a 9 mm or .40 caliber weapon. Fired cartridge casings (FCC) from the crime scene were from a .40 caliber weapon and other forensic identifiers were consistent with a Smith & Wesson .40 caliber weapon.<sup>6</sup>

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<sup>5</sup> The defense suggests Emily, a person of similar build to James, was the shooter. However, the police also performed a forensic analysis of Emily's cell phone and determined he was miles away from the crime scene shortly before and after the time of the crime.

<sup>6</sup> The FCC had identical hemispherical firing pin markings and a projectile recovered from the body was a .40 caliber projectile with five right twist lands

The review of James' phone also found repeated internet searches for news stories related to the shooting. Additionally, other text messages told various people to watch the news as well as other references to the killing.<sup>7</sup>

Finally, video surveillance from the crime scene showed two men approaching Boyer, drawing weapons, and shooting him, before fleeing in the direction the eyewitness saw the man she identified as James running, carrying a handgun.

Although much of the evidence against James was circumstantial, the jury found the evidence sufficient to support the Commonwealth's allegation that James was one of the shooters who killed Leonard Boyer.

While we agree with counsel that the issues James request be raised are frivolous, we are also aware that the line between frivolous and non-meritorious can be difficult to discern. Given that this appeal addresses the most serious of crimes, we will provide a detailed review.

In his first issue, James argues the evidence presented at trial was insufficient to support the verdict. Our standard of review for a claim of insufficient evidence is well settled and often repeated.

With respect to such claims, we consider the evidence in the light most favorable to the Commonwealth as verdict winner. In that

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and grooves (LAG) rifling. As noted, both are consistent with a semi-automatic Smith & Wesson .40 caliber weapon.

<sup>7</sup> A sampling of the messages: "Yo bro, I just got the word nigga gone, lol, check the news at 10", "Say less, bro. Just know this, lol, I got my first ring", and "Lol, Facts I'm a fuckin young legend. They cnt tell me shit now." Trial Court Opinion at 5.

light, we decide if the evidence and all reasonable inferences from that evidence are sufficient to establish the elements of the offense beyond a reasonable doubt. We keep in mind that it was for the trier of fact to determine the weight of the evidence and the credibility of witnesses. The jury was free to believe all, part or none of the evidence. This Court may not weigh the evidence or substitute its judgment or that of the factfinder.

**Commonwealth v. Devries**, 112 A.3d 663, 667 (Pa. Super. 2015) (citation omitted). Further, “[t]he Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.” **Commonwealth v. Callen**, 198 A.3d 1149, 1167 (Pa. Super. 2018) (citation omitted). “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.” **Commonwealth v. Devine**, 26 A.3d 1139, 1145 (Pa. Super. 2011) (citation omitted). Finally, “the function of a jury is to reconcile conflicting testimony...”. **Commonwealth v. Yocum**, 418 A.2d 534, 536 (Pa. Super. 1980).

James was convicted of three crimes: first-degree murder, conspiracy to commit murder, and possession of an instrument of crime. The elements of first-degree murder and conspiracy to commit murder are as follows.

First-degree murder occurs when a person intentionally kills another person, willingly, deliberately and with premeditation. 18 Pa.C.S. 2501, 2502(a), (d). Accordingly, the Commonwealth must prove: “(1) a human

being was unlawfully killed; (2) the accused was responsible for the killing; and, (3) the accused acted with malice and a specific intent to kill.” ***Commonwealth v. Williams***, 176 A.3d 298, 306-307 (Pa. 2017) (citation omitted). “The finder of fact may infer that the defendant had the specific intent to kill the victim based on the defendant’s use of a deadly weapon upon a vital part of the victim’s body.” ***Commonwealth v. Clemons***, 200 A.3d 441, 462 (Pa. 2019) (citation omitted).

Conspiracy is statutorily defined at 18 Pa.C.S § 903:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S. § 903(a).

Therefore, to prove the existence of a conspiracy,

[t]he Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent, and (3) an overt act done in furtherance of the conspiracy. Circumstantial evidence may provide proof of the conspiracy. The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt.

Additionally[,] an agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the

circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

***Commonwealth v. Bricker***, 882 A.2d 1008, 1017 (Pa. Super. 2005) (citation omitted).

With these standards in mind, we examine James' insufficiency claim. James sets forth 10 assertions that he claims demonstrates insufficient evidence to support his convictions. They are:

- 1.) there was no physical evidence connecting [James] to the crime;
- 2.) the Commonwealth did not prove that the photograph of the gun stored in [James'] cell phone was the murder weapon;
- 3.) the Commonwealth did not prove either that [James] purchased that gun or the actual caliber of the gun depicted in [James'] cell phone;
- 4.) the cell phone evidence failed to establish that [James] was near the scene of the shooting when it occurred;
- 5.) the prosecutor's claim that texts extracted from [James'] cell phone indicated he was bragging about shooting amounted to mere accusations and speculation;
- 6.) the video of the shooters was too blurry to make out the faces of the two males involved in shooting and showed that one of the males still was wearing a hat when he got into a car, contradicting the [C]ommonwealth's assertion that one of the males either took off his hat or grabbed it when it fell off;
- 7.) [James] has a large tattoo on his neck and facial hair which Wanda Scott did not notice;
- 8.) Wanda Scott's description of the gun she saw during the incident did not match the physical characteristics of the gun in the photograph taken from [James'] cell phone;



9.) Detective Nordo knew Wanda Scott's family and could have coerced her into identifying [James];

10.) Detective Nordo is corrupt; and the conviction rests solely on circumstantial evidence and mere speculation.

**Anders** Brief at 14-15 (reformatting added).

In essence, these issues are summed up by the second half of James' 10<sup>th</sup> assertion in which he claims the conviction rests solely on circumstantial evidence and mere speculation. However, this argument is based upon James' view of the evidence in a light that most favors him, rather than the Commonwealth as verdict winner, and overlooks the fact that a conviction may be based solely on circumstantial evidence.

The evidence, viewed in the light most favorable to the Commonwealth, demonstrates that James is from a neighborhood that had been involved in a violent dispute with the victim's neighborhood, James had been seeking to purchase a Smith & Wesson semi-automatic handgun, that handgun was either a .40 caliber or 9 mm weapon, the murder weapon was a .40 caliber handgun, the FCC found at the scene were consistent with having been fired from a Smith & Wesson semi-automatic, and the projectile recovered from the victim's body had five right twist LAG rifling marks, which is consistent with having been fired from a Smith & Wesson semi-automatic.

Further, a forensic review of James' cell phone demonstrated the phone, if not James himself, was in the immediate proximity of the murder at the time of the crime. The forensic review of the cell phone also demonstrated the phone moved, immediately after the shooting, in a path leading back to

James' neighborhood. There was no evidence indicating the phone was possessed by anyone other than James. Texts taken from James' cell phone are consistent with a person bragging about having committed the shooting. The texts refer to news reports, telling others to keep quiet, and explaining that James is laying low. The forensic review of the phone shows repeated internet searches of the crime.

Finally, the Commonwealth's eyewitness identified James, by way of photo array and lineup, as one of the people she saw running from the crime scene, carrying a gun, getting into a car, and fleeing. There is no question that the people she saw were the two people on video surveillance observed shooting the victim.

While the evidence presented against James was, largely, circumstantial, it was by no means merely speculative. The evidence at trial showed two men, one of whom was James, acting in concert (conspiracy), shooting a man multiple times, and killing him (first-degree murder). The possession of the handgun used to unlawfully kill another human provided sufficient evidence to support PIC. James is not entitled to relief on this issue.<sup>8</sup>

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<sup>8</sup> As part of the claims he requested raised, James included a reference to Detective Philip Nordo, whose only connection to this matter was to show the photo array to the witness, Wanda Scott. Although arguing the Commonwealth's evidence was mere speculation, James' allegations regarding Detective Nordo are, in fact, nothing but speculation. We are aware of the accusations Detective Nordo is facing, but James provided no evidence linking Detective Nordo's problems to the instant matter. Mere reference to a news article detailing corruption charges against a police officer cannot

James' next claim is that his conviction is against the weight of the evidence. A weight of the evidence claim must be raised before the trial court by oral or written motion prior to sentencing or by written post-sentence motion. **See** Pa.R.Crim.P. 607. Failure to do so results in mandatory waiver of the claim. James failed to preserve his weight of the evidence claim. Accordingly, it is waived.

James' ultimate claim is the trial court erred when it failed to grant a mistrial after Commonwealth witness, Detective Thomas Gaul, implied James was involved in gang activity.

Our review of a trial court's denial of a motion for a mistrial "is limited to determining whether the trial court abused its discretion." **Commonwealth v. Fortenbraugh**, 620 Pa. 483, 69 A.3d 191, 193 (2013) (internal quotation marks omitted). A trial court may grant a mistrial "only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." **Commonwealth v. Simpson**, 562 Pa. 255, 754 A.2d 1264, 1272 (2000). A mistrial "is not necessary where cautionary instructions are adequate to overcome prejudice." **Commonwealth v. Chamberlain**, 612 Pa. 107, 30 A.3d 381, 422 (2011).

**Commonwealth v. Cash**, 137 A.3d 1262, 1273 (Pa. 2016).

Additionally, "[t]he law presumes the jury will follow the instructions of the court." **Commonwealth v. Conte**, 198 A.3d 1169, 1178 (Pa. Super. 2018) (citation omitted).

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provide the basis for relief to an appellant. **See Commonwealth v. Castro**, 93 A.3d 818 (Pa. 2014). Here, James does not even provide reference to news articles. Accordingly, these bald allegations regarding unrelated accusations cannot form the basis of appellate relief.

Specifically, James complains of the following exchange:

[ADA] Tumulo: When you made arrangements to speak with the defendant Dyaire James, did you know him to live in any particular neighborhood? And I'm asking whether it was New Homes or Penntown area.

[Det. Gaul]: He was a known associate of the 7<sup>th</sup> and Green area, Penntown.

[ADA] Tumulo: And for that reason you believe --

[Defense Counsel] Alva: Your Honor, I object.

The Court: You are leading. I assume that's why you're objecting?

[Defense Counsel] Alva: No, I object for something else.

The Court: Well, I haven't heard the question. So let me hear the question.

(Counsel confer)

[Defense Counsel] Alva: Can we --

The Court: Are you asking me to see me at sidebar?

[Defense Counsel] Alva: Yes, please.

(Discussion at sidebar off the record)

[ADA] Tumulo: May I, Your Honor?

The Court: You may.

[ADA] Tumulo: Detective Gaul, you knew Dyaire James to live around the Penntown area; is that correct?

[Det. Gaul]: That's correct.

[ADA] Tumulo: For that purpose you wanted – he was somebody you wanted to speak to to see if he had any information about this particular murder?

[Det. Gaul]: Yes, sir, that's correct.

N.T. Trial, 7/10/2019, at 257-58.

At the end of Detective Gaul's testimony, counsel for James moved for a mistrial, specifically referring to the detective's use of the phrase "known associate." The trial court denied the request stating:

I do not believe that a mistrial is needed and that's what I had indicated at sidebar, but clearly I wanted the record to be complete. I will consider a limiting instruction, Mr. Alva, if you want to propose one or the Court will draft one. I think we may read more into the phrase "known associate" than the layperson would, but your request for a mistrial is denied. I will certainly consider a limiting instruction.

***Id.*** at 294.

The trial court subsequently drafted a limiting instruction, and with the approval of defense counsel, gave the limiting instruction to the jury.

The Court: All right. I'll read it. "You have heard evidence from Detective Gaul tending to show that the defendant was an associate of the Penntown area. This evidence is before you for a limited purpose. That is for the purpose of tending to show that the defendant lives in the Penntown area. The evidence must not be considered by you in any way other than for the purpose I just stated."

I did not like that you were saying it's police jargon, but I think that gives the same message.

[Defense Counsel] Alva: That's fine.

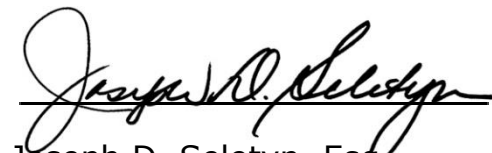
N.T. Trial, 7/13/2018, at 5.

Not only did the trial court give a limiting instruction regarding the objected phrase, which we must presume the jury followed, defense counsel agreed with the limiting instruction thereby waiving the claim for a mistrial. Accordingly, James is not entitled to relief on this issue.

In light of the foregoing, including our independent review of the certified record as mandated by **Flowers**, we grant counsel's motion to withdraw and affirm judgment of sentence.

Judgment of sentence affirmed. Motion to withdraw is granted.

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: 5/1/19