NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	
JERMAINE VILLINES,	:	No. 2045 EDA 2011
	:	
Appellant	:	

Appeal from the Judgment of Sentence, March 17, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0005660-2010

BEFORE: FORD ELLIOTT, P.J.E., MUNDY AND FITZGERALD,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 28, 2013**

Jermaine Villines appeals from the judgment of sentence entered on March 17, 2011 in the Court of Common Pleas of Philadelphia County. We affirm.[1]

At trial, the evidence presented connecting appellant to the crimes was as follows. On September 17, 2009, appellant arrived at the 4000 block of North Broad Street to visit his friend Charles Mason ("Mason"). The men were celebrating the birth of Mason's baby by drinking beer on the porch. Appellant and Mason were joined at the house by appellant's cousin, William

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* Retired Justice specially assigned to the Superior Court.

[1] Appellant was tried together with his co-defendant and cousin, William Villines, who filed an appeal at No. 2044 EDA 2011. Villines appeal has been assigned to this same panel but involves different issues.

Villines ["Villines"], Anwar Conyers ("the victim"), and Khadij Davis ("Davis"). Shortly thereafter, Mason had to go to the pharmacy to get medicine for his girlfriend, who had just given birth. As Mason and the victim walked together to get into the car, the victim exchanged words with appellant. The victim commented to appellant, "What's up killer," to which appellant replied, "You the killer." (Notes of testimony, 1/19/11 at 80.)

Mason and the victim returned from the pharmacy ten to fifteen minutes later. The victim approached appellant and a verbal argument about money appellant owed the victim ensued. (***Id.*** at 83-87.) Villines remained calm throughout the argument. Mason urged the victim to leave and then headed toward his porch believing that the victim and Davis were following him. (***Id.*** at 87.)

Instead, the victim walked toward his car. Upon seeing Villines holding a gun, the victim put his hands up and stated "whoa, whoa, hold on." (Notes of testimony, 1/20/11 at 56-57.) Appellant stated, in a conversational tone, to Villines, "Green light, hit him." (***Id.*** at 54-55; notes of testimony, 1/19/11 at 87-88.) Within seconds of appellant's words, Villines shot the victim five times, with three of the shots hitting the victim in the head before the victim reached the car.[2] (***Id.*** at 89-90.) After shooting the victim, Villines fled the scene; a passerby saw him shove something

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[2] Villines testified that he shot the victim because he thought the victim was going to his car to get a gun. (Notes of testimony, 1/21/11 at 55-57.)

through a fence. The police arrived and transported the victim to the hospital where he died on September 18, 2009.

Appellant and Villines met up at 4041 North Broad Street, where appellant lived with his girlfriend Melissa Askew. The men changed clothes and fled. Askew testified that she had seen appellant before she left for work at 11:30 p.m. on September 17, 2009. (Notes of testimony, 1/20/11 at 90-91.) He was gone when she returned. Neither appellant nor Villines returned to the apartment for their belongings. (***Id.*** at 92.)

After speaking to Mason on September 19, 2009, the police searched for Davis. Based on the information Davis provided to the police on October 8, 2009, a warrant was issued for Villines's arrest. On October 14, 2009, Officer Joseph Moore stopped a vehicle with heavily tinted windows for investigation. Villines was a passenger in the car and gave the officer false identification in the name of Dondi Ringgold. When a records check established that Ringgold had an outstanding arrest warrant, Villines was taken into custody. Thereafter, his real identity was determined and he was arrested for murder.

Appellant was not arrested until January 7, 2010, after Villines gave a statement to the police implicating him in the crime. Appellant was charged with murder, conspiracy, and several violations of the Uniform Firearms Act.[3]

[3] Judgments of acquittal were entered on the charges of firearms not to be carried without a license, carrying a firearm on a public street, and possession of an instrument of crime. (Notes of testimony, 1/21/11 at 127.)

Appellant and Villines were jointly tried by a jury sitting before the Honorable M. Teresa Sarmina. Appellant was convicted of third degree murder and conspiracy.[4] On March 17, 2011, appellant was sentenced to 20 to 40 years' imprisonment for third degree murder and a concurrent term of 10 to 20 years' imprisonment for conspiracy, followed by 10 years of reporting probation. A post-sentence motion was filed on March 24, 2011 and the court denied the motion on July 22, 2011. A timely notice of appeal was filed on August 1, 2011. Appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion.

The following issues have been presented for our review:

> I. Is [appellant] entitled to an arrest of judgment with regard to his convictions for third-degree murder and criminal conspiracy since the evidence is insufficient to sustain these verdicts of guilt as the Commonwealth failed to sustain its burden of proving [appellant's] guilt beyond a reasonable doubt?
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> II. Is [appellant] entitled to a new trial with regard to his convictions for third-degree murder and criminal conspiracy since the verdicts of guilt are against the weight of the evidence?
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> III. Is [appellant] entitled to a new trial as a result of the trial court's ruling that prohibited him

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[4] Villines was convicted of first-degree murder, criminal conspiracy, possession of an instrument of crime, and violations of the Uniform Firearms Act.

from cross-examining Commonwealth witness Charles Mason with his preliminary hearing testimony as to his interpretation of the words allegedly uttered by [appellant]?

IV. Is [appellant] entitled to a remand for resentencing since the aggregate 20 to 40 year sentence imposed by the trial court for third degree murder and criminal conspiracy was excessive and not a reflection of [appellant's] character, history and condition?

Appellant's brief at 5.

Appellant first challenges the sufficiency of the evidence to support his convictions of third degree murder and conspiracy. Our standard of review for such an issue states:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. 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. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. 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. Adams, 39 A.3d 310, 323 (Pa.Super. 2012), quoting ***Commonwealth v. Brown***, 23 A.3d 544, 559–560 (Pa.Super. 2011) (***en banc***) (citations omitted).

The offenses of third degree murder and conspiracy are defined as follows:

> Third-degree murder is defined as "all other kinds of murder" other than first degree murder or second degree murder. 18 Pa.C.S. § 2502(c). "The elements of third-degree murder, as developed by case law, are a killing done with legal malice."
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> > Malice exists where there is a particular ill-will, and also where "there is a wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences and a mind regardless of social duty.
>
> A person is guilty of [criminal] conspiracy with another person or persons ... if with the intent of promoting or facilitating the commission of a crime, he:
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> > (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.
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> 18 Pa.C.S.A. § 903(a).

Commonwealth v. Marquez, 980 A.2d 145, 148 (Pa.Super. 2009) (case citations omitted), ***appeal denied***, 604 Pa. 704, 987 A.2d 160 (2009).

Appellant argues that there was no evidence to indicate that he knew Villines possessed a weapon or that Villines intended to shoot the victim. (Appellant's brief at 21, 23.) Appellant avers that he was merely present during the shooting and that he did not enter into an agreement with Villines to kill the victim. (***Id.*** at 26.) In support, appellant directs us to several cases, including ***Commonwealth v. Mengine***, 477 Pa. 156, 383 A.2d 870 (1978) and ***Commonwealth v. Johnson***, 513 A.2d 476 (Pa.Super. 1986). These cases are inapposite.

In ***Mengine***, the occupants of two cars became involved in a dispute while moving to the service window of a drive-in restaurant, which culminated in the shooting death of the victim when one of defendant's passengers, without warning, suddenly exited the car, pulled out a gun, and fired one shot. The Pennsylvania Supreme Court found "the prosecution ha[d] simply failed to produce any evidence of an unlawful agreement," because the defendant did not know any member of the other party, there was no prior encounter between any of the opposing party members that might have provided the impetus for the crime, and the defendant did not participate in the crime. ***Mengine***, 477 Pa. at 161, 383 A.2d at 872-873.

In ***Johnson***, the defendant was standing with a group of patrons in front of a bar when a patron stated, "here comes a white boy. Let's get

him." ***Johnson***, ***supra*** at 477. Another patron pulled a gun and fired two shots at the victim who was riding on a bicycle. Nothing in the record indicates that Johnson had any active role before or during the crime. A panel of this court concluded that the evidence demonstrated the defendant was merely present at the scene of the spontaneous crime. ***Id.*** at 478.

Here, in contrast to the above-cited cases, appellant and the victim knew each other as they were cousins. There had been a prior verbal dispute between appellant and the victim. Villines escalated the argument by introducing a handgun. The common design of appellant and Villines can be inferred from their acts and words before, during and after the shooting. The victim began to walk away from the verbal argument; when he turned around and saw the weapon he stated, "whoa, whoa. Hold on." Appellant then stated to Villines "Green Light. Hit him." (Notes of testimony, 1/19/11 at 87-88, 130-131, 187; notes of testimony, 1/20/11 at 55, 62, 196.) Within seconds of appellant's words, Villines fired five times with the first shot hitting the back of the victim's head. (Notes of testimony, 1/19/11 at 89; notes of testimony, 1/20/11 at 57-58.) The jury obviously interpreted these words to be an agreement to shoot the victim. Appellant and Villines were together during the entire event. Appellant and Villines also fled the scene and reunited at the apartment appellant shared with his girlfriend. (Notes of testimony, 1/20/11 at 58; notes of testimony, 1/21/11 at 102-104.) It is well-established that "an attempt to flee or conceal oneself from

the police is an additional circumstance from which guilt can be inferred." Commonwealth v. Jones, 444 A.2d 729, 731 (Pa.Super. 1982). Moreover, it is established that "when a person commits a crime, knowing that he is wanted therefor, and flees or conceals himself, such conduct is evidence of the consciousness of guilt and may form the basis in connection with other proof from which guilt may be inferred." ***Commonwealth v. Whack***, 482 Pa. 137, 141, 393 A.2d 417, 419 (1978), quoting ***Commonwealth v. Tinsley***, 465 Pa. 329, 333, 350 A.2d 791, 792-793 (1976). Even where no direct evidence is presented to establish actual knowledge that he was being sought by police, circumstantial proof of such knowledge may be sufficient. ***Commonwealth v. Osborne***, 433 Pa. 297, 302-303, 249 A.2d 330, 333 (1969). Here, appellant immediately fled the scene and concealed himself for approximately four months. Thus, we disagree that appellant was "merely present" at the scene of the crime. This evidence established appellant was guilty of conspiracy with Villines to shoot the victim.[5]

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[5] We note that the Pennsylvania Supreme Court has recently granted allowance of appeal regarding the issue of whether conspiracy to commit third degree murder is a cognizable offense in Pennsylvania. ***See Commonwealth v. Fisher***, 38 A.3d 767 (2012); ***Commonwealth v. Best***, 38 A.3d 766 (2012), and ***Commonwealth v. Stanton***, 38 A.3d 766 (2012). That question, however, does not arise here since appellant was charged with, ***inter alia***, murder generally, and criminal conspiracy to commit murder. ***See Commonwealth v. Weimer***, 602 Pa. 33, 37-38, 977 A.2d 1103, 1105 (2009) ("One may certainly be convicted of conspiracy to commit homicide, and the jury's decision to convict of murder in the third degree does not render the preexisting conspiracy a nonequity.")

Additionally, we find appellant's claim that the evidence did not establish malice for third degree murder unavailing. It is well-settled that "[m]alice may be inferred from the use of a deadly weapon on a vital part of the victim's body." ***Commonwealth v. Gooding***, 818 A.2d 546, 550 (Pa.Super. 2003), ***appeal denied***, 575 Pa. 691, 835 A.2d 709 (2003). Viewing the evidence in the light most favorable to the Commonwealth, we conclude that the evidence was sufficient to establish third degree murder.

Next, appellant attacks the weight of the evidence.

> A verdict is against the weight of the evidence "only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice." ***Commonwealth v. Cousar**,* 593 Pa. 204, 928 A.2d 1025, 1036 (2007). . . . [A] weight of the evidence claim is addressed to the discretion of the trial judge. It is the province of the jury to assess the credibility of witnesses, and a trial judge will not grant a new trial merely because of a conflict in the testimony or because he would have reached a different conclusion on the same facts, if he had been the trier of fact. . . . This Court's function on review is to determine whether, based upon a review of the record, the trial court abused its discretion rather than to consider the underlying question of weight of the evidence.

Commonwealth v. Vandivner, 599 Pa. 617, 630, 962 A.2d 1170, 1177-178 (2009). "In criminal proceedings, the credibility of witnesses and weight of the evidence are determinations that lie solely with the trier of fact." ***Commonwealth v. King***, 959 A.2d 405, 411 (Pa.Super. 2008); ***accord Commonwealth v. Jackson***, 955 A.2d 441, 444 (Pa.Super. 2008) ("It is within the province of the fact-finder to determine the weight to be

accorded each witness's testimony and to believe all, part, or none of the evidence introduced at trial."), ***appeal denied***, 600 Pa. 760, 967 A.2d 958 (2009).

Appellant essentially asks this court to view the evidence in his favor; such an argument is not pertinent to the weight of the evidence. As stated in the aforementioned argument, the evidence presented demonstrated that appellant's words were, in essence, a direction to Villines to shoot the victim, who was walking away from a verbal argument over a debt. The witnesses at trial were subject to extensive cross-examination, which exposed appellant's interpretation of the evidence. The jury resolved those credibility determinations in favor of the Commonwealth and convicted appellant. The trial court concluded that the verdict was not against the weight of the evidence, and we must agree. Review of the record does not reveal a verdict which is shocking to one's sense of justice. Thus, appellant's weight of the evidence claim affords him no relief.

In the third issue presented, appellant argues the trial court erred in prohibiting him from cross-examining Commonwealth witness Mason with Mason's preliminary hearing testimony as to the interpretation of the words appellant uttered to Villines. (Appellant's brief at 47.) This claim is without merit.

During direct examination, Mason explained that he heard appellant state words to the effect "green light, hit him." The prosecutor asked Mason

what he believed this phrase to mean; Mason responded that he believed it meant:

> take-care of somebody. Like if you having an alteration with somebody and you give somebody the green light, that means you giving them the okay to handle their business as far as causing bodily harm or whatever.

Id. at 88-89. During cross-examination, defense counsel sought to introduce Mason's preliminary hearing testimony which was to the effect that he did not think appellant's words were serious. After a discussion at sidebar, the trial court ruled that Mason's interpretation of the language appellant used was irrelevant. The court agreed to strike from the record Mason's direct examination testimony as to the meaning of the terms and instructed the jury to disregard Mason's opinion. (Notes of testimony, 1/19/11 at 140-141.) The court specifically instructed the jury that it was solely up to them to decide what import, if any, the words had. (***Id.*** at 140.)

Admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. ***Commonwealth v. Alderman***, 811 A.2d 592, 595 (Pa.Super. 2002). "Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable

inference or presumption regarding a material fact." ***Commonwealth v. Grzegorzewski***, 945 A.2d 237, 239 (Pa.Super. 2008) (citation omitted).

We find no error on the part of the trial court in refusing to permit appellant to ask Mason what he thought appellant meant when he said, "Green light. Hit him." Mason's interpretation of appellant's words was not relevant. As the Commonwealth points out, it was appellant's understanding, and that of Villines, not Mason, that the jury had to determine. Mason's testimony regarding his impression of what appellant meant by his statements would not aid the jurors in their understanding of what appellant had meant by his statements. As the trial court notes, "counsel, himself, understood that such cross-examination was irrelevant and stated at sidebar that the Judge could 'instruct the jury that it's irrelevant what [Mason] thought at the time or even what he thinks now." (Trial court opinion, 12/1/11 at 8, citing notes of testimony, 1/19/11 at 133.) We agree with the trial court that the interpretation of appellant's words were solely for the fact-finder. No relief is due.

The final issue presented challenges the discretionary aspects of his sentence. Appellant argues that his sentence is excessive, the court did not properly weigh governing sentencing principles, and the court improperly applied the "deadly weapon enhancement." (Appellant's brief at 13-14.)

In order to preserve an issue pertaining to the discretionary aspects of sentence, the issue must first be raised either at the time of sentencing, or

in a post-sentence motion. ***Commonwealth v. McAfee***, 849 A.2d 270, 275 (Pa.Super. 2004), ***appeal denied***, 580 Pa. 695, 860 A.2d 122 (2004). As appellant failed to do either, the issue is waived. Appellant did not raise the specific claims presented herein at the sentencing hearing. Nor did appellant raise these specific reasons in his post-sentence motion; rather, appellant presented a boilerplate claim attempting to preserve any discretionary aspect of sentencing claim he might wish to present at a later date[6]. Appellant also does not direct us to the location in the record where this issue was preserved. ***See*** Pa.R.A.P., Rule 2119(e), 42 Pa.C.S.A. (statement of place of raising or preservation of issues). Appellant did not ask for an extension to of time to prepare a more specific objection. Therefore, appellant did not give the sentencing judge an opportunity to reconsider or modify his sentence on this basis; and therefore, the claim is waived. ***See Commonwealth v. Reeves***, 778 A.2d 691, 692-693 (Pa.Super. 2001); Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A. (issues not raised in the lower court are waived and cannot be raised for the first time on appeal). Moreover, the issue cannot be preserved by including it in the concise statement of errors complained of on appeal, pursuant to Rule 1925(b). ***Id.***

Judgment of sentence affirmed.

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[6] Appellant's post-sentence motion merely included the following boilerplate claim: "[t]he defendant moves for reconsideration of sentence at this time so that any objection [he] may have to the sentence he received is preserved and so new counsel and the defendant may evaluate whether to pursue any claims relative to the sentence." (Docket #2.)

Judgment Entered.

Prothonotary

Date: 5/28/2013