NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DANIEL RASHEED R. JOHNSON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 213 EDA 2013

Appeal from the Judgment of Sentence of January 11, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0008608-2009

BEFORE: GANTMAN, DONOHUE AND OLSON, JJ.

MEMORANDUM BY OLSON, J.: **FILED DECEMBER 19, 2013**

Appellant, Daniel Rasheed Johnson, appeals from the judgment of sentence entered on January 11, 2013. We affirm in part and vacate in part.

The trial court detailed the factual background of this case as follows:

> On June 3, 2008, at about 9:30 p.m., Kareem McCoy [("McCoy")], Jasmine Fields [("Fields")], McCoy's brother, and Fields' sister all went to Lid's Pike Bar at 3858 North 15th Street, Philadelphia. Around 11:20 p.m., McCoy and Fields left the bar and entered McCoy's four-door white Chevrolet Malibu parked on the 1500 block of Pike Street. While McCoy and Fields were sitting in the vehicle, Darnell Lee [("Lee")] and [Appellant] rode their bicycles up to the vehicle. Lee approached McCoy on the driver's side and [Appellant] approached Fields on the passenger side of the vehicle. Lee then said, "You know what this is" and lifted his hoodie to show a big silver gun that was tucked into his waistband. McCoy said, "You got this, homey" and handed Lee his watch and money. When McCoy told Lee that his [tele]phone had dropped between the driver's seat and door, Lee and [Appellant] both said, "Well, pick it up then." Instead of picking up the [tele]phone, McCoy exited his vehicle and started fighting with Lee. During this struggle, Lee and McCoy moved toward the rear of the vehicle, where McCoy was shot at least twice.

McCoy was shot a third time after [Appellant] ran to the rear of the vehicle. This shooting occurred at or around 11:31 p.m. on June 3, 2008.

Afterward, Lee jumped onto a bicycle and fled toward 16th and Smedley Streets. As Fields tried to exit the front passenger door, [Appellant's] bicycle became stuck under the vehicle. Fields made eye contact with [Appellant], who then ran in the same direction as Lee. When Fields exited the vehicle, she approached McCoy and saw him lying on the ground. He had a hole in his face and was struggling to breathe. Blood was behind his head and was coming from his face and hand. Fields called 911 and ran into the bar, where she encountered McCoy's brother.

McCoy was transported to Temple University Hospital, where he was pronounced dead at approximately 1:27 a.m. on June 4, 2008. Dr. Gary Collins, deputy chief medical examiner, conducted an autopsy of McCoy's body. While performing his examination, Dr. Collins found that McCoy sustained three gunshot wounds. Two gunshot wounds were penetrating wounds and one gunshot wound was a perforating wound. The first penetrating wound was located on McCoy's inner eyebrow. The bullet went through the soft tissues of the forehead, skull, and brain. The bullet went left, back and across the structures of the right and left sides of the brain. The gunshot caused fractures to the bones above the eye and bleeding around the brain. Dr. Collins recovered this bullet from the left side of McCoy's brain. The second penetrating wound was located one to two inches below McCoy's knee. Dr. Collins recovered this second bullet from the muscles in the back of McCoy's right leg. The third gunshot wound was a perforating wound where the bullet entered the base of McCoy's left middle finger, went through soft tissues and bones, and exited his left wrist.

Dr. Collins concluded to a reasonable degree of medical certainty that the cause of death was the penetrating gunshot wound to the head. He opined that the gunshot wound was immediately incapacitating. An individual who has suffered this type of gunshot wound will fall, collapse, or cease voluntary functions. It prevents a person from being able to call for help, shout, or run. With this type of injury, it is expected that the person will die as a result of the heartbeat and respiration ceasing. Dr. Collins further concluded to a reasonable degree of medical

certainty that the manner of death was homicide. He submitted the two bullets recovered from McCoy's body to the [f]irearms [i]dentification [u]nit.

On June 4, 2008, at 1:38 a.m., Police Officer Clyde Frasier arrived at the crime scene, where he marked and photographed the evidence and created a sketch. At the crime scene, Officer Frasier recovered a 20-inch red-colored dirt bicycle and transported it to the [c]rime [s]cene [u]nit for processing. He dusted the bicycle for fingerprints, but received negative results. Officer Frasier also recovered four pieces of ballistics evidence: three fired cartridge casings and one bullet jacket. The first piece of ballistics evidence was a [.]380 auto fired cartridge casing found at the rear of the car next to the red bicycle. The second piece of ballistics evidence was a Federal [.]45 auto fired cartridge casing found toward the rear of the vehicle. The third piece of ballistics evidence was a [.]380 auto fired cartridge casing found near the alleyway behind the bar's garage. The fourth piece of ballistics evidence was a bullet jacket copper fragment found on the sidewalk near the rear of the driver's side of the vehicle. Officer Frasier submitted this ballistics evidence to the [f]irearms [i]dentification [u]nit.

Kenneth Lay [("Lay")], a laboratory supervisor in the [f]irearms [i]dentification [u]nit analyzed the submitted ballistics evidence and testified at trial as an expert in the field of firearms examination. Lay examined the ballistics evidence submitted by the [m]edical [e]xaminer's office. One bullet lead core was extracted from McCoy's right thigh. This bullet was mutilated and gouged and Lay observed blood and tissue-like substances on a portion of its base. Lay was unable to determine the exact caliber of this bullet due to its deformity, but he opined that it was between .40 and .45 caliber. A second bullet was extracted from McCoy's skull. This bullet was torn and expanded with a tissue-like substance, but it was sufficiently intact for Lay to determine that it was either a .38 caliber or []9 millimeter caliber bullet.

Lay also examined the ballistics evidence recovered from the crime scene, which included two .380 caliber automatic and one .45 caliber fired cartridge casing[s]. All three fired cartridge casings were manufactured by Federal. The bullet jacket was also .45 caliber. Lay noted that the .45 caliber firearm and the .380 caliber firearm that fired these bullets were not submitted

to him for examination. Lay concluded to a reasonable degree of scientific certainty that the two .380 caliber automatic fired cartridge casings were fired from the same firearm. The one .45 caliber fired cartridge casing was not fired from that weapon due to its size and caliber. Lay compared the .45 caliber fired cartridge casing, the bullet recovered from McCoy's right thigh, and the bullet recovered from McCoy's skull. Due to their size and caliber, he concluded to a reasonable degree of scientific certainty that the one fired cartridge casing and two bullets recovered from McCoy's body were fired from two different firearms. At trial, both parties stipulated that [Appellant] and Lee did not possess a valid license to carry a firearm.

Detective John Cahill was assigned to investigate this murder. At approximately 2:15 a.m., Detective Cahill responded to the crime scene with Detective Ted Hagan. On June 4, 2008, Detective Dunlap assisted with the recovery of surveillance footage from the digital video recording player at the bar. He found a total of eight video cameras around the interior and exterior of the bar. Camera [one] was an interior camera in the southeast corner of the bar. Camera [n]umber [two] was an interior camera facing south. Camera [n]umber [three] was an interior camera in the southwest corner of the bar. Camera [n]umber [four] was an interior camera in the northeast corner of the bar, close to the Pike Street entrance. Camera [n]umber [five] was an exterior camera located on the front of the property at the southwest corner of 15th and Pike Streets, and viewed the 1500 block of Pike Street westbound. Camera [n]umber [six] was located outside the entrance door at 15th and Pike Streets and viewed the southwest corner of 15th and Pike Streets. Camera [n]umber [seven] viewed the sidewalk on Pike Street. Camera [n]umber [eight] was an interior view. In addition to finding these eight video cameras, Detective Dunlap found the digital video recording player on the second floor of the bar.

Detective Dunlap checked the operability of the video recording player and determined that it was functioning properly. When he checked the time, Detective Dunlap observed that it was military time and discovered that it was nine minutes faster than the actual time determined by the U.S. Naval Observatory. Detective Dimlap downloaded all eight camera views, copied them onto a digital video disc, and gave it to the assigned detective. Detective Dunlap recovered a one-half hour block of

video running on June 3, 2008 from 23:20 to 23:50 (11:20 p.m. to 11:50 p.m.). He also recovered one [50]-minute block of video from 22:30 to 23:20 (10:30 p.m. to 11:20 p.m.) from Camera [n]umbers [five] and [six], both exterior cameras. Camera [n]umber [five] had the best camera view of the incident. Because multiple camera views could not be shown at once, Detective Dunlap used software to copy and compile camera views into one running video.

The first video clip was recorded at 23:29:36 from [c]amera [n]umber [five] and displayed a male and female entering a white Malibu several feet off the corner. The next video clip showed two men riding bicycles on Pike Street traveling toward 15th Street. The two men rode past the camera and turned southbound onto 15th Street, where they were recorded by [c]amera [n]umber [six]. The men were out of the camera's view when they traveled up Pike Street. The subsequent video clip came from [c]amera [n]umber [five] and showed bicycles crossing the street. One bicycle rode onto the curb to the driver side of the white Malibu and the other bicycle rode to the passenger side. Someone was inside the vehicle because the brake lights were lit. At 23:40 and 23:41, someone was talking at the driver's side of the vehicle. A man wearing a striped shirt exited the vehicle, but then went back inside the vehicle.

The video then showed some action on the curb side next to the vehicle. One of the men ran away. The passenger door was open. A person and an object were on the ground. People started to exit the bar. An armed security guard is visible. Police arrived and secured the scene. A large crowd gathered. People moved their vehicles. In addition to compiling these several camera views, Detective Dunlap took 130 still photographs from the video. These still photographs accurately depicted the views from [c]amera [n]umber [five] and [c]amera [n]umber [six].

After reviewing this video, Detective Hagan returned to Lid's Pike Bar and interviewed Jarita Capehart [("Capehart")] at or about 12[:00] noon on June 4, 2008. The video displayed Capehart walking westbound on the 1500 block of Pike Street prior to the murder. During this interview, Capehart did not appear to be under the influence of drugs or alcohol. After reviewing her five-page statement, Capehart signed it. Capehart was interviewed a second time by Detective Cahill on June 6, 2008. During this

interview, Detective Cahill learned that Lee was her cousin and that his nickname was "Gold." Capehart knew [Appellant] as "Vito." This was the first time that Detective Cahill learned that, on the evening of the murder, [Appellant] and Lee were at Capehart's residence, which was approximately one and one-half blocks away from Lid's Pike Bar. She told Detective Cahill that [Appellant] and Lee were in front of her house when she left for the bar at 8:45 p.m. [Appellant] was wearing cargo shorts and a red or burgundy shirt. Lee was wearing a white shirt, tan cargo pants[,] and a bulletproof vest. [Appellant] had a red bicycle and Lee had a blue and pink bicycle.

Capehart left the bar at about 11:30 p.m. When she arrived home, she saw Lee's brother, Durrell, who told her that he heard gunshots. Capehart then went upstairs and told Lee's sister, Kita, that someone was shot outside the bar. When Capehart called a friend who was still at the bar, she was informed that McCoy had been shot. Capehart went downstairs and saw Lee and Dur[r]ell at the door. At that time, she did not see [Appellant] and did not know if he was in her basement. Lee told her that he was leaving because too many police were around. Capehart stated that she had not seen [Appellant] or Lee since the murder. The day before giving this statement, Capehart had seen the blue and pink bicycle, but she had not seen the red bicycle since the shooting. Capehart did not appear to be under the influence of drugs or alcohol during this interview. After reviewing her eight and one-half page statement, Capehart signed it. She identified [Appellant] after being shown a photographic array. She also identified Lee after being shown a photograph.

On June 10, 2008, Detective Hagan interviewed Naja McCoy and took her statement. [Naja] McCoy informed Detective Hagan that McCoy was her blood cousin, but that she considered him her brother because they were raised in the same household. [Naja] McCoy also knew Lee because she grew up with him in the neighborhood. She knew Lee's nickname to be "Gold." [Naja] McCoy told Detective Hagan that she spent a lot of time at Capehart's residence because she was best friends with Kita. [Naja] McCoy was also the godmother to two of Kita's children. About every other year, she helped Kita buy bicycles for the children. As a result, bicycles were always on the porch. However, after the murder, the bicycles were missing.

[Naja] McCoy also told Detective Hagan that she went to Capehart's residence on June 3, 2008, between 3:30 p.m. and 4:30 p.m. When she arrived, she saw Lee, who was wearing a dark hooded sweatshirt, white tee-shirt[,] and dark jeans. After she hugged Lee, he showed her that he was also wearing a bulletproof vest. She asked him why he was wearing it, and he told her that he was being careful because he took a chrome gun from "El Boog" during an incident on Erie Avenue. As she was leaving Capehart's residence at or before 5:00 p.m., Lee introduced [Naja] McCoy to [Appellant], who identified himself as "Vito." This was the first and last time that she saw [Appellant]. It was also the last time that she saw Lee. At trial, [Naja] McCoy confirmed that she had a conversation with Tyree Chandler [("Chandler")] after the murder. [Naja] McCoy further testified that she reviewed her four-page statement and signed it. She also signed and dated photographs of [Appellant] and Lee, which were attached to her statement.

On June 10, 2008, Detective Cahill interviewed Fields, who had been in a relationship with McCoy for two years. Detective Cahill first met Fields at the homicide unit and delayed interviewing her because she was crying and hysterical. In her statement, Fields described the two men who approached McCoy's vehicle. The man who approached the driver's side was a bearded, brown-skinned black male in his twenties who was approximately six feet and one inch tall. This man was wearing a black hoodie and a white tee-shirt, and she saw a tattoo on the top of the man's right hand when he grabbed the gun. She described the man on the passenger side of the vehicle as being between 18 to 20 years old with light brown skin and a scruffy beard. This man was wearing tan khaki pants and a gray hoodie. After the interview, she reviewed her three-page statement and signed it.

After being shown a photographic array, Fields identified [Appellant] as the man who stood on the passenger side of the vehicle. She next identified Lee as the man who approached the driver's side of the vehicle. These identifications were signed and attached to her statement. At trial, Fields stated that she was certain of her identifications.

During this interview, Detective Cahill showed Fields the signed statement she provided to Detective Knecht . . . at 12:52 a.m. on June 4, 2008. She reviewed this statement and corrected one minor typographical error. No other corrections were made.

At trial, she stated that she tried to answer the detective's questions to the best of her ability, but that there were a few inaccurate statements in that document. Fields disputed the statement that the man who approached the driver's side of the vehicle did not have a gun. During her interview with Detective Knecht and at trial, Fields stated that this was incorrect because Lee did possess a gun during this incident. She also denied stating Lee's height as [between five feet seven inches and five feet nine inches] tall because he was the same height as McCoy, who was about six feet tall.

Fields testified at Lee's preliminary hearing. Before testifying at [Appellant's] preliminary hearing, she had attended a lineup that included [Appellant] and five other people on June 9, 2009. Detective William Urban conducted this lineup, where [Appellant] was positioned as number 5. To prevent [Appellant's] facial tattoos from being seen during the lineup, defense counsel requested the placement of Band-Aids on each lineup participant's face. [Appellant] had one teardrop tattoo on his left cheek and one tattoo stating "Rest in Peace" with someone's name underneath. As a result of defense counsel's request, one Band-Aid was placed on the right cheek and one Band-Aid was placed on the left cheek of each lineup participant.

When Fields arrived at this lineup, she was asked if she recognized anyone related to the shooting. Fields said, "Give me a second." She walked up to the window and said, "It's [n]umber [four] or [n]umber [five]. It's one of them." Fields then identified [n]umber [four] and signed her lineup identification statement. At trial, Fields explained that she had difficulty making an identification at the lineup because the lineup participants had Band-Aids on their faces. By the time she went to [Appellant's] preliminary hearing, Fields realized that [Appellant] was number [five] in the lineup. At the preliminary hearing, Fields identified [Appellant] as the man who was at the passenger side of the vehicle trying to pick up the red bicycle.

On June 10, 2008, Sergeant William Britt assigned Detectives Burke and Rocks to search for [Appellant and Lee] as fugitives. On June 13, 2008, based on information received, Sergeant Britt and several officers went to 3731 North 16th Street, where they found Tyree Chandler. Chandler was subsequently transported to the homicide unit, where he was interviewed. Detective

> Bamberski testified that two warrants had been issued for Chandler to appear as a witness by the time of trial. Despite law enforcement's efforts to locate Chandler, he has not been seen since June 13, 2008, when he provided a signed statement.
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> Based on Chandler's interview, Sergeant Britt and members of the U.S. Marshals Fugitive Task Force went to the area of 24th and Norris Streets. During their surveillance, they observed Lee riding a bicycle northbound on 24th Street toward Diamond Street. They pursued him, but then lost him when he fled into a public housing authority development. On June 14, 2008, Sergeant Britt and members of the U.S. Marshals Fugitive Task Force went to [a]partment 905 at 4455 Holden Street based on information received. When they arrived, they found and arrested [Appellant] and Lee. A search warrant was later executed at that address, where police recovered a photograph depicting [Appellant].

Trial Court Opinion, 6/10/13, at 1-14 (certain given names, certain honorifics, footnotes, and internal citations omitted).

The relevant procedural history of this case is as follows. A complaint was filed on June 16, 2008. An information was subsequently filed on July 22, 2009. Jury selection began on October 25, 2012 and was completed on October 31, 2012. Opening statements were given and evidence entered beginning on November 1, 2012. Testimony concluded on November 5, 2012. Closing arguments were made and the jury began deliberations on November 7, 2012.

On November 9, 2012, the jury found Appellant guilty of second-degree murder,[1] robbery,[2] conspiracy to commit murder,[3] and carrying a

[1] 18 Pa.C.S.A. § 2502(b).

[2] 18 Pa.C.S.A. § 3701(a)(1)(i).

firearm on public streets in Philadelphia.[4] On January 11, 2013, Appellant was sentenced to a mandatory term of life imprisonment without the possibility of parole for the second-degree murder conviction and a concurrent sentence of 10 to 20 years' imprisonment for the robbery conviction. He was also sentenced to consecutive sentences of 10 to 20 years' imprisonment for conspiracy to commit murder and 2½ to 5 years' imprisonment for carrying a firearm on public streets in Philadelphia. This timely appeal followed.[5]

Appellant presents two issues for our review:

> 1. Is the [A]ppellant entitled to an arrest of judgment with respect to his convictions for murder of the second degree, robbery, carrying a firearm on a public street[,] and criminal conspiracy since the evidence is insufficient to sustain the verdicts of guilt as the Commonwealth failed to sustain its burden of proving the [A]ppellant's guilt beyond a reasonable doubt?
>
> 2. Is the Appellant's sentence [] illegal since the trial court's imposition of a separate sentence for robbery violated the [A]ppellant's right to be free from double jeopardy?

Appellant's Brief at 4.

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[3] 18 Pa.C.S.A. §§ 903(a)(1), 2502(b).

[4] 18 Pa.C.S.A. § 6108.

[5] On January 24, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). Appellant filed his concise statement on February 11, 2013. The trial court filed its Rule 1925(a) opinion on June 10, 2013. Both issues raised on appeal were contained within Appellant's concise statement.

Appellant first challenges the sufficiency of the evidence. "A claim challenging the sufficiency of the evidence presents a question of law." ***Commonwealth v. Fortune***, 68 A.3d 980, 983 (Pa. Super. 2013) (citation omitted). Therefore, our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Felder***, 75 A.3d 513, 515 (Pa. Super. 2013) (citation omitted). "In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense." ***Commonwealth v. Cox***, 72 A.3d 719, 721 (Pa. Super. 2013), *quoting* ***Commonwealth v. Koch***, 39 A.3d 996, 1001 (Pa. Super. 2011). "[T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence . . . . [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." ***Commonwealth v. Thomas***, 65 A.3d 939, 943 (Pa. Super. 2013) (first alteration in original), *quoting* ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1236 n.2 (Pa. 2007).

Appellant presents three specific arguments as to why the evidence was insufficient to convict him of the instant offenses. First, he argues that there was insufficient evidence that he was the individual who approached the passenger side of McCoy's car. Second, he argues that there was insufficient evidence that the murder was committed during the perpetration

of a felony. Finally, he argues that he should not be held liable as Lee's co-conspirator and/or accomplice.

Appellant first contends that there is insufficient evidence that he was the individual who approached the passenger side of McCoy's vehicle. He argues that the video cameras were unable to identify the individuals whom approached McCoy's car. He also contends that the Commonwealth presented no physical evidence that tied him to the crime. He further argues that Fields identified another individual at the lineup and that Fields' and Capehart's stories differed as to the clothes worn by the individual whom approached the passenger side of McCoy's car.

Appellant is not entitled to relief based upon his contention that he could not be identified on the video tapes depicting the crime scene. In ***Commonwealth v. Fisher***, we held that the Commonwealth is not required to produce recordings if the recordings are not necessary to prove an element of the offense. 764 A.2d 82, 87–88 (Pa. Super. 2000), *appeal denied*, 782 A.2d 542 (Pa. 2001); ***see also Commonwealth v. Steward***, 762 A.2d 721, 722-723 (Pa. Super. 2000), *appeal denied*, 782 A.2d 545 (Pa. 2001); ***Commonwealth v. Dent***, 837 A.2d 571, 590 (Pa. Super. 2003), *appeal denied*, 863 A.2d 1143 (Pa. 2004). In this case, the Commonwealth was able to prove Appellant's identify through eyewitness testimony and circumstantial evidence. Therefore, the Commonwealth was not required to introduce a recording that positively identified Appellant.

Appellant cites several cases in support of his argument that testimony by witnesses cannot be considered when physical evidence contradicts that evidence. Appellant is correct that our Supreme Court has held "that testimony in conflict with the incontrovertible physical facts and contrary to human experience and the laws of nature must be rejected[.]" ***Commonwealth v. Widmer***, 744 A.2d 745, 752 (Pa. 2000) (internal quotation marks omitted), *quoting* ***Commonwealth v. Santana***, 333 A.2d 876, 878 (Pa. 1975). However, Appellant does not cite incontrovertible physical evidence that supports his contention that he was not one of the perpetrators of the robbery and murder, and no such evidence was presented at trial. Therefore, the incontrovertible evidence rule does not apply. ***See Commonwealth v. Toledo***, 529 A.2d 480, 486-487 (Pa. Super. 1987), *appeal denied*, 538 A.2d 876 (Pa. 1988); ***Hoff v. Tavani***, 170 A. 384, 386 (Pa. Super. 1934).

Appellant also implicitly argues that physical evidence was necessary to prove that he was a perpetrator of the offense. That argument is without merit. There is no requirement that physical evidence be presented at trial. ***See Commonwealth v. Passmore***, 857 A.2d 697, 708 (Pa. Super. 2004), *appeal denied*, 868 A.2d 1199 (Pa. 2005). Other evidence, such as eyewitness identification and/or circumstantial evidence is sufficient to prove that a defendant was the perpetrator of an offense. ***Commonwealth v. Brown***, 52 A.3d 1139, 1165 (Pa. 2012), *citing* ***Commonwealth v. Duncan***,

373 A.2d 1051 (Pa. 1977) ("testimony of a single eyewitness, alone, was sufficient to convict even though it conflicted with other trial testimony"). Thus, Appellant's argument that there was insufficient evidence that he was the perpetrator of the offense, because there was a lack of physical evidence, is without merit.

The heart of Appellant's argument related to his identification as the perpetrator of the instant offense is that Fields identified another individual at the lineup and that Fields' and Capehart's stories differed as to the clothes worn by the individual who approached the passenger side of McCoy's car. As to Fields' inconsistent identifications, we have previously held that "any uncertainty in an eyewitness's identification of a defendant is a question of the weight of the evidence, not its sufficiency." ***Commonwealth v. Cain***, 906 A.2d 1242, 1245 (Pa. Super. 2006), *appeal denied,* 916 A.2d 1101 (Pa. 2007), *citing* ***Commonwealth v. Minnis***, 458 A.2d 231, 233 (Pa. Super. 1983). Although Fields was uncertain of the assailant's identification during the lineup, and ultimately chose another individual, she correctly identified Appellant during a photographic array. N.T., 11/2/12, at 107; N.T. 11/5/12, at 173-174, 218. She also identified Appellant as the individual who approached her side of McCoy's vehicle at Appellant's preliminary hearing and at trial. N.T., 11/2/12, at 107, 120. Therefore, her misidentification at the lineup only went to the weight of the evidence, not its sufficiency.

Likewise, we cannot agree that minor inconsistencies in eyewitness descriptions of Appellant "render[ed] the identification testimony of the[] witnesses so unreliable as to make the verdict one based upon surmise or conjecture." ***Commonwealth v. Hamilton***, 546 A.2d 90, 96 (Pa. Super. 1988), *appeal denied*, 558 A.2d 531 (Pa. 1989); ***Brown***, 52 A.3d at 1165. In sum, taken as a whole and viewed in the light most favorable to the Commonwealth, there was sufficient evidence that Appellant was the individual who approached the passenger side of McCoy's car during the robbery.

Appellant next contends that the evidence was insufficient to show that the murder was committed during the perpetration of a felony. As we have explained:

> "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S.A. § 2502(b). The "perpetration of a felony" is defined as: "The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa.C.S.A. § 2502(d).

Commonwealth v. Knox, 50 A.3d 732, 739 (Pa. Super. 2012), *appeal denied*, 69 A.3d 601 (Pa. 2013). Appellant does not argue that what occurred at McCoy's car was not a robbery. Rather, he contends that "[t]here was a break in the chain of events between the robbery and the shooting." Appellant's Brief at 37 (internal quotation marks omitted).

It is clear that there was no break in the chain of events in this case. It was necessary for Lee to shoot McCoy in order to escape from the robbery because McCoy got out of his vehicle in an attempt to confront Lee and prevent Lee and Appellant from escaping. N.T., 11/2/12, at 92. When a homicide occurs in order to facilitate the escape from a robbery, there is no break in the chain of events and the homicide rises to second-degree murder. ***See Commonwealth v. Johnson***, 485 A.2d 397, 402 (Pa. Super. 1984).

Even assuming *arguendo* that the homicide was not necessary in order to escape,

> [t]here was no evidence that [A]ppellant attempted to withdraw from the robbery. He was aware that [Lee] carried [a] deadly weapon[]. . . . This evidence provided the jury with sufficient basis to conclude that [A]ppellant should have known that someone could be shot during the robbery or flight. It is evident that [A]ppellant assumed the risk that a killing could occur during the crime to which he committed himself.

Id.

Likewise, in ***Commonwealth v. Maldonado***, the assailants fled after stealing a box from a group having a picnic. 494 A.2d 402, 404 (Pa. Super. 1985). We termed this a "fresh pursuit;" however, we concluded that "[t]he robbery statute . . . provides that an act is deemed 'in the course of committing a theft' if it occurs in flight after the attempt or commission. Within seconds, or at the most minutes, the decedent was killed while appellants were still in flight and acting in concert." ***Id.*** at 408-409 (internal

citation omitted). Thus, we concluded that even if there was a fresh pursuit, this did not constitute a break in the chain of events. The same is true in the case at bar. Even if the homicide was not necessary to the robbery and even if there was a fresh pursuit, the evidence supported a finding that there was no break in the chain of events.

Appellant's contention that "there is absolutely no evidence to establish the fact that the [A]ppellant had homicide on his mind when he apparently attempted to steal from [McCoy]" is also without merit. As our Supreme Court has explained, "[s]econd-degree murder includes all of the elements of first-degree murder except the specific intent to kill, and occurs when a defendant is engaged as a principal or an accomplice in the perpetration of a felony." ***Commonwealth v. Weimer***, 977 A.2d 1103, 1111 (Pa. 2009), *citing* ***Commonwealth v. Malone***, 47 A.2d 445 (Pa. 1946); 18 Pa.C.S.A. § 2502(b). Therefore, whether Appellant had homicide on his mind is irrelevant. ***See Commonwealth v. Lambert***, 795 A.2d 1010, 1022 (Pa. Super. 2002) (*en banc*), *appeal denied*, 805 A.2d 521 (Pa. 2002) (citations omitted) ("The malice or intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim.").

Appellant also argues that he should not be held liable as a co-conspirator and/or accomplice. However, the evidence supports a finding that Appellant was liable as a principal to the crime. As we have explained,

> the responsibility of persons, other than the slayer, for a homicide committed in the perpetration of a felony requires proof of a conspiratorial design by the slayer and the others to commit the underlying felony and of an act by the slayer causing death which was in furtherance of the felony.

Lambert, 795 A.2d at 1022-1023 (internal alterations omitted), *quoting* ***Commonwealth v. Middleton***, 467 A.2d 841, 848 (Pa. Super. 1983).

The evidence produced at trial showed that Lee and Appellant rode their bicycles up to McCoy's car together. N.T., 11/5/12, at 72-74. Lee approached the passenger side of the vehicle at the same time that Appellant approached the passenger side of the vehicle. N.T., 11/2/12, at 83. Appellant was present when Lee showed McCoy his firearm and implicitly demanded that McCoy hand over his possessions. ***Id.*** at 83-85. When McCoy stated that he had dropped his cellular telephone, Lee and Appellant said together, "Well, pick it up then." ***Id.*** at 87-88. When McCoy and Lee engaged in a physical altercation after McCoy exited the vehicle, Appellant ran to the back of the vehicle to assist and presumably fired a shot. ***Id.*** at 92. This evidence was sufficient for the jury to conclude that there was a conspiratorial design between Lee and Appellant to commit the robbery. Furthermore, as we noted above, the homicide was perpetrated in furtherance of the robbery. Accordingly, Appellant could be held liable as a principal for McCoy's murder.

Even assuming *arguendo* that Appellant was not a principal, the evidence was sufficient to prove that he was liable as an accomplice. As we have explained,

> The very nature of accomplice liability is that one who actively and purposefully engages in criminal activity is criminally responsible for the criminal actions of his/her co-conspirators which are committed in furtherance of the criminal endeavor. However, in order to impose this form of criminal liability the individual must be an active partner in the intent to commit a crime. Further, an accomplice must have done something to participate in the venture. Lastly, mere presence at the scene is insufficient to support a conviction: evidence indicating participation in the crime is required. Most importantly, the law requires some proof that a party was an active participant in a criminal enterprise in order to impose accomplice liability. Such a finding cannot be based upon mere assumption or speculation.

Lambert, 795 A.2d at 1024 (internal quotation marks and alterations omitted), *quoting* ***Commonwealth v. Vining***, 744 A.2d 310, 321 (Pa. Super. 1999) (*en banc*).

In the case at bar, the evidence was sufficient to prove that Appellant was an active participant in the robbery. He told McCoy to hand over his telephone when McCoy informed Lee that the telephone had fallen on the floor. N.T., 11/2/12, at 87-88. When Lee and McCoy were engaged in the physical alteration, Appellant went to assist Lee. ***Id.*** at 92. Accordingly, the evidence was sufficient to hold Appellant liable as an accomplice to Lee's murder.

In sum, the evidence, when considered in the light most favorable to the Commonwealth, was sufficient to prove that Appellant was the individual

whom approached the passenger side of McCoy's vehicle. The evidence was also sufficient to show that the homicide occurred during the perpetration of the robbery and that Appellant was both a principal and an accomplice in that robbery. Therefore, the Commonwealth satisfied its burden of proof for each element of each offense for which Appellant was convicted.

Finally, Appellant and the Commonwealth agree that because Appellant's conviction for robbery should have merged with his second-degree murder conviction for purposes of sentencing, Appellant's sentence was illegal. ***See*** Appellant's Brief at 43 and Commonwealth's Brief at 23.

"A claim that crimes should have merged for sentencing purposes raises a challenge to the legality of the sentence." ***Commonwealth v. Quintua***, 56 A.3d 399, 400 (Pa. Super. 2012), *appeal denied*, 70 A.3d 810 (Pa. 2013) (citation omitted). "An illegal sentence must be vacated. When the legality of a sentence is at issue on appeal, our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Mendozajr***, 71 A.3d 1023, (Pa. Super. 2013) (internal quotation marks and citations omitted), *quoting* ***Commonwealth v. Catt***, 994 A.2d 1158, 1160 (Pa. Super. 2010) (*en banc*).

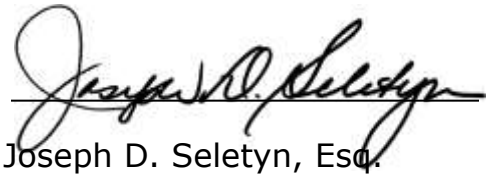
Appellant and the Commonwealth are correct that the robbery conviction should have merged with the second-degree murder conviction. ***See*** 42 Pa.C.S.A. § 9765; ***cf. Commonwealth v. Adams***, 39 A.3d 310, 325 (Pa. Super. 2012), *appeal granted on other grounds*, 48 A.3d 1230 (Pa.

2012) (underlying felony merges with second-degree murder). Therefore, we will vacate Appellant's sentence with respect to the robbery conviction.

As Appellant's sentence for robbery was concurrent with his mandatory life imprisonment sentence for second-degree murder, this vacatur does not upset the sentencing scheme and, therefore, does not require remand. ***See Commonwealth v. Lomax***, 8 A.3d 1264, 1269-1270 (Pa. Super. 2010) (citation omitted); ***see also*** Trial Court Opinion, 6/10/13, at 20 (trial court believes that remand is not necessary).

Judgment of sentence as to Appellant's conviction for violation of 18 Pa.C.S.A. § 3701(a)(1)(i) vacated. Judgment of sentence affirmed in all other respects.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/19/2013