NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JAMAAL SIMMONS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2257 EDA 2012

Appeal from the Judgment of Sentence May 9, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007218-2010

BEFORE: GANTMAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY GANTMAN, J.: **FILED DECEMBER 05, 2013**

Appellant, Jamaal Simmons, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial convictions for third degree murder, conspiracy to commit third degree murder, aggravated assault, and recklessly endangering another person ("REAP").[1] We affirm.

In its opinion, the trial court fully and correctly sets forth the relevant facts of this case as follows:

> On July 25, 2009 at approximately 2 [o'clock] in the afternoon, [Appellant] was driving a black van down Norris Street between 23rd and 24th Streets. When the van reached Judson Street, a person clothed in black exited the

[1] 18 Pa.C.S.A. §§ 2502(c), 903(a), 2702(a), 2705, respectively.

*Retired Senior Judge assigned to the Superior Court.

> van and fired one shot down Norris Street in the direction of 24th Street. At that time, Rodney Barnes ("Barnes") and his co-worker, Curtis Johns ("Johns") were standing at the rear of Barnes' van parked on Norris Street between 23rd and 24th. They were both union carpenters who had been working for the Philadelphia Housing Authority at the Raymond Rosen Manor. The shot hit Barnes in the head killing him instantly and shattered the lift gate of Barnes' truck, showering Johns with glass. [Appellant] then returned with the van, picked up the unknown gunman and drove off.
>
> Barnes remained on life support for 12 days and died when it was removed on August 5, 2009. The medical examiner testified that Barnes died from a single gunshot to the head. Barnes was not the intended victim; the intended victim was one Richard Taylor who at the time had been walking down Norris Street near to where the victim was standing. There was bad blood between [Appellant] and Taylor over an incident that had occurred sometime prior to the shooting.
>
> A warrant was issued for [Appellant] and he was arrested in New York. A van registered to his brother and containing [Appellant's] fingerprint, was recovered in Vermont.
>
> The shooting was recorded by security cameras located on a building across the street from where the victim was standing. The tape shows the van approaching and shows the person getting out of the van firing the shot and then getting back in the van. The jury was shown pictures of the van they recovered in Vermont compared to the van shown on the videotape. The vans were very similar.

(Trial Court Opinion, dated December 27, 2012, at 1-2). The procedural history includes:

> [Appellant], was tried before this [c]ourt and a jury on January 4-11, 2012, and was convicted of third degree murder, conspiracy to commit third degree murder, aggravated assault, and [REAP]. This [c]ourt deferred sentencing to have the benefit of a presentence

> investigation and a mental health report. On May 9, 2012, this [c]ourt sentenced [Appellant] to 15 to 30 years' incarceration for third degree murder, 15 to 30 years' incarceration for conspiracy to commit third degree murder, [5] to 10 years' incarceration for aggravated assault, all sentences to be served concurrently, and no further penalty for REAP. On May 21, 2012, post sentence motions were filed and were denied on May 30, 2012.

(***Id.*** at 1). Appellant filed his notice of appeal on June 14, 2012. On June 18, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal. Appellant timely complied on June 25, 2012.

Appellant raises the following issues for our review:

> IS APPELLANT ENTITLED TO AN ARREST OF JUDGMENT WITH RESPECT TO HIS CONVICTIONS FOR THIRD DEGREE MURDER, CRIMINAL CONSPIRACY, AGGRAVATED ASSAULT AND RECKLESSLY ENDANGERING ANOTHER PERSON SINCE THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THESE CONVICTIONS AS THE COMMONWEALTH FAILED TO PROVE APPELLANT'S GUILT OR THE ESSENTIAL ELEMENTS OF THESE CRIMES BEYOND A REASONABLE DOUBT?
>
> IS APPELLANT ENTITLED TO A NEW TRIAL SINCE THE VERDICTS OF GUILT ARE AGAINST THE WEIGHT OF THE EVIDENCE?
>
> IS APPELLANT ENTITLED TO A NEW TRIAL AS A RESULT OF THE TRIAL COURT'S RULING THAT ALLOWED THE COMMONWEALTH TO PRESENT THE TESTIMONY OF RICHARD TAYLOR THAT HE WAS UNDER THE IMPRESSION THAT HE WAS THE INTENDED TARGET OF THE SHOOTER BECAUSE THERE WAS BAD BLOOD BETWEEN HIM AND APPELLANT?
>
> IS APPELLANT ENTITLED TO A NEW TRIAL AS A RESULT OF THE TRIAL COURT'S RULING THAT ALLOWED COMMONWEALTH WITNESS DETECTIVE JOHN LEWIS TO TESTIFY TO HIS OPINION REGARDING THE SIMILARITIES BETWEEN A VAN DEPICTED IN A SURVEILLANCE VIDEO

> AND A VAN OWNED BY APPELLANT'S BROTHER WHICH WAS CONFISCATED BY POLICE IN VERMONT?
>
> IS APPELLANT ENTITLED TO A NEW TRIAL AS A RESULT OF THE TRIAL COURT'S RULING THAT GRANTED THE COMMONWEALTH'S MOTION TO CROSS EXAMINE APPELLANT'S CHARACTER WITNESSES ON THEIR KNOWLEDGE OF APPELLANT'S RAP LYRICS AS DEPICTED IN VARIOUS DVD'S AND VIDEOS?
>
> IS APPELLANT ENTITLED TO A REMAND FOR RESENTENCING SINCE THE AGGREGATE SENTENCE OF 15 TO 30 YEARS INCARCERATION IS EXCESSIVE AND NOT REFLECTIVE OF HIS CHARACTER, HISTORY OR CONDITION?
>
> IS APPELLANT ENTITLED TO THE GRANT OF A NEW TRIAL BASED UPON AFTER-DISCOVERED EVIDENCE?

(Appellant's Brief at 5-6).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Carolyn Engel Temin, we conclude Appellant's issues one through six merit no relief. The trial court opinion comprehensively discusses and properly disposes of the questions presented. (***See*** Trial Court Opinion at 3-18) (finding: **(1)** evidence was sufficient to establish Appellant drove shooter to scene, shooter fired shot in direction of Richard Taylor, but instead killed Mr. Barnes, and Appellant returned to scene, picked up shooter and drove away; hence evidence was sufficient to support guilty verdicts; **(2)** verdict is not against weight of evidence on ground alleged, where jury chose to believe witnesses' prior statements to police rather than their trial testimony; **(3)** admission of testimony regarding "bad blood" between him and Appellant

was within discretion of trial court, to establish motive and intent; **(4)** admission of lay opinion testimony regarding similarities of Appellant's vehicle and vehicle depicted on surveillance video was within discretion of trial court and did not serve to confuse or prejudice jury; **(5)** court's decision to grant prosecution's motion *in limine* to use rap lyrics in rebuttal to proposed defense character evidence was proper; **(6)** sentence was within sentencing guidelines and not excessive). As to these issues, we affirm on the basis of the trial court's opinion.

In his final issue, Appellant contends he is in possession of after-discovered evidence in the form of a "statement" by Mr. Tyrell Samuels-Bey, which Appellant claims he could not have obtained through the exercise of reasonable diligence before trial. Sometime after the judgment of sentence was entered, Mr. Samuels-Bey made a statement that he had sold bad drugs to the driver of the van just before the shooting; and the driver was not Appellant. Mr. Samuels-Bey says this drug exchange prompted the shooter to fire a shot at Mr. Samuels-Bey. Mr. Samuels-Bey did not come forward with this pertinent information previously, because he was afraid of criminal prosecution for the drug transaction. Appellant concludes he is entitled to remand for an evidentiary hearing concerning this claim of after-discovered evidence. We cannot agree.

To secure a new trial based on after-discovered evidence:

> [Defendant] must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the

> trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; **and** (4) would likely result in a different verdict if a new trial were granted.

Commonwealth v. Pagan, 597 Pa. 69, 106, 950 A.2d 270, 292 (2008), *cert. denied*, 555 U.S. 1198, 129 S.Ct. 1378, 173 L.Ed.2d 633 (2009) (emphasis added). The test is conjunctive; the defendant must satisfy by a preponderance of the evidence all of these factors to warrant a new trial. ***See id.***; ***Commonwealth v. Rivera***, 939 A.2d 355, 359 (Pa.Super. 2007), *appeal denied*, 598 Pa. 774, 958 A.2d 1047 (2008).

To obtain a new trial based on after-discovered evidence, the petitioner must explain why he could not have produced the evidence in question at or before trial with the exercise of reasonable diligence. ***Commonwealth v. Jones***, 402 A.2d 1065, 1066 (Pa.Super. 1979). A defendant may unearth information that the party with the burden of proof is not required to uncover, so long as such diligence in investigation does not exceed what is reasonably expected. ***Commonwealth v. Brosnick***, 530 Pa. 158, 166, 607 A.2d 725, 729 (1992). A defendant has a duty to bring forth any relevant evidence in his behalf. ***Commonwealth v. Johnson***, 323 A.2d 295, 296 (Pa.Super. 1974). Likewise, a defendant who fails to question or investigate an obvious, available source of information, cannot later claim evidence from that source constitutes newly discovered evidence. ***Commonwealth v. Chambers***, 528 Pa. 558, 583, 599 A.2d 630, 642

(1991), *cert. denied*, 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992). "Unless there has been a clear abuse of discretion, an appellate court will not disturb the trial court's denial of an appellant's motion for a new trial based on after-discovered evidence. In order for after-discovered evidence to be exculpatory, it must be material to a determination of guilt or innocence." ***Commonwealth v. Chamberlain***, 612 Pa. 107, 166, 30 A.3d 381, 416 (2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 2377, 182 L.Ed.2d 1017 (2012) (internal citations omitted). "Further, the proposed new evidence must be 'producible and admissible.'" ***Id.*** at 164, 30 A.3d at 414.

Instantly, the trial court reasoned as follows:

> In support of his claim, [Appellant] attached to his post-verdict motion, the statement of one [Tyrell] Samuels-Bey. According to the statement, Bey admits that in July 2009 in the Raymond Rosen Projects, he sold drugs to the occupants of a black van with tinted windows on Judson Street between Norris and Diamond Streets. He says the driver of the van was a black male named "Brandon." Bey claims that he knew he had sold bad drugs and took off on his bike after the sale. He noticed the van behind him as he pedaled away on his bike. He saw the passenger exit the van and fire one shot. Bey's statement says that he did not come forward with information because he was afraid of getting in trouble. Although he knows [Appellant] as a rapper he does not know him personally but he is 100% certain that [Appellant] was not the driver of the van.
>
> Contrary to [Appellant's] claim that he is only now discovering the name of the person on the bike, the person on the bike was identified both in the statement of Khalil Bradley and Richard Taylor. In Richard Taylor's statement, on page 3, it indicates that he was shown a picture taken from a My Space photo of Jeffrey Pickens and identified the person in the picture as, "that's who was on the bike

> talking to Steel and the boy who shot the maintenance man." In the statement of Khalil Bradley, the following occurred:
>
> Q. Can you tell me what you saw?
>
> A. The boy Jeff was coming up the street on his bike fast. When he was next to the housing guy the mini-van came up Judson and was going towards the Comcast building. It stopped on my side of Norris Street at the end of the block. Then the boy opened the side door of a dark colored tinted out mini-van and I heard a boom then I saw the housing guy turn and then his head moved and the glass shattered.
>
> Q. Who is Jeff?
>
> A. He's from over the bridge, he be with LZAY, Tahir, Old dog and BTF. He be around Dover and Diamond and Newkirk and Diamond and 31st and Berks, like from the area they call "the land of the lost." I heard he had burned the guy in the van. And then a little later on:
>
> Q. What do you mean by burn?
>
> A. Sold him some fake wet. Drugs. He diluted it with starter fluid or cooking oil.
>
> The defense had this material in discovery long before the date of the trial and could have investigated to see who that person was and whether [he] had information about the driver of the van that differed from the evidence supplied by the Commonwealth. [Appellant] is not entitled to a new trial based on a claim of after-discovered evidence.

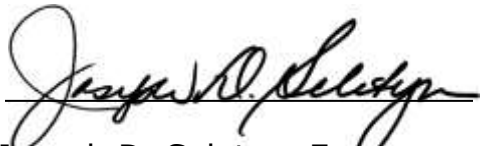
(Trial Court Opinion at 19-21). The record confirms the court's analysis. From discovery and before his trial, Appellant had several leads to investigate the identity of the person on the bike, whom he now claims is Mr. Samuels-Bey. ***See Brosnick, supra***; ***Chambers, supra***; ***Jones,***

supra; ***Johnson, supra***. Appellant failed to show when and how he first learned the identity of the person on the bike and obtained the statement of Mr. Samuels-Bey. We further observe that Mr. Samuels-Bey's "statement" does not carry the weight of an affidavit. Although he reduced his statement to writing and signed it, the statement was not duly sworn before someone other than Mr. Samuels-Bey. Thus, the statement is mere narration. Therefore, we see no reason to disturb the court's decision to reject the statement as presented. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

*JUDGE COLVILLE CONCURS IN THE RESULT.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/5/2013

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0007218-2010**
v.	:	
JAMAAL SIMMONS	:	**APPEAL**

OPINION SUR PA.R.A.P. 1925(a)

TEMIN, J. **December 27, 2012**

Procedural History

The defendant, Jamaal Simmons, was tried before this Court and a jury on January 4-11, 2012, and was convicted of third degree murder, conspiracy to commit third degree murder, aggravated assault, and recklessly endangering another person ("REAP"). This Court deferred sentencing to have the benefit of a presentence investigation and a mental health report. On May 9, 2012, this Court sentenced the defendant to 15 to 30 years incarceration for third degree murder, 15 to 30 years incarceration for conspiracy to commit third degree murder, five to 10 years incarceration for aggravated assault, all sentences to be served concurrently, and no further penalty for REAP. On May 21, 2012, post sentence motions were filed and were denied on May 30, 2012.

This appeal followed.

Facts

At trial, the Commonwealth proved the following:

On July 25, 2009 at approximately 2 p.m. in the afternoon, the defendant was driving a black van down Norris Street between 23rd and 24th Streets. When the van reached Judson Street, a person clothed in black exited the van and fired one shot down Norris Street in the direction of 24th Street. At that time, Rodney Barnes ("Barnes") and his co-worker, Curtis Johns ("Johns") were standing at the rear of Barnes' van parked on Norris Street between 23rd and 24th. They were both union carpenters who had been working for the Philadelphia Housing Authority at the Raymond Rosen Manor. The shot hit Barnes in the head killing him instantly and shattered the lift gate of Barnes' truck, showering Johns with glass. The defendant then returned with the van, picked up the unknown gunman and drove off.

Barnes remained on life support for 12 days and died when it was removed on August 5, 2009. The medical examiner testified that Barnes died from a single gunshot to the head. Barnes was not the intended victim, the intended victim was one Richard Taylor who at the time had been walking down Norris Street near to where the victim was standing. There was bad blood between the defendant and Taylor over an incident that had occurred sometime prior to the shooting.

A warrant was issued for the defendant and he was arrested in New York. A van registered to his brother and containing the defendant's fingerprint, was recovered in Vermont.

The shooting was recorded by security cameras located on a building across the street from where the victim as standing. The tape shows the van approaching and shows the person getting out of the van firing the shot and then getting back in the van. The jury was shown pictures of the van they recovered in Vermont compared to the van shown on the videotape. The vans were very similar.

Issues

The defendant claims that:

1. The evidence was insufficient to support the verdict;

2 The verdict was against the weight of the evidence;

3. The court erred in admitting the testimony of Richard Taylor;

4. The court erred in admitting the testimony of Det. John Lewis;

5. The court erred in granting the Commonwealth's motion to cross-examine the defendant's character witnesses on their knowledge of the contents of rap lyrics written by the defendant;

6. His sentence of 15 to 30 years is excessive; and

7. The Court erred in denying his post-sentence motion without a hearing.

Discussion

1. <u>Sufficiency of the Evidence</u>

The defendant claims that the evidence was insufficient to support his convictions for third degree murder, criminal conspiracy, aggravated assault and REAP.

The evidence is sufficient to establish murder in the third degree where the Commonwealth proves that: the defendant caused the victim's death, and in doing so acted with malice. Malice is an essential element of third degree murder. *Commonwealth v. Horton*, 401 A.2d 320 (Pa. 1979)

"Malice aforethought requires a unique state of frame of mind characterized by wickedness, hardness, cruelty, recklessness, and disregard of social duty:

> "Malice is a legal term, implying much more [than ill-will, spite, or a grudge]. It comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Urder, therefore, at common law embraces cases where no intent to kill existed, but where the state or frame of ind termed malice, in its legal sense, prevailed.

"Malice has been characterized as exhibiting an 'extreme indifference to human life', and may be found to exist not only in an intentional killing, but also in an unintentional homicide where the perpetrator 'consciously disregarded an unjustified and extremely high risk that his actions mjght cause death or serious bodily harm'." *Commonwealth v. Ludwig*, 874 A.2d 623, 631-32 (Pa. 2005) (citations omitted).

Malice may be inferred from the use of a deadly weapon on a vital part of the victim's body. *Commonwealth v. Gonzalez*, 564, 609 A.2d 1368 (Pa. Super. 1992).

The doctrine of Transferred Intent applies to all specific intent crimes and states:

> b) When intentionally or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the intent or the contemplation of the actor unless:

> (1) the actual result differs from that designed or contemplated as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused. 18 Pa.C.S. §303 (b)(1).

To convict a defendant of conspiracy, the Commonwealth must prove beyond a reasonable doubt that: (1) the defendant intended to commit or aid in the commission of the criminal act; (2) the defendant entered into an agreement with another (a "co-conspirator") to engage in the crime; and (3) the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime. The essence of a criminal conspiracy, which is what distinguishes this crime from accomplice liability, is the agreement made between the co-conspirators.

Association with the perpetrators, presence at the scene, or mere knowledge of the crime is insufficient to establish that a defendant was part of a conspiratorial agreement to commit the crime. There must be additional proof that the defendant intended to commit the crime along with his co-conspirator.

Direct evidence of the defendant's criminal intent or the conspiratorial agreement is rarely available. The defendant's intent and agreement is often proven through circumstantial evidence, such as by the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators. Where there is evidence of an agreement and the defendant intentionally entered into the agreement, that defendant may be liable for the overt acts committed in furtherance of the conspiracy regardless of which co-conspirator committed the act. *Commonwealth v. Barnes*, 871 A.2d 812, 819-

820 (Pa.Super Ct. 2005) (citing *Commonwealth v. Murphy*, 577 Pa. 275, 292, 844 A.2d 1228, 1238 (2004)).

In determining whether there was sufficient evidence to support a verdict, the court must view the evidence and all reasonable inferences derived therefrom in the light most favorable to the Commonwealth. It must then determine whether the Commonwealth proved every element of the crimes charged beyond a reasonable doubt. The entire record must be evaluated and all evidence actually received must be considered and the trier of fact is free to believe all, part, or none of the evidence. *Commonwealth v. Woods*, 638 A.2d 1013, 1015 (Pa. 1994).

[The Court] must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

"The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances."

Commonwealth v. Mobley, 2011 PA Super 14, 14 A.3d 887, 889-90 (Pa. Super. 2011) (quoting *Commonwealth v. Mollett*, 2010 PA Super 153, 5 A.3d 291, 313 (Pa.Super. 2010)) *Commonwealth v. Tarrach,* 2012 PA Super 82, April 9, 2012.

"Under the Crimes Code, a person may be convicted of aggravated assault, graded as a felony of the first degree punishable by a maximum term of incarceration of 20 years, if he or she '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." 18 Pa. C.S.A. §2702(a)(1). Serious bodily injury is further defined by the Crimes Code as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa.C.S.A. §2301.

Where, as here, [Johns], did not suffer 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. Looking first to whether evidence established intent to cause serious bodily injury, we note that such an inquiry into intent must be determined on a case-by-case basis. *Commonwealth v Dailey*, 828 A.2d 356 (Pa. Super. 2003). Because direct evidence of intent is often unavailable, intent to cause serious bodily injury may be shown by the circumstances surrounding the attack. *Commonwealth v. Caterino*, 678 A.2d 389 (Pa. Super. 1996). 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. Rosado*, 684 A.2d 605, 608 (Pa. Super. 1996).

To convict a defendant of Recklessly Endangering Another Person ("REAP") the Commonwealth must prove beyond a reasonable doubt that the defendant recklessly engaged in conduct which placed or may have placed another person in danger of death of serious bodily injury. REAP requires: 1) *mens rea* of recklessness; 2) *actus reus* of some conduct; 3) causation which placed another person in; 4) danger of death or serious bodily injury. *Mens rea* for reckless endangering another person is a conscious disregard of a known risk of death or great bodily harm to another person and "serious bodily injury" is "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member of organ". *Commonwealth v. Reynolds*, 835 A.2de 720, 727 (Pa. Super. Ct. 2003) (internal citations omitted)

The evidence was sufficient to show that the defendant drove the shooter to the scene, that the shooter fired a shot in the direction of Richard Taylor, but instead killed Barnes and showered Johns with glass and that the defendant then returned to the scene, picked up the shooter and drove off. The evidence was sufficient to support the verdicts. This claim is without merit.

2. <u>Weight of the Evidence</u>

The defendant claims that he is entitled to a new trial because the verdicts were against the weight of the evidence.

A motion for a new trial on grounds that the verdict was contrary to the weight of the evidence concedes that there was sufficient evidence to support the verdict. However, it asserts that the verdict is so contrary to the evidence as to shock one's sense of justice, and the award of a new trial is imperative so that right may be given another opportunity to prevail. *Commonwealth v. Murray*, 597 A.2d 111, 113 (Pa. 1991) (citing *Commonwealth v. Taylor*, 471 A.2d 1228, 1230 (Pa. Super. 1984)). It is not only the trial court's power, but its duty to award a new trial when it believes the verdict was against the weight of the evidence and resulted in a miscarriage of justice. *Id.*

In assessing a claim that the verdict is against the weight of the evidence, [the Court be] mindful of the principle that passing on the credibility of witnesses is a function solely within the province of the finder of fact, which is free to believe all, part, or none of the evidence. *Commonwealth v. Mayfield*, 585 A.2d 1069 (Pa. 1991).

To succeed on a weight of the evidence claim, the defendant must establish from the record that "the verdict was so contrary to the evidence as to shock one's sense of justice and make the award of a new trial patently imperative". *Commonwealth v. Fromal*, 572 A.2d 711, 716-717 (Pa. Super. 1990) (citing *Commonwealth v. Hunter*, 554 A.2d 550, 550 (Pa. Super. 1989)). The evidence should be viewed in the light most favorable to the verdict winner. *Commonwealth v. Hardcastle*, 546 A.2d 1101, 1106 (Pa. 1988). See *Commonwealth v. Hawkins*, 701 A.2d 492, 501 (Pa. 1997)

The defense claims that the verdict is against the weight of the evidence because the witnesses identifying the defendant as the driver of the van all recanted their statements that had been given to police. However, it is well established in

Pennsylvania that the jury may consider the witnesses' statements given to the police along with their testimony at trial as substantive evidence. In this case the jury obviously decided to believe the facts related in the statements that the witnesses gave to the police rather than their testimony at trial. This the law permits them to do. *Commonwealth v. Brady*, 507 A2d 66 (1986);*Commonwealth v. Lively,* 530 Pa. 464(1992).

This claim is without merit.

3. Admission of Richard Taylor's Testimony

The defense claims that the court erred in admitting the testimony of Richard Taylor, that he was under the impression that he was the intended target of the shooter. In his statement to police, Richard Taylor said that the shooter must have been shooting at him because there was bad blood between himself and Steel (the defendant). (N.T. 1512 at 119). This statement had been the subject of a motion in limine by the defense. The Court ruled that it would permit the statement but would give a cautionary instruction to the jury to explain that it didn't come in for the truth of the matter stated but only as a present sense impression. However, when the witness, Taylor, testified on the witness stand, that he had never made the statement, the Court held a side bar conference with counsel to find out if they still wanted the cautionary instruction to be given. Counsel for the defense indicated that as a matter of strategy he would request the Court not to give the instruction.

"The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law...our standard of review is very narrow...[t]o constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." *McManamon v. Washko*, 906 A.2d 1259, 1268-1269 (Pa. Super. Ct. 2006) (internal citations omitted).

The evidence of "bad blood" between Taylor and the defendant was admissible to show motive for the crime and intent.

This claim is without merit.

4. <u>Testimony of Detective John Lewis</u>

The defendant claims this Court erred in admitting the testimony of Detective John Lewis ("Lewis") regarding the similarities between the van in the surveillance video and the van owned by the defendant's brother because Lewis' conclusions invaded the exclusive fact finding function of the jury.

Admission of lay opinion testimony based on the witness' perception is left to the sound discretion of the trial court after determining whether: a) the proffered testimony is helpful to the jury's deliberation on the ultimate issues; and b) does not unduly confuse or prejudice the jury. *McKee v. Evans*, 551 A.2d 260, 269 (Pa. Super. Ct. 1988).

Lewis' testimony noted similarities between the van as shown in the video and the van belonging to the defendant's brother, to wit: the vans were similar in color, body type, headlight assembly, grille section, and both had a roof rack. Lewis testified regarding similarities between the two vans as follows:

> Q. [Prosecutor] Now, just to be fair and clear about this, are you – Can you tell us – I assume you're not telling us that that van in that video is the same van you found in Vermont?
>
> A. [Lewis] No. It has the same body type, similar body type, similar headlight assembly, grille. Appears to be a similar vehicle.

N.T. -01.06.2012 at 281.

Lewis' testimony was helpful to the jury in examining the photographs of the two vans and did not confuse or prejudice the jury. At the same time as the detective was testifying, the jury was observing a picture of both vans on the screen. The jury was able to make its own conclusions about whether or not they agreed with the detective's testimony concerning the similarities of the vans. The testimony of the detective did not invade the province of the jury.

This claim is without merit.

5. <u>The Defendant's Rap Lyrics</u>

The defendant was seeking to introduce character testimony that he had a reputation for being peaceful, non-violent and law abiding. This Court ruled that rap lyrics written by the defendant could come in rebuttal. As a result the defendant did not call any character witnesses. In this case, the Commonwealth did not announce its

intentions to use the rap lyrics in rebuttal to character evidence until the beginning of the second week of trial. The District Attorney reported that he had not discovered the rap lyrics until the weekend when he viewed them on YouTube.

Literary works that are relevant to character testimony are admissible and the relevance of such evidence is not outweighed by its prejudicial effect. *Commonwealth v. Ragan*, 645 A.2d 811, 821 (Pa. 1994) (citing *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989)).

"In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Pa.R.E. 404(b)(4). The purpose of this rule "is to prevent unfair surprise, and to give the defendant reasonable time to prepare an objection, or ready a rebuttal for, such evidence." Pa.R.E. 404, cmt. However, there is no requirement that the "notice" must be formally given or be in writing in order for the evidence to be admissible." *Commonwealth v. Lynch*, 2012 Pa. Super. LEXIS 2948, 12-13 (2012) (quoting *Commonwealth vl. Mawhinney*, 915 A.2d 107, 110 (Pa. Super. 2006)).

The discussion and specific lyrics at issue were read into the record as follows:

> MR. MISCHAK: With that, I have advised my client not to introduce character traits, because some of the lyrics are chilling enough that although I'm sure the jury will be instructed and understand to some degree the purpose of those questions being asked, I think it would have a chilling effect on my client, particularly in a case like this. Perhaps I don't want to delay anything, maybe it can be done after. Obviously, I would ask the record to reflect the particular lyrics the Commonwealth introduces.

THE COURT: I will ask Mr. Gilson to read them into the record.
MR. GILSON: Yes.

Your Honor, over the weekend, I viewed numerous videos posted on YouTube that show the defendant rapping certain lyrics. I wrote down the ones I thought were relevant to the issues of character traits of peacefulness, law-abidingness and nonviolence. I understand there were a number of them. I understand the Court wouldn't want me to read them all. The ones I think are the most relevant or most pertinent I'm quoting.
Quote, I keep the pistol tight, end quote.
Quote, Me, I like the gun flow, end quote.
Quote, I ain't try8ing to talk it out. I ain't trying to squash it. I just want a funeral. I want to see some violence, end quote.
Quote, All I know is violence, money and drugs. They say increase the peace, so I double my guns, end quote.
Those are a few. There are many more examples.
THE COURT: Those are what you read in cross-examination?
MR. GILSON: Yes, those would be the ones I would read in cross-examination.
THE COURT: Just so that is clear.
MR. MISCHAK: Thank you, Your Honor.

N.T. 01.09.2012 at 161-62.

Defense counsel was aware that the defendant was a rap artist and could have discovered the lyrics himself on You Tube. The lyrics were relevant to the character traits at issue and would have been properly admitted had the defendant introduced character witnesses in support of a reputation for peacefulness, non-violence, and being law abiding.

This claim is without merit.

6. <u>Sentence</u>

The defendant claims that his sentence of 15 to 30 years is excessive and does not reflect his character, history or condition.

"Sentencing is within the sound discretion of the sentencing judge, and that decision will not be disturbed absent an abuse of discretion. To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive." *Commonwealth v. Shaffer*, 722 A.2d 195, 198-199 (Pa. Super. Ct. 1998) (internal citations omitted).

"It is well settled under Pennsylvania law that in sentencing a defendant: The court shall follow the general principle that the sentence imposed shall call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing . . . [T]he court shall . . . disclose in open court, at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing . . . the court shall provide a contemporaneous written statement of the reason or reasons for the deviation. . ." 42 Pa. C.S.A. §9721(b).

It is sufficient that this statement be made "on the record and in the defendant's presence." *Commonwealth v. Smith*, 534 A.2d 836, 838 (Pa. Super. 1987).

"One of the most important functions performed by a trial judge is the fashioning of the sanction to be imposed for those who are convicted of violating our laws. Traditionally, the deference to the sentencing judge's discretion in such matters has been recognized. The goal to be achieved in the sentencing decision must

accommodate a number of different objectives. The trial court is required to be fair to the offender but at the same time protect society and vindicate the victim. The sentencing decision focuses on the well-recognized concerns for deterrence, retribution, and rehabilitation. In dealing with such an equation, reasonable men can obviously differ and thus the law has seized upon the deference to the trial judge's decision in this area. n. 4.

> "Fn. 4. Even the relatively recent legislative attempts to formulate sentencing guidelines were not designed to curtail the discretionary aspects of the sentencing decision, but rather to assist in structuring it so that those factors commonly accepted as relevant will be brought to bear in such a judgment." *Commonwealth v. Jones*, 565 A.2d 732, 734 (Pa. 1989) (internal citations omitted).

"[S]entencing is a highly individualized matter, which takes into account a multitude of factors pertaining to each defendant's character, record and participation in crime . . . [s]entencing does not involve a rigid and mechanical application of aggravating and mitigating factors". *Commonwealth v. Haag,* 562 A.2d 289, 299 (Pa. l989).

According to the Sentencing Guidelines the recommended sentence for third degree murder for a defendant with a prior record score of zero is as follows:

Crime	OGS	PRS	MIT.	STD.	AGG.	MANDATORY
Third Degree Murder	14	0	5 years	6 to 20 years	7 years	None

Per 204 Pa. Code § 303 et seq, as implemented by the 6th Edition, Revised Basic Sentencing Guidelines, effective December 5, 2008. There was no deadly weapons enhancement.

The statutory sentence for third degree murder is not more than 40 years. 18 Pa.C.S. 1102(d).

At the sentencing hearing, this Court reviewed the presentence report, mental health report, victim impact statements, and letters in support of the defendant. After considering all the evidence presented, this Court sentenced the defendant to fifteen to thirty years for third degree murder.

This Court's sentence reflected the circumstances of the crime and the defendant's background. The sentence for third degree murder was within the standard guidelines and the maximum sentence imposed was less than the maximum sentence permitted by the law.

Immediately prior to imposing the sentence, the Court stated:

> THE COURT: In sentencing, Mr. Simmons, I have considered many things.
>
> This has been a very difficult case for the Court, because I have considered a zero prior record score, and ordinarily, that would weigh very heavily with me. I've listened to the pleas of your family and your friends to consider your background and consider that you were, up until this day, a good person who obeyed the law and contributed to his community and took good care of his child, and I have considered all that.
>
> But I think there are facts in this case that eat into the usually mitigating circumstances that would be present from a zero prior record score and that is inherent in the facts of this case and the fact that we do not know who the shooter was and the fact that in your letter to me that you wrote, you wrote the same thing that your family wrote.

You wrote about your background. I know about your background. It was a good background. And if we were only talking about what happened up to the date of the murder, you would have many good things in your favor.

But you have never explained to me in your letter why someone like you would participate in an event like this, and so I have to make my conclusions from the facts of the case. And although I don't agree with the District Attorney that retribution is an appropriate thing to consider in sentencing, and I hope the Barnes family understands that, that in sentencing I have to consider the facts about the case and the characteristics of the defendant, and I have to weigh the fact that he does have a zero prior record score against the horrendous facts of this case, which would indicate a certain kind of coldness and hardness of heart that indicate someone who is not going to be of value to society, and I hope I'm wrong.

And I hope that the people – that the gentleman who testified who said that he would guide you in the future and that he, himself, had been incarcerated and had gotten out of prison to lead a very good life, that you will be able to do that.

But, Mr. Simmons, in sentencing you, I've considered all these things and I've decided on the following sentencing: On CP-51-CR-0007218-2010, on the charge of murder in the third degree, Count 3, I sentence you to not less than 15, no more than 30 years in the state correctional institution.

And on Count 4 of that same bill, I sentence you to not less than 15, no more than 30 years to run concurrently, at the same time, as the sentence imposed on Count 3.

And on Count 2, charging you with aggravated assault, I sentence you to not less than five, no more than ten years to fun concurrently with the sentence imposed on Count 3.

And on Count 8, I impose no further penalty.

So your sentence is not less than 15, no more than 30 years.

(N.T. 05.09.2012 at 37-39).

The deadly weapon enhancement was not used in arriving at the sentence.

The sentence was an entirely proper exercise of this Court's discretion.

This claim is without merit.

7. After-Discovered Evidence

The defendant claims he was entitled to a hearing on his post-sentence motion regarding after-discovered evidence. After-discovered evidence is newly discovered facts, not newly discovered or newly willing sources of previously known facts. Admission of evidence previously available to a defendant would be contrary to the plain language of the exception that "the facts upon which the claim is predicated were unknown to the petitioner." *Commonwealth v. Johnson*, 863 A.2d 423, 427 (Pa. 2004) (citing 42 Pa. C.S. § 9545(b)(1)(ii)).

A defendant is entitled to post-conviction relief if he pleads and proves that his conviction resulted from "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced." 42 Pa.C.S.A. § 9543(a)(2)(vi).

The defendant must prove that the evidence could not have been obtained at, or prior to, the conclusion of trial by the exercise of reasonable diligence and the evidence must must be of a nature and character that a different verdict will likely result if a new trial is granted. *Commonwealth v. Frey*, 517 A.2d 1265 (Pa. 1986), *cert. denied*, 481 U.S. 1007, 107 S.Ct. 1633, 95 L.Ed.2d 296 (1987).

The standard of review of a trial court's denial of a new trial based on after-discovered evidence is clear abuse of discretion and any proffered after-discovered evidence must be exculpatory and material to a determination of guilt or innocence.

Commonwealth v. Chamberlain, 30 A.3d 381, 416 (Pa. 2011) (internal citations omitted).

In support of his claim, the defendant attached to his post-verdict motion, the statement of one Terrell Samuels-Bey. According to the statement, Bey admits that in July 2009 in the Raymond Rosen Projects, he sold drugs to the occupants of a black van with tinted windows on Judson Street between Norris and Diamond Streets. He says the driver of the van was a black male named "Brandon". Bey claims that he knew he had sold bad drugs and took off on his bike after the sale. He noticed the van behind him as he pedaled away on his bike. He saw the passenger exit the van and fire one shot. Bey's statement says that he did not come forward with information because he was afraid of getting in trouble. Although he knows the defendant as a rapper he does not know him personally but he is 100% certain that the defendant was not the driver of the van

Contrary to the defendant's claim that he is only now discovering the name of the person on the bike, the person on the bike was identified both in the statement of Khalil Bradley and Richard Taylor. In Richard Taylor's statement, on page 3, it indicates that he was shown a picture taken from a My Space photo of Jeffrey Pickens and identified the person in the picture as, "that's who was on the bike talking to 'Steel' and the boy who shot the maintenance man. In the statement of Khalil Bradley, the following occurred:

Q. Can you tell me what you saw?

A. The boy Jeff was coming up the street on his bike fast. When he was next to the housing guy the mini-van came up Judson and was going towards the Comcast building. It stopped on my side of Norris Street at the end of the block. Then the buy opened the side door of a dark colored tinted out mini-van and I heard a boom then I saw the housing guy turn and then his head moved and the glass shattered.

Q. Who is Jeff?

A. He's from over the bridge, he be with LZAY, Tahir, Old dog and BTF. He be around Dover and Diamond and Newkirk and Diamond and 31st and Berks,., like from the area they call "the land of the lost". I heard he had burned the guy in the van.

And then a little later on:

Q. What do you mean by burn?

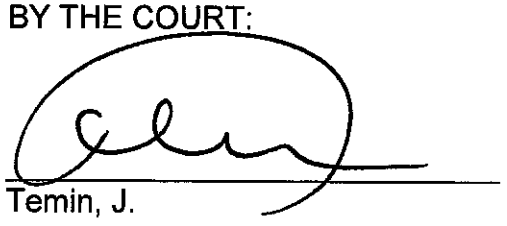
A. Sold him some fake wet. Drugs. He diluted it with starter fluid or cooking oil.

The defense had this material in discovery long before the date of the trial and could have investigated to see who that person was and whether they had information about the driver of the van that differed from the evidence supplied by the Commonwealth. The defendant is not entitled to a new trial based on a claim of after-discovered evidence.

Conclusion

For the reasons set forth above, the appeal should be denied.

BY THE COURT:



Temin, J.