NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ANTOINE RAY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2450 EDA 2011

Appeal from the Judgment of Sentence August 15, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0013718-2009

BEFORE: BOWES, ALLEN, and PLATT,* JJ.

MEMORANDUM BY BOWES, J.: Filed: January 11, 2013

Antoine Ray appeals from the aggregate judgment of sentence of fifteen to thirty years incarceration imposed by the trial court after a jury convicted him of third degree murder, robbery, and criminal conspiracy to commit robbery, and acquitted him of second degree murder.[1] We affirm.

On Christmas night, 2007, the victim, Andrew Jackson, was visiting with family in Philadelphia. The family was enjoying a game of cards when Mr. Jackson decided to retrieve a case of beer from his car. A group of young men surrounded Mr. Jackson in an attempt to rob him. Mr. Jackson

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* Retired Senior Judge assigned to the Superior Court.

[1] The criminal conspiracy count in the criminal information was a general conspiracy charge. At trial, however, the trial court instructed the jury that the conspiracy was to commit robbery. N.T., 5/3/11, at 158; ***see also*** N.T., 5/2/11, at 169-171.

resisted and was shot seven times with a .25 caliber semi-automatic handgun. The victim's cousin and several neighbors heard the shots and observed the attackers flee. In addition, two passersby, a mother and daughter, telephoned police moments before the shooting to report the robbery. However, none of the witnesses could identify the assailants and the case initially remained unsolved.

The investigation renewed over one year later when a witness, who was under arrest at the time, came forward and provided information that he saw Appellant and two others fleeing from the scene. The witness, Terrance Farley, also asserted that Appellant and his co-defendants had admitted to shooting someone during a robbery. Mr. Farley, at trial, denied making statements to police that implicated Appellant and his two co-defendants, Kevin Lofton and Anwar Shamsid-Deen. Instead, he acknowledged that he only identified them as persons he knew from the neighborhood.

The police investigation also led them to J.D., a fifteen-year-old juvenile, who was thirteen at the time of the shooting. J.D. was housed at Glen Mills, a juvenile facility. Philadelphia police traveled to Glen Mills, retrieved J.D. and returned with him to Philadelphia, a forty-five-to-fifty-minute trip. Police handcuffed J.D. in the vehicle and did not alert his mother of the purpose of their interrogation. J.D. informed police that he was present during the robbery and that Appellant and his co-defendants attempted to rob the victim before Kevin Lofton shot him. At trial, J.D.

denied inculpating Appellant. Appellant and his two co-defendants were tried jointly. On May 4, 2011, the jury acquitted Appellant of second degree murder, but adjudicated him guilty of third degree murder, robbery, and conspiracy to commit robbery.[2] The trial court sentenced Appellant to ten to twenty years imprisonment on the third degree murder count and a consecutive five-to-ten-year term of incarceration for robbery. In addition, the court imposed a concurrent two-and-one-half-to-five-year sentence on the conspiracy to commit robbery charge.

This appeal followed. The trial court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the trial court authored its Pa.R.A.P. 1925(a) decision. The matter is now ready for our consideration. Appellant levels four issues for our review.

> 1. Was it error to have admitted the testimony of the Commonwealth's witnesses which was in conflict with each other and inconsistent with the weight of the evidence?
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> 2. Did the trial court err in allowing into evidence testimony of a thirteen (13) year old juvenile witness, who was interviewed by homicide detectives without an interested adult, attorney, or counselor present?

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[2] The criminal information charged Appellant generally with murder, listing language consistent with first, second, and third degree murder. The jury was not instructed on first degree murder relative to Appellant. ***See*** N.T., 5/3/11, at 146-147, 149-150.

3. Did the prosecutor commit misconduct when he referred to the Commonwealth's juvenile witness as a "snitch" during closing arguments?

4. Did the trial court err in rendering an inconsistent verdict?

Appellant's brief at 1-2.

Appellant's argument relative to his first issue is that the Commonwealth presented insufficient evidence to convict him of third-degree murder, robbery, and conspiracy to commit robbery. It is well settled that in evaluating a sufficiency claim

> We 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.
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> 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***, 14 A.3d 887, 889–890 (Pa.Super. 2011). Additionally, "in applying the above test, the entire record must be evaluated and all evidence actually received must be considered." ***Commonwealth v. Coleman***, 19 A.3d 1111, 1117 (Pa.Super. 2011).

Commonwealth v. Brown, 52 A.3d 320, 323 (Pa.Super. 2012).

In leveling his position, Appellant properly sets forth this Court's standard of review and then disregards it by contending that J.D. and

Terrance Farley's prior out-of-court statements were not credible. This Court simply does not re-weigh or disregard a jury's credibility determinations. ***See Commonwealth v. DeJesus***, 860 A.2d 102, 107 (Pa. 2004). Accordingly, Appellant's argument is without merit.[3]

Next, Appellant contends that the trial court erred in allowing into evidence J.D.'s statements to police. Appellant highlights that J.D. was a juvenile when interviewed by police and was not afforded an opportunity to

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[3] We note that it is undisputed that Appellant did not shoot the victim and that currently pending before our Supreme Court is the issue of whether a defendant can be guilty of conspiracy to commit third degree murder. This question necessarily is intertwined with whether a defendant can be found guilty of third degree murder based on conspiracy liability. The jury herein was instructed that it could find Appellant guilty of third degree murder as either a conspirator or as an accomplice. While accomplice liability for third degree murder has been upheld, ***see Commonwealth v. Roebuck***, 32 A.3d 613 (Pa. 2011), the jury verdict herein was a general verdict. The law is in a state of flux as to whether one can specifically intend to agree to commit the non-specific intent crime of a reckless or criminally negligent killing. ***See Commonwealth v. Best***, 38 A.3d 766, ***Commonwealth v. Stanton***, 38 A.3d 766; ***Commonwealth v. Fisher***, 38 A.3d 767 (Pa. 2012) (granting allowance of appeal to determine if criminal conspiracy to commit third-degree murder is a cognizable offense); ***Commonwealth v. Weimer***, 977 A.2d 1103 (Pa. 2009) (Todd, J. dissenting) (Justice Todd joined by Justice Saylor opined that conspiracy to commit third degree murder is legally impossible); ***cf. Commonwealth v. Clinger***, 833 A.2d 792 (Pa.Super. 2003); ***compare Commonwealth v. Marquez,*** 980 A.2d 145 (Pa.Super. 2009) (*en banc*); ***Commonwealth v. Johnson***, 719 A.2d 778 (Pa.Super. 1998) (*en banc*); ***Commonwealth v. Baskerville***, 681 A.2d 195 (Pa.Super. 1996); ***Commonwealth v. La***, 640 A.2d 1336 (Pa.Super. 1994); ***Commonwealth v. Bigelow***, 611 A.2d 301 (Pa.Super. 1992); ***Commonwealth v. Wannamaker***, 444 A.2d 1176 (Pa.Super. 1982). Appellant, however, has not challenged his jury instructions on this ground or asserted that third degree murder based on conspiracy liability is non-existent.

consult with an interested adult. He asserts that because J.D. was unaccompanied by an adult, his statement was involuntary. In essence, Appellant seeks to suppress a statement offered by another witness. This, he cannot do. First, Appellant has no standing to suppress a statement given by another individual based on constitutional violations of the other person's rights. Second, Appellant did not attempt to prevent the statement from being entered into evidence before or at trial. Thus, the issue is waived. ***See Commonwealth v. Spell***, 28 A.3d 1274, 1280 (Pa. 2011) (failure to timely object results in waiver).

Finally, prior inconsistent statements of witness may be admissible under Pa.R.E. 803.1(1). ***See also Commonwealth v. Lively***, 610 A.2d 7 (Pa. 1992). As Appellant does not make any argument pursuant to ***Lively*** or Rule 803.1(1), we only note that J.D. signed the verbatim statement of questions and answers and, although he claimed not to have made the statements therein, admitted to signing the document and did not refuse to testify. ***Compare Commonwealth v. Romero***, 722 A.2d 1014 (Pa. 1999) (witness who refuses entirely to testify is unavailable under rules of evidence and therefore it is improper to admit prior statement as substantive evidence).

The third position Appellant argues on appeal is that the prosecutor committed misconduct by referring to J.D. as a snitch during closing arguments. The specific comment being challenged was when the

prosecutor stated that J.D. was "a young man who sure is holding a sign over his head saying I'm no snitch." N.T., 5/3/11, at 104. Appellant, nonetheless, did not object to the comment and the issue is waived. ***Spell***, ***supra***; Pa.R.A.P. 302(a). Furthermore, the claim is entirely without merit. Appellant posits that the statement was not supported by credible evidence and prevented the jury from weighing the evidence objectively. However, a prosecutor is permitted to fairly respond to defense counsel arguments. ***Commonwealth v. Noel***, 53 A.3d 848, 858 (Pa.Super. 2012). J.D.'s testimony at trial that he did not implicate Appellant was in direct contradiction to his statements to police. Defense counsel accused J.D. of being a proven liar. The prosecution properly attempted to explain the discrepancy by arguing that the testimony at trial was less credible than the statements provided to police in that J.D. did not want to be labeled as a police informant. We discern no misconduct.

Appellant's final argument, listed in his statement of questions as an inconsistent verdict claim, actually presents a challenge to the weight of the evidence.[4] The issue is waived due to Appellant's failure to raise it pursuant

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[4] Appellant raised both an inconsistent verdict and weight of the evidence claim in his Pa.R.A.P. 1925(b) statement. He does not present any argument in his brief relative to an inconsistent verdict. Moreover, while a verdict of not guilty for felony murder is inconsistent with the findings of guilt in this matter, it is well settled that an inconsistent verdict is not grounds for relief. ***Commonwealth v. Stokes***, 38 A.3d 846 (Pa.Super. 2011).

to Pa.R.Crim.P. 607. ***Commonwealth v. Sherwood***, 982 A.2d 483, 494 (Pa. 2009).

Judgment of sentence affirmed.