

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

JOSEPH HOLMES

Appellant

No. 2665 EDA 2011

Appeal from the Judgment of Sentence August 26, 2011  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0003019-2010

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

MEMORANDUM BY OTT, J.:

Filed: February 6, 2013

Joseph Holmes appeals from the judgment of sentence imposed on August 26, 2011, in the Court of Common Pleas of Philadelphia County. On June 13, 2011, a jury convicted Holmes of murder of the first degree and possession of an instrument of crime (PIC),<sup>1</sup> in the fatal shooting of Donovan Raheem Weary<sup>2</sup> on February 14, 2008. The trial court sentenced Holmes to serve a term of life imprisonment. On appeal, Holmes (1) requests this Court to remand the case based upon newly discovered evidence, (2) challenges the sufficiency and weight of the evidence, (3) claims the trial

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\* Retired Senior Judge assigned to the Superior Court.

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

<sup>2</sup> The victim's nickname was "Double." N.T., 6/6/2011, at 13.

judge erred in finding waiver of issues in the Pa.R.A.P. 1925(b) statement, and (4) contends the prosecutor committed prosecutorial misconduct in her opening and closing statements, denying Holmes his right to due process and a fair trial.<sup>3</sup> Based upon the following, we vacate the judgment of sentence, grant Holmes's request, and remand this case for further proceedings consistent with this memorandum.

The trial judge has aptly summarized the facts underlying this appeal:

On February 1[4], 2008, the victim, Donovan Raheem Weary ("Weary"), called [Holmes] at his home and they arranged to meet regarding money that Weary owed [Holmes] for drugs that [Holmes] had advanced to Weary. [Holmes]'s girlfriend, Niamah Fisher ("Fisher"), and his brother Joshua, were with [Holmes] when he received the call. [Holmes] then told Joshua to go down to the basement to get a gun and after Joshua came back up, the three left the Holmes brothers' home. Fisher walked north on Forrest Avenue toward Homer Street and the Holmes brothers walked south on Forrest Avenue toward Middleton Street.

After joining up with Weary, [Holmes] and Joshua walked down an alley that runs parallel to Forrest Avenue, between Forrest and Ogontz Avenues and between Middleton and Homer Streets. Fisher saw the three men walking towards Homer Street and then saw [Holmes] and Weary exchange something. She then saw [Holmes] push Weary up against a garage and shoot Weary twice in the head. [Holmes] saw Fisher on Homer Street and followed her home and told her that she should be quiet or she would be next.

The crime remained unsolved until November 2009, when Fisher, believing that she was about to be replaced in [Holmes]'s affections, called the police and told them about the murder and

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<sup>3</sup> We have reordered the issues presented by Holmes, for purposes of our discussion.

gave the police a signed statement with details of the murder. Fisher later reconciled with [Holmes]. At trial, she repudiated her statement which was then admitted into evidence.

Based on Fisher's statement the police located another witness, Raymond Johnson ("Johnson"), who gave a statement indicating that he saw [Holmes] running from the crime scene. Johnson also repudiated his statement and it was also admitted into evidence.

After [Holmes] was arrested, he and Fisher exchanged letters and had several telephone conversations in which they discussed Fisher's statement and testimony. They discussed methods for her to avoid testifying or to testify in such a way that she would not admit to seeing the defendant shoot Weary.

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[Holmes] presented alibi evidence from: Abraham Holmes ("Abraham"), Holmes's brother; from Tyiesha Edwards, Abraham's girlfriend; and from Marcella Holmes, [Holmes's] mother; that [Holmes] had not left his home the day of the murder except to purchase liquor.

Trial Court Opinion, 1/27/2012, at 2-3, 6.

As already stated, a jury found Holmes guilty of the above mentioned offenses. Following sentencing and the denial of post-sentence motions, this appeal followed.<sup>4</sup>

Initially, we address Holmes's request that this Court remand the case on the basis of newly discovered evidence to allow the trial court to determine whether a new trial is warranted in this case. Pennsylvania Rule of Criminal Procedure 720 governs the procedure an accused must follow

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<sup>4</sup> Holmes timely complied with the order of the trial court to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

regarding newly discovered evidence. The Rule states: "A post-sentence motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery." Pa.R.Crim.P. 720(C). Moreover, the Comment to Rule 720 explains: "[A]fter-discovered evidence discovered during the direct appeal process must be raised promptly during the direct appeal process." Pa.R.Crim.P. 720, Comment.

Following the filing of this appeal, and in compliance with Rule 720(C), counsel for Holmes filed a petition for remand with this Court on May 3, 2012, after receiving a letter, which will be more fully discussed below. On June 5, 2012, this Court denied the motion without prejudice to Holmes's right to raise the newly-discovered evidence claim in his appellate brief. Holmes has presented the issue in his brief, and therefore we proceed to review the proffered letter, and a subsequent letter received by counsel. **See** Holmes's Brief at 37–43.

The motion for remand alleges, in part: "Two eyewitnesses have been discovered" and "[f]rom the new information provided, it appears that the shooter is not Joseph Holmes, but was a Terrell Woods, whose nickname is "Street." Holmes's Motion for Remand, 5/3/2012, at ¶¶1–2. The motion for remand identifies the two eyewitnesses as Malik Mack and Demon McNeail. **Id.** at ¶1. However, the motion attaches a letter from McNeail only, together with an envelope, postmarked April 23, 2012, with McNeail's return address.

In Holmes's brief, filed June 28, 2012, counsel for Holmes also identifies an individual, named Darryl Witherspoon, and attaches a copy of a hand-written letter from Witherspoon, which, according to counsel, he received on May 25, 2012, after he had filed the motion for remand.<sup>5</sup> Furthermore, counsel for Holmes, in the brief, states there is "also apparently another eyewitness, who has not sent any letters, but has just been discovered. His name is Malik Mack."<sup>6</sup> We note, however, that Mack was mentioned in the petition for remand, filed on May 3, 2012, and to date, no letter or affidavit from him has been submitted to this Court. Accordingly, we address the request for remand only with regard to the letters of McNeail and Witherspoon.

We note, first, that the Commonwealth agreed at oral argument that the case should be remanded for an evidentiary hearing with regard to the letter proffered by McNeail. Therefore, we turn our attention to the letter proffered by Witherspoon. We are mindful that:

To warrant relief, after-discovered evidence must meet a four prong test: (1) the evidence could not have been obtained before the conclusion of the trial by reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence will not be used solely for purposes of impeachment; and (4) the evidence is of such a nature and character that a different outcome is likely. *Commonwealth v. Dennis*, 552 Pa. 331, 715 A.2d 404 (1998). At an evidentiary hearing, and

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<sup>5</sup> **See** Holmes's Brief at 38 and Exhibit "D."

<sup>6</sup> Holmes's Brief at 38.

appellant must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted. ... [P]rocedure demands that the lower court develop the record and make that call in the first instance.

***Commonwealth v. Rivera***, 939 A.2d 355, 359 (Pa. Super. 2007), *appeal denied*, 598 Pa. 774, 958 A.2d 1047 (2008) (citation omitted). ***See also Commonwealth v. Perrin***, 2013 PA Super 1 [1166 EDA 2011] (Pa. Super. 2013); ***Commonwealth v. Castro***, 55 A.3d 1242 (Pa. Super. 2012) (*en banc*).

Witherspoon, in his letter, writes "I may have some vital information to a homicide that happened in the alley on Forrest Avenue behind the Gulf gas station,"<sup>7</sup> and offers an admission by the actual shooter.<sup>8</sup> Although the Commonwealth asserts that Witherspoon's statement is hearsay, we leave the question of admissibility to the trial court. ***See Commonwealth v. Chamberlain***, 30 A.3d 381, 414 (Pa. 2011)

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<sup>7</sup> Holmes's Brief, Exhibit "D."

<sup>8</sup> Witherspoon's letter states, in relevant part:

Streets who [sic] real name is Terrell Woods was a real close friend of mine confided in me and told me that he had set him up by having Double meet him in the driveway so he could buy some drugs off Double. He said when he met Double in the driveway he shot him in head twice. He told me he him [sic] stop hustling on that side of the tracks.

Holmes's Brief, Exhibit "D." Witherspoon's letter was attached to Holmes's brief with no accompanying envelope.

(proposed new evidence must be “producible and admissible”) (citations omitted). Therefore, applying the above stated test for after-discovered evidence, and guided by *Rivera*, we conclude that the letter of Witherspoon presents a colorable claim of after-discovered evidence that warrants remand to the trial court.

We now turn to the remaining contentions raised by Holmes:

Was the evidence insufficient to support the verdicts for murder of the first degree and possession of an instrument of crime?

Were the verdicts for murder of the first degree and possession of an instrument of crime against the weight of the evidence?

. . . .

Did the Assistant District Attorney err in her opening and closing statements by implying [Holmes] was capable of being vicious, suggesting [Holmes] was going to hurt Ms. Fisher, the Commonwealth witness, in the future, by suggesting [Holmes] took advantage of his mother, and then by screaming at [Holmes] by leaning over the defense table? Did this conduct deny Holmes his right to due process and a fair trial?

**See** Holmes’s Brief at 5–6.<sup>9</sup>

Having thoroughly reviewed the record, and the briefs of the parties, we conclude that these claims are meritless. The Commonwealth presented sufficient evidence to support the verdicts for murder of the

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<sup>9</sup> Holmes also contends that the trial court erred in suggesting that there was waiver on the basis of his Pa.R.A.P. 1925(b) statement, with regard to several issues set forth therein, including his challenge to the sufficiency and weight of the evidence. However, the trial court, in spite of its finding of waiver, proceeded to discuss those issues on the merits. Therefore, we need not address the issue of waiver.

first degree and possession of an instrument of crime, particularly, (1) the prior inconsistent statements of Fisher and Johnson, which were admitted as substantive evidence, (2) the testimony of Demetrius Northern, the victim's nephew, who corroborated Fisher's account of Holmes's drug-dealing relationship with the victim, and (3) the letters from Holmes to Fisher, showing Holmes's influence on Fisher.<sup>10</sup> Furthermore, the jury was free to believe the recanted statements and reject the alibi defense presented by Holmes. Lastly, the jury is presumed to have followed the trial court's instruction to disregard the prosecutor's remark in her opening statement;<sup>11</sup> the prosecutor's closing remarks were not improper;<sup>12</sup> and the trial court sustained the defense objection to the

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<sup>10</sup> **See** N.T., 6/8/2011, at 8–12; 6/9/2011 at 240–242.

<sup>11</sup> The prosecutor, in her opening statement, stated:

Once that adrenaline dies down, this is a man, Joseph Holmes, that she [referring to Fisher] has been with at the time for five years. She knows his family. She's lived with his family. She's aware of what Joseph Holmes is capable of.

N.T., 6/7/2011, at 79. When trial counsel objected and moved for a mistrial, the trial court ruled: "The objection is sustained. The jury will disregard what the District Attorney just said about what she knows about what somebody might be capable of. You will totally disregard that." *Id.* The jury is presumed to follow the court's instructions. **See *Commonwealth v. DeJesus***, 860 A.2d 102, 110 (Pa. 2004).

<sup>12</sup> At issue are the following statements, made by the prosecutor in her closing, to which trial counsel interposed an objection and requested a mistrial:

*(Footnote Continued Next Page)*



prosecutor's behavior during her closing speech and instructed the prosecutor not to do it again, which the prosecutor obeyed.<sup>13</sup> Therefore, these claims present no basis upon which to grant relief.

(Footnote Continued) \_\_\_\_\_

And [Holmes] is keeping her close to the vest. The interesting question is, what's going to happen after this? He doesn't need her anymore. And she's probably sitting at home thinking about that issue right about now.

\* \* \* \*

I'm going to start with [Holmes's] mother. Marcella Holmes. She's working — let's talk, like, for real. She is working two jobs, and she's got all these sons and all their girlfriends pretty much free-loading over at her house.

N.T., 6/10/2011, at 190, 192.

Holmes contends that the prosecutor's query — "what's going to happen after this?" — implied Fisher had been threatened by Holmes, and that the prosecutor's remark about "free-loading" suggested Holmes was taking advantage of his mother. We agree with the trial court that "nothing in that statement [referring to the query] refers to a threat," and "the prosecutor [was] calling the girlfriends freeloaders." Trial Court Opinion, 1/26/2012, at 8–9. Furthermore, the prosecutor's comments concerning Holmes's mother related to **her** character and credibility, not Holmes's, as the prosecutor was attempting to point out what Holmes's mother was willing to do for her children, namely, provide an alibi because "she's a mother and because [Holmes] asked her to." N.T., 6/10/2011, at 193.

<sup>13</sup> *Compare Commonwealth v. Culver*, 51 A.3d 866, 875–876 (Pa. Super. 2012) (holding that the trial court did not abuse its discretion in granting a mistrial where the prosecutor pointed his finger at defendant, and engaged in physically menacing actions, which continued despite repeated warnings from the trial court, and "was not an isolated event").

Accordingly, we vacate the judgment of sentence and remand for an evidentiary hearing consistent with this memorandum. If a new trial is not required, the trial court shall re-impose the judgment of sentence as originally entered. ***See Rivera***, 939 A.2d at 359.

Judgment of sentence vacated. Case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished. Holmes's motion to order the Court of Common Pleas to certify and transmit the trial transcripts is dismissed as moot.<sup>14</sup>

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<sup>14</sup> This Court received the following seven transcripts on January 18, 2013: N.T., 3/10/2010, 6/6/2011, 6/7/2011, 6/8/2011, 6/9/2011, 6/10/2011, and 6/13/2011.