

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

JOSHUA HOLMES

Appellant

No. 2704 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-0003018-2010

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

MEMORANDUM BY OTT, J.:

Filed: February 22, 2013

Joshua 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 third degree,<sup>1</sup> in the fatal shooting of Donovan Raheem Weary on February 14, 2008. The trial court sentenced Holmes to serve a term of 15 to 35 years' imprisonment. On appeal, Holmes contends the trial court committed reversible error (1) "by refusing to correct the jury's unlawful verdict of guilt as the [sic] third degree murder — in a case wherein [Holmes] was not alleged to have been the shooter, wherein he was found not guilty of the

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> **See** 18 Pa.C.S. § 2502(c).

weapon offense and conspiracy, and wherein the co-defendant was found not guilty of conspiracy but guilty of the weapon offense and first degree murder," and (2) "by overruling [Holmes's] objection to the introduction of unduly prejudicial firearms evidence from an unrelated and irrelevant incident on a different date involving firearms that were never alleged to have included the unrecovered weapon allegedly used by the co-defendant." Holmes's Brief at 4. Based upon the following, we affirm.

The trial judge has aptly summarized the Commonwealth's evidence as follows:

On February 1[4], 2008, the victim, Donovan Raheem Weary ("Weary"), called co-defendant Joseph Holmes at his home and they arranged to meet regarding money that Weary owed Joseph for drugs that Joseph had advanced to Weary. Joseph's girlfriend, Niamah Fisher ("Fisher"), and [Holmes], were present when Joseph received the call. Joseph then told [Holmes] to go down to the basement to get a gun. After [Holmes] 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 Joseph 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 Joseph and Weary exchange something. She then saw Joseph push Weary up against a garage and shoot him twice in the head. Joseph saw Fisher on Homer Street and followed her home. [Holmes] arrived at Fisher's home while Joseph was talking to Fisher and held her arms while Joseph told Fisher 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 Joseph's affections, called the police and told them about the murder and

gave the police a signed statement with details of the murder. Fisher later reconciled with Joseph. 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 after hearing shots he saw [Holmes] and Joseph running from the crime scene. Johnson also repudiated his statement at trial and it was also admitted into evidence.

On April 29, 2009, the police executed a search warrant of [Holmes's] residence and found two firearms in the basement that were similar to the firearm used in the murder. Neither firearm was the murder weapon.

The medical examiner testified that the victim died of two gunshot wounds to his head. For one of the shots, the gun was in contact with the victim's head and for the other shot, the gun was fired at close range.

Trial Court Opinion, 1/27/2012, at 1–3.

The trial court denied Holmes's motion for judgment of acquittal. As already stated, a jury found Holmes guilty of murder of the third degree.<sup>2, 3</sup> Following sentencing, this appeal followed.<sup>4</sup>

Holmes first argues that he was unlawfully convicted of third degree murder because (1) he was not the shooter, (2) he was found not guilty of

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<sup>2</sup> **See** 18 Pa.C.S. §§ 2502(a) and 907, respectively.

<sup>3</sup> Holmes's co-defendant, his brother Joseph, was found guilty of murder of the first degree, and possession of an instrument of crime (PIC). Joseph has also filed an appeal from his judgment of sentence. **See**, Docket No. 2665 EDA 2011.

<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).

conspiracy and PIC, and (3) accomplice liability requires intent as an essential element, and “there can be no intent to commit an unintentional murder.” Holmes’s Brief at 8.

Having reviewed the record in this case, and the arguments presented by Holmes, we agree with the well-stated rationale provided by the Honorable Carolyn Engel Temin in her Pa.R.A.P. 1925(a) Opinion, which rejected Holmes’s argument, as follows:

“[A] conviction for murder of the third degree is supportable under [the] complicity theory where the Commonwealth proves the accomplice acted with the culpable mental state required of a principal actor, namely, malice. In other words, the Pennsylvania Crimes Code legally, logically, and rationally imposes accomplice liability for depraved heart murder.” ***Commonwealth v. Roebuck***, [32 A.3d 613, 624 (Pa. 2011)].

“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 might cause death or serious bodily harm.’” ***Commonwealth v. Ludwig***, 874 A.2d 623, 631–32 (Pa. 2005) (citations omitted).

“[A] person will be found to be an accomplice ‘of another person in the commission of an offense if: (1) with the intent of promoting or facilitating the commission of the offense, he: (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it.’” 18 Pa.C.S.A. § 306(c). ***Commonwealth v. Marquez***, 980 A.2d 145, 148 (Pa. Super. Ct. 2009).

The Commonwealth proved that [Holmes] heard that Joseph was going to meet with the victim, went to the basement to get a gun at the direction of Joseph, accompanied Joseph to

meet with the victim, was with Joseph when he shot the victim twice in the head, fled the crime scene, and met up with Joseph and helped to threaten Fisher [Joseph's girlfriend], the only witness to the crime.

This claim is without merit.

Trial Court Opinion, *supra*, at 4. Additionally, Holmes's reliance on the findings of the jury that he was not guilty of conspiracy and PIC is unavailing, since "an acquittal cannot be interpreted as a specific finding in relation to some of the evidence." *Commonwealth v. Miller*, 35 A.3d 1206, 1213 (Pa. 2012). Therefore, we reject Holmes's first argument.

Next, Holmes contends that the trial court erred in admitting evidence that, on April 24, 2009, officers executing a search warrant at Holmes's residence recovered two guns from the basement. *See* N.T., 6/9/2011, at 24–26.<sup>5</sup> Holmes argues that admission of such evidence violated Pa.R.E. 403<sup>6</sup> because neither of the firearms recovered was the murder weapon, and other persons were present in the house and had access to the firearms.

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<sup>5</sup> The trial court noted in its opinion that "On May 10, 2011, the Commonwealth filed a motion to introduce evidence recovered from [Holmes's] home. On June 6, 2011, this Court held a hearing on the motion. On June 7, 2011, this Court held that the weapons seized in [Holmes's] home were admissible against [Holmes]." Trial Court Opinion, 1/27/2011, at 5.

<sup>6</sup> Pennsylvania Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403.

Holmes also argues that the Commonwealth violated the reasonable notice requirement of Pa.R.E. 404(b)(4).<sup>7</sup>

Our review of the question raised by appellant is guided by well settled principles.

The admissibility of evidence is a matter of trial court discretion and a ruling thereon will only be reversed upon a showing that the trial court abused that discretion. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

***Commonwealth v. Williams***, 2012 PA Super 264 (Pa. Super. 2012) (quotations and citations omitted).

A weapon shown to have been in a defendant's possession may properly be admitted into evidence, even though it cannot positively be identified as the weapon used in the commission of a particular crime, if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime. Any uncertainty that the weapon is the actual weapon used in the crime goes to the weight of such evidence.

***Commonwealth v. Williams***, 640 A.2d 1251, 1260 (Pa. 1994).

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<sup>7</sup> Pennsylvania Rule of Evidence 404(b)(4) provides:

**(b) Other crimes, wrongs, or acts.**

...

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial.

Pa.R.E. 404(b)(4).

Applying the above cited legal principles, we conclude Holmes's evidentiary challenge warrants no relief. The evidence that two guns were recovered from the basement of Holmes's residence was relevant to show Holmes's access to firearms. ***See Commonwealth v. Williams, supra***, 640 A.2d at 1260 (defendant's possession of guns which were not the murder weapons was admissible to show, *inter alia*, that he 'readily obtained and disposed of handguns'). In addition, the evidence corroborated Fisher's testimony that she saw Holmes go into the basement to get a gun. ***See id.*** (evidence of defendant's possession of guns which were not the murder weapons was admissible to corroborate witnesses' testimony). Furthermore, the jury was informed by the trial judge that the recovered guns were not the murder weapon. ***See*** N.T., 6/9/2011, at 25–26. Finally, we agree with the trial court that the Commonwealth provided adequate notice by filing its motion to introduce the firearms evidence four weeks prior to trial. Therefore, Holmes's second claim fails.

Accordingly, finding no merit in the contentions presented by Holmes, we affirm.

Judgment of sentence affirmed.

Strassburger, J., files a dissenting memorandum.