NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. LEANDROS ECHEVARRIA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 300 EDA 2012

Appeal from the Judgment of Sentence January 10, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007224-2011

BEFORE: STEVENS, P.J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY STEVENS, P.J. **FILED MAY 06, 2013**

Leandros Echavarria (hereinafter "Appellant") appeals from the judgment of sentence entered in the Court of Common Pleas of Philadelphia County on January 10, 2012, at which time he was sentenced to a mandatory aggregate term of ten (10) years to twenty (20) years in prison following his convictions of Robbery, Conspiracy and Possession of an Instrument of Crime.[1] Upon our review of the record, we affirm.

The trial court has set forth the facts and procedural history herein as follows:

---

* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 3701(a)(1); 18 Pa.C.S.A. § 903; 18 Pa.C.S.A. § 907(a), respectively.

PROCEDURAL HISTORY

Appellant was before this [c]ourt, on a waiver trial, on November 14, 2011[,] with co-defendant Robert Santiago. Neither Santiago nor counsel appeared and were held in contempt. Appellant was tried alone and convicted of Robbery, Possessing an Instrument of Crime ("PIC"), and Criminal Conspiracy. On January 10, 2012[,] Appellant was sentenced to the following: Robbery (F-1), ten to twenty years; PIC (M-1), two and [a] half to five years (concurrent with the Robbery conviction); and Criminal [C]onspiracy (F2), ten to twenty years, (concurrent with the Robbery conviction). This was a second strike case, which made the Robbery (F-1) a mandatory ten to twenty years.

This timely appeal follows.

FACTS

On April 28, 2011, at approximately 11:50 p.m., complainant Peter McGrath was driving along the 3300 block of Kensington Avenue in the city and county of Philadelphia, when he stopped to help Terry Brownly,[2] whom he believed to be in distress. As Brownly entered the vehicle, Appellant and Santiago jumped into the back of the car.

Appellant and co-defendant both placed knives at the back of McGrath's neck and one of them said, "Give me your money, and give me your car." (N.T. 11/14/11 at 54. McGrath accelerated his vehicle forward northbound on Kensington Avenue, against traffic.

Police Sergeant Ronald Janka was in a marked patrol vehicle parked at the red light at Kensington and Westmoreland facing the northbound lanes when he saw McGrath driving wildly toward him, swerve around his marked patrol car, change direction, and continue southbound on Kensington Avenue speeding erratically. (N.T. 11/14/11 at 68). Janka stopped the vehicle at Kensington Avenue and Hilton Street, which was northbound at Allegheny Avenue. (Id.).

Appellant was in the rear right passenger seat of the vehicle and stepped out of the vehicle when Sergeant Janka stopped the vehicle. As soon as Appellant exited the vehicle, the

---

[2] Terry Brownly is a female.

> sergeant drew his weapon and ordered Appellant back into the vehicle after seeing four occupants were in the vehicle and taking in account the time of night, location, and the fact the sergeant was alone.
>
> Janka approached the vehicle on the driver's side and spoke to complainant (N.T. 11/14/11 at 70). McGrath informed the sergeant that "they tried to rob me," "the males in the back seat," "they put knives to the back of [my] neck." (N.T. 11/14/11 at 74). McGrath identified Appellant and Santiago as the men who tried to rob him. (N.T., 11/14/11 at 74).
>
> Appellant and Santiago were placed under arrest by backup officers Valgowski and Stauffer. Officer Stauffer recovered two knives-one 12-inch kitchen knife and one 6-inch folding knife- "from the floorboard" of the back seat on the passenger side where Appellant was sitting. (N.T. 11/14/11 at 85).

Trial Court Opinion, filed 8/1/12 at 1-2.

Appellant filed a timely Notice of Appeal on January 17, 2012. The trial court ordered Appellant to file a statement of the matters he intended to raise on appeal, and Appellant did so on April 2, 2012, wherein he raised one issue:

> The evidence was insufficient as a matter of law to find [Appellant] guilty of Robbery, and Other Charges where complainant's testimony was incredible and there was no evidence other than that testimony to support that the Appellant attempted to rob the complainant.

However, in his brief, Appellant raises the following question for our review:

> Whether the verdict of guilty as to robbery (F-1) was against the weight of the evidence in view of the plainly misleading and untruthful testimony of the complainant?

Brief for Appellant at 2.[3]

At the outset, we note that Appellant's assertion in his brief that his robbery conviction had been against the weight of the evidence is arguably waived since he failed to present that specific claim in his court-ordered Pa.R.A.P. 1925(b) statement but rather averred therein that the evidence had been **insufficient** to find Appellant guilty of "Robbery, and Other Charges." (emphasis added). ***Commonwealth v. Hill***, 16 A.3d 484 (Pa. 2011) (holding claims not raised in a court-ordered Pa.R.A.P. 1925(b) statement will be seemed waived). ***See also*** Pa.R.A.P. 1925(b)(4)(vii) (providing that issues not included in an appellant's Rule 1925(b) concise statement are waived). In addition, his failure to include the Conspiracy and Possession of an Instrument of Crime charges in his "Statement of Question Involved" has resulted in his waiver of any claim as to those convictions. ***See*** Pa.R.A.P. 2116(a) (indicating no questions will be considered unless they are stated in the statement of questions involved or are fairly suggested thereby).

Appellant did indicate in his Pa.R.A.P. 1925(b) statement that the evidence was insufficient to support his convictions in that the complainant's uncontroverted testimony was "incredible." As such, Appellant's contention

---

[3] While on the cover page counsel indicates he is the attorney for Appellant "Harold Noel," the caption indicated Appellant's correct name, and Harold Noel is nowhere mentioned in the body of the brief.

does not challenge the sufficiency of the evidence, but rather the weight it should have been afforded. ***Commonwealth v. Griffin***, 2013 WL 1313089, at *5 (Pa. Super. April 2, 2013) *citing* ***Commonwealth v. Palo***, 24 A.3d 1050, 1055 (Pa. Super. 2011), *appeal denied*, 34 A.3d 828 (Pa. 2011) (stating an appellant's "sufficiency" argument directed entirely to the credibility of the Commonwealth's chief witness challenged the weight, not the sufficiency, of the evidence). We find Appellant sufficiently preserved a weight of the evidence claim as to the Robbery conviction in his Rule 1925(b) Statement, though he has, nevertheless, waived a weight of the evidence claim for purposes of appeal.

In its Pa.R.A.P. 1925(a) Opinion, the trial court analyzed Appellant's sufficiency of the evidence claims raised in his Pa. R.A.P. 1925(b) statement as both challenges to the weight and to the sufficiency of the evidence, and in his brief Appellant develops an argument concerning the weight of the evidence but pertaining only to the Robbery charge. Specifically, Appellant does not dispute that he entered the complainant's car and held a knife to his neck. Rather, Appellant challenges the trial court's "conclusion that what happened in the car was first degree robbery as opposed to an attempt to extort money from him or commit a robbery with less than threat of serious bodily injury is unjustified precisely due to the complainant's false testimony." Brief for Appellant at 12. Appellant reasons that "a common sense review of the complainant's testimony as to the facts preceding the

appearance of the two men strongly suggests the complainant was untruthful in that the facts strongly suggest he was attempting to solicit a woman who[m] he thought was a prostitute and in his own words, concluded that in doing so he had been 'set a up' for a robbery." ***Id***.

> In order to preserve a claim of weight of the evidence for appellate review, the issue must be raised with the trial judge in a motion for a new trial either orally prior to sentencing, by written motion prior to sentencing, or in a post-sentence motion. ***See*** Pa.R.Crim.P. 607; ***Commonwealth v. Butler***, 729 A.2d 1134, 1140 (Pa. Super. 1999) (holding that a challenge to the weight of the evidence is waived for failure to present the issue first to the trial court).

Commonwealth v. Lewis, 45 A.3d 405, 410 (Pa. Super. 2012); ***See also Griffin, supra***.

Appellant did not aver in his brief that he had raised this issue before the trial court, and our review of the record disclosed that he, in fact, did not raise this issue orally prior to sentencing, in a post-sentence motion or in his Pa.R.a.P. 1925(b) statement. Thus, he has failed to preserve his claim that his Robbery conviction was against the weight of the evidence.[4] ***See*** Pa.R.Crim.P. 607.

---

[4] It is noteworthy that a panel of this Court recently stated "[t]he Pennsylvania Supreme Court has explained that [a]ppellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. To grant a new trial on the basis that the verdict is against the weight of the evidence, this Court has explained that the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." ***Commonwealth v. Childs***, 63 A.3d 323 (Pa. Super. 2013). Herein,
(Footnote Continued Next Page)

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/6/2013

(Footnote Continued) ———————————

Appellant does not argue that the verdict was so contrary to the evidence as to shock one's sense of justice. In fact, Appellant admits "it certainly seems plausible . . . there had been a 'set-up'" and concedes that his "having knives held at his neck [] of course could have been used to inflict immediate injury in response to his act of beginning to drive away." Brief for Appellant at 12.