NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOSEPH WALKER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3160 EDA 2011

Appeal from the Judgment of Sentence October 28, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0000373-2010

BEFORE: STEVENS, P.J., BOWES, and FITZGERALD,* JJ.

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

Joseph Walker appeals from the judgment of sentence of ten to twenty years imprisonment imposed after he was convicted by a jury of conspiracy, carrying an unlicensed firearm, and possession of an instrument of crime ("PIC"). We affirm.

The trial court provided an extensive outline of the evidence presented by the Commonwealth at trial, which we utilize in part:

> The Commonwealth . . . presented the testimony of the victim, Joel Rodriguez Laboy. Mr. Laboy testified that on September 18, 2009, at approximately 11:00 p.m., he was driving to a club in Philadelphia, when he saw a couple friends at Howard and Huntingdon Streets. He pulled over to converse with them. When he got out of his car, Christina Carrasco, a woman whom Mr. Laboy recently met [from his job at a

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* Former Justice specially assigned to the Superior Court.

restaurant], approached from a residence across the street, and greeted him with a hug. They had a brief conversation, after which Ms. Carrasco returned to the residence, and Mr. Laboy resumed talking with his friends. At that time, he noticed a Ford Crown Victoria, dark blue or black in color, drive by the intersection. He did not think anything of it, and continued to speak with his friends. Moments later, in the midst of conversation, his friends took off running. Mr. Laboy turned and saw four men emerge from the same Crown Victoria, each holding guns. He was unable to run from the men as they already were "on him". Mr. Laboy immediately recognized Appellant - - the driver of the vehicle - - from the neighborhood; he knew Appellant by the nickname of "Joe Ball". (***See*** N.T. 08/17/11, pp. 21-26).

Mr. Laboy testified that Appellant's cohorts approached Mr. Laboy, pointing their guns at his chest, while Appellant fired several shots down the street toward the fleeing males. Appellant's cohorts ordered Mr. Laboy to give them his "stuff." He complied, while stating "please don't shoot me." He gave them everything he had - - $400 in cash, his watch, hat, credit cards and IDs - - and put them on the ground. He took a step back, turned to Appellant, and said, "Please, Joe Ball, don't shoot me." As soon as he said Appellant's name, "all the shots were fired." The first two shots propelled Mr. Laboy from the sidewalk and into the middle of the street; the gunmen continued to shoot Mr. Laboy repeatedly as he lay in the street. Left for dead, Mr. Laboy remembered thinking of his two young children and that he was going to die, when Ms. Carrasco emerged from her residence and came to his aid. She placed Mr. Laboy into his car, which was still running, and drove him to Episcopal Hospital; he was fading in and out of consciousness and losing his breath on the way to the hospital, and completely lost consciousness upon arrival. (***See*** N.T. 08/17/11, pp. 26-32).

Mr. Laboy testified that he was shot multiple times in the arm, twice in the chest, and multiple times in the legs and back. . . . . On September 22, 2009, Mr. Laboy spoke with detectives while recovering in the intensive care unit. He described the incident to detectives, and provided the name of Joe Ball. Detectives returned with a photo spread and Mr. Laboy positively identified Appellant as one of his four assailants. Mr. Laboy also positively identified Appellant both at the preliminary hearing and at trial. (***See*** N.T. 08/17/11, pp. 33-42).

. . . .

Philadelphia Police Officer Joseph Goodwin [also] testified . . . for the Commonwealth. Officer Goodwin testified that he has been assigned to the 26th Police District for the past 15 years, during which time he has come to know Appellant by the nickname of "Joe Ball". Shortly after the September 18, 2009 shooting, Officer Goodwin received a warrant for Appellant's arrest, which directed him to the address of 2557 North Front Street. There, he encountered Appellant's mother and girlfriend; he explained that Appellant had an active arrest warrant for a shooting. They responded that they had not seen him and they did not know where he was at present. Officer Goodwin left his cell phone number with Appellant's mother and asked her to have Appellant call him so that they could arrange for Appellant's surrender. Officer Goodwin returned to 2557 North Front Street on two more occasions, but Appellant was not present either time. Approximately two months later, on November 24, 2009, Officer Goodwin received a phone call from Appellant's attorney, who indicated Appellant's desire to turn himself in. On November 25, 2009, Appellant appeared at the police station and was placed under arrest. (***See*** N.T. 08/17/11, pp. 139-144).

The Commonwealth next presented the testimony of Philadelphia Police Detective Sean Leahy. Detective Leahy testified that, on September 19, 2009, at approximately 1:00 a.m., he arrived at the crime scene, which had been secured by fellow police officers. There, he discovered three (3) 10-millimeter fired cartridge casings ("FCCs") lying within six feet of a quantity of blood on the highway; in the same vicinity, he discovered a white baseball cap, black skull cap, credit card and photo identification card. After photographing the above evidence, Detective Leahy recovered the FCCs under property receipt and submitted them to the ballistics lab for further investigation. He attempted to gather information from individuals at the scene and nearby residents, but no one was willing to provide any information. On September 22, 2009, he met with Mr. Laboy, who had regained consciousness, at the hospital. Mr. Laboy immediately informed him that "Joe Ball" was one of the gunmen. Detective Leahy retreated to East Detectives briefly and returned with a photo array. Mr. Laboy positively identified Appellant without hesitation; he then provided a formal statement to Detective Leahy. Based on the

> information and evidence assembled, a warrant for Appellant's arrest was issued. However, Detective Leahy noted, Appellant did not turn himself in until approximately two months later. Finally, Detective Leahy testified that a search warrant also was issued for Appellant's residence at 2557 North Front Street in Philadelphia, which police executed on September 24, 2009, but did not recover any evidence. (***See*** N.T. 08/17/11, pp. 164-190).

Trial Court Opinion, 5/15/12, at 2-6 (footnotes omitted). It was stipulated that Appellant did not have a license to carry a gun. Based on this evidence, Appellant was convicted of conspiracy, carrying an unlicensed firearm, and PIC, but was acquitted of attempted murder, aggravated assault, and robbery. This appeal followed imposition of a ten-to-twenty-year term of imprisonment. Appellant raises these contentions on appeal:

1. Whether the evidence was insufficient to support a conviction for criminal conspiracy in violation of 18 Pa.C.S.A. § 903(a)(1)?

2. Whether the evidence was insufficient to support a conviction for carrying a firearm without a license in violation of 18 Pa.C.S.A. § 6106(a)(1)?

3. Whether the evidence was insufficient to support a conviction for possession of an instrument of crime in violation of 18 Pa.C.S.A. § 907(a)?

4. Whether the trial court erred in failing to give an 'accuracy in doubt' instruction to the jury despite a request by defense counsel?

5. Whether the trial court erred by giving a consciousness of guilt/flight or concealment instruction to the jury?

Appellant's brief at 1.

Appellant's first three allegations are viewed under the following standard of review:

> The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact[-]finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Helsel, 53 A.3d 906, 917-18 (Pa.Super. 2012) (quoting ***Commonwealth v. Bricker***, 41 A.3d 872, 877 (Pa.Super. 2012)).

Appellant's position with respect to his conspiracy conviction pertains to the lack of proof "of any type of agreement [among] the Appellant and the other three individuals [who] attempted to take the victim's possessions." Appellant's brief at 9. In ***Commonwealth v. Devine***, 26 A.3d 1139, 1147 (Pa.Super. 2011) (citation omitted), we outlined that to obtain "a conviction for criminal conspiracy, the Commonwealth must establish the defendant: 1) entered into an agreement to commit or aid in an unlawful act with another person or persons; 2) with a shared criminal

intent; and 3) an overt act was done in furtherance of the conspiracy." Appellant challenges the Commonwealth's proof with respect to the first aspect of this crime.

As we expressly observed in ***Commonwealth v. Ruiz***, 819 A.2d 92, 97 (Pa.Super. 2003), "[a]n explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities." Accordingly, the Commonwealth can present circumstantial evidence to prove the existence of an accord to commit a crime. ***Devine***, ***supra***. Specifically, "The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt." ***Id***. at 1147.

> Among the circumstances which are relevant, but not sufficient by themselves, to prove a corrupt confederation are: (1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy. The presence of such circumstances may furnish a web of evidence linking an accused to an alleged conspiracy beyond a reasonable doubt when viewed in conjunction with each other and in the context in which they occurred.

Ruiz, ***supra*** at 97 (citation omitted).

In this case, there was a strong association among the conspirators as they arrived at the scene of the crime together, exited the car in unison, and all displayed weapons. Appellant had knowledge of the commission of the

crime since one of his cohorts demanded the victim's money in Appellant's presence. He was actually present at the scene, and he participated in the object of the conspiracy by shooting at fleeing, potential victims and standing with his accomplices as Mr. Laboy placed all of his possessions on the ground. All the pertinent circumstances attendant with proof of a conspiracy exist in the present case, and Appellant's conviction of conspiracy is not infirm.

In challenging his conviction for carrying an unlicensed weapon, Appellant faults the Commonwealth's proof because the gun that he possessed was not produced, and there was no testimony regarding the type of weapon that he possessed. "Appellant's conviction . . . for carrying a firearm without a license required the Commonwealth to establish that Appellant was either carrying a firearm in a vehicle or concealed on his person, and that he had no license to do so." ***Commonwealth v. Baldwin***, 985 A.2d 830, 833 (Pa. 2009). In this case, Appellant stipulated that he did not have a license to carry a gun. Then, Mr. Laboy established that Appellant exited a vehicle in possession of a gun, which he fired at fleeing people. This testimony was sufficient to satisfy the remaining two elements of the crime in question. Appellant provides no authority for the proposition that the Commonwealth had to either establish the type of weapon possessed or produce the gun itself. Hence, this claim fails.

Appellant's next position is that the evidence was insufficient to establish PIC since he was acquitted of all the crimes for which he was charged in connection with his use of his gun. In order "to sustain a PIC conviction, the Commonwealth must prove two elements: (1) possession of an object that is a weapon; and (2) intent to use that weapon for a criminal purpose." ***Commonwealth v. Moore***, 49 A.3d 896, 900 (Pa.Super. 2012) (citation and quotation marks omitted). If a defendant is found innocent of all crimes of which he was accused in connection with his use of a gun, the second element of PIC cannot be sustained. ***Id***. In this case, however, Appellant was found guilty of conspiracy. Since we have concluded that the evidence was sufficient to sustain that conviction, his argument as to PIC, which is dependent upon the lack of an underlying conviction, necessarily fails.

Appellant next complains about the trial court's refusal to disseminate an instruction under ***Commonwealth v. Kloiber***, 106 A.2d 820 (Pa. 1954), which invites the jury to view certain eyewitness testimony with caution. "Our standard of review when considering the denial of jury instructions is one of deference—an appellate court will reverse a court's decision only when it abused its discretion or committed an error of law." ***Commonwealth v. Baker***, 24 A.3d 1006, 1022 (Pa.Super. 2011) (citation omitted). Under our jurisprudence, a ***Kloiber*** instruction is warranted only in limited circumstances:

> Under ***Kloiber***, "a charge that a witness's identification should be viewed with caution is required where the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past." ***Commonwealth v. Gibson***, 547 Pa. 71, 688 A.2d 1152, 1163 (1997) (citing ***Kloiber***). Where an eyewitness has had "protracted and unobstructed views" of the defendant and consistently identified the defendant "throughout the investigation and at trial," there is no need for a ***Kloiber*** instruction. ***Commonwealth v. Dennis***, 552 Pa. 331, 715 A.2d 404, 411 (1998). When the witness already knows the defendant, this prior familiarity creates an independent basis for the witness's in-court identification of the defendant. . . . ***Commonwealth v. [Freddie] Johnson***, 433 Pa. 34, 248 A.2d 840, 841–42 (1969) (witness had known defendant for three years prior to robbery and murder; no trial court error in not issuing ***Kloiber*** instruction); ***see also Commonwealth v. [Clarence] Johnson***, 419 Pa.Super. 625, 615 A.2d 1322, 1335–36 (1992) (witness knew defendant and "had seen him on several occasions" prior to murder; defendant not entitled to ***Kloiber*** instruction because witness's in-court identification was supported by independent basis).

Commonwealth v. Ali, 10 A.3d 282, 303 (Pa. 2010).

In this case, the victim's view of Appellant was not obstructed. Mr. Laboy identified Appellant as participating in his attack to police, during a photographic identification, at the preliminary hearing, and at trial. Finally, Mr. Laboy knew Appellant and referred to him by his street name. Hence, it is clear that Appellant was not entitled to a ***Kloiber*** instruction, and the trial court did not abuse its discretion in refusing to disseminate one.

Appellant's final challenge is to the trial court's decision to instruct the jury that the fact that he concealed himself from police for two months could be considered as consciousness of guilt. "A jury instruction is proper if

supported by the evidence of record." ***Commonwealth v. Clark***, 961 A.2d 80, 92 (Pa. 2008). If "a person commits a crime, knows that he is wanted therefor, and flees or conceals himself, such conduct is evidence of consciousness of guilt, and may form the basis of a conviction in connection with other proof from which guilt may be inferred." ***Id***. (citations omitted).

In the present matter, the Commonwealth detailed police efforts to locate Appellant for two months after the crime. These unsuccessful attempts to locate Appellant at his abode created the inference that he was secreting himself from police. Hence, the evidence supported the charge in question, and there was no error in this respect.

Judgment of sentence affirmed.