NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DOMENIQUE LEWIS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 358 WDA 2012

Appeal from the Judgment of Sentence September 8, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0008184-2010

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.: Filed: April 29, 2013

Domenique Lewis brings this appeal from the judgment of sentence imposed on September 8, 2011, in the Court of Common Pleas of Allegheny County. A jury convicted Lewis of attempt - criminal homicide (two counts), aggravated assault (two counts), robbery (two counts), and carrying a firearm without a license,[1] and the trial judge found Lewis guilty of possession of firearms prohibited.[2] The trial court sentenced Lewis to an aggregate term of imprisonment of 33½ to 67 years. In this appeal, Lewis challenges (1) the weight of the evidence, (2) the sufficiency of the

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 901(a) and 2502; 18 Pa.C.S. § 2702(a)(1); 18 Pa.C.S. § 3701(a)(1)(i); and 18 Pa.C.S. § 6106(a)(1), respectively.

[2] 18 Pa.C.S. § 6105(a)(1).

evidence, and (3) the trial court's denial of his motion for mistrial. Based upon the following, we affirm.

As the parties are well acquainted with the facts of this case, we simply restate the trial court's summation of the incident underlying Lewis's convictions:

> A February night of 2012 brought plenty of snow to the Pittsburgh area. It also brought Domenique Lewis into the home of Megan Wilsher and Brett Quinn. Lewis's visit was short-lived. He ended the visit by shooting Ms. Wilsher in the face. He then fired more shots wounding Mr. Quinn.

Trial Court Opinion, 4/20/12, at 1. Following the verdicts of the jury and trial court, Lewis filed post sentence motions that were denied by operation of law. ***See*** Order-Denial of Post Sentence Motion by Operation of Law, 1/23/2012. This appeal followed.[3]

Lewis first challenges the weight of the evidence. In this appeal, Lewis argues that the verdict was against the weight of the evidence for the following reasons: the victims did not initially identify Lewis as the shooter; Quinn identified Lewis as the shooter as a means of revenge; Quinn influenced Wilsher's identification of Lewis; and, after Quinn told Wilscher that Lewis was not the shooter, Wilsher refused to change her story because

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[3] Lewis 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).

she was afraid she would lose her ability to receive hospital bill payment from the Victim's Fund. ***See*** Lewis's Brief at 14.

We note that Lewis raised this issue in both his post-sentence motion and his Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal ("concise statement"), by simply stating, without particularity, "the verdict in this case was against the weight of the evidence."[4] The trial court determined that the issue was inadequately presented since "Lewis has failed to articulate which fact, or collection of facts, are deserving of greater weight." Trial Court Opinion, ***supra,*** at 3, *citing* Pa.R.Crim.P. 575(A)(2)(c), (A)(3),[5] and ***Commonwealth v. Seibert***, 799 A.2d 54, 62 (Pa. Super. 2002).[6] The trial court therefore concluded that Lewis had waived his challenge to the weight of the evidence. ***See*** Trial Court Opinion, ***supra***.

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[4] Lewis's post sentence motion stated, in relevant part: "The Defendant purports that the verdict in this case was against the weight of the evidence." Lewis's Post Sentencing Motions, Motion for New Trial, ¶15, 9/13/2011. In his Rule 1925(b) statement, Lewis claimed: "The verdict in this case was against the weight of the evidence." Lewis's Concise Statement, 3/21/2012.

[5] Rule 575, pertaining to "Motions and Answers," states, in relevant part: "The motion shall state with particularity the grounds for the motion, the facts that support each ground, and the types of relief or order requested[,]" Pa.R.Crim.P. 575(A)(2)(c), and "The failure, in any motion, to state .. a ground therefor shall constitute a waiver…." Pa.R.Crim.P. 575(A)(3).

[6] In ***Commonwealth v. Seibert***, 799 A.2d 54 (Pa. Super. 2002), the defendant, in his Pa.R.A.P. 1925(b) concise statement merely stated that "'the verdict of the jury was against the weight of the credible evidence as to all of the charges.'" ***Id.*** at 62. This Court found that the claim, as stated in

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Our standard of review of a challenge to the weight of the evidence is as follows:

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. ***Commonwealth v. Widmer***, 560 Pa. 308, 319, 744 A.2d 745, 751–52 (2000); ***Commonwealth v. Brown***, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994). …
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> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:
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> > Appellate 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*. ***Brown***, 648 A.2d at 1189. …
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> ***Widmer***, 560 Pa. at 321–22, 744 A.2d at 753 (emphasis added).

Commonwealth v. Clay, ___ A.3d ___, ___ (Pa., filed February 8, 2013).

Here, since the trial court, finding waiver, did not review the weight of the evidence claim, there is no exercise of discretion for this Court to review. To the extent that the trial court's decision not to review the issue because it was presented with "no particularity … [and] no facts set forth in support"[7] is itself an exercise of discretion, we agree with the trial court's waiver analysis. ***See Seibert, supra***. Accordingly, Lewis has waived this claim.

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the concise statement, was too vague to permit review, and was therefore waived. ***Id.***

[7] Trial Court Opinion, 4/20/2012, at 3.

Next, Lewis challenges the sufficiency of the evidence. The trial court found this issue was also waived. In his concise statement, Lewis framed his sufficiency challenge as follows: "The evidence in this matter was insufficient to sustain a conviction."[8] Lewis's Concise Statement, 3/21/2012, at 3. The trial court recognized that a sufficiency challenge can appear for the first time in a concise statement, but found Lewis had failed to preserve his claim because he failed to provide any details regarding his challenge. ***See*** Trial Court Opinion, ***supra***, at 4, *citing* ***Commonwealth v. Williams***, 959 A.2d 1252 (Pa. Super. 2008).[9] The trial court explained that Lewis's statement was even less detailed than the claim found to be too vague in ***Williams***, specifically: "'There was insufficient evidence to sustain the charges of Murder, Robbery, VUFA no license, and VUFA on the streets. Thus, [Appellant] was denied due process of law.'" ***Williams***, ***supra***, at 1256.

Our review confirms the determination of the trial court that waiver applies here. As this Court recently stated:

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[8] Lewis framed his sufficiency challenge in his brief in identical terms. ***See*** Lewis's Brief at 5, 15.

[9] In ***Commonwealth v. Williams***, 959 A.2d 1252 (Pa. Super. 2008), this Court reiterated that, when challenging the sufficiency of the evidence on appeal, the appellant's concise statement must "specify the element or elements upon which the evidence was insufficient" in order to preserve the issue for appeal. ***Id.*** at 1257 (quoting ***Commonwealth v. Flores***, 921 A.2d 517, 522–523 (Pa. Super. 2007).

> In order to preserve a challenge to the sufficiency of the evidence on appeal, an appellant's Rule 1925(b) statement must state ***with specificity*** the element or elements upon which the appellant alleges that the evidence was insufficient. ***Commonwealth v. Gibbs***, 981 A.2d 274, 281 (Pa. Super. 2009), *appeal denied*, 607 Pa. 69, 3 A.3d 670 (Pa. 2010) "Such specificity is of particular importance in cases where, as here, the appellant was convicted of multiple crimes each of which contains numerous elements that the Commonwealth must prove beyond a reasonable doubt." ***Id.*** at 281 (citation omitted). Here, as is evident, Appellant not only failed to specify which elements he was challenging in his Rule 1925(b) statement, he also failed to specify which conviction he was challenging. Thus, we find Appellant's sufficiency claim waived on this basis. ***See Gibbs***, ***supra***.

Commonwealth v. Garland, ___ A.3d ___, ___ [2013 PA Super 41] (Pa. Super. 2013) (citations omitted) (emphasis added). Applying the above cited case law to the sufficiency challenge presented in Lewis's concise statement, we conclude that due to the complete lack of specificity, Lewis failed to preserve this issue for review.

In any event, even if this Court considered Lewis's sufficiency challenge — which is based on his contention that the evidence did not establish that he was the shooter[10] — no relief would be due. At trial, Megan Wilscher testified that on February 26, 2010, while Lewis was sitting in her living room, he stood up, pulled out a gun, smiled at her, and fired at her. Wilscher testified Lewis shot her in the face, and after she fell, he shot her again. Wilsher lost her right eye as a result of the shooting. ***See*** N.T.,

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[10] ***See*** Lewis's Brief at 15–16.

6/22/2012, at 77, 80–81. In corroboration of this testimony, the Commonwealth presented evidence that Lewis's fingerprints were found on a Coke can recovered from the scene. ***See id.*** at 196–197.

Furthermore, the Commonwealth, through the testimony of Detective Scott Evans, introduced a recorded statement made by Lewis to police, in which he admitted that on February 26, 2010, he had engaged in a struggle with Brett Quinn over a gun that discharged in the living room; he took the gun and fired at Quinn multiple times, chased him and took his chain and watch; returned to the house where he took $400 to $500 dollars from Wilsher's purse, as well as her cellular phone; and then disposed of the gun. ***See*** N.T., 6/23/2012, at 30–46. The Commonwealth, through Detective Evans, also introduced documentation to show Lewis did not possess a permit to carry a gun. ***Id.*** at 46. Finally, outside the presence of the jury, the Commonwealth offered into evidence the certification from the juvenile court for Lewis's robbery conviction. ***Id.*** at 87.

Applying our well-settled standard of review,[11] we conclude this evidence was sufficient to establish that Lewis was the shooter and to

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[11] Our standard of review of a challenge to the sufficiency is as follows:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the

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sustain his convictions for attempt – criminal homicide, aggravated assault, robbery, firearms not to be carried without a license, and possession of firearms prohibited. Although Lewis contends that his trial testimony rebutted the statements he made during the police interview, the fact-finder was free to reject his testimony. ***See Commonwealth v. Priest***, 18 A.3d 1235, 1241 (Pa. Super. 2011) ("It is well settled that the [fact finder] is free to believe all, some or none of a witness's testimony.") Accordingly, Lewis's sufficiency challenge, had it not been waived, would fail on the merits.

Lastly, Lewis asserts that the trial court erred in denying his motion for a mistrial. Specifically, Lewis contends that a statement made by the trial judge created an inference before the jury that Lewis was required to present a case on his behalf. ***See*** Lewis's Brief at 17–20.

In reviewing Lewis's claim, we are mindful that:

> A mistrial is an "extreme remedy" that is only required where the challenged event deprived the accused of a fair and impartial trial. The denial of a mistrial motion is reviewed for an abuse of discretion.

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> verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (citations omitted).

Commonwealth v. Laird, 988 A.2d 618, 638 (Pa. 2010), *cert. denied*, 131 S. Ct. 659 (U.S. 2010) (citations omitted).

Our review leads us to conclude that Lewis is not entitled to relief based on this assertion of trial court error. Moreover, since the trial court has thoroughly addressed and properly rejected this issue, we adopt the trial court's discussion, as follows:

> The jury trial started on June 22, 2011. The government called 11 witnesses that day. Their 12th and final witness — Det. Scott Evans — was going to be rather lengthy so the Court, after consulting with the jury, continued the trial until the following morning. Before adjourning, and in the jury's presence, the Court said:
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> > Before we get started, this will be the last Commonwealth witness. We are going to come back tomorrow, because the defense is going to have to put on their case.
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> Trial Transcript, pg. 215 (June 22, 2011). There was no immediate objection by either party. The next day, before any testimony was received, Lewis's lawyer moved for a mistrial.
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> > At the end of the day yesterday, as the Court was asking the jurors it [sic] they wanted to continue or go to 4:30 and stop before Detective Evans started his testimony, the Court said, you know, because the Commonwealth - - I'm paraphrasing this part - - the Commonwealth has to finish their case and then the defense has to put on their case, and the Court continued on.
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> Trial Transcript, pg. 3 (June 23, 2011). The Court's response was:
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> > What my recollection was is that ... [t]he Commonwealth will exhaust its case after Detective Evans, then it becomes the defense's case, which it is. Now, that doesn't mean you have to do anything. You can rest once it becomes your case. You have no duty to put on a defense.

> I've instructed the jury in the introductory statement that the defendant has an absolute right to do nothing, he doesn't have to put on a defense. And that will be read to them again in the closing instruction.
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> If that was said and you want me to make some statement clarifying that I will. If you choose for me not to make a statement I won't. But I am denying your motion.

Id., pgs. 3-4.[6]

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[6] The Court's closing instructions included the admonition that a person accused of a crime "is not required to present evidence or prove anything in his own defense." Trial Transcript, pg. 173 (June 23, 2011).

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> The "Achilles heel" of this argument is what happened after this motion was denied. The government's last witness testified and then, Lewis, himself, spoke to the jury. He offered contrary explanations to various pieces of the government's evidence. The Court sees no error in what it said, especially in light of the defense actually presenting evidence and not resting on the presumption. Furthermore, the Court sees no prejudice. Lewis, at least implicitly, acknowledges this deficiency because he has advanced not one iota of prejudice.

Trial Court Opinion, ***supra***, at 4–6 (footnote omitted).

We simply add that we are not persuaded by Lewis's argument that he "decided to take the stand to testify in his own defense out of fear that the jury would believe that in not doing so, the evidence presented by the Commonwealth would be considered by the jury to be absolute fact based on the trial judge's inference." Lewis's Brief at 18. As the trial court pointed out to trial counsel at the time of the motion for mistrial, the jury was

instructed at the beginning of the case, and would be instructed at the end of the case, that Lewis did not have to present a defense. As juries are presumed to follow the court's instructions, we agree with the trial court that Lewis suffered no prejudice. ***See Commonwealth v. Mollett***, 5 A.3d 291, 313 (Pa. Super. 2010), *appeal denied*, 14 A.3d 826 (Pa. 2011). Accordingly, we conclude there was no abuse of discretion in the decision of the trial court to deny the motion for mistrial.

Accordingly, we affirm.

Judgment of sentence affirmed.