

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
DARIN K. WRIGHT,		
Appellant		No. 488 EDA 2012

Appeal from the Judgment of Sentence entered January 12, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009147-2008

BEFORE: OLSON, WECHT and COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: February 15, 2013

Appellant, Darin K. Wright, appeals from the judgment of sentence entered on January 12, 2012 following his jury trial convictions for third-degree murder and carrying a firearm in public in Philadelphia.¹ We affirm.

The facts and procedural history of this case may be summarized as follows. On March 13, 2007, Appellant had a verbal altercation with the victim on a Philadelphia street corner in front of other people. Later, an eyewitness heard Appellant say that the next time he saw the victim, he was going to "hit" or kill him. The same day, the victim returned to the place of the earlier argument and sat in his parked car. Appellant approached the

¹ 18 Pa.C.S.A. §§ 2502(c) and 6108, respectively.

*Retired Senior Judge assigned to the Superior Court.

victim and resumed the argument. Several minutes later, Appellant drew a firearm and fired five shots at the victim. One of the shots struck the victim in the head, killing him instantly. Following the murder, Appellant bragged to others about killing the victim and made a rap video to that effect. The Commonwealth lodged the aforementioned charges against Appellant.² On September 13, 2011, a jury convicted Appellant of third-degree murder and carrying a firearm in public in Philadelphia. On January 12, 2012, the trial court imposed a sentence of 20 – 40 years of imprisonment for third-degree murder and a concurrent term of nine months to two years of imprisonment on the firearm conviction. This timely appeal followed.³

Appellant presents the following issues⁴ for our review:

- I. Was the evidence presented at trial insufficient to sustain Appellant's convictions of murder in the third degree, 18 [Pa.C.S.A.] § 250[2](C); and carrying

² The Commonwealth also charged Appellant with first-degree murder and conspiracy. The jury acquitted Appellant of those crimes.

³ Appellant filed a notice of appeal on February 3, 2012. The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) and Appellant complied timely. The trial court issued an opinion under Pa.R.A.P. 1925(a) on April 19, 2012.

⁴ Appellant presents issues II, IV and V in his statement of the questions involved section of his appellate brief. However, later in the argument section of his brief, Appellant provides no analysis or citation to the record or legal authority on these claims. Appellant's Brief at 6. Accordingly, we deem them waived. **See** Pa.R.A.P. 2119(b); **see also Commonwealth v. Hernandez**, 39 A.3d 406, 412 (Pa. Super. 2012) (failure to develop argument with citation to and analysis of relevant authority waives issue on appeal).

firearms on public streets in Philadelphia, 18 [Pa.C.S.A.] § 6108?

- II. Did the Commonwealth fail to prove beyond a reasonable doubt that [Appellant] acted with wanton and willful disregard of a[n] unjustified and extremely high risk that the conduct of [Appellant] would result in the death of another?
- III. Did the lower court err by rejecting [Appellant's] objection to the Commonwealth's witness, Detective Peters['] statements regarding the term "Bloodline"; [Appellant asserts] that a curative jury instruction would be ineffective to cure the tain[t] and tha[t] a mistrial was proper?
- IV. Did the court err in deny[ing] [Appellant's] request for a mistrial based on the Commonwealth's closing argu[ment] reference to an out of court statement alle[gedly] made by [Appellant] and alle[gedly] repeated by the co-defendant, neither of which were admitted into evidence during the trial?
- V. Did the court err in its admission of a "You Tube" video containing [Appellant's] rap performance, absent an adequate evidentiary foundation as required by Pa.R.Evid. 701?

Appellant's Brief at 9 (renumbered for clarity and complete capitalization omitted).

In his first issue presented, Appellant claims there was insufficient evidence to support his convictions.⁵ Appellant asserts "[t]he

⁵ We note that Appellant's brief to this Court has a glaring defect. In the argument section, counsel argues sufficiency of the evidence for another, wholly unrelated case. Appellant sets forth the legal elements of robbery, a crime not implicated herein, and cites to notes of testimony from a trial in 2010, even though Appellant's trial was held in 2011. **See** Appellant's Brief (*Footnote Continued Next Page*)

Commonwealth's entire case was based upon the uncorroborated and inconsistent testimony [of] witnesses who were unreliable which resulted in a verdict supported by mere conjecture and speculation." *Id.* at 12. For example, Appellant maintains, "an alleged eyewitness to the event could not recall where he was standing at the time of this assumedly memorable event." *Id.* Appellant further argues there was contradictory eyewitness testimony as to whether the co-defendant was present during the shooting. *Id.* Finally, Appellant argues, "the Commonwealth did not prove, beyond a reasonable doubt, that [Appellant] acted with wanton disregard for human life" to support a finding of malice.⁶ *Id.* at 13.

The standard we apply in reviewing the sufficiency of the 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 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

(Footnote Continued) _____

at 13-14. However, because we have the notes of testimony from Appellant's trial, our independent review is unhampered.

⁶ As presently framed, Appellant's sufficiency challenge targets the alleged inconsistencies of eyewitness testimony, as well as sufficiency of the Commonwealth's proof that Appellant acted with wanton disregard to human life. Appellant has not challenged other issues relevant to his conviction such as the cause of the victim's death. We shall confine our analysis to the claims Appellant properly developed on appeal.

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.

A person may be convicted of third-degree murder where the murder is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice aforethought. Malice consists of a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Further, malice may be inferred from the use of a deadly weapon on a vital part of the victim's body.

Commonwealth v. Gooding, 818 A.2d 546, 549-550 (Pa. Super. 2003) (citations, quotations and brackets omitted).

Appellant also challenges the sufficiency of the evidence to support his conviction for carrying a firearm in public in Philadelphia, which states: “No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless [] such person is licensed to carry a firearm.” 18 Pa.C.S.A. § 6108. “An individual who is 21 years of age or older may apply to a sheriff for a license to carry a firearm[.]” 18 Pa.C.S.A. § 6109.

Upon review of the certified record, two eyewitnesses testified that they observed Appellant engaged in a verbal altercation with the victim prior to the murder. N.T., 8/7/2011, at 204-207; N.T., 8/8/2011, at 122-126.

One of the eyewitnesses testified that after the argument, he heard Appellant say, "the next time I see [the victim], I'm going to hit him." N.T., 8/8/2011, at 128. Both eyewitnesses identified Appellant as the person who shot at the victim five times at close range with a handgun, through the driver's side window of the car the victim was driving. N.T., 8/7/2011, at 212-216; 8/8/2011, at 130-131. Appellant fled the scene. *Id.* One of the eyewitnesses testified that Appellant bragged about the murder a week or two after the crime. N.T., 8/7/2011, at 223-224. Following the murder, Appellant changed his appearance by cutting off his cornrowed hair. *Id.*; *see also* N.T., 8/8/2011, at 133. Moreover, another man from the neighborhood initially gave police a statement that Appellant confessed the murder to him, despite his denial at trial to giving such statement. N.T., 9/8/2011, at 190-210.

Based on the foregoing, we discern there was sufficient evidence to sustain Appellant's convictions. Appellant shot at the victim's head five times at close range, killing him. Malice may be inferred from the use of a deadly weapon on a vital part of the body. The jury could also infer malice because Appellant was overheard saying he should have killed the victim, Appellant resumed the argument, and then shot the victim. Thereafter, Appellant fled and later cut his hair. *See Commonwealth v. McCollum*, 926 A.2d 527, 530 (Pa. Super. 2007) (fleeing from the scene is evidence of consciousness of guilt); *Commonwealth v. Brown*, 676 A.2d 1178, 1183 (Pa. 1996) (A jury may infer consciousness of guilt upon finding that a

defendant intentionally altered his physical appearance to avoid identification). Further, Appellant was a minor at the time of the crime and was, therefore, ineligible to apply for a firearm license. As such, we find sufficient evidence to support both of Appellant's convictions. Thus, Appellant's first issue fails.

Next, Appellant claims the trial court abused its discretion when it denied a mistrial after "[t]he prosecution blatantly ignored [a] direct [c]ourt order and elicited information from its witness in reference to the group "Bloodline[.]" Appellant's Brief at 15.

Appellant does not point to the record citation where the alleged error occurred. "When an allegation is unsupported by any citation to the record, such that this Court is prevented from assessing this issue and determining whether error exists, the allegation is waived for purposes of appeal." *Commonwealth v. Harris*, 979 A.2d 387, 393 (Pa. Super. 2009), *citing* Pa.R.A.P. 2119(c). However, the trial court addresses this issue in its Rule 1925(a) opinion and points to the challenged trial testimony:

[Commonwealth]: When you did research and found that Khayree Murray⁷ had been arrested, did you have him transported to the Homicide Unit?

[Detective Brian Peters]: Yes.

⁷ Khayree Murray was a witness for the prosecution who gave a statement implicating Appellant in the crime.

[Commonwealth]: And why did you have him transported to the Homicide Unit?

[Detective Peters]: I had information that Mr. Murray was aligned with a group that we were investigating at the time. The group was the 24 Bloods—

[Defense counsel]: Objection, sidebar?

The Court: I'm just going to direct the jury to disregard that last comment.

[Off record sidebar discussion.]

Trial Court Opinion, 4/19/2012 *citing* N.T., 8/8/2011, at 268-269.

Our standard of review for the denial of a mistrial is as follows:

The trial court is in the best position to assess the effect of an allegedly prejudicial statement on the jury, and as such, the grant or denial of a mistrial will not be overturned absent an abuse of discretion. A mistrial may be granted only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. Likewise, a mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice.

Commonwealth v. Simpson, 754 A.2d 1264, 1272 (Pa. 2000) (citations omitted).

We have previously determined:

alleged prejudicial comments must be evaluated with regard to the circumstances of each trial, including, but not limited to: the nature of the comment, the person to whom the alleged prejudicial comment was directed, the identity of the person making the comment, and if a witness, the importance of that witness' testimony to either the Commonwealth's or defense's case, and whether the court gave immediate cautionary instructions if it deemed the remark prejudicial.

Commonwealth v. Harris, 443 A.2d 851, 854-855 (Pa. Super. 1982).

The testimony of the Commonwealth witness in the instant case was inadvertent and an unexpected response to a proper question. Appellant admitted that the Commonwealth did not act in bad faith. N.T., 8/9/2010, at 21. The trial court immediately directed the jury to disregard the comment and struck it from the record. Moreover, the comment at issue did not link Appellant directly with the group, Bloodline, and was the only passing reference at trial. The trial court offered Appellant a curative instruction and Appellant declined. ***Id.*** at 21-23. Given the overwhelming evidence of Appellant's guilt as established by eyewitness testimony at trial, we simply do not find defendant was deprived of a fair trial by the passing comment inadvertently elicited from Detective Peters. Accordingly, the trial court did not abuse its discretion in denying Appellant's request for a mistrial.

Judgment of sentence affirmed.