NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. YASIN EL AMAN SHAKIR, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 517 WDA 2013

Appeal from the Judgment of Sentence entered October 15, 2012,
in the Court of Common Pleas of Beaver County,
Criminal Division, at No(s): CP-04-CR-0001882-2011.

BEFORE: BOWES, ALLEN, and LAZARUS, J.

MEMORANDUM BY ALLEN, J.: **FILED DECEMBER 17, 2013**

Yasin El Aman Shakir, ("Appellant"), appeals from the judgment of sentence imposed after a jury convicted him of attempted murder, four counts of aggravated assault, firearms not to be carried without a license, and recklessly endangering another person.[1]

The trial court summarized the pertinent facts as follows:

> In the early evening hours of July 13, 2011, Tomara Scott, her friend Robin Reddix, and three males – Jiwan Bailey, Razaun King, and [Appellant], Yasin El Aman "Moosie" Shakir - engaged in a conversation outside of Scott's residence on Chaske Street in Penn Hills, Allegheny County [in which they discussed committing a robbery]. A plan was developed for the robbery of a bar in Aliquippa, Beaver County. Scott ... suggested that the establishment known as "The Outkast Bar" would be an easy target. Later in the evening, Scott, accompanied by Reddix,

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[1] 18 Pa.C.S.A. §§ 901(a), 2502, 2702(a)(1) and (4), 6106(a)(1), and 2705.

Bailey, King and [Appellant], drove her automobile from Penn Hills to Aliquippa. During the trip, the five occupants further discussed the planned robbery. Upon entering Aliquippa, Scott parked her vehicle outside the OutKast Bar, and Scott and Reddix entered the bar to have a couple [of] drinks in order to determine the feasibility of implementing their plan. While the women were in the bar, the three men walked around the neighborhood and later returned to the vehicle to await the females. Near to closing time, Scott and Reddix exited the bar and reconvened with the three men in the car where they spoke of whether to proceed with the robbery of the bartender. The women observed that the owner of the bar had been present and possessed a weapon. Upon further discussion, the plot to rob the bartender was abandoned, causing Bailey to become agitated at having come to Aliquippa for naught. They all entered Scott's vehicle intending to return to Penn Hills.

While driving from the area of the bar at approximately 1:40 A.M. on July 14, 2011, the occupants of the automobile observed two men, Lucien Roberts and Brian Elmore, Jr. – walking up Fifth Avenue hill. Scott proceeded to the bottom of the hill, stopped the vehicle, turned to Bailey and said, "Jiwan, there you go." Bailey exited the vehicle and [Appellant] followed. King remained inside the vehicle to complete a text message and exited a short time later. Bailey, King, and [Appellant] approached Roberts and Elmore. King observed [Appellant] retrieve a silver handgun from his waist. [Appellant] told Roberts and Elmore to "take it off" or "throw it off" (meaning "give me whatever you got"). Elmore responded, "beat it, get out of here." Roberts initially observed [Appellant] point his gun at Elmore. In response, Roberts retrieved his .45 caliber semi-automatic pistol from his waist as Bailey directed his weapon at Roberts. Nearly simultaneously, shots were fired by both [Appellant] and Roberts. King ran and hid behind a telephone pole and did not observe the shooting, although he heard gun fire and saw flashing from the firing of the weapons. Roberts, who possessed a license to carry a firearm and whose weapon was properly registered to him as the owner, fired three or four rounds before he was tackled by Bailey, who attempted to take the pistol from Roberts. In the struggle that ensued between Roberts and Bailey, Roberts fired approximately five more shots, three of which struck Bailey. Elmore, who had been drinking that night and was somewhat intoxicated, fled across the street behind a nearby garage; however, he was struck by a

total of six bullets – two in the right leg, one in the right thigh, one in the left buttocks and two in the left hand. Elmore indicated that he was hit with the first shot as he stepped off the curb into the street. He was subsequently transported to UPMC Presbyterian Hospital for treatment. Elmore remained in the hospital for two or three days during which he underwent surgery on his left hand, including the insertion of a rod. As of the date of trial, he was unable to completely bend a finger on his left hand. None of the bullets were surgically removed from Elmore's body. Although not struck by any gun fire, Roberts found two bullet holes in the basketball shorts he was wearing. Upon extricating himself from Bailey's grasp, Roberts returned to his feet, fled to the top of the hill and called the police. Roberts testified that the entire incident lasted approximately six minutes.

[Appellant] returned to Scott's waiting vehicle. King, being unfamiliar with the area, left the scene and came upon two individuals from whom he borrowed a cellular phone which he utilized to call his own cellular telephone in Scott's vehicle. Reddix answered the call. Scott, along with [Appellant] and Reddix, proceeded to King's location, at which time he entered the car. King inquired as to Bailey's absence and condition. [Appellant] replied that he thought Bailey had tackled Roberts and ran from the scene. While in the vehicle, King again observed the silver firearm in the left hip area of [Appellant]. King testified that none of the other occupants of the vehicle possessed a firearm. Roberts described [Appellant's] weapon as being a revolver. Scott drove her vehicle to her residence in Penn Hills with Reddix, King, and [Appellant] as occupants. Later that morning the participants learned of Bailey's death.

Detective Sergeant Steven Roberts of the Aliquippa Police Department testified that a total of four spent .45 caliber casings were located at the scene and fragments from other bullets of an unknown caliber were located in the roadway. He explained that Lucien Roberts' .45 caliber pistol was a semi-automatic weapon which ejected spent casings. No casings of any other caliber were found at the scene. Detective Sergeant Roberts explained that since the silver handgun in the possession of [Appellant] was a revolver, which does not automatically ejects its spent casings, he did not expect to find any spent casings from the revolver. Detective Sergeant Roberts further indicated that upon a check with the Pennsylvania State Police, a certification was

> received that [Appellant] did not possess a license to carry a firearm nor was he eligible to do so due to his age of 19 years. The three bullets in the body of Bailey were determined to be .45 caliber ammunition.
>
> Officer Brandon Yourke of the Wilkinsburg Police Department testified that he arrested [Appellant] on an unrelated outstanding warrant on July 21, 2011, eight days after the shooting, and upon searching [Appellant] found six live .38 caliber bullets in his left front trouser pocket.
>
> The Commonwealth called William Best as a ballistics expert. ... Mr. Best was requested to and did take measurements of a bullet depicted on an x-ray of Elmore's body using a digital micrometer, and excluded the bullet in Elmore's body as being a .45 caliber bullet based on its size. He further indicated that he could not exclude the bullet as being either a .38 caliber or a .32 caliber bullet. Mr. Best indicated that he had never taken measurements of an x-ray image previously but was aware that the procedure had, in fact, been utilized. He also related that he had not received any training in radiology.

Trial Court Opinion, 3/6/13, at 2-8.

Appellant was arrested and charged with the aforementioned crimes. A jury trial commenced on September 6, 2012, and on September 11, 2012, the jury returned its guilty verdicts.

On October 15, 2012, the trial court conducted a sentencing hearing, at the conclusion of which it sentenced Appellant to 8½ to 17 years of imprisonment for attempted murder, a consecutive 5 to 10 years for aggravated assault, and a consecutive 1½ to 3 years for carrying a firearm without a license, for an aggregate term of imprisonment of 15 to 30 years. No further penalties were imposed on the remaining counts. Appellant filed a post-sentence motion which the trial court denied, and on March 6, 2013,

the trial court issued a memorandum opinion in support of its order. This appeal followed. On March 21, 2012, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant complied.

Appellant raises the following issues for our review:

> I. Was the admission into evidence of the .38 caliber bullets found on [Appellant] eight days after the incident improper because those bullets did not specifically relate to any of the events in question in this case and because of the lack of proof of the involvement of a .38 caliber gun in the testimony of this case?
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> II. Was [it] error to qualify William Best as an expert witness by concluding that Mr. Best had a reasonably specialized knowledge as to the subject matter for which he rendered testimony?
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> III. Did the trial court commit error in not giving the jury a ***Kloiber*** charge (identification testimony-accuracy in doubt) because at the time that the original identification as made by the witness, he could only say that the shooter was either one of two people in the lineup but that he would be able to better identify the defendant if he had a 3-D view and a better description?
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> IV. Did the Commonwealth fail to prove beyond a reasonable doubt that [Appellant] acted with a specific intent to kill, an element of the crime for attempted homicide, and was the evidence sufficient to support the conviction on the charge of criminal attempt, murder?
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> V. Was there sufficient evidence to establish the necessary elements for aggravated assault in that there was nothing in [Appellant's] words or conduct from which the element of the specific intent to cause serious bodily injury to either party could be shown, and for possession of a firearm or concealed a firearm as the term "concealed" is defined?

VI. Alternatively, were the verdicts of guilty on each charge against the weight of the evidence when the first of three witnesses at the scene (Elmore) was too drunk to recollect anything, the companion of [Appellant], (King) could not say that [Appellant] shot anyone or that he pointed the gun at anyone, and the last person at the scene (Roberts), testified that neither of the two men that he was wrestling with, the deceased and [Appellant], was the gunman who was doing the shooting?

VII. Where a [trial] court states factors considered in fashioning a sentence that are not supported by the record, is [Appellant] entitled to a new sentence?

Appellant's Brief at 5-6.

For purposes of clarity and ease of analysis, we will first address Appellant's second issue that the trial court erred in qualifying William Best as an expert witness. Appellant's Brief at 32-36. Appellant argues that the trial court erred in concluding that Mr. Best had a reasonably specialized knowledge as to the subject matter for which he testified. *Id*. Specifically, Appellant claims that Mr. Best had no specialized knowledge or training in x-ray technology, and therefore should not have been permitted to testify as an expert regarding the size of the bullets in Elmore's body, based solely on his examination of x-ray images of the bullets. *Id*.

"The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion. The standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable

pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. A witness does not need formal education on the subject matter of the testimony, and may be qualified to render an expert opinion based on training and experience." ***Commonwealth v. Serge***, 837 A.2d 1255, 1259 (Pa. Super. 2003); Pa.R.E. 702.

Here, Appellant objects to the testimony of Mr. William Best as the Commonwealth's ballistics expert. Appellant claims that Mr. Best had no training or experience in radiology, and had never identified bullet caliber based on examination of x-rays. Appellant argues therefore that Mr. Best was not qualified to testify as to the caliber of the bullets embedded in Mr. Elmore's body based on an x-ray analysis. The trial court however, disagreed, explaining that "Mr. Best was not interpreting the x-ray, but simply taking measurements of an object displayed on the x-ray, which was within his field of expertise." Trial Court Opinion, 3/6/13, at 22. We find no abuse of discretion in the trial court's determination that Mr. Best was qualified to testify as a ballistics expert. *See generally*, N.T., 9/10/12, at 455-467.

At trial, Mr. Best's testimony was limited to opining on the caliber of the bullets in Mr. Elmore's body, based on a measurement of the length and width of the x-ray image. *Id*. Mr. Best testified that he received an education in forensic science and training in firearm and tool mark

examination. *Id*. He additionally testified that he had previously qualified as a ballistics expert, and that he had taken "thousands of measurements" on bullets and employed the same methodology in measuring the x-ray image of the bullet. We conclude, here, that Mr. Best had a reasonable pretension to specialized knowledge in ballistics, and was properly qualified as an expert in that field.

"[O]nce an expert is qualified to testify, the weight to be given his testimony is a matter for the jury." ***Commonwealth v. Harris***, 817 A.2d 1033, 1054 (Pa. 2002). Appellant was given the opportunity to, and did in fact conduct a rigorous cross-examination of Mr. Best regarding the limitations of measuring a bullet from an x-ray image, to discredit his methodology and conclusions. N.T, 9/10/12, at 479-486. Moreover, Appellant was given the opportunity to present his own expert to refute Mr. Best's testimony. Appellant opted not to do so. *See* Trial Court Opinion, 3/6/13, at 20; ***In re D.Y.***, 34 A.3d 177, 183 (Pa. Super. 2011) ("Once expert testimony has been admitted, the rules of evidence then place the full burden of exploration of facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination [;] [i]t is thus the burden of opposing counsel to explore and expose any weaknesses in the underpinnings of the expert's opinion.") (citations omitted); ***Commonwealth v. Petroll***, 696 A.2d 817, 835 (Pa. Super. 1997) (incorrect calculations in an expert's analysis did not disqualify

him from providing expert testimony as it did not implicate his qualification to testify as an expert but rather went to the weight to be accorded his testimony, a matter to be determined by the jury). Given the foregoing, we conclude that the trial court did not abuse its discretion in admitting Mr. Best as a ballistics expert.

Appellant next asserts that the trial court erred in admitting into evidence the .38 caliber bullets found in Appellant's pocket at the time of his arrest. Appellant's Brief at 27-32. Appellant argues that the bullets were inadmissible because the Commonwealth produced only speculative evidence that a .38 caliber weapon was used in the commission of the crime, given Mr. Best's testimony that he could not determine, from the x-ray image, whether Elmore was shot with a .38 or .32 caliber. Appellant contends that since there was no evidence other than speculation that a .38 caliber bullet was used, the .38 caliber bullets found in his pocket should not have been admitted.

"Admission of evidence ... rests within the sound discretion of the trial court, which must balance evidentiary value against the potential dangers of unfairly prejudicing the accused, inflaming the passions of the jury, or confusing the jury." ***Commonwealth v. Bryant***, 67 A.3d 716, 726, (Pa. 2013) (citations and internal quotation marks omitted). Evidence that is not relevant is not admissible. Pa.R.E. 402. Relevant evidence is that which "has any tendency to make a fact more or less probable than it would be

without the evidence" and "the fact is of consequence in determining the action." Pa.R.E. 401.

> Relevance does not mean evidence is automatically admissible, however. Such evidence is only admissible where the probative value of the evidence outweighs its prejudicial impact. ... [R]elevant evidence may nevertheless 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. Because all relevant Commonwealth evidence is meant to prejudice a defendant, [however] exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.

Commonwealth v. Owens, 929 A.2d 1187, 1190-1191 (Pa. Super. 2007) (citations and internal quotations omitted).

"With regard to the admission of weapons evidence, such evidence is clearly admissible where it can be shown that the evidence was used in the crime charged. Challenges to the admissibility of weapons evidence often occur, however, where, as here, the evidence cannot be positively identified as related to the crime." ***Owens***, 929 A.2d at 1191. "The general rule is that where a weapon can not be specifically linked to a crime, such weapon is not admissible as evidence." ***Commonwealth v. Robinson***, 721 A.2d 344, 351 (1998). "The exception to this general rule is where the accused had a weapon or implement suitable to the commission of the crime charged. [This weapon] is always a proper ingredient of the case for the prosecution." ***Owens***, 929 A.2d at 1191 (finding shotgun shells seized from the defendant's home relevant even though not from weapon used in crime,

since such evidence forms part of the history and natural development of the events, and handgun parts and ammunition found were also relevant as tending to prove that defendant had weapons similar to the ones used in the perpetration of the crime).

Here, the trial court explained its decision to admit the .38 caliber bullets into evidence as follows:

> In the instant case, [Appellant] was found in possession of six .38 caliber live bullets on his person at the time of his arrest eight days after the shooting. The victim, Roberts, described the weapon in [Appellant's] possession at the time of the shooting as a revolver. Both Detective Sergeant Roberts and ballistics expert Best indicated that revolvers do not eject spent shell casings, which explained why only .45 caliber spent casings were found at the scene. Mr. Best further indicated that the length-by-width ratio between .38 caliber and .32 caliber ammunition is nearly identical and that he could not determine conclusively that the bullet shown on Elmore's x-ray was a .38 caliber or .32 caliber. ... Although the caliber of bullet in Elmore's body could not be positively identified, evidence that [Appellant] was in possession of six .38 caliber live rounds tended to prove that [Appellant] had ammunition similar to that depicted on Elmore's x-ray, and any uncertainty regarding the ammunition did not affect the admissibility but only the weight of such evidence.

Trial Court Opinion, 3/6/13, at 23-27.

We agree with the trial court that the .38 bullets found on Appellant at the time of his arrest were admissible at trial. "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." ***Owens***,

929 A.2d at 1191 *quoting* ***Commonwealth v. Broaster***, 863 A.2d 588, 592(Pa. Super. 2004). Although Mr. Best stated that he did not know whether the bullet in Mr. Elmore's body was a .32 or a .38 caliber, he testified that "based on the length to width ra[t]io of the [x-ray] image, and the length to width ratio of known 45 caliber standards, I can exclude the [x-ray] image as being a 45 caliber." N.T., 9/10/12, at 472-473. In addition to excluding the bullet as belonging to Mr. Roberts' .45 caliber pistol, Mr. Best testified that, based on his measurements, he was able to exclude various other ammunition, to conclude that the bullet in Mr. Elmore's body was either a .38 or .32 caliber. *Id*. at 472-478.

Based on the foregoing, we find no error in the trial court's decision to admit the .38 bullets found in Appellant's pocket, since the Commonwealth demonstrated that a weapon with similar bullets was used in the commission of the crime. "Uncertainty [as to] whether the weapons evidence was actually used in the crime goes to the weight of such evidence, not its admissibility." ***Owens***, 929 A.2d at 1191 (*citing* ***Commonwealth v. Williams***, 537 Pa. 1, 20, 640 A.2d 1251, 1260 (1994) (citation omitted)). ***See also Commonwealth v. Brown***, 71 A.3d 1009 (Pa. Super. 2013) (a 'scientific link' between the gun and the murder bullet is not necessary; rather, the evidence must only tend to prove that defendant had a similar weapon to the one used to murder the victim, and where the Commonwealth's firearm expert tended to prove that the gun admitted into

evidence was similar to the gun used in the murder, the admission of the gun and expert testimony comparing the bullets was proper); ***Commonwealth v. Reese***, 31 A.3d 708, 723 (Pa. Super. 2011) ("evidence that the defendant possessed a device or instrument that could have been the murder weapon is admissible"). We do not find that the potential prejudicial effect of the admitting the bullets into evidence outweighed their probative value, nor do we find any error in the trial court's decision to admit the bullets into evidence. ***Owens, supra.***

Appellant next argues that the trial court erred in not giving the jury a ***Kloiber*** charge to inform the jury that the testimony of one of the victims, Lucien Roberts, should be treated with caution. Appellant's Brief at 37-40. Appellant sought an instruction that the jury should view as suspect Mr. Roberts' identification of Appellant as one of the perpetrators, because Mr. Roberts was unable to positively identify Appellant as the shooter from a photographic lineup. *Id*. Appellant claims that upon viewing the lineup, Mr. Roberts could only say that the shooter was either one of two people represented, and that he would be able to better identify the perpetrator if he had a 3-D view and a better description. *Id*.

"A ***Kloiber*** instruction informs the jury that an eyewitness identification should be viewed with caution when either the witness did not have an opportunity to view the defendant clearly, equivocated on the identification of the defendant, or has had difficulties identifying the

defendant on prior occasions." ***Commonwealth v. Sanders***, 42 A.3d 325 (Pa. Super. 2012) *citing* ***Commonwealth v. Ali***, 608 Pa. 71, 10 A.3d 282, 303 (2010). In ***Commonwealth v. Kloiber***, 106 A.2d 820 (Pa. 1954), our Supreme Court held:

> [W]here the witness is not in a position to clearly observe the assailant, or ***he is not positive as to identity***, ***or his positive statements as to identity are weakened by qualification*** or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that ***the Court should warn the jury that the testimony as to identity must be received with caution***.

Kloiber, 106 A.2d at 826–27 (emphasis added). A ***Kloiber*** charge, however, is "distinct from the credibility determination a fact-finder must make." ***Commonwealth v. Collins***, 70 A.3d 1245, 1255 (Pa. Super. 2013). "We evaluate whether a ***Kloiber*** instruction is necessary under an abuse of discretion standard." ***Commonwealth v. Sanders***, 42 A.3d 325, 332-333 (Pa. Super. 2012).

Here, Appellant argues that Mr. Roberts was unable to positively identify Appellant from a photographic lineup and therefore a ***Kloiber*** instruction was warranted to instruct the jury to receive Mr. Roberts' identification testimony with caution. Our review of the record indicates that Mr. Roberts was shown several sets of photographic lineups, on two different days. N.T., 9/7/12, at 116-119, 127-146. Mr. Roberts was shown the first set of photographic lineups on July 14, 2011, when he was in police custody on the night of the shooting. *Id*. at 116. Having viewed the photographic

lineups presented to him on July 14, 2011, Mr. Roberts stated that two of the people in the lineups bore a "loose resemblance" to the perpetrators of the crime but that he would "have to see them in person to tell." *Id*. at 117-118. Mr. Roberts was unable to identify or select any of the perpetrators from the photographic lineup presented on July 14, 2011, and testimony at trial indicated that Appellant was not represented in those photographs. *Id.* at 145; 9/11/12, at 521.

On July 27, 2011, Mr. Roberts returned to the police station to view another photographic lineup, from which he identified and circled the individuals depicted in Photograph No. 2 and Photograph No. 7. Mr. Roberts testified to his July 27, 2011 identification as follows:

Appellant's Counsel:	... [W]hat you had was a ... sleeve of photographs right, and they were colored photographs ...
Lucien Roberts:	I'm pretty sure, yeah ...
Appellant's Counsel:	And then what happened is, one of the detectives asked you to look at that sleeve of photographs and ... see if the fellow, one of the fellows that was in the photograph was there, correct?
Lucien Roberts:	Yes.
	***
Appellant's Counsel:	And you circled not one, but two people?
Lucien Roberts:	Yes.

Appellant's Counsel: ... So what [the police detective] asked you do to is to identify the person that you saw, but ... you really couldn't narrow it down to one? You circled two people and said, "It's one of these two," right?

Lucien Roberts: Yes, and I saw more than one person, which I circled the people that I thought I saw.

Appellant's Counsel: Oh, so you are not saying it was the same person, the second circle that was in there?

Lucien Roberts: The person that was with him.

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Appellant's counsel: ... are you saying that ... in the lineup, you said, "This is one"... "and this is the other person... that was there?"

Lucien Roberts: Yes. That's what I am saying.

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Appellant's counsel: Did you tell [the detective] that it was either [photograph number] two or [photograph number] seven? Those photographs were one of the two actors that got away that night?

Lucien Roberts: Yes.

Appellant's counsel: You didn't say both?

Lucien Roberts: No. I said either two or seven. ... The one I circled I knew. I was sure of the one. The other one, I had no clue, because ... I'd never seen these guys in my life ...

Appellant's Counsel: But because you couldn't rule them out, you put a second circle on there, right?

Lucien Roberts:	Yes. ... Leave nothing to chance.
	***
Lucien Roberts:	I...at the time, I had no knowledge. I'm thinking that the guy – the two guys I circled and two and seven was two guys, one—two of the guys who were in the conflict with me and my friend that night.
	***
Assistant District Attorney:	Does it appear that [Appellant] is in that photo array?
Lucien Roberts:	Yes, it does.
Assistant District Attorney:	What number is he?
Lucien Roberts:	He's Number 7 right here.
	***
Assistant District Attorney:	You indicated previously that [Appellant] is Number 7.
Lucien Roberts:	Yes.
Assistant District Attorney:	Do you remember making the statement as to the descriptions here when you made that selection?
Lucien Roberts:	Yeah. I said I needed to see, like a person's height, or something like that.
Assistant District Attorney:	You wanted a 3-D of him?
Lucien Roberts:	Yes. I needed a description of their height and what they looked like, more than just a face on them.

Assistant District Attorney:	And [at] the preliminary hearing [held] on October 3, 2011 ... that's where you indicated that you ID'd [Appellant] as the shooter? Is that correct?
Lucien Roberts:	Yes

N.T., 9/7/12, at 127-130, 142-146.

Based on the foregoing testimony, Appellant argues that at the July 27, 2011 photographic lineup, Lucien Roberts was unable to determine whether Appellant was depicted in Photograph No. 2 or Photograph No. 7 without having a 3-D image to aid him. Accordingly, Appellant asserts that because Mr. Roberts failed to positively pinpoint Appellant in the photographic lineup, and his identification of Appellant was equivocal, a ***Kloiber*** instruction was warranted. N.T., 9/11/12, at 522.

The trial court disagreed with Appellant's contention that Mr. Roberts could not determine whether Appellant was depicted in Photograph No. 2 or Photograph No. 7 of the photographic lineup. The trial court explained:

> The victim, Roberts, did not fail to identify [Appellant] at the lineup. [Appellant] contends that the victim, Roberts' choices of two persons from the lineup indicated that he meant the perpetrator could have been either one or the other. However, this interpretation is contrary to the testimony of the victim, Roberts, and Detective Sergeant Roberts, both of whom stated that the victim, Roberts, selected [Appellant] and one other person from the photographic lineup. [Appellant] further ignores the undisputed testimony of Scott, Reddix, and King that placed [Appellant] at the scene. [Moreover, the trial court] provided an instruction on identification testimony ... directing the jury to consider the victim's opportunity to observe the assailant, whether a prior identification of [Appellant] had been made, whether the identification was positive or qualified by

> inconsistences, and whether the victim identified anyone else as the perpetrator.

Trial Court Opinion, 3/6/13, at 35-36.

Our careful review of the record supports the trial court's conclusion that Mr. Roberts identified two different perpetrators in the July 27, 2011 photographic lineup, did not equivocate in his identification of Appellant, and did not misidentify or fail to identify Appellant. Moreover, Detective Sergeant Roberts, who was present during the photographic lineup, testified that Lucien Roberts "circled two individuals and said 'those two were there.'" N.T., 9/10/12, at 424-425. Furthermore, Mr. Roberts testified that he had a clear, unobstructed view of Appellant at the crime scene, and the area was well-lit. N.T., 9/7/11, at 119. Although when viewing the July 27, 2011 photographic array, Mr. Roberts stated that he would benefit from a 3-D image to aid in his identification, he nevertheless positively identified Appellant as one of the perpetrators, and later repeated his identification at the preliminary hearing and at trial. For the foregoing reasons, we find no error in the trial court's determination that Mr. Roberts positively identified Appellant and that a ***Kloiber*** instruction cautioning the jury about Mr. Roberts' identification was not warranted.

In his fourth and fifth issues, Appellant challenges the sufficiency of the evidence. Appellant's Brief at 40-49.

> 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 [this] 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 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. Rushing, 71 A.3d 939, 966-967 (Pa. Super. 2013) (citations omitted).

Appellant argues that the evidence was insufficient to sustain his conviction for attempted murder because the Commonwealth failed to prove beyond a reasonable doubt that Appellant acted with a specific intent to kill. Appellant's Brief at 42-47. Additionally, Appellant claims the evidence was insufficient to sustain his convictions for aggravated assault because the Commonwealth failed to prove that he had the specific intent to cause serious bodily injury. *Id*.

"A conviction for attempted murder requires the Commonwealth to prove beyond a reasonable doubt that the defendant had the specific intent to kill and took a substantial step towards that goal. 18 Pa.C.S. §§ 901, 2502." ***Commonwealth v. Blakeney***, 946 A.2d 645, 652 (Pa. 2008). "We

have held that a specific intent to kill can be inferred from the circumstances surrounding an unlawful killing. Moreover, specific intent to kill may be inferred from the fact that the accused used a deadly weapon to inflict injury to a vital part of the victim's body." ***Commonwealth v. Robertson***, 874 A.2d 1200, 1207 (Pa. Super. 2005).

An individual is guilty of aggravated assault if he:

> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
>
> ***
>
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

18 Pa.C.S.A. § 2702. "For aggravated assault purposes, an 'attempt' is found where an accused who possesses the required, specific intent acts in a manner which constitutes a substantial step toward perpetrating a serious bodily injury upon another." ***Commonwealth v. Fortune***, 68 A.3d 980, 984 (Pa. Super. 2013).

In support of his sufficiency arguments, Appellant claims that he only discharged his gun as part of an attempt to rob the victims, not to kill them or cause serious bodily injury, thus negating the element of specific intent for attempted murder. Additionally, Appellant argues that the Commonwealth's forensic expert examined only one of the bullets in Elmore's body, which he could not conclusively identify as a .38 caliber bullet, and that the Commonwealth presented no medical testimony that

Elmore was shot in a vital area of his body, to sustain his conviction for attempted murder. With regard to his aggravated assault conviction, Appellant argues that there was nothing in his words or conduct from which the specific intent to cause serious bodily injury could be shown. For these reasons, Appellant claims that his attempted murder and aggravated assault convictions are unsupported by the evidence. We disagree.

The Commonwealth presented testimony that Appellant approached the victims from behind, and while attempting a robbery, Appellant pointed his gun at Mr. Elmore and Mr. Roberts and fired. N.T., 9/7/12, at 80-82. Mr. Elmore sustained six bullet wounds to his left hand, right calf, buttocks, and thigh. *Id*. at 166. The Commonwealth's ballistics expert testified that at least one of the bullets in Mr. Elmore's body was either a .32 or .38 caliber, and was not fired from Lucien Roberts' .45 caliber pistol. N.T., 9/10/12, at 472-473. Under the circumstances of this case, the jury could properly infer Appellant's specific intent to kill, as well as his specific intent to cause serious bodily injury, to sustain Appellant's convictions for attempted murder and aggravated assault. ***See Manley,*** 985 A.2d at 272 (Pa. Super. 2009) (where appellant attacked the victim, shooting multiple shots, five of which hit the victim and the victim was struck in the groin, thigh, shoulder and twice in the hand, although none of the bullets hit the victim in a vital organ, the jury could properly infer the specific intent to kill from these circumstances); ***Commonwealth v. Jackson***, 955 A.2d 441

(Pa. Super. 2008) (where a detective chased a defendant who was armed with a gun and shooting at a third person, and defendant turned, looked at the detective, and raised his arm toward the detective, the fact finder could have reasonably found that defendant took a substantial step toward intentionally killing the detective, even though defendant did not fire the gun); ***Commonwealth v. Wyche***, 467 A.2d 636 (Pa. Super. 1983) (where the appellant aggressively attacked the victim, shooting four shots, three of which hit their target, although the fatal bullet entered the victim through the buttock, the jury could properly infer the specific intent to kill from these circumstances).

Appellant additionally challenges the sufficiency of the evidence with regard to his conviction for carrying a firearm without a license because there was no evidence that he concealed a handgun. Appellant's Brief at 47-49. Appellant was found guilty of carrying a firearm without a license in violation of 18 Pa.C.S.A. § 6106, which reads in pertinent part:

> ... any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 Pa.C.S.A. § 6106(a)(1).

Thus, to sustain a conviction under Section 6106 for carrying a firearm without a license, the Commonwealth must establish that Appellant was carrying a firearm concealed on his person, and that he had no license to do

so.[2] Appellant's claim that the evidence was insufficient to demonstrate that he "concealed" a firearm "on or about his person" is belied by the record. Razaun King, who accompanied Appellant during the drive from Penn Hills to Aliquippa, testified that during that time he did not see Appellant carrying a gun until the encounter with the victims. N.T., 9/7/12, at 220. Lucien Roberts, one of the victims, testified that when Appellant approached him, Appellant's hand was under his t-shirt and that during the encounter, Appellant "pulled out a gun." *Id*. at 79-81. From this testimony, the jury could have reasonably inferred that Appellant carried the handgun concealed on or about his person. ***See Rushing, supra*** (resolving questions of credibility is a function of the trier of fact who is free to believe all, some, or none of the evidence); ***Commonwealth v. Barker***, 70 A.3d 849, 854 (Pa. Super. 2013) (In reviewing such sufficiency challenges, "we evaluate the record in the light most favorable to the verdict winner, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence[;][t]he Commonwealth need not establish guilt to a mathematical certainty").

Appellant next argues that the verdicts were against the weight of the evidence because the testimony of the Commonwealth's witnesses was not credible. Appellant's Brief at 49-55. Appellant argues that Brian Elmore,

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[2] Appellant does not dispute that he did not have a license to carry a firearm.

one of the witnesses, was too intoxicated to recollect any of the events surrounding the crime, that the testimony of Lucien Roberts was inconsistent and not credible, and that Appellant's companion, Razaun King, could not testify as to whether Appellant utilized his gun during the commission of the crime. Accordingly, Appellant argues that the verdict was against the weight of the evidence and a new trial was warranted.

The weight of the evidence is exclusively for the finder of fact, who is free to believe all, part, or none of the evidence, and to assess the credibility of the witnesses. ... An appellate court cannot substitute its judgment for that of the jury on issues of credibility." ***Commonwealth v. Palo***, 24 A.3d 1050, 1055 (Pa. Super. 2011). "Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim." ***Commonwealth v. Champney***, 832 A.2d 403, 408 (Pa. 2003) (citations omitted).

Here, in reaching its verdict, the jury apparently credited the testimony of Lucien Roberts and Razaun King, and found their testimony to be credible and their identification of Appellant to be reliable, despite cross-examination by Appellant designed to impeach their credibility. Appellant

asserts that Mr. King's testimony was self-serving, and Mr. Lucien's testimony was not credible because his account of the events at trial varied from his account to police at the time of the incident. However, "[such] [q]uestions concerning inconsistent testimony and improper motive go to the credibility of the witnesses. [An appellate court] cannot substitute its judgment for that of the [fact finder] on issues of credibility." ***Commonwealth v. DeJesus***, 860 A.2d 102, 107 (Pa. 2004). Moreover, both Mr. King and Mr. Roberts testified that they saw Appellant in possession of a silver handgun, and the inconsistencies in Mr. Roberts' testimony, e.g., with regard to whether he was tackled to the ground by one or two people, were minor in nature. N.T., 9/7/12, at 141, 213. ***See Commonwealth v. Simmons***, 662 A.2d 621 (Pa. 1995) (finding no merit to the appellant's assertion that inconsistencies in the witnesses' testimony rendered it incredible, since the inaccuracies claimed were only minor and witness credibility is solely for the jury to determine); ***Commonwealth v. Boxley***, 838 A.2d 608, 613 (Pa. 2003). The trial court found no merit to Appellant's post-sentence challenge to the weight of evidence, concluding that the verdict was not so contrary to the evidence as to shock the conscience. We find no abuse of discretion in this determination.

In his final issue, Appellant raises a challenge to the discretionary aspects of his sentence. Specifically, Appellant claims that the trial court relied on sentencing factors that are not supported by the record.

Appellant's Brief at 55-57. "A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." ***Commonwealth v. Hill***, 66 A.3d 359, 363 (Pa. Super. 2013) (citations omitted).

> An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test: (1) whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

Commonwealth v. Allen, 24 A.3d 1058, 1064 (Pa. Super. 2011).

Here, Appellant filed a timely direct appeal, and preserved his claims in a post-sentence motion. Appellant has complied with Pa.R.A.P. 2119(f) by including in his brief a concise statement of reasons relied upon for allowance of appeal. *See* Appellant's Brief at 26. We therefore proceed to determine whether Appellant has raised a substantial question for our review.

Appellant argues that the trial court abused its sentencing discretion by placing undue weight on factual findings that were unsupported by the record, in particular that Appellant had a stable family history which, Appellant claims, is unsupported by the record. Additionally, Appellant claims the trial court disregarded factors such as Appellant's rehabilitative, mental, physical, and emotional needs. *Id*. at 57. We conclude that

Appellant has raised a substantial question for our review. ***See Commonwealth v. Downing***, 990 A.2d 788, 792 (Pa. Super. 2010) (claim that the trial court relied on an improper factor raises a substantial question permitting review); ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004) (claim that the trial court relied upon incorrect factual assertions when imposing sentence asserts a substantial question).

"Sentencing in Pennsylvania is individualized, and requires the trial court to fashion a sentence that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. 42 Pa.C.S.A. § 9721(b). The trial court must also consider the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing." ***Commonwealth v. Baker***, 72 A.3d 652, 662-663 (Pa. Super. 2013) (citations and internal quotations omitted).

In reviewing a challenge to the discretionary aspects of sentencing, we evaluate the court's decision under an abuse of discretion standard. Additionally, this Court's review of the discretionary aspects of a sentence is confined by the statutory mandates of 42 Pa.C.S. § 9781(c) and (d). ***Commonwealth v. Dodge***, --- A.3d ----, 2013 WL 4829286 at 6-7 (Pa. Super. 2013).

Section 9781(c) provides:

> (c) Determination on appeal.—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:
>
> (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
>
> (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
>
> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
>
> In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S. § 9781(c).

Pursuant to 42 Pa.C.S. § 9781(d), in reviewing the record, appellate courts consider:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
>
> (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
>
> (3) The findings upon which the sentence was based.
>
> (4) The guidelines promulgated by the commission.

42 Pa.C.S.A. § 9781(d).

"When a sentencing court has reviewed a presentence investigation report, we presume that the court properly considered and weighed all relevant factors in fashioning the defendant's sentence." ***Baker***, 72 A.3d at

663. Here, at the sentencing hearing, the trial court reviewed the pre-sentence investigation report, and additionally heard statements from Appellant, his counsel, and the Commonwealth. N.T., 10/15/12, at 13-38. The trial court then explained that it had taken into consideration the sentencing guidelines, the victim impact statements, the circumstances and nature of the crime, and the protection of the community and society. *Id*. at 39-43. Additionally, the trial court stated that in making its sentencing determination, it considered Appellant's age, employment history, rehabilitative needs, criminal record, and expressions of remorse, contrary to Appellant's assertion that the trial court failed to give adequate consideration to mitigating factors. *Id*. The trial court additionally noted its consideration of Appellant's family circumstances in making its sentencing determination, explaining:

> The reasons for the sentence that I am imposing today is ...despite the fact that you appear to come from a somewhat of a stable home, if your two parents are teachers, teaching in Saudi Arabia, they are doing something right.
>
> I don't know if any other siblings of yours have gotten into the kind of trouble that you have gotten into, because there is nothing in front of me to indicate that, but I am going to assume they haven't.
>
> I don't know your parents, either, but they must be doing something right if they have been chosen to teach English to people in Saudi Arabia, and they must have been thinking of you, according to what you said, when they decided to home school you because they didn't want you to be exposed to exactly what you are here for today.

> It seems to me that they were trying to do the right thing for you, but something went wrong somewhere along the way, and you were drawn into what we call the bad elements in our society, and you got caught up in that, and you got caught up in carrying a gun and perhaps dealing in drugs.

Id. at 42-43.

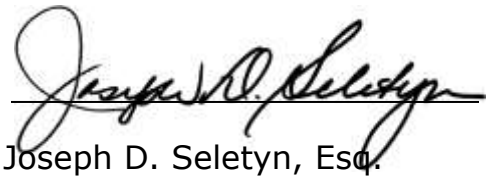
Appellant claims that the trial court's determination that Appellant had a stable family history is unsupported. This assertion is belied by the record. At the sentencing hearing, Appellant stated that he lived with his mother until he was seventeen years old, and was home schooled by his parents until 2007, in an effort by his parents not to "expose [him] to the negativity of high school." N.T., 10/15/12, at 14-15, 27. Moreover, Appellant acknowledged that with regard to his criminal history, "this is not what [my family] raised me to be." *Id*. Although Appellant cites his lack of parental supervision after the age of seventeen as contributing to his criminal behavior, the trial court's conclusion that Appellant came from a stable family background is supported by the record. We may not re-weigh the significance placed on each sentencing factor by the trial court, and find no abuse of discretion in its sentencing determinations here. ***Commonwealth v. Williams***, 69 A.3d 735, 742 (Pa. Super. 2013); ***Commonwealth v. Minott***, 577 A.2d 928, 929 (Pa. Super. 1990) ("The discretion of the sentencing judge must be accorded great weight because he is in the best position to weigh various factors such as the nature of the crime, the

defendant's character, and the defendant's displays of remorse, defiance, or indifference.").

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013