

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DAVID SNYDER,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 625 EDA 2013

Appeal from the PCRA Order of February 8, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0305502-2003

BEFORE: GANTMAN, OLSON AND WECHT, JJ.

MEMORANDUM BY OLSON, J.:

FILED DECEMBER 24, 2013

Appellant, David Snyder, appeals *pro se* from the order entered on February 8, 2013 dismissing his petition filed under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

We previously outlined the factual history of this case as follows:

On November 11, 2002, the victims, Marcus Miller ("Miller"), Eric Lewis ("Lewis"), and David Lee ("Lee"), were leaning on parked cars a few feet away from a Chinese restaurant entrance that they had just left, when a group of five men, including [A]ppellant, passed by the victims. Miller testified that the five men were "looking at us all weird," which prompted Miller to say, "I smack [sic] the shit out of them." The five men entered the Chinese restaurant for a short period of time, then exited the [restaurant], and approached the victims. The victims had their backs to the five men, but heard one of them say, "Don't move." None of the victims moved and the five men opened fire. Miller testified he pushed Lewis out of the way, and the two started running toward Atlantic Street. Lewis was shot, but was able to reach the home of an ex-girlfriend, who called for an ambulance.

While Miller was attempting to escape, he turned to find Lee and was then shot in the back and fell in-between the cars.

Miller only actually saw one gun and was able to get a good look at the five men when he was lying on the ground. He identified them as the five men who previously passed by, looked at them "weird," and then entered the Chinese restaurant. After the shooting ceased, Miller heard one of the five men say, "They dead. We out." The assailants left, walking toward Venango Street. Miller got up and went across the street. He saw Lee fall as he was running away and heard him say, "Call 9-1-1." Miller checked on Lee and attempted to reach the home of Lee's mother, but he collapsed in the street in front of her house and was picked up by an ambulance.

All three victims were taken to the hospital to be treated, but Lee did not survive. The police brought two suspects into the hospital for Miller and Lewis to identify. At that time, Miller positively identified those two suspects as having been involved in the shooting. However, Miller testified that he was unable to recall identifying anyone while he was in the hospital and that he was on morphine at that time. The two suspects that were identified at the hospital were subsequently released because they were not involved in the shooting. Lewis was never able to positively identify any suspects, including [A]ppellant when he was seated as a defendant in the courtroom.

Police took into their possession the taped security footage from a video camera inside the Chinese restaurant which shows all of the assailants, who had just passed the victims on the street and entered the restaurant. Miller was able to positively identify two individuals that were depicted in still photographs created from the video tape as having been involved in the incident, one of which was [A]ppellant. However, when shown photographs of [A]ppellant that were not from the video stills, Miller was not able to identify him. Miller explained that he was able to make the identifications from the video stills based on the clothing that he remembers the shooters wearing. However, Miller claims that as time passed, he was better able to remember the events that took place on November 11, 2002 and the faces of the shooters.

Appellant was arrested on February 4, 2003 for possession of marijuana. Upon arrest, [A]ppellant gave a fake name to police.

Police did not learn his actual name until two hours after his arrest. After [A]ppellant's arrest, police conducted a line-up on February 21, 2003, where Miller identified [A]ppellant. Miller also identified [A]ppellant in court.

Commonwealth v. Snyder, 970 A.2d 478 (Pa. Super. 2009) (unpublished memorandum) at 3-6, *appeal denied*, 992 A.2d 124 (Pa. 2010) (internal citations omitted; second alteration in original).

Appellant was convicted of:

third[-]degree murder,¹ two counts of aggravated assault,² and conspiracy.³ The [trial court] imposed consecutive sentences of [20] to [40] years' incarceration, [7½] to [15] years' incarceration, and [6] to [12½] years' incarceration for the respective crimes. No direct appeal was taken and on June 13, 2006, [A]ppellant filed a petition for relief under the [PCRA] seeking a reinstatement of his direct appeal rights. On September 22, 2006, the trial court reinstated his appeal rights, *nunc pro tunc*.

Id. at 1-2.

We affirmed the judgment of sentence. **Id.** at 9. On April 11, 2011, Appellant filed a timely *pro se* PCRA petition. The PCRA court appointed Attorney Janis Smarro to represent Appellant. On July 9, 2012, Attorney Smarro filed a no-merit letter pursuant to **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988), and **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). Appellant filed a response to the no-merit letter and Attorney Smarro filed a reply and an amended petition to withdraw as

¹ 18 Pa.C.S.A. § 2502(c).

² 18 Pa.C.S.A. § 2702(a)(1).

³ 18 Pa.C.S.A. § 903.

counsel. On January 7, 2013, the PCRA court entertained argument on Attorney Smarro's petition to withdraw and thereafter notified Appellant that it intended to dismiss his petition without an evidentiary hearing pursuant to Pennsylvania Rule of Criminal Procedure 907(1). On February 8, 2013, the PCRA court granted Attorney Smarro's petition to withdraw and dismissed Appellant's PCRA petition. This timely appeal followed.⁴

Appellant presents three issues for our review:⁵

1. Whether [the PCRA court] erred [by finding no merit to A]ppellant's claim of trial counsel['s] ineffectiveness for failing to object to his client being found guilty of [] conspiracy to commit an unintentional crime of [] third[-]degree murder where [A]ppellant was found not guilty of a [] weapons offense and two counts of attempted murder, therefore, [] the jury's verdict was that [Appellant] was not [] the shooter and this [guilty] verdict [for] third[-]degree [murder] stood on conspiracy grounds and conspiracy grounds alone.
2. Did the [PCRA court] err in also [finding no merit to A]ppellant's claim of trial counsel's ineffectiveness to secure expert witness testimony where there is an enormous amount of evidence in the case at bar suggesting that administrators['] behaviors influence the witness's choice in making identification[?]
3. Whether [the PCRA court] erred in [] finding [no merit in A]ppellant's claim that trial counsel was ineffective for failing to object to prosecutorial misconduct claim[,] where [the] prosecutor directly told the jury to find [A]ppellant guilty not [based upon] the evidence that the Commonwealth

⁴ On February 26, 2013, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). **See** Pa.R.A.P. 1925(b). Appellant filed his concise statement on or before March 11, 2013. The PCRA court issued its Rule 1925(a) opinion on August 7, 2013.

⁵ We have re-numbered the issues for ease of disposition.

presented, but based [upon] the fact that [A]ppellant was present at the scene of the crime and was seen [on the restaurant's] video surveillance[.]

Appellant's Brief at 6 (internal quotation marks omitted).

As most PCRA appeals involve mixed questions of fact and law, "[o]ur standard of review of a [PCRA] court order granting or denying relief under the PCRA calls upon us to [consider] whether the determination of the PCRA court is supported by the evidence of record and is free of legal error." **Commonwealth v. Barndt**, 74 A.3d 185, 191-192 (Pa. Super. 2013) (internal quotation marks and citation omitted). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." **Commonwealth v. Cintora**, 69 A.3d 759, 762 (Pa. Super. 2013) (citation omitted).

"Prior to addressing the substance of [Appellant's arguments] we must determine whether [he] properly preserved [the issues]. An appellant's failure to include an issue in his Rule 1925(b) [concise] statement [of errors complained of on appeal ('concise statement')] waives that issue for purposes of appellate review." **Madrid v. Alpine Mountain Corp.**, 24 A.3d 380, 382 (Pa. Super. 2011) (citation omitted).

Appellant's concise statement reads, in its entirety:

Whether[the] PCRA court erred when it denied [Appellant's] claim challenging his trial counsel being ineffective when he failed to object to prosecution misconduct, when the prosecutor informed the jury that because the [Appellant] was present or seen in front of the Chinese [restaurant] when the crime

occurred[] the [Appellant] was guilty of participating in the killing of the [victims].

Concise Statement, 3/11/13. Appellant did not include his first or second issues raised on appeal in his concise statement. Therefore, they are waived and we will not address their merits.

Appellant did preserve his third issue on appeal, alleging his counsel was ineffective for failing to object to the Commonwealth's closing argument. A "defendant's right to counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution is violated where counsel's performance so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." **Commonwealth v. Simpson**, 66 A.3d 253, 260 (Pa. 2013) (internal quotation marks and citation omitted). "Counsel is presumed to be effective." **Commonwealth v. Bennett**, 57 A.3d 1185, 1195 (Pa. 2012) (citation omitted).

In order to overcome the presumption that trial counsel was effective, Appellant must establish that "(1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his client's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different." **Commonwealth v. Luster**, 71 A.3d 1029, 1039 (Pa. Super. 2013) (internal alterations, quotation marks, and citation omitted). "The burden of proving ineffectiveness rests

with the appellant,” and “[t]he failure to satisfy any one of the prongs of the test for ineffective assistance of counsel requires rejection of the claim.” ***Commonwealth v. Hill***, 42 A.3d 1085, 1089-1090 (Pa. Super. 2012), *appeal granted on other grounds*, 58 A.3d 749 (Pa. 2012) (citations omitted).

Appellant argues that his trial counsel was ineffective for failing to object to the prosecutor’s closing argument. “[R]eversible error arises from a prosecutor’s comments only where their unavoidable effect is to prejudice the jurors, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict.” ***Commonwealth v. Busanet***, 54 A.3d 35, 64 (Pa. 2012) (citation omitted).

The Commonwealth’s closing argument included the following passages:

[Defense counsel] talked about, in his opening and closing, that I have a bunch of paints over there. And [he’s] right; I do. Every time somebody got up there and gave an answer, it was a stroke of a brush. Every time an expert gave an opinion, it was another stroke. Every time you saw a photograph, there it goes again. Every time there was a casing or a bullet out on that scene, there was another stroke.

But the portrait that’s painted is right there on the screen. The portrait that is painted, these two defendants^[6] — you see them sitting there just as **you see them standing there in the Chinese [restaurant]? They did that crime.**

If they were in that Chinese [restaurant], then you know

⁶ Appellant was tried together with his co-defendant, Stephen Jones.

they participated, assisted, conspired, and killed David Lee, shot at Marcus Miller, injuring him, and shot at Eric Lewis.

You have basically testimony, ballistics, video, and photographs. The testimony in this case is not inconsistent. There is nothing inconsistent about it.

N.T., 3/15/05, at 59-60 (emphasis added).

And Marcus Miller recognizes these two defendants from that night.

If we can put the stills and photo array up.

And there is a distinction between the photo array, which has two dimensional flat pictures, and going to a lineup. When you go to a lineup, people are in color; they're 3D; they're like I am in front of you. They walk around. They have facial expressions. You can see them. You can see their — the color of their skin; the nuances of how they walk.

You see all of those things when you're at a lineup. You don't see that just looking at pictures. You don't see that.

As [defense counsel] says: Yeah, why not pick the kid with a big Band-Aid on then? Clearly, he is not recognizing [Appellant] or Stephen Jones in these photographs. That doesn't mean he doesn't know who shot him. It doesn't mean he can't recognize them if he saw them again. It simply means that in that forum, he didn't.

And if the tape is so suggestive as they like to point out, then I guess he should have, right? But the tape is not suggestive. The tape is not suggestive. The tape is merely — only thing better would have been if the tape faced outside and up towards the car.

But the tape shows you the people who went into that Chinese [restaurant], came out, and shot at these people. And if you find they're on the tape, then you find they're part of this conspiracy to shoot Marcus Miller, Eric Lewis, and David Lee and ultimately results in Mr. Lee's death.

So if we can bring up the stills, 45 and 62, and leave — look at these stills. Look at the people on them. Look at their height. Look at their facial features. You can determine it for yourself who's that person. Do you see the profile of [Appellant]? Look at the profile there.

N.T., 3/15/05, at 82-84 (emphasis added).

But you know based upon the evidence what their intent was and what they set out to do. Because as soon as they walked out of that Chinese [restaurant], in the time it would take to get up to where the cars are: [p]ow, pow, pow, pow, pow. You hear the gunshots. You hear the gunshots.

"Don't move" is all they said. Don't move. And then all of the shots ring out. There wasn't any pause. There wasn't any delay. It is because they're all acting together. These two defendants and the co-conspirators that they were with. And they are equally complicit for their own actions of the others that they were with.

David Lee had the right to live. And being 20, 21 years old is too young to go. That's the right that these two men and their friends took from David Lee.

There is one right that survives even in death, and that is the right to justice. Give David Lee justice. Look at this evidence, reevaluate the evidence in its entirety. Don't take it piecemeal, as [the] defense would like you to. Look at it together. Evaluate it together. **Look at the tape. Because if they're on the tape, they did this crime.**

N.T., 3/15/05, at 92-93 (emphasis added).

Appellant contends that the emphasized portions were improper argumentation and that his trial counsel should have objected to those portions of the prosecutor's closing argument. "Any challenged prosecutorial comment **must not be viewed in isolation**, but rather must be considered

in the context in which it was offered.” ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1146 (Pa. 2011) (emphasis in original; citation omitted).

“The prosecutor must be free to present his or her arguments with logical force and vigor.” ***Commonwealth v. Bryant***, 67 A.3d 716, 728 (Pa. 2013) (alteration and citation omitted). “[I]t is entirely proper for the prosecutor to summarize the evidence presented, to offer reasonable deductions and inferences from the evidence, and to argue that the evidence establishes the defendant’s guilt.” ***Commonwealth v. Thomas***, 54 A.3d 332, 338 (Pa. 2012) (citation omitted). A prosecutor may use oratorical flair and may respond to arguments made by defense counsel. ***Commonwealth v. Sneed***, 45 A.3d 1096, 1110 (Pa. 2012) (citation omitted).

When considered in context, the prosecutor was merely summarizing the evidence and offering reasonable inferences thereon. An essential element of any criminal offense is that the defendant committed the crime at issue. ***See Commonwealth v. Andre***, 17 A.3d 951, 962 (Pa. Super. 2011). The prosecutor’s statements regarding Appellant’s presence at the Chinese restaurant were meant to prove this element of the offenses charged. The statements did not urge the jury to find Appellant guilty merely because he was present. Rather, the prosecutor urged the jury to consider the photographs and video, along with the eyewitness identification of Appellant at trial, and conclude that the individuals depicted in the video, including Appellant, were the same individuals that committed the crime.

As the PCRA court stated:

In her closing argument, the trial prosecutor emphasized at least six independent factors, each of which was distinct from [Appellant's] "mere presence" at the crime scene, as reliable proof that [Appellant] was one of the individuals who participated in the shooting of Miller, Lewis[,] and Lee. The trial prosecutor highlighted how [Appellant] and his co-defendant appeared to hide guns in their possession while inside the Chinese restaurant; how the sounds of gunshots took place immediately after they left the restaurant; how the body language of the men inside the restaurant indicated that they were plotting a crime; that the ballistics evidence found at the scene demonstrated that the gunmen emerged from the restaurant and formed a horseshoe around Miller, Lewis[,] and Lee before opening fire; that Miller credibly identified [Appellant] as one of the shooters; and that [Appellant] was trying to hide his real identity by giving a false name to police when he was arrested on an unrelated drug charge a few months later. The trial prosecutor argued that [Appellant]'s guilt was established by a multitude of factors – not merely by his presence near the scene of the crime.

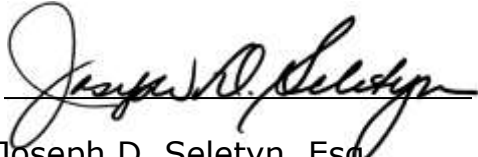
PCRA Court Opinion, 8/7/13, at 7.

In sum, the prosecutor's closing argument merely urged the jury to believe the Commonwealth's version of events and to find that Appellant indeed committed the criminal acts at issue. The closing arguments did not distort the factfinding process. Therefore, Appellant's underlying claim is meritless and trial counsel was not ineffective for failing to object to the prosecutor's closing arguments. **See *Luster***, 71 A.3d at 1039.

Order affirmed.

J-S70019-13

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013