NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
KRISTEN LYNN STRAUSSER	
Appellant	No. 709 MDA 2011

Appeal from the Judgment of Sentence of April 7, 2011
In the Court of Common Pleas of Columbia/Montour County
Criminal Division at No(s): CP-19-CR 0000381-2009
CP-19-CR-0000517-2009

BEFORE: STEVENS, P.J., PANELLA, J., and MUNDY, J.

MEMORANDUM BY PANELLA, J. Filed: January 3, 2013

Appellant, Kristen Lynn Strausser, appeals from the judgment of sentence entered April 7, 2011, by the Honorable Thomas A. James, Jr., in the Court of Common Pleas of Columbia/Montour County. We affirm.

The trial court aptly summarized the facts of this case as follows:

> Summarily, the facts of these two [consolidated] cases involve two arsons. [Strausser's] boyfriend, Colten Barrett ("Barrett"), had pleaded guilty to crimes arising out of the two arsons involved in [Strausser's] two cases and to several other arson related crimes in Columbia County and Lycoming County. The two fires in this appeal were the "Belles" fire and the "Albertson" fire. On March 16, 2009, [Strausser] and Barrett had discussed setting several fires and scouted out locations, including the Belles and Albertson houses. [Strausser] and Barrett were firefighters. They apparently wanted to have more opportunities to extinguish fires. On March 16, 2009, both [Strausser] and Barrett together went to the Belles house and set it afire. Mr. Belles escaped uninjured. ….

> On or about May 11, 2009, Barrett set the Albertson house afire, injuring Reuben and Pauline Albertson. [Strausser] and Barrett had conversations after March 16, 2009, and before the fire was set at the Albertson location. [Strausser] did not go to the Albertson fire location or help set the house afire. ….

Trial Court Opinion, 7/12/11, at 2. At docket number 381-CR-2009, arising from the Belles fire, Strausser was charged with criminal conspiracy to commit homicide, criminal conspiracy to commit aggravated assault, two counts of criminal conspiracy to commit arson, two counts of arson, criminal conspiracy to commit burglary, criminal conspiracy to commit recklessly endangering another person and criminal conspiracy to commit criminal mischief. At docket number 517-CR-2009, arising from the Albertson fire, Strausser was charged with two counts of criminal conspiracy to commit homicide, arson, two counts of criminal solicitation to commit arson and two counts of criminal conspiracy to commit arson. Following a jury trial, at which Barrett was granted immunity to testify against Strausser, Strausser was convicted of all charges. Following a hearing, on April 7, 2011, the trial court sentenced Strausser to an aggregate term of 17 to 34 years' imprisonment. On April 15, 2011, Strausser filed a post-sentence motion, which the trial court denied on April 19, 2011. This timely appeal followed.

On appeal, Strausser raises the following issues for our review:

A. The trial court erred as a matter of law in not granting Strausser's demurrer on the charges of conspiracy to commit homicide on the Belles criminal information and on the conspiracy to commit homicide and conspiracy to commit arson charges in the Albertson criminal information.

B. The trial court erred as a matter of law in not granting Strausser's post-trial motion seeking a judgment of acquittal

on the Albertson criminal information on the basis of the weight of the evidence.

C. The trial court erred as a matter of law in not suppressing the oral statements and written statements given by Kristen Strausser to the Pennsylvania State Police on the evening of May 11, 2009.

D. The trial court erred as a matter of law in not suppressing Strausser's second oral and written statement on May 16, 2009, as it was a product of an illegally obtained first statement and an illegal arrest.

E. The trial court erred as a matter of law in instructing the jury on criminal conspiracy to commit homicide, murder in the third degree, as it is impossible to conspire or intend to do something that is an unintended consequence.

F. The trial court erred as a matter of law or in its discretion in not granting a mistrial as to juror Glenda Demott or at a minimum conducting an in camera hearing to question whether said juror was sleeping during the second jury charge.

G. The trial court erred in its discretion in not granting a mistrial, as the defense notified the court that the alternate juror selected as a potential replacement at the conclusion of day two (2) had been listening and participating in a discussion among the Commonwealth's expert witnesses and had been making disparaging remarks and gestures directed at the defense during the presentation of the defense case. (This juror was ultimately selected by the remaining jurors as the foreperson of the jury).

H. The trial court erred as a matter of law or its discretion in allowing the Commonwealth to introduce into evidence Commonwealth exhibit C5, a blown up picture of Reuben Albertson receiving medical treatment shortly after being extracted from the burning residence.

I. The trial court erred in its discretion or as a matter of law in allowing the testimony of Franklin Bartlow [Albertson] concerning whether individuals could see into the Albertson home from the roadway adjacent to the home.

> J. The trial court erred in Strausser's cumulative sentence, as the sentence was not in compliance with the dictates of 42 [PA.CONS.STAT.ANN.] § 9721(b).

Appellant's Brief at 21-22.

We proceed to address Strausser's first issue raised on appeal, in which she argues that the trial court erred by not granting her demurrer on the charges of conspiracy to commit third degree murder on the Belles and Albertson information and on the conspiracy to commit arson on the Albertson information. Appellant's Brief at 34. Since Strausser did not rest following the trial court's adverse ruling, but proceeded to put on a case in defense, she has waived this issue on appeal. ***See Commonwealth v. Ilgenfritz***, 466 Pa. 345, 347 n.*, 353 A.2d 387, 388 n.* (1976). However, we will proceed to treat this issue as a properly preserved challenge to the sufficiency of the evidence. ***See Commonwealth v. Helsel***, 53 A.3d 906, 917 (Pa. Super. 2012) (citations omitted).

Our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact[-]finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in

> applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Id. at 917-918 (citation omitted).

"[T]o sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy. " ***Commonwealth v. Knox***, --- A.3d ---, 2012 WL 2877586 at *4 (Pa. Super., filed July 16, 2012) (citation omitted). "This overt act need not be committed by the defendant; it need only be committed by a co-conspirator." ***Id***.

> The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.

Id. (citation omitted).

"To establish the offense of third degree murder, the Commonwealth need only prove beyond a reasonable doubt that the defendant killed an individual, with legal malice, '*i.e.,* ... wickedness of disposition, hardness of

heart, wantonness, cruelty, recklessness of consequences, or a mind lacking regard for social duty.'" ***Commonwealth v. Devine***, 26 A.3d 1139, 1146 (Pa. Super. 2011) (citation omitted), ***appeal denied***, 42 A.3d 1059 (Pa. 2012).

Regarding the evidence in support of the conspiracy to commit third degree murder convictions, Strausser argues that the Commonwealth failed to establish that she acted with the requisite malice.[1] Although Strausser admits that her "intent was to set a fire for purposes of interior fire-fighting time," she incredulously argues that it "was not the natural and probable consequence of the co-conspirator's actions that setting the fire would cause death or serious bodily injury to the occupant of the residence." Appellant's Brief at 43. We flatly reject this outrageous and disingenuous argument. "Malice is established where an 'actor consciously disregard[s] an unjustified and extremely high risk that his actions might cause death or serious bodily harm.'" ***Devine***, 26 A.3d at 1146. Notwithstanding Strausser's belief that the residences to which she and Barrett set fire were unoccupied, we do not hesitate to find that Strausser consciously disregarded an unjustified and extremely high risk of death in setting fire to residential structures.

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[1] Although Strausser initially argues that conspiracy to commit third degree murder is not a viable charge in Pennsylvania, in the end, she concedes that "there are cases wherein the Superior Court has found that a Defendant can be charged with Conspiracy to Commit Third Degree Murder because death was the natural and probable consequence of such attack." Appellant's Brief, at 41.

To the extent that Strausser argues that the Commonwealth failed to establish there existed an agreement to commit third degree murder, this Court has held that "despite the fact that an individual co-conspirator did not contemplate a killing, where such killing is a natural and probable consequence of a co-conspirator's conduct, murder is not beyond the scope of the conspiracy." ***Commonwealth v. Johnson***, 719 A.2d 778, 786 (Pa. Super. 1998) (citation omitted), ***appeal denied***, 559 Pa. 689, 739 A.2d 1056 (1999). As a conspirator to set residential homes afire in order to satisfy her own desire for interior fire-fighting time, Strausser is liable for conspiracy to commit third degree murder because death is clearly the natural and probable consequence of arson. Accordingly, we find sufficient evidence to support Strausser's convictions of conspiracy to commit third degree murder.

Strausser additionally challenges the sufficiency of the evidence in support of her conviction of conspiracy to commit arson in the Albertson information. Strausser argues that Barrett's testimony that she told him to set the Albertson residence on fire is incredible, and therefore the Commonwealth did not prove that there was an agreement between Strausser and Barrett for him to set fire to the Albertson residence. Appellant's Brief at 38. In convicting Strausser of conspiracy to commit arson on the Albertson information, the jury obviously credited Barrett's testimony. We are bound by that credibility determination when reviewing a

sufficiency challenge on appeal. ***Commonwealth v. King***, 990 A.2d 1172, 1178 (Pa. Super. 2010). We therefore find Strausser's challenge to be without merit.

We likewise find no merit to Strausser's argument that her convictions under the Albertson information were against the weight of the evidence. Strausser preserved this issue by raising it in her post-sentence motion filed on April 15, 2011. Our standard of review is well-settled:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses.
>
> As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when "the figure of Justice totters on her pedestal, or when "the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience."
>
> Furthermore, 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. Cruz, 919 A.2d 279, 281-82 (Pa. Super. 2007) (citations omitted).

Herein, Strausser argues that her convictions on the Albertson information were against the weight of the evidence in that Barrett's testimony was "simply not credible." The trial court, after reviewing the record, concluded that the verdict did not shock its conscience and denied Strausser's challenge. ***See*** Order, 04/18/11. In light of the evidence discussed *supra*, we cannot conclude that this decision was an abuse of the trial court's discretion. Accordingly, we conclude that this issue on appeal merits no relief.

Strausser next argues that the trial court erred when it denied her motion to suppress her oral and written confession given to police on May 11, 2009. We review an order denying a motion to suppress evidence solely for a determination as to whether the evidence of record supports the factual findings, inferences and legal conclusions of the suppression court. ***See Commonwealth v. Taylor***, 850 A.2d 684, 686 (Pa. Super. 2004). If the record supports the suppression court's factual findings, we may reverse only for an error of law. ***Id***.

Following a suppression hearing, the trial court ultimately determined that Strausser was not in custody when she gave her May 11, 2009, statement to police regarding her involvement in the Belles fire. In so finding, the suppression court noted the following findings of fact:

> [Strausser] was approached by officers at her home on the date of her arrest. She was offered and declined to drive herself to the barracks for an interview[;] rather she rode with the officers. She was permitted to have and use her cell phone. She was …

> advised that she was free to leave if she desired. Rather, [Strausser] spoke with the officers concerning Mr. Barrett and herself and their involvement in two fires. She advised officers concerning Mr. Barrett's desires with respect to the fires and she then described how she and he located the sites of the fires. They further discussed how to the fires should be set and what would make them most effective. She was aware of the desire for a live rescue and interior time.

Suppression Court Opinion, 5/26/10 at 1-2.

> The test for determining whether a suspect is in custody is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted. This standard is an objective one, which takes into consideration the reasonable impression on the person being interrogated. The test does not depend upon the subjective intent of the law enforcement officer interrogator but instead focuses on whether the individual being interrogated reasonably believes his freedom of choice is being restricted. The fact that the police may have focused on the individual being questioned or that the interviewer believes the interviewee is a suspect is irrelevant to the issue of custody. A person is considered to be in custody for the purposes of ***Miranda*** when the officer's show of authority leads the person to believe that she was not free to decline the officer's request, or otherwise terminate the encounter.

Commonwealth v. Page, 965 A.2d 1212, 1217-1218 (Pa. Super. 2009) (internal quotes and citations omitted).

Applying the above standard to this case, we agree with the trial court that Strausser's interview with police on May 11, 2009, did not constitute custodial interrogation. In addition to the trial court's findings of fact, we note that the interview was conducted in a conference room, rather than an interview room, N.T., Suppression Hearing, 3/11/10 at 68, that Strausser was given a break during the interview, ***id***. at 70, and that Strausser signed a Pennsylvania State Police noncustodial written statement form which

advised her that she was free to leave at any time during the interview, ***id***. at 77. We additionally stress that although police did drive Strausser to the station for the interview in an unmarked police car, she was given the opportunity to drive her own vehicle, but declined. We simply find no evidence to support Strausser's claims that she was somehow deceived into accompanying the officers to the police station for questioning. As the record does not support Strausser's claim that she was in custody at the time she confessed to her involvement in the Belles fire, she is not entitled to the suppression of her pre-arrest statement.

Strausser additionally argues that her post-arrest confession should be suppressed as the product of an illegally obtained first statement and an illegal arrest. Appellant's Brief at 56. Following her arrest, *Strausser requested* an interview at the Columbia County Prison on May 16, 2009, with Corporal Michael Reoffer. Prior to the interview, Corporal Reoffer apprised Strausser of her ***Miranda*** rights. N.T., Suppression Hearing, 3/11/10 at 79-80. During the interview, Strausser voluntarily divulged additional details about her participation in the Belles and Albertson fires. She now argues that her second interview was "at the exploitation of the initial illegality [of the first interview] and was not purged of taint." Appellant's Brief at 60.

We find this issue to be without merit. As discussed *supra*, we find no illegality in the May 11, 2009, interview at the police station. As there is no basis to suppress Strausser's pre-arrest statements to police, and Strausser

was properly Mirandized prior to her custodial statement on May 16, 2009, we find no basis on which to suppress this statement.

Strausser next argues that the trial court erred when it instructed the jury on the charges of criminal conspiracy to commit homicide, murder in the third degree. Appellant's Brief at 61. However, as previously noted, Strausser concedes that "the Superior Court has found that a Defendant can be charged with Conspiracy to Commit Third Degree Murder because death was the natural and probable consequence of such attack." Appellant's Brief at 41 (*citing* ***Commonwealth v. La***, 640 A.2d 1336, 1345 (Pa. Super. 1994), ***appeal denied***, 540 Pa. 597, 655 A.2d 986 (1994); ***Commonwealth v. Wanamaker***, 444 A.2d 1176, 1178-1179 (Pa. Super. 1982)). Therefore, this claim is baseless.

In her next issue on appeal, Strausser contends that the trial court erred when it denied her motion for a mistrial based upon counsel's observation of a juror allegedly sleeping during the court's jury charge on conspiracy. Appellant's Brief, at 62. Defense counsel initially observed the juror allegedly sleeping during opening remarks. Although the trial court denied Strausser's motion for a mistrial at that time, the court indicated that it would continue to observe the juror during trial. N.T., Jury Trial, 1/26/11 at 73-74. Defense counsel again allegedly observed the juror asleep during the court's jury charge on conspiracy and renewed the request for a mistrial. The trial court, however, noted that, "I have not noticed. I think if she

closed her eyes it is de minimis in nature. I'm going to denying the motion. … Now I know she was paying attention." N.T., Jury Trial, 1/28/11 at 164. We note that the trial court has considerable discretion in controlling the conduct of a trial. ***Commonwealth v. Jones***, 461 A.2d 267, 268 (Pa. Super. 1983) (trial court's denial of mistrial after juror allegedly fell asleep during jury charge was not an abuse of discretion where trial court did not observe juror sleeping). Based upon the lower court's observations, we do not find that the court abused its discretion in denying the motion for mistrial.

Strausser additionally argues that the trial court erred in denying her motion for mistrial based upon counsel's observations of an alternate juror allegedly speaking with expert witnesses and making disparaging remarks about Strausser. Appellant's Brief at 64. It is well-settled that "trial judges must be given an opportunity to correct errors at the time they are made." ***Commonwealth v. Strunk***, 953 A.2d 577, 579 (Pa. Super. 2008) (citation omitted). "[A] party may not remain silent and afterwards complain of matters which, if erroneous, the court would have corrected." ***Id***. (citation omitted).

Instantly, the record indicates that defense counsel failed to raise an objection to the alternate juror's conduct at the time it was allegedly observed. Rather, counsel requested a mistrial only when it became clear that the alternate juror would be included in the jury on the last day of trial.

See N.T., Jury Trial, 1/28/11 at 3-7. As the matter was not immediately raised before the trial court when the objectionable conduct occurred, Strausser is precluded from seeking a remedy on appeal. We further note that the trial court found Strausser's allegations regarding the alternate juror to have been baseless. ***Id***. at 6

Strausser next challenges the trial court's admission into evidence an enlarged photograph of victim Reuben Albertson receiving medical treatment after he was rescued from his burning home. We note our applicable standard of review as follows:

> [t]he admissibility of photographs falls within the discretion of the trial court and only an abuse of that discretion will constitute reversible error. The test for determining whether photographs are admissible involves a two-step analysis. "First, the court must decide whether a photograph is inflammatory by its very nature. If the photograph is deemed inflammatory, the court must determine whether the essential evidentiary value of the photograph outweighs the likelihood that the photograph will improperly inflame the minds and passions of the jury."

Commonwealth v. Lowry, --- A.3d ----, 2012 WL 5286200 at *9 (Pa. Super., filed Oct. 26, 2012) (internal citations omitted).

The photograph at issue depicted victim Reuben Albertson covered in soot, but otherwise uninjured, and receiving medical assistance. The trial court noted that the picture was not gory and found it probative of whether or not the victim sustained serious bodily injury. Trial Court Opinion, 7/12/11 at 6-7. Further, the court found the probative value of the photograph far outweighed the prejudicial effect, if any. ***Id***. at 7. We find no error in the trial court's application of the above standard, and therefore

find Strausser's challenge to the admission of the photographs to be without merit.

Strausser next claims the trial court erred when it admitted witness testimony that you could not see into the Albertson porch from the roadway adjacent to the home. Appellant's Brief at 68. Strausser argues that it was error to admit the testimony because the witness, Franklin Bartlow Albertson, testified that *no one* could see the porch of the Albertson residence from the roadway, and thus testified to facts outside of his personal knowledge. This argument is unavailing. Our review of the transcript reveals that although counsel for the prosecution perhaps inartfully asked whether "one" could see the porch from the roadway, Bartlow Albertson clearly answered based upon his own personal recollection and observation. N.T., Jury Trial, 1/26/11 at 164-165. We therefore find no basis on which to preclude this relevant testimony.

Lastly, Strausser argues that the trial court erred when it failed to consider her rehabilitative needs when it sentenced her to 17 to 34 years' imprisonment. This claim, which raises a challenge to the discretionary aspects of Strausser's sentence, is without merit. Where, as here, "the sentencing court had the benefit of a pre-sentence investigation report ("PSI"), we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v.***

Moury, 992 A.2d 162, 171 (Pa. Super. 2010) (internal citations omitted). Accordingly, we find no abuse of the trial court's discretion.

Judgment of sentence affirmed. Jurisdiction relinquished.