NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RAYMOND ROBERT DAVIS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 911 MDA 2012

Appeal from the Judgment of Sentence of January 18, 2012,
in the Court of Common Pleas of Luzerne County,
Criminal Division, at No. CP-40-CR-0002292-2010

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: Filed: March 12, 2013

This case is a direct appeal from the judgment of sentence imposed on Appellant after he was convicted of three counts of possessing a controlled substance with the intent to deliver it ("PWID") and two counts of conspiracy to commit PWID/delivery. The controlled substances were cocaine, both crack and powder, and heroin. Appellant raises numerous issues involving the sufficiency of the evidence, due process, compulsory process, admission of evidence, and variance between the criminal information and the trial evidence. We affirm the judgment of sentence.

The record reveals the following facts. In 2010, Brian Pillonato was working with the Pennsylvania State Police as a confidential informant

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* Retired Senior Judge assigned to the Superior Court.

("CI"). At some point, Pillonato began going to a residence at 58 North Hancock Street, Wilkes-Barre ("Hancock Street") to buy drugs. Initially, he bought them at that address from Charlie Jackson and Tracy Smith. In March 2010, Pillonato encountered Appellant, whom Pillonato came to know as Gutter, at Hancock Street. This encounter seems to have happened while Jackson and Smith were sorting money and packages of drugs. Appellant gave his phone number to Pillonato and told him that he should call Appellant directly. Appellant indicated he would then tell Pillonato "what to do." N.T., 11/14/11, at 126. Pillonato's testimony indicated Appellant told Pillonato to call Appellant directly "because of the packages being messed up." ***Id.***

On April 7, 2010, Pennsylvania State Police arranged with Pillonato for him to conduct a controlled buy of drugs at the Hancock Street address. To that end, Pillonato called Appellant, and Appellant instructed him to go to Hancock Street. Appellant also told Pillonato to call Appellant back once Pillonato was inside the residence. Pillonato went to Hancock Street and, upon his arrival, he told the person or people he encountered there that he wanted to buy cocaine and heroin. Pillonato saw Charlie Jackson and Tracy Smith in the residence. Once inside the residence, Pillonato called Appellant.

While Pillonato made his initial April 7th call to Appellant, and received instructions to go to Hancock Street, Pennsylvania State Trooper Christopher Maguire was conducting surveillance of 27 Dougher Lane, Wilkes-Barre ("Dougher Lane") and Hancock Street. He was doing so in connection with

the aforementioned efforts to conduct a controlled buy. Maguire saw Appellant exit Dougher Lane and walk to the rear of Hancock Street. Maguire then lost sight of Appellant.

In the meantime, Pillonato was waiting inside Hancock Street for Appellant. Appellant arrived. Pillonato was then given bags of crack cocaine and heroin. The testimony is not clear as to whether Appellant or someone else physically gave the drugs to Pillonato. Pillonato eventually turned the drugs over to police.

During the time Pillonato was in the Hancock Street residence, he apparently sent a text message to Maguire indicating that a third party would be arriving to buy a large amount of heroin. Maguire and other police later conducted a traffic stop on that third party, Kayla Culver, after she had entered and then left Hancock Street. When police did so, they found that Culver possessed sixty bags of heroin. The drugs seized from Culver and those turned over to police by Pillonato bore a stamp of "Blue Print."

Culver testified about drug purchases she made at Hancock Street. In late March 2010, she went to that address to buy heroin. Once there, she gave money to Tracy Smith. Smith, Bryan Pearl and an additional person in the residence were arguing about "the count" of drugs and money "being off." ***Id.*** at 209. Culver also indicated that, during the argument and/or count, an individual whom Culver knew as "G" was "directing it." ***Id.*** She further explained that G was yelling about "the count" and was giving orders

of some type to several people, including Pearl and Smith. ***Id.*** at 194. Those people were following G's various orders and appeared to be threatened by him. Culver testified that G was Appellant.

Furthermore, Culver explained that, at some point, Smith had told Culver to call G anytime Culver wanted to order heroin. As a result, every time Culver placed an order to buy drugs at Hancock Street, she called G. G would give Culver "a specific time" and Culver would then go to the Hancock Street residence. ***Id.*** at 181. When Culver arrived, she would give her money to Smith or to whoever was there, and someone other than the person who took the money would then give Culver drugs. Culver explained that G himself never handed her drugs and was not usually present, though he was at Hancock Street on a few occasions. Sometimes when Culver was at the residence, she overheard Pearl talking to G on the telephone.

On April 7, 2010, the date of the aforementioned controlled buy involving Pillonato, Culver placed an order to buy drugs at Hancock Street. She then went to that address and Pearl gave her sixty packets of heroin. Culver left the residence, drove a distance and was stopped by the State Police. Police then seized the sixty bags of heroin we mentioned *supra*.

On April 15, 2010, Pillonato called Smith in order to buy crack. Smith told him that she would take care of the sale herself. Pillonato went to Hancock Street, bought crack and turned it over to Trooper Maguire.

On April 22, 2010, Pillonato called Appellant in order to buy crack. Pillonato then went to Hancock Street, called Appellant back and waited. Appellant arrived and sold Pillonato the crack. Pillonato gave that crack to police.

On April 26, 2010, Pillonato called Appellant and Appellant indicated he would have Pearl meet Pillonato. Pillonato then went to Hancock Street. At some point, both Appellant and Pearl were in the residence and had some type of discussion about six bundles of heroin. Pillonato then bought crack cocaine. Pearl handed the drugs to Pillonato.

Diane Malarkey testified that, from June 2009 through May 2010, she leased Dougher Lane to Appellant. She sent at least one piece of mail to him there. When she called him from time to time to collect the rent, he would tell her that he would send someone to pay it. Persons other than Appellant would then arrive to pay the amounts due. Neither Malarkey nor her husband installed a security camera at the address, but her husband once found that someone unknown to him had installed such a camera on the premises.

State Trooper Lamm testified that he conducted surveillance of Dougher Lane and Hancock Street during March and April 2010. On two occasions, March 2 and April 10, he saw Appellant exit and enter Dougher Lane. The context of the testimony indicated Appellant was alone when doing so.

On April 28, 2010, Maguire and other state police executed a search warrant at Dougher Lane. Upon arrival, police found the house contained a surveillance system with an outdoor camera allowing occupants to see people approaching the building from one or more directions. The indoor screen or monitor allowing occupants to conduct surveillance was in a first-floor room.

The residence was, according to Maguire, sparsely decorated, apparently having not too much furniture or related items other than one couch, one or more tables, a few televisions, the surveillance system, a mattress and box spring on the floor, a pillow, and a blanket or sheet. One bedroom contained nothing but garbage. It did not appear to Maguire that anyone was living at Dougher Lane. Bryan Pearl and his girlfriend, Angel Holly, were in the Dougher Lane residence when police arrived.

During the warrant search, police found and seized roughly 66 grams of heroin. The stamp on the heroin was "Blue Print." Testifying as both a fact witness and an expert in drug-trafficking, Maguire explained that the street-sale value of that heroin was approximately $20,000.00. Police also found and seized powder and crack cocaine totaling to some 75 grams. Maguire opined that, depending on the degree to which the cocaine might be diluted with a cutting agent, its street value was in the range of $7,000.00 to $20,000.00. Additionally, police seized a bag of procaine, a substance used as a cutting agent.

There were more items police took from Dougher Lane, including a box of nine millimeter bullets, a loaded magazine, $1,330.00 in cash, several hundred to a thousand bags or baggies, apparently empty, and at least one scale with residue of white and/or tan powder on it. Maguire opined that the residue on the scale indicated to him that the scale was used for weighing cocaine and/or heroin. He also explained that the bags/baggies were of the type often used to package crack or powder cocaine.

In the course of searching Dougher Lane, police found an envelope addressed to Appellant from Malarkey, rental receipts for April and May 2010, a rental agreement in Appellant's name for an address at 70 Kulp Street, Wilkes-Barre, and two receipts for money transfers containing Appellant's name but each indicating his address was in Virginia. One money-transfer receipt was dated in March 2010. The Commonwealth introduced evidence that Appellant listed yet another address, 19 Bank Street, Wilke-Barre, on his driver's license.

Police found several utility and tax bills for Dougher Lane in the names of persons other than Appellant. Maguire testified that those persons never appeared throughout the investigation/surveillance of Dougher Lane and Hancock Street.

Based on the amount and value of the drugs, along with the packaging material, scale(s), ammunition, money, surveillance system, and the appearance/condition of the interior of Dougher Lane (*i.e.*, that no one

seemed to be living there) Maguire offered his opinion that the address was used as a stash house—a location where a drug distributor stores controlled substances, but does not live, and from which the distributor then supplies other persons with drugs so that those persons can sell the drugs at a location or locations different than the stash house.

At some point, Appellant was arrested. He was tried, convicted of the charges noted *supra*, and sentenced. He then filed this timely appeal.

Appellant first challenges the sufficiency of the evidence. Regarding the three PWID offenses, all of which were alleged to have happened on April 28, 2010, Appellant claims April 28th was mentioned only one time during the trial—specifically, at a point when Maguire indicated he took pictures of the inside of 27 Dougher Lane during the execution of the search warrant at that address. Appellant also claims there was no evidence that he possessed drugs on the 28th. He concludes that none of the elements of PWID were proven for any PWID count.

With respect to his conspiracy convictions, Appellant maintains there was no evidence of an agreement between him and either Pearl or Smith, the persons with whom Appellant was alleged to have conspired. He notes Pearl did not testify. Appellant also points out that Smith testified for Appellant and indicated that, although she worked selling drugs with Pearl and G, she did not know Appellant and he was not G. Appellant also contends the evidence did not show an overt act by him or the alleged

coconspirators between April 7, 2010, and April 28, 2010, the date-range of the conspiracy counts.

For the reasons that follow, each of Appellant's sufficiency claims fail.

To secure a conviction for PWID, the Commonwealth must prove the defendant possessed a controlled substance with the intent to deliver it. 35 P.S. § 780-113(a)(30). The term "deliver" means the actual, constructive, or attempted transfer from one person to another. ***Id.*** § 780-102.

All the facts and circumstances surrounding a defendant's possession of drugs are relevant to determine whether the defendant had the intent to deliver those drugs. ***In the Interest of R.N.***, 951 A.2d 363, 367 (Pa. Super. 2008). Some particular facts and/or circumstances that may inform an evaluation of whether a defendant had the intent to deliver a controlled substance are the packaging of the substance, weaponry, large sums of cash, and the lack or presence of drug-use paraphernalia. ***Id.*** In contrast to drug-use paraphernalia, the presence of paraphernalia consistent with drug delivery (*e.g.*, scales and bags for packaging) tends to show the intent required under Section 780-113(a)(30). ***Commonwealth v. Keefer***, 487 A.2d 915, 918 (Pa. Super. 1985). Expert testimony is admissible to show an intent to deliver ***Commonwealth v. Carpenter***, 955 A.2d 411, 414 (Pa. Super. 2008).

The elements of conspiracy are set forth in the relevant statutory provisions as follows:

> **(a) Definition of conspiracy.--**A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
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> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime;
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> * * * * * * * *
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> **(e) Overt act.--**No person may be convicted of conspiracy to commit a crime unless an overt act in pursuant of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

18 Pa.C.S.A. § 903(a)(1), (e).

The Commonwealth need not demonstrate an explicit, formal agreement to prove a conspiracy but, instead, may show a criminal agreement by relying on inferences arising from the conduct, relations and circumstances of the parties. ***Commonwealth v. Johnson***, 985 A.2d 915, 920 (Pa. 2009).

This Court has discussed our review of sufficiency arguments in this way:

> When evaluating a sufficiency claim, our standard is whether, viewing all the evidence and reasonable inferences in the light

> most favorable to the Commonwealth, the factfinder reasonably could have determined that each element of the crime was established beyond a reasonable doubt. This Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. We do not weigh the evidence or make credibility determinations. Moreover, any doubts concerning a defendant's guilt were to be resolved by the factfinder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence.

Commonwealth v. King, 990 A.2d 1172, 1178 (Pa. Super. 2010) (internal citations omitted).

Initially, we note Appellant is wrong to contend that April 28, 2010, was mentioned only once during the trial. Appellant essentially ignores some 42 pages of direct examination during which Maguire testified specifically about the search and seizure of contraband involving Dougher Lane on April 28th. It is true, as Appellant asserts, that Maguire indicated he photographed Dougher Lane during that search. However, as we summarized *supra*, Maguire also provided considerably more testimony about the events of April 28th.

The facts of record set forth earlier in this memo, along with reasonable inferences from those facts, support several conclusions. Appellant leased Dougher Lane and, while trying to hide his connection with that address, used his leased property to possess and store valuable amounts of powder cocaine, crack cocaine and heroin. The amounts and value of the drugs along with the other contraband at Dougher Lane tended to show Appellant's intent to deliver the drugs by selling them.

Pillonato and Culver called Appellant on multiple occasions from April 7, 2010, to April 28, 2010. During those calls, Pillonato and Culver expressed their interest in buying cocaine and/or heroin. Appellant directed Pillonato and Culver to go to Hancock Street to buy the drugs in question. Appellant was sometimes present at the subsequent drug transactions and, on at least one occasion, gave drugs directly to Pillonato. Usually, however, other persons, including Pearl and Smith collected money from the buyers, Pillonato and Culver, and/or gave the drugs to those buyers.

The conduct, relations and circumstances between Appellant, Pillonato and Smith allowed for the reasonable inference that they intended to sell drugs, that they agreed to sell those drugs and, in fact, that they engaged in overt acts to accomplish their criminal intent. That is, they did, indeed, sell cocaine and heroin through their cooperative, criminal efforts. Smith told Culver to call Appellant to order drugs. Appellant told Pillanato that he (Appellant) would send Pearl to meet Pillonato to sell Pillonato drugs and, in fact, Pearl arrived at Hancock Street and did so. Appellant, Pearl and Smith discussed and/or argued about the correct count of money and drugs and, during those exchanges, Appellant gave various orders while Pearl and Smith complied with his directions. Pearl and/or Smith were present at Hancock Street and participated in sales to the buyers after Appellant instructed the buyers to go to the Hancock Street residence.

In sum, the totality of the circumstances supported the conclusion, beyond a reasonable doubt, that Appellant possessed the cocaine, both

crack and powder, and the heroin seized from his leased property on April 28, 2010. Moreover, the evidence also supported a finding beyond a reasonable doubt that Appellant conspired with Pearl and Smith to sell cocaine and heroin during the period of April 7, 2010, to April 28, 2010. Any doubts about Appellant's guilt, including any questions of weight and credibility were for the jury to decide. We certainly cannot say that the evidence was so weak and inconclusive that no probability of guilt could be based thereon. Appellant's sufficiency arguments are meritless.

Appellant argues his rights to due process and compulsory process were violated when the Commonwealth intimidated a potential defense witness, Pearl, into not testifying. More particularly, Appellant claims the Commonwealth intimidated Pearl in two ways: (1) by requiring, as part of his plea agreement, that he not testify for Appellant; and (2) by communicating to Pearl that his girlfriend, Holly, would not receive a disposition of probation-without-verdict ("PWV") on her criminal charges if Pearl testified on Appellant's behalf.[1]

The facts surrounding Appellant's foregoing claims are as follows. After Pearl indicated a desire to plead guilty, there was an in-court exchange involving him, his counsel, the Commonwealth, and the trial court. During that exchange, Pearl advised the court he was interested in testifying for

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[1] It appears the girlfriend's criminal charges arose from the same incidents as the case now before us.

Appellant but believed he could not do so because of the potential plea agreement with the Commonwealth. The Commonwealth revealed it did, in fact, want Pearl to agree that he would not testify for Appellant or, for that matter, the Commonwealth. After the court indicated it was unlikely to accept an agreement with such limitations, the Commonwealth withdrew its plea-agreement offer. At some later time, Pearl pled guilty. Though it is not clear to us, it seems he pled without any other plea agreement.

At some point, Appellant subpoenaed Pearl. Pearl appeared at trial but advised Appellant that he (Pearl) would not testify. When Appellant's counsel brought this situation to the court's attention, Pearl expressed his concern that Holly would not receive PWV if Pearl testified for Appellant. After some discussion in which the prosecutor indicated he did not "personally" care what happened to Holly's case, ***see*** N.T., 11/14/11, at 319, the following exchange occurred:

> Court: You can fairly say . . . that if [Pearl], in fact, testified that would not be something that is held against her?
>
> Commonwealth: No.
>
> Court: Okay. I think that's clearly stated then. Are we ready to proceed?

Id. at 321.

Based on the negative manner in which the foregoing question and answer were phrased, it is not apparent from the cold record if the

Commonwealth's answer of "No" meant that the Commonwealth would not hold against Holly Pearl's act of testifying for Appellant or if "No" meant that the Commonwealth could not fairly state that it would not hold against Holly Pearl's act of testifying. In its opinion, the trial court indicates the Commonwealth's answer meant the Commonwealth would not hold Pearl's act of testifying against Holly. Whether Pearl interpreted the Commonwealth's answer differently than the court did, interpreted the answer the same as the court did but simply did not believe the Commonwealth, or had some other factors in his mind, he subsequently did not testify, apparently having still refused to do so.

Appellant now argues the Commonwealth intimidated Pearl into not testifying by virtue of his potential plea agreement and by virtue of the situation involving Holly.

Appellant points to no place in the record where he preserved his claims that the any circumstances regarding the initial, potential plea agreement with Pearl, any possible hazard to Holly, and/or any alleged intimidation stemming from either of those situations violated Appellant's rights. As we noted *supra*, Appellant does cite discussion among Pearl, Pearl's counsel, the Commonwealth, and the trial court concerning the plea-agreement offer. Additionally, Appellant did advise the court about Pearl's reluctance to testify because of the potential risk to Holly. However, the portions of the record cited by Appellant merely reveal the court's efforts, successful or not, to address Pearl's concerns. Appellant simply does not

show us, and we have not found, any place where he lodged an objection to the Commonwealth's alleged intimidation, or to the court's efforts, or to any other circumstances that he now claims constituted a violation of his rights. As such, his arguments on this issue have been waived. Pa.R.A.P. 302(a), 2117(c), 2119(e).

Appellant next argues the court erred in admitting testimony from Culver. He contends Culver's testimony was irrelevant. In this vein, he claims Culver was unable to identify Appellant as G, the person whom the Commonwealth contended led the drug conspiracy charged in this case. Appellant also asserts that Culver's testimony related to events of March 2010 rather than April 2010, the latter being the month in which the offenses in this case were alleged to have occurred.

Appellant's argument is factually incorrect. Culver did identify Appellant as G. Also, Culver testified not just to an incident in March 2010 but also one on April 7, 2010, a date corresponding to the conspiracy charge against Appellant.

In its opinion, the trial court gave an analysis of its conclusion that Culver's testimony was relevant. In so doing, the court explained that the evidence from Culver tended to identify Appellant as G and tended to show he was involved in the conspiracy to sell drugs that was charged against him in the criminal information. In light of those probative tendencies, the court found Culver's testimony relevant under Pa.R.E. 401. The court then went

on to conclude that the probative value of Culver's testimony was not outweighed by any danger of unfair prejudice. Accordingly, the court opined that the testimony was not excludable under Pa.R.E. 403.

This Court will not disturb a trial court's decision to admit evidence unless the trial court erred by abusing its discretion. ***Commonwealth v. Hardy***, 918 A.2d 766, 776 (Pa. Super. 2007). An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law. ***Commonwealth v. Riley***, 19 A.3d 1146, 1149 (Pa. Super. 2011). It is an appellant's burden to persuade us the trial court erred and relief is due. ***Commonwealth v. Wrecks****,* 931 A.2d 717, 722 (Pa. Super. 2007). We will not construct an argument on an appellant's behalf. ***Hardy***, 918 A.2d at 771.

Appellant does not critique the trial court's reasoning. He does not demonstrate the court acted with bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law. Instead, he makes the incorrect factual assertions we noted *supra* and concludes Culver's testimony was not relevant. Appellant's argument does not persuade us the trial court erred or that relief is due. Thus, this claim fails.

In his next issue, Appellant maintains the trial court erred when it allowed the Commonwealth to introduce the documents such as utility and tax bills seized from Dougher Lane that contained the names of people other

than him. According to Appellant, he sublet his apartment at 27 Dougher Lane to those people. The court admitted the bills as being relevant to the Commonwealth's effort to prove Appellant took steps to conceal his connection with the Dougher Lane address and, in turn, hide his involvement with the drug selling that was the subject of this case. The court also reasoned that the weight of any such evidence was for the jurors to consider.

Once again, Appellant fails to explain how the trial court's reasoning was based on bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law. He merely asserts baldly that the documents were irrelevant because, according to him, the Commonwealth's theory of Appellant distancing himself was not a "matter in issue." Appellant's Brief at 16. Having demonstrated no abuse of discretion, Appellant is not entitled to a remedy.

We note, too, that Appellant contends the documents were wrongly admitted in that they were hearsay. He does not cite to any place in the record, and we have found no place, where he preserved a hearsay objection. The only objection he has cited and we have found was based on relevance. Therefore, the hearsay theory is waived, even though it supports his general issue that the documents were wrongly admitted. ***Commonwealth v. Rush***, 959 A.2d 945, 949 (Pa. Super. 2008) (indicating this Court cannot review a legal theory not presented to the trial court even

if that theory supports a general issue that was preserved and was supported by some other theory in the trial court).

Appellant's next claim is that the court should have granted a mistrial when the Commonwealth asked Appellant's alibi witness whether police seized $8,000.00 from the witness and whether the money was subsequently forfeited in a civil proceeding. The context of the testimony seems to indicate the seizure and forfeiture were not related to the incidents in this case. After the witness acknowledged the seizure and forfeiture, the Commonwealth then elicited testimony from him that, because of the seizure and forfeiture, he was upset with the police.

Appellant does not set forth and does not apply the legal principles governing requests for a mistrial. Having not developed his argument, he cannot succeed on this issue.

In his last issue, Appellant claims the trial court erred in not dismissing the PWID counts on the grounds that the Commonwealth's evidence did not match the date of each offense as listed in the criminal information.

Appellant's argument on this issue does not apply or even articulate the legal principles that govern situations where a defendant claims there was a discrepancy between the criminal information and the proof at trial. We will not build Appellant's argument for him. He is entitled to no relief on this allegation of error.

Based on our foregoing discussion, Appellant's claims fail. Therefore, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judge Ott concurs in the result.