J-S54012-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
TYRELL DAVIS,	:	
	:	
Appellant	:	No. 1681 EDA 2012

Appeal from the Judgment of Sentence January 13, 2012,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0010231-2010 - N6836130

BEFORE: DONOHUE, WECHT and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED OCTOBER 04, 2013**

Tyrell Davis ("Davis") appeals from the judgment of sentence entered following his convictions of robbery, conspiracy, and second-degree murder.[1] Following our review, we affirm.

The facts underlying Davis' convictions, as summarized by the trial court, are as follows:

> On May 27, 2010, [at] approximately 11:21 PM, Philadelphia Police Officer Joseph White received a radio call of an automobile accident … relaying that the vehicle was on fire. While en route, White was stopped a block away … by [Davis] who was sitting on the corner sidewalk, bleeding from his face, head and right foot. [Davis] stated that he had been shot. White immediately placed [Davis] in his patrol car and transported him to Temple University Hospital. White testified that prior to transporting [Davis] he observed the car crash scene where the vehicle was flipped over and its' [*sic*] engine block afire [*sic*].

[1] 18 Pa.C.S.A. §§ 3701(a)(1)(i), 903, 2502(b).

*Retired Senior Judge assigned to the Superior Court.

> After getting [Davis] into the patrol car[,] White asked [Davis] who shot him and [Davis] provided White with a description. [Davis] stated that his assailant was approximately 5'8" in height, a black male with braids, and he described the clothing the assailant was wearing. White stated that although injured[,] [Davis] was very coherent.
>
> While [Davis] was being treated at the hospital[,] White learned that [Davis] was not suffering from a gunshot wound, but rather that he suffered abrasions, burns and bruising resulting from being dragged from the vehicle involved in the crash. White also obtained additional information from [Davis] that he was with his friend Ziggy in the vehicle when he was shot and that his assailant was driving a green mini-wagon. [Davis] also added that his assailant approached him while he sat in the vehicle and asked [Davis] where they were from, and that when [Davis] responded that they were from 32nd Street and Allegheny Avenue, the male began shooting into the vehicle.
>
> Shortly after receiving this information from [Davis], White learned that a victim from the car crash, Maurice Williams, was brought to the hospital and pronounced dead. White first assumed that the decedent was [Davis'] friend Ziggy, however, after examining the body, White discovered that the body did not fit the description of Ziggy that [Davis] had given him. White related this to [Davis] and [Davis] responded that the decedent was the hack, i.e., the driver of a non-licensed taxi, who he and Ziggy hired at Broad Street and Allegheny Avenue. Shortly thereafter, Detective John Harkin, who assisted in the investigation, arrived and began to question [Davis] about the accident. [Davis] gave Detective Harkin a version of the events that differed from the version he previously gave White.
>
> Homicide Detective Thomas Gaul, the assigned investigator in this case, went directly to the scene of the incident with his partner where he observed

> the overturned vehicle that [the decedent] had been driving. … Gaul had been briefed that [the decedent] had been taken from the overturned vehicle and that [Davis] was found at the scene when Officer White arrived. … After processing the scene, Gaul returned to the homicide unit where he spoke briefly with [Davis]. Thereafter, Gaul returned [to the scene of the crime] to search for a firearm[,] but was unsuccessful. Upon returning to the homicide unit[,] Gaul attempted to reconcile contradictory statements that [Davis] gave about the incident. Gaul gave [Davis] ***Miranda*** warnings but did not question [Davis] until after he spoke with a potential witness to the incident, Jonathan Philson.
>
> Upon returning to the homicide unit[,] Gaul re-***Mirandized*** [Davis][,] who gave a statement that he and his friend Ziggy were looking for a hack whose vehicle they intended to take, and that they came upon [the decedent] who appeared to be an easy target. Ziggy stated that the theft would be 'sweet and easy.' According to [Davis'] statement, [the decedent] was directed by Ziggy to drive to a dark[,] vegetated area … where Ziggy produced a silver colored revolver, placed it to the back of [the decedent's] heard [*sic*], and stated 'Give up the keys, old head.' When [the decedent] hesitated[,] Ziggy repeated his demand and then he shot three to five times into the back of [the decedent's] head. [Davis] told Gaul that he was seated in the passenger side front seat beside the decedent and Ziggy was in the back seat. He further stated that [the decedent never placed the vehicle in park and so] after the shooting the vehicle [moved,] whereupon [Davis] jumped out and was injured.

Trial Court Opinion, 6/15/12, at 1-3.

At the conclusion of trial, the jury convicted Davis of the crimes set forth above. He was subsequently sentenced to life imprisonment on the murder conviction and 10 to 20 years of imprisonment on each of the

remaining convictions. The trial court denied Davis' post-trial motions and this timely appeal followed.

Davis presents one issue on appeal, which he states as follows: "Was not the evidence insufficient as a matter of law to sustain the verdicts as to second[-]degree murder, robbery and criminal conspiracy where there was no evidence that [Davis] acted as an accomplice or shared an intention with the shooter to commit a robbery of the decedent?" Appellant's Brief at 7.

Essentially, Davis' claim is that he can be found criminally liable for murder and robbery only if he is found to have been in a criminal conspiracy with Ziggy, but that there is insufficient evidence to support his conspiracy conviction.[2] Davis argues that the evidence establishes that he was merely present when Ziggy murdered the decedent in his attempt to steal the decedent's vehicle, and not that he was engaged in a conspiracy with Ziggy. Appellant's Brief at 14-20. For the following reasons, we do not agree.

We begin by recognizing that "our standard of review of sufficiency claims requires that 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." ***Commonwealth v. Barker***, 70 A.3d 849,

[2] Davis briefly argues that there was insufficient evidence to support a finding that he was an accomplice to Ziggy. Appellant's Brief at 14-15. Davis' conspiracy conviction, which we find to be sufficiently supported by the evidence, makes him culpable for the acts (*i.e.*, the robbery and murder) committed by his co-conspirator, Ziggy. ***See Lambert, infra.*** Thus, we need not consider whether the evidence supports a finding that Davis acted as an accomplice as defined in 18 Pa.C.S.A. § 306(c).

854 (Pa. Super. 2013) (citation omitted). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty." ***Id.***

Conspiracy is defined as follows:

> 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:
>
> > (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; or
> >
> > (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S.A. § 903(a).

"A conviction for criminal conspiracy … is sustained where the Commonwealth establishes that the defendant entered an agreement to commit or aid in an unlawful act with another person or persons with a shared criminal intent and an overt act was done in furtherance of the conspiracy." ***Commonwealth v. Lambert***, 795 A.2d 1010, 1016 (Pa. Super. 2002) (*en banc*) (citation omitted).

> Mere association with the perpetrators, mere presence at the scene, or mere knowledge of the crime is insufficient. Rather, the Commonwealth

> must prove that the defendant shared the criminal intent, *i.e.*, that the Appellant was an active participant in the criminal enterprise and that he had knowledge of the conspiratorial agreement. The defendant does not need to commit the overt act; a co-conspirator may commit the overt act.
>
> A conspiracy is almost always proved through circumstantial evidence. The conduct of the parties and the circumstances surrounding their conduct may create 'a web of evidence' linking the accused to the alleged conspiracy beyond a reasonable doubt. The evidence must, however, rise above mere suspicion or possibility of guilty collusion.

Id. (citations omitted). Furthermore, "once there is evidence of the presence of a conspiracy, conspirators are liable for acts of co-conspirators committed in furtherance of the conspiracy." ***Id.***

This Court has identified the following factors as germane to determining whether there is a "web of evidence" to support the finding of a conspiracy: "(1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy." ***Id.*** In listing these factors, however, we cautioned that these are "[a]mong the circumstances which are relevant, but not sufficient by themselves, to prove a corrupt confederation[.]" ***Id.***

In ***Lambert***, we affirmed the defendant's conspiracy conviction based upon the presence of these factors. In that case, the appellant's co-defendant broke into his girlfriend's house three times in two days. The first time, the co-defendant badly damaged the front door of the residence and

engaged in a physical fight with a man who was sleeping in his girlfriend's bed. The following day, the co-defendant returned, entering the residence through the door that he had broken the night before. The co-defendant found the same man in bed with his girlfriend, and they fought again. As they fought, the girlfriend's mother (who also resided in the house) took $300 from the co-defendant's pocket before the co-defendant fled. The final break in occurred later the same day, when the appellant, who was known to be a close friend with the co-defendant, drove the co-defendant to his girlfriend's house to retrieve his money. The co-defendant broke through the barrier that his girlfriend had placed in front of the front door and, once inside, proceeded to his girlfriend's mother's bedroom, where he demanded the return of his money while brandishing a gun. When the girlfriend's mother stated that she did not have his money, the co-defendant shot her in the head, killing her. The co-defendant proceeded to point the gun at his girlfriend and demand his money from her. Once she turned the money over, the co-defendant dragged her outside at gunpoint. During these events, the appellant was waiting by his car, which was double parked in front of the girlfriend's residence, only a few feet from the front door. When the co-defendant and girlfriend emerged from the house, the appellant urged the co-defendant to hurry and get into his car. The co-defendant released his girlfriend as he approached the appellant's car. As the co-

defendant entered the appellant's car, he turned and shot his girlfriend in the side.

In the aftermath of these events, the appellant was convicted of second-degree murder, burglary and conspiracy. On appeal, we considered the four factors outlined above and concluded that the evidence was sufficient to support the conspiracy conviction:

> The circumstantial evidence reflects that Appellant and Co-Defendant had a shared criminal plan of committing a burglary at [the girlfriend's] house. The plan contemplated a quick getaway as evidenced by Appellant keeping his car double-parked very close to the front door of the house with the passenger door in an open position.
>
> The plan contemplated the use of unlawful force as evidenced by what Appellant did while Co-Defendant used such force. The record reflects the front door of [the girlfriend's] house was very close to the street where Appellant was standing outside of his car door. Appellant observed Co-Defendant breaking down the front door and entering the home without the occupants' consent. The record does not reflect that Appellant said or did anything. Rather, the record reflects that Appellant simply stood outside of his double parked car, with the passenger door in an open position, and waited for Co-Defendant to enter and, then, to return. After the gun was shot, fatally wounding [girlfriend's mother], the record again fails to reflect that Appellant said or did anything. Rather, Appellant remained outside of his car and waited for Co-Defendant to return. When Co-Defendant dragged [his girlfriend] out of the house, Appellant encouraged Co-Defendant at least three times to hurry up. When Co-Defendant shot [his girlfriend], the record fails to reflect that Appellant did anything to assist [the girlfriend]. Rather, Appellant drove Co-Defendant away from the scene of the crime.

> This 'web of evidence' is woven together by virtue of Appellant's close association with Co-Defendant, Appellant's knowledge of the crime, Appellant's presence at the scene of the crime and Appellant's participation in the object of the conspiracy by supporting Co-Defendant in his commission of the burglary. Thus, the evidence is sufficient to support a jury's conclusion beyond a reasonable doubt that Appellant and Co-Defendant engaged in a criminal conspiracy to commit burglary, *i.e.*, what Co-Defendant and Appellant did was in accordance with a shared criminal intent and shared criminal plan to commit a burglary.

Id. at 1019-20.

The facts in the present case are similar to the facts presented in ***Lambert***. The evidence of record, when viewed in the light most favorable to the Commonwealth, establishes that at the time of the events in question, Davis had known Ziggy for two to three months and that Davis saw Ziggy every day; that on the night in question, Davis knew Ziggy intended to steal a car from a hack; that Davis knew Ziggy carried a gun and had shot someone only a few weeks before; that they chose the decedent because he looked "easy to take advantage of" and that Davis was present in the vehicle when Ziggy attempted to rob the decedent at gun point and shot him in the head. N.T., 11/1/11, at 61-68. As in ***Lambert***, despite his knowledge of Ziggy's criminal intentions, at no time did Davis attempt to dissuade Ziggy from his criminal plans or attempt to stop Ziggy from carrying them out. To the contrary, in full knowledge of Ziggy's plans Davis (both figuratively and

literally) went along for the ride. Accordingly, as in ***Lambert***, we conclude that this evidence is sufficient to support Davis' conviction.

Davis argues that he "could not have known at the time that he got in the cab that Ziggy intended to carjack or commit a robbery at the point of a gun" and therefore that Davis "did not possess the shared mental state that was necessary to make him a co-conspirator." Appellant's Brief at 15-16. He also argues that "there was likewise no evidence that [Davis] had any reason to believe that Ziggy was armed with a gun or that he intended to commit a robbery with it." ***Id.*** at 18. Davis concludes, "It is therefore inappropriate to impute malice for purposes of the second[-]degree murder charge to [Davis] in the absence of a nexus of common criminal intent with Ziggy to commit the underlying robbery." ***Id.*** at 18-19. Davis is mistaken. First, as we discussed above, there ***is*** evidence that Davis knew that Ziggy intended to steal the vehicle from the decedent and evidence that Davis knew Ziggy carried a gun and recently shot another person. N.T., 11/1/11, at 61-68.[3] Second, because we have found that the evidence is sufficient to support a finding that Davis engaged in a conspiracy with Ziggy, Davis is liable for the acts of his co-conspirator committed in furtherance of the

[3] We recognize that Davis testified to the contrary at trial; however, it is within the province of the jury as fact finder to make credibility determinations, and we, as an appellate court, may not disturb such determinations on appeal. ***See Commonwealth v. Lutes***, 793 A.2d 949, 960 (Pa. Super. 2002).

conspiracy. ***Lambert***, 795 A.2d at 1016. Thus, Davis is liable for the acts taken by Ziggy in furtherance of the objective of the conspiracy.

Davis points to ***Commonwealth v. Menginie***, 477 Pa. 156, 383 A.2d 870 (1978), ***Commonwealth v. Johnson***, 513 A.2d 476 (Pa. Super. 1986), and ***Commonwealth v. Wilson***, 449 Pa. 235, 296 A.2d 719 (1972) in support of his claim that he was "merely present" when Ziggy killed the decedent while robbing him. ***See*** Appellant's Brief at 16-18. We are not persuaded. In contrast to the present case, all three of these cases involve spontaneous actions by people other than the appellant. In ***Menginie***, a verbal confrontation between the occupants of two cars at a drive-in restaurant quickly escalated to a point where Menginie and all but one of the other occupants of the cars exited their vehicles, at which point the person who remained in the vehicle drew a gun and fatally shot a man. Menginie was convicted of, *inter alia*, voluntary manslaughter and conspiracy. On appeal, the Pennsylvania Supreme Court reversed his conspiracy conviction upon finding that the Commonwealth failed to present any evidence that Menginie or his companions planned the confrontation or that he "encouraged, acquiesced in, or even knew that the person in the rear set had a gun, or that he intended to use it." ***Menginie***, 477 Pa. at 160-61, 382 A.2d at 872.

In ***Johnson***, three men and a woman were exiting a bar at the precise moment the victim rode past the bar on his bicycle. One of the men with

Johnson said, "Here comes a white boy. Let's get him." ***Johnson***, 513 A.2d at 477. Within seconds of those words being spoken, another man (also not Johnson) pulled out a gun and fatally shot the victim. ***Id.*** Johnson was convicted of conspiracy, third-degree murder, and robbery. On appeal, we found that the conspiracy conviction could not stand because "there was no overt evidence of an agreement that included Johnson in which he assented to go along with the commission of the crime." ***Id.*** at 478.

In ***Wilson***, the appellant, Wilson, was meeting two friends at a bar. When he arrived, he found his friends seated at the far end of the bar. Before he reached his friends, Wilson was stopped by the victim, who invited Wilson to have a drink with him. They soon got into a dispute over who would pay for the drinks. The dispute escalated into a physical fight, at which point Wilson's friends joined in the brawl. At one point, the three friends were beating the victim as he lay on the floor. In an attempt to stop the fight, the bartender restrained Wilson. As Wilson was restrained, one of his friends stabbed the victim, and the victim ultimately died from these stab wounds. On appeal, the Supreme Court rejected the notion that Wilson could be held liable for his friend's actions on either an accomplice or conspiracy theory because,

> [t]here is no indication that, prior to entering the bar, the three men formed an intent to engage in an altercation either with the decedent or anyone. To the contrary, this fight was spontaneous and partly precipitated by the decedent. All witnesses agree that the appellant did not sit with his friends from

> the time he entered the bar until the time they entered the fight. There was no testimony to suggest that he in any way invited or encouraged his friends to join in the struggle after it had begun. More importantly, there is no evidence that he encouraged, acquiesced in, or was even aware of the use of the knife.

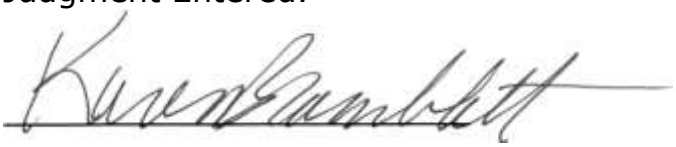
Id. at 238, 296 A.2d at 721. Simply, "the Commonwealth [] failed to establish any common understanding either explicit or implicit, formed either before or during the affray and that this failure is fatal to the case of the Commonwealth." ***Id.***

Thus, in all three of these cases, there was a lack of evidence of shared criminal intent between the appellants and the actors who committed the crimes because the situations developed in spontaneous and unanticipated ways. In contrast, in the present case, the evidence establishes that Davis knew of Ziggy's intention to steal the victim's car when he entered the victim's vehicle, and he knew that Ziggy would use a gun to accomplish his objective. This knowledge permits the finding that Davis "assented to go along with the commission of the crime." ***Johnson***, 513 A.2d at 478. We therefore do not agree with Davis' attempt to paint the circumstances of his case as a spontaneous occurrence similar to those in ***Menginie***, ***Johnson***, and ***Wilson***.

Having found no merit to Davis' claim, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Prothonotary

Date: 10/4/2013