NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. WAYNE M. BOWIE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2216 EDA 2012

Appeal from the Judgment of Sentence July 16, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012427-2011

BEFORE: BOWES, PANELLA, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: **FILED NOVEMBER 15, 2013**

Wayne M. Bowie appeals from the judgment of sentence of three years probation after the trial court found him guilty of perjury. We affirm.

The trial court delineated the pertinent factual background as follows.

> The Defendant, Wayne Bowie, and the [c]omplainant, his brother[,] Police Officer John Bowie[,] began having a "bad relationship" sometime in 2004 at which time the Defendant sued the complainant over a car. From this point until the instant case in 2011, the Defendant made numerous complaints to Internal Affairs regarding the [c]omplainant, and each brother filed at least one Protection From Abuse order against the other.
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> On May 18, 2011, Defendant Wayne Bowie went to Philadelphia Family Court to file a Protection from Abuse (PFA) petition against his brother, John Bowie. The facts alleged in the PFA were that on April 27, 2011 at "approximately 1:30 p.m., my brother, a police officer, followed me in his work car. He

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* Former Justice specially assigned to the Superior Court.

> pulled up behind me, and I saw him through my mirror. I went around the block and he followed me, passed by me in the car, and he pointed his finger at me. In October he followed me as I was going to a body shop. He pulled over in his cop car and patted his holster, and he simulated firing a gun at me. I filed a complaint with the police department and have yet to hearing [sic] anything from them. I believe he will follow through with his threats."
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> On May 29, 2011, the Defendant and the complainant in the instant matter, John Bowie, attended a hearing at 34 South 11th Street (Philadelphia Family Court) regarding the above described PFA. During the course of this hearing, the Defendant Wayne Bowie testified in support of the above described facts alleged in the PFA petition, specifically, that the incident in question occurred on April 27, 2011 between 1:00 and 1:30 in the afternoon. In his defense, John Bowie presented several witnesses at the PFA hearing who testified that he was in mandatory police training at the date and time he was alleged to have threatened the Defendant, Wayne Bowie. The PFA was subsequently dismissed.
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> In the instant matter, Sergeant John Crandley, Sergeant Patrick Curley and Officer Herberto Quintana each testified to seeing and interacting with the complainant, Police Officer John Bowie, at police training on the date and at the time John Bowie was alleged to have threatened the Defendant. The [c]omplainant, John Bowie[,] engaged in two [p]olice [o]fficer classes and subsequently took two examinations on the date and time in question.
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> The Defendant testified that the period around April 27, 2011 was a tumultuous time in his life due to health problems and the illness and subsequent death of his sister-in[-]law in Texas. He additionally testified that any error regarding the date of the incident was a product of his own confusion. Dr. Charles Bolno provided testimony for the [d]efense as to the Defendant's health problems and the fact that he had come to see him on April 28, 2011, the day after the alleged incident. He also testified that as a result of his depression, the Defendant was experiencing multiple symptoms including but not limited to forgetfulness.

Trial Court Opinion, 5/28/13, at 1-3 (internal citations omitted).

The trial court found Appellant guilty of perjury and sentenced him to three years probation. Appellant failed to file a post-sentence motion, but timely appealed. The court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the court authored its Pa.R.A.P. 1925(a) decision. The matter is now ready for this Court's consideration. Appellant raises the following issues for our review.

> I. Was the evidence sufficient to support the verdict as to perjury as to the element of perjury requiring knowledge of the falsity of the testimony at the time made?
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> II. Was the verdict against the weight of the evidence as to the element of perjury requiring knowledge of the falsity of the testimony at the time made?
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> III. Did the Trial Court err in granting the Commonwealth's Motion in Limine to Admit Other Acts Evidence and admitting such evidence at trial where the prejudice far outweighed the probative value of such evidence and merely showed the Defendant's propensity to file complaints against his brother?
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> IV. Did the Defendant receive a fair and impartial trial where the Trial Judge assisted the prosecutor by questioning the Commonwealth witness on rebuttal, Police Officer Clemens,[1] and interrogating and effectively cross examining the defense witness, Dr. Charles Bolno, after the prosecutor ceased her cross examination?

Appellant's brief at iii.

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[1] The record refers to the officer as Chris Clenens, not Clemens. Appellant refers to the officer as Officer Clemens throughout his brief.

Appellant's initial challenge is to the sufficiency of the evidence. In deciding a sufficiency challenge, "we must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt." ***Commonwealth v. Brown***, 52 A.3d 320, 323 (Pa.Super. 2012). Further, we must draw all reasonable inferences from the evidence in favor of the Commonwealth as the verdict-winner. ***Commonwealth v. Hopkins***, 67 A.3d 817, 820 (Pa.Super. 2013). "Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail." ***Brown***, ***supra*** at 323. "[T]he evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented." ***Id***.

The Commonwealth can meet its burden "by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." ***Id***. This Court cannot "re-weigh the evidence and substitute our judgment for that of the fact-finder." ***Id***. Additionally, "the entire record must be evaluated and all evidence actually received must be considered." ***Id***.

Appellant begins his argument by implying that charges were brought against Appellant because his brother is a police officer, and relaying several irrelevant facts for purposes of sufficiency review. We focus our analysis on the evidence introduced. Appellant concedes that the evidence established that John Bowie was in police training on the date that Appellant testified his brother engaged in threatening behavior. He also acknowledges that the evidence shows that Appellant's testimony was made under oath at an official proceeding. However, Appellant argues that the Commonwealth did not prove that Appellant had the requisite knowledge that his statements were false. In this regard, he contends that his testimony shows that he was simply mistaken as to the date and time of his brother's alleged threatening behavior.

The Commonwealth replies that Appellant's sufficiency argument is waived. In this regard, it asserts that Appellant failed to specify which element of perjury was not proven in his concise statement. We reject the Commonwealth's position. In ***Commonwealth v. Laboy***, 936 A.2d 1058 (Pa. 2007), our Supreme Court admonished this Court for too quickly finding 1925(b) waiver where the criminal case is not complex and the trial court adequately addressed the sufficiency claim. Instantly, this case involves a solitary conviction of perjury, is non-complex, and the trial court fully discussed the sufficiency of the evidence. Nevertheless, we find that the

Commonwealth introduced sufficient evidence to warrant Appellant's conviction.

"A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true." 18 Pa.C.S. § 4902(a). In addition, the "falsity of a statement may not be established by the uncorroborated testimony of a single witness." 18 Pa.C.S. § 4902(f). Appellant's knowledge of the falsity of his statements made under oath can be proven circumstantially. ***Commonwealth v. Karafin***, 307 A.2d 327, 332 (Pa.Super. 1973) ("the state of defendant's belief in the falsity can be proved by circumstantial evidence and by inference drawn from proven facts.").

To the extent Appellant relies on his own testimony, he is improperly viewing the evidence in a light most favorable to him and not the Commonwealth. The trial court as the fact-finder was free to judge the credibility of Appellant. The court necessarily discredited Appellant's testimony that any error on his part was based on his emotional turmoil. The evidence established, by multiple witnesses, that Appellant testified under oath that his brother made threatening gestures to him on a date and time when such actions could not have occurred. The trial court also admitted testimony that Appellant has a reputation for being dishonest. As

we consider all evidence introduced in examining a sufficiency claim, it was a fair and logical inference from the evidence that Appellant knew that his statements were false.

Appellant's second issue leveled on appeal relates to the weight of the evidence. However, Appellant did not file a post-sentence motion preserving his claim. Therefore, we agree with the Commonwealth's position that the issue is waived. ***Commonwealth v. Bryant***, 57 A.3d 191, 196 (Pa.Super. 2012).

The next position Appellant raises is that the trial court erred in admitting other acts evidence. "The trial court's decision to allow the admission of evidence is a matter within its sound discretion, and we will reverse that decision only when it has been shown that the trial court abused that discretion." ***Commonwealth v. Briggs***, 12 A.3d 291, 336 (Pa. 2011).

Appellant maintains that the trial court erred in admitting evidence of Appellant's complaints to the Philadelphia Police Department's Internal Affairs division about his brother. According to Appellant, these prior acts were improperly admitted to demonstrate Appellant's bad character in violation of Pa.R.E. 404(b)(1). He continues that the admission of the evidence was not harmless error because the trial court found that he was "in the habit of regularly making allegations against the [c]omplainant that did not hold up under investigation." Appellant's brief at 24. Appellant

submits that "[t]he evidence only showed Defendant's propensity to file a legitimate complaint under established procedures when he felt his brother acted inappropriately." ***Id***. The Commonwealth fails to discuss this issue in any manner.

The trial court stated in its opinion that the evidence demonstrated a common plan and scheme.[2] Pursuant to Pa.R.E. 404, other acts evidence is admissible for a range of purposes so long as the probative value outweighs the possibility of prejudice. The rule at the time of Appellant's trial read in relevant part:

> **(b) Other crimes, wrongs, or acts.**
>
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
>
> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
>
> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

Former Pa.R.E. 404(b)(1)-(3).

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[2] We are aware that the Commonwealth at the hearing for the motion *in limine* to introduce this evidence expressly argued that it was not introducing the evidence to show a "common plan or scheme or identity[.]" N.T., 5/4/12, at 6. Instead, the Commonwealth proffered that it was introducing the complaints to prove intent.

"Rule 404(b)(1) is merely a codification of the well-settled evidentiary law that 'evidence of prior crimes and bad acts is generally inadmissible if offered for the sole purpose of demonstrating the defendant's bad character or criminal propensity.'" ***Commonwealth v. Rushing***, 71 A.3d 939, 971 (Pa.Super. 2013).

We find that the trial court did not err in admitting the evidence in question. This evidence was not introduced to prove that Appellant was likely to engage in perjury. Nor was the evidence used exclusively to demonstrate that Appellant's actions in the prior incidents established that he committed perjury in this case. Rather, the evidence was introduced in an attempt to show that Appellant has a history of making unfounded allegations against his brother, which would support an inference that he knew the statements he made at the PFA hearing lacked credulity. Appellant is entitled to no relief on his third claim.

The final issue Appellant presents on appeal is that the trial court deprived him of a fair trial by questioning two witnesses. Appellant contends that the trial court improperly questioned Officer Chris Clenens, whom the Commonwealth presented in order to demonstrate Appellant's character as an untruthful person. As a result of the court's questioning, Officer Clenens did relay that Appellant had a reputation amongst police personnel as being deceptive and untruthful. Appellant maintains that the court's questioning

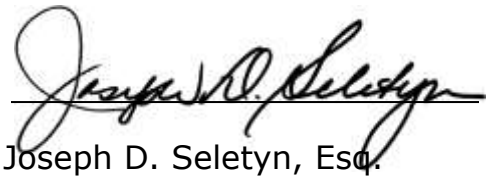
did not clarify any ambiguous testimony and bolstered the witness' testimony.

In addition, Appellant argues that the trial court erred in cross-examining a defense witness, Dr. Bolno. Appellant asserts that the trial court acted as an advocate on behalf of the Commonwealth by questioning the doctor. Specifically, the court inquired with Dr. Bolno about the duration in which he had treated Appellant, his training in treating depression and anxiety, and when he first diagnosed Appellant with depression, as well as Appellant's duties as a private investigator, and other related psychiatric issues.

The Commonwealth replies that Appellant's issue is waived because he neglected to lodge any objections to the trial court's questions. We agree. The record conclusively demonstrates that Appellant never objected to any of the questions by the trial court. Issues cannot be raised for the first time on appeal. Pa.R.A.P. 302(a); ***Commonwealth v. Bedford***, 50 A.3d 707, 713-714 (Pa.Super. 2012) (*en banc*).

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/15/2013