

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

COOK BUNDY

Appellant

No. 630 EDA 2012

Appeal from the Judgment of Sentence March 9, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012923-2008

BEFORE: BOWES, J., GANTMAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.:

Filed: March 5, 2013

Appellant, Cook Bundy, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his bench trial conviction for aggravated assault, criminal conspiracy, firearms not to be carried without a license, carrying firearms on public streets or public property in Philadelphia, possessing instruments of crime, simple assault, and reckless endangerment of another person.¹ We affirm.

In its opinion, the trial court set forth the relevant facts and procedural history of this case as follows:

On August 5, 2008, [Victim 1] and her brother, [Victim 2], drove to a relative's house on the 2100 block of North College Avenue, Philadelphia. Upon arrival, [Victim 2] was

¹ 18 Pa.C.S.A. §§ 2702, 903, 6106, 907, 2701, and 2705 respectively.

involved in a verbal dispute when he stumbled upon a scuffle between his daughter and stepson[.] Following this, [Victim 1] and [Victim 2] returned to their vehicle to leave. While entering the car, [Victim 1] noticed five men approaching the car and without warning, gunshots were fired from the group. [Appellant] was one of the shooters[.] As a result of the shooting, [Victim 1] was hit once in the knee and [Victim 2] was hit ten times.

On November 20, 2009, [Appellant] was found guilty in a waiver trial....

On March 9, 2010, this [c]ourt sentenced [Appellant] to an aggregate term of five to ten years' imprisonment and fifteen years' probation. [Appellant] was sentenced to five to ten years for aggravated assault, ten years of concurrent probation for conspiracy, five years of consecutive probation for possessing instruments of crime, and five years concurrent probation for carrying firearms on public streets in Philadelphia. [T]he charges of firearms not to be carried without a license, simple assault, and recklessly endangering another person were *nolle prosequed*.

On [March 24, 2011], [Appellant] filed a Post-Conviction Relief Act ("PCRA") petition. On January 27, 2012, a PCRA hearing was granted and [Appellant's] right to direct appeal was reinstated *nunc pro tunc*....

(Trial Court Opinion, filed July 16, 2012, at 1-2). Appellant filed a notice of appeal *nunc pro tunc* on February 16, 2012. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant complied.

Appellant raises the following issue for our review:

WHETHER THERE WAS SUFFICIENT EVIDENCE TO FIND [APPELLANT] GUILTY OF ALL CRIMES OF CONVICTION, AGGRAVATED ASSAULT, CRIMINAL CONSPIRACY, AND POSSESSION OF AN INSTRUMENT OF CRIME.

(Appellant's Brief at 2).

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

The standard we apply in reviewing the sufficiency of the 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 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.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, ___ Pa. ___, 32 A.3d 1275 (2011) (quoting *Commonwealth v. Jones*, 874 A.2d 108, 120-21 (Pa.Super. 2005)).

Section 2702 of the Crimes Code defines the offense of aggravated assault in relevant part as follows:

§ 2702. Aggravated assault

(a) Offense defined.—A person is guilty of aggravated assault if he:

- (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or

recklessly under circumstances manifesting extreme indifference to the value of human life;

* * *

(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

* * *

18 Pa.C.S.A. § 2702(a)(1), (4). "Serious bodily injury" is defined as, "Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa.C.S.A. § 2301.

"Where the victim suffers serious bodily injury, the Commonwealth is not required to prove specific intent." ***Commonwealth v. Patrick***, 933 A.2d 1043, 1046 (Pa.Super. 2007) (*en banc*), *appeal denied*, 596 Pa. 705, 940 A.2d 364 (2007). "The Commonwealth need only prove [the defendant] acted recklessly under circumstances manifesting an extreme indifference to the value of human life." ***Id.*** (quoting ***Commonwealth v. Nichols***, 692 A.2d 181, 185 (Pa.Super. 1997)). "To prevail on a theory of recklessness, the Commonwealth must show an assailant's recklessness rose to the level of malice, a crucial element to sustain a conviction for aggravated assault." ***Commonwealth v. Bruce***, 916 A.2d 657, 664 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007).

Malice is...established when there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be

injured. Where malice is based on a reckless disregard of consequences, it must be shown that the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily injury; at the very least, the conduct must be such that one could reasonably anticipate death or that serious bodily injury would likely and logically result.

Commonwealth v. McClendon, 874 A.2d 1223, 1229 (Pa.Super. 2005)

(internal citations and quotation marks omitted).

Section 903 of Crimes Code defines the offense of conspiracy in relevant part as follows:

§ 903. Criminal conspiracy

(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:

(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[.]

* * *

18 Pa.C.S.A. § 903(a)(1), (2). Circumstantial evidence may provide proof of conspiracy. ***Commonwealth v. Perez***, 931 A.2d 703, 708 (Pa.Super. 2007). An agreement can be implied from a variety of circumstances including knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal incident. ***Id.***

Section 907 of the Crimes Code defines the offense of possessing instruments of crime in relevant part as follows:

§ 907. Possessing instruments of crime

(a) Criminal instruments generally.—A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.

(b) Possession of weapon.—A person commits a misdemeanor of the first degree if he possesses a firearm or other weapon concealed upon his person with intent to employ it criminally.

* * *

18 Pa.C.S.A. § 907(a), (b). Criminal intent can be inferred from the circumstances surrounding possession, including the use of a firearm in the commission of an offense. *Commonwealth v. Andrews*, 564 Pa. 321, 337, 768 A.2d 309, 317-18 (2001).

After a thorough review of the record, the briefs of the parties, the applicable law, and the reasoned opinion of the Honorable Rayford A. Means, we conclude Appellant's issue merits no relief. The trial court properly disposes of the question presented. (**See** Trial Court Opinion at 3-6) (finding: (A) Appellant was seen holding gun and numerous shots were fired toward driver's side of vehicle containing two people; Victim 1 was shot in her knee and Victim 2 was shot ten times throughout his body; Appellant attempted to cause and did in fact cause serious bodily injury to another, with deadly weapon; therefore, sufficient evidence existed to support Appellant's aggravated assault conviction; (B) Appellant arrived at scene of

shooting with second shooter, was identified as one of two shooters, and fled with second shooter; therefore, Appellant's participation and conduct in aggravated assault provided sufficient evidence to support his conviction for conspiracy; (C) Appellant possessed gun immediately before shooting began, and ballistic evidence proved two loaded guns were used during shooting; therefore, evidence was sufficient to support Appellant's possessing instruments of crime conviction). Accordingly, we affirm on the basis of the trial court opinion.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

FILED
JUL 16 2012
Criminal Appeals Unit
First Judicial District of PA

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0012924-2008
: :
: :
vs. : 630 EDA 2012
: :
: :
Cook Bundy : June 16, 2012

MEANS, J.

OPINION

FACTUAL HISTORY

On August 5, 2008, Royreall McNair and her brother, William Thomas, drove to a relative's house located on the 2100 block of North College Avenue, Philadelphia. Upon arrival, Mr. Thomas was involved in a verbal dispute when he stumbled upon a scuffle between his daughter and stepson, Terence Lewis. Following this, Ms. McNair and Mr. Thomas returned to their vehicle to leave. While entering the car, Ms. McNair noticed five men approaching the car and without warning, gunshots were fired from the group. Defendant, Cook Bundy, was one of the shooters and Stefon Davis was identified as a potential second shooter. As a result of the shooting, Ms. McNair was hit once in the knee and Mr. Thomas was hit ten times.

PROCEDURAL HISTORY

On November 20, 2009, Defendant was found guilty in a waiver trial before the Honorable Rayford A. Means of Aggravated Assault, 18 Pa. C.S. § 2702, Criminal Conspiracy, 18 Pa. C.S. § 903, Firearms Not to be Carried Without a License, 18 Pa. C.S. § 6106, Carrying Firearms on Public Streets in Philadelphia, 18 Pa. C.S. § 6108, Possessing Instruments of Crime, 18 Pa. C.S. § 907, Simple Assault, 18 Pa. C.S. § 2701, and Recklessly Endangering Another Person, 18 Pa. C.S. § 2705.

On March 9, 2010, this Court sentenced Defendant to an aggregate term of five to ten years imprisonment and fifteen years of probation. Defendant was sentenced to five to ten years for Aggravated Assault, ten years of concurrent probation for Conspiracy, five years of consecutive probation for Possessing Instruments of Crime, and five years of concurrent probation for Carrying Firearms on Public Streets in Philadelphia. While the charges of Firearms Not to be Carried Without a License, Simple Assault, and Recklessly Endangering Another Person were nolle prossed.

On December 2, 2011, Defendant filed Post Conviction Relief Act ("PCRA") petition. On January 27, 2012, a PCRA hearing was granted and Defendant's right to direct appeal was reinstated *nunc pro tunc*, since his previous counsel failed to file a direct appeal as requested. On February 16, 2012, Defendant filed a direct appeal with this Court claiming insufficient evidence to find the defendant guilty of: (1) Aggravated Assault; (2) Criminal Conspiracy; and (3) Possession of an Instrument of Crime.

LEGAL ISSUES

There was sufficient evidence presented to this Court to warrant Defendant's convictions. The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, the jury could reasonably have determined all elements of the crime to be established beyond a reasonable doubt. Commonwealth v. Hardcastle, 519 A.2d 1101, 1105 (Pa. 1988); Commonwealth v. Cox, 686 A.2d 1279, 1287 (Pa. 1996). Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered. Commonwealth v. Griscavage, 517 A.2d 1256, 1257 (Pa. 1986). Finally, the trier of fact, while passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part or none of the evidence introduced at trial. Commonwealth v. Proetto, 771 A.2d 823, 833 (Pa. Super. 2001). Under these standards, the Commonwealth's evidence was more than sufficient to sustain the convictions.

A. Aggravated Assault

A person who is guilty of Aggravated Assault, a felony of the first degree, must "attempt to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to human life." 18 Pa. C.S.A. § 2702(a). Intent can be proven by direct or circumstantial evidence; it may be inferred from acts or conduct or from attendant circumstances. Commonwealth v. Roche, 783 A.2d 766, 769 (Pa. Super. 2001) (Citing Commonwealth v. Little, 614 A.2d 1146, 1154 (Pa. Super. 1992)). The following factors can be utilized in ascertaining

whether the defendant intended to inflict serious bodily injury by one blow, as is necessary to support conviction for Aggravated Assault: (1) if the defendant was disproportionately larger or stronger than the victim; (2) whether the defendant would have escalated his attack but was restrained from doing so; (3) whether the defendant was in possession of a weapon; and (4) statements before, during, or after the attack which might indicate defendant's intent to inflict further injury upon the victim. Commonwealth v. Burton, 2 A.3d 598 (Pa. Super. 2010).

Here, the Defendant attempted to cause serious bodily injury and did in fact cause such injury intentionally or, at the very least, recklessly. Credible testimony established that the Defendant was seen holding a gun, that shots were fired towards the driver's side of the car, and that one person in the car was shot in the leg and another was struck ten times in different portions of the body. N.T., 11/18/2009, 15, 18. Defendant's conduct clearly exhibits an attempt to cause serious bodily injury to another with a deadly weapon. Additionally, firing shots into a car with two people in it is intentionally, or at the very least recklessly, an attempt to cause serious bodily injury to those in the car. Thus, there was sufficient evidence to support Defendant's conviction of Aggravated Assault.

B. Criminal Conspiracy

A person is guilty of Criminal Conspiracy if, with the intent of promoting or facilitating its commission, he agrees to engage in conduct which constitutes such crime; or he agrees to aid other persons in the planning or commission of such crime. 18 Pa. C.S.A. § 903(a)(1). Once there is an agreement between the conspirators, the overt acts of

one are imputed to all that are involved. Id. “An agreement to commit an unlawful act “can be proven by the relation, conduct, or circumstances of the parties.” Commonwealth v. Jackson, A.2d 1102, 1104 (Pa. Super. 1984).

Here, credible testimony established that Defendant was identified as one of two shooters. N.T., 11/18/2009, 17-18. Defendant was also seen arriving and leaving the 2100 block of North College Avenue with the other shooter, Stefon Davis. N.T., 11/18/2009, 16. This behavior is indicative of an implicit conspiracy by Defendant, as both he and Mr. Davis agreed to travel to the location of the shooting, and both participated in the unlawful act of Aggravated Assault through shooting the victims. Therefore, this is sufficient evidence to support a conviction of Criminal Conspiracy.

C. Possession of an Instrument of Crime

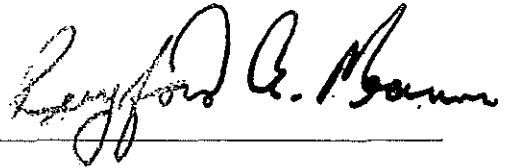
A defendant is guilty of Possession of an Instrument of Crime if he possesses any instrument of crime with the intent to employ it criminally. 18 Pa. C.S. § 907 (a). An instrument of crime is defined as anything commonly used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have. 18 Pa. C.S. § 907(d)(2). Mere “use of a loaded gun on his victim is more than sufficient to establish his guilt of possession of an instrument of crime.” Commonwealth v. McNair, 603 A.2d 1014, 1017 (Pa. 1992). Additionally, it has been held that wholly circumstantial evidence is sufficient to support a conviction of Possession of an Instrument of Crime. See Commonwealth v. Young, 692 A.2d 1112, 1114 (Pa. Super. 1997). Ballistic evidence proved that there were two loaded guns that were used during the shooting. N.T., 11/29/2009, 40. In addition, credible witness testimony established

that the Defendant was in possession of a gun. N.T., 11/18/2009, 18. As such, this is sufficient evidence to support a conviction of Possession of an Instrument of Crime.

CONCLUSION

Based on the aforementioned reasoning, the judgment of this Court should not be disturbed and Defendant should not be entitled to any post conviction relief.

BY THE COURT:

A handwritten signature in cursive script, reading "Raymond C. Means", written over a horizontal line.

MEANS, J.