IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. CR – 834 – 2006
	:
vs.	:
	:
KYION BALL,	:
Defendant	:

OPINION IN SUPPORT OF ORDER OF JULY 31, 2007,
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order of July 31, 2007, which denied his post-sentence motions. By Order dated June 5, 2007, Defendant was sentenced to life imprisonment on one count of first degree murder, and to various terms of incarceration on the remaining counts, following his conviction on March 15, 2007, by the Court, sitting without a jury, of first degree murder, possession of an instrument of crime, firearms not to be carried without a license, aggravated assault with a deadly weapon, and recklessly endangering another person. In his Concise Statement of Matters Complained of on Appeal, Defendant raises several issues, many of which relate to his contention that the Commonwealth failed to offer the requisite degree of proof that he was the perpetrator of the crime.

First, Defendant contends the evidence was "insufficient to prove that he was the person who shot the victims", specifically alleging that Eric Locke testified that Defendant was not the person, that Mr. Locke testified that it was not Defendant's voice on the intercepted telephone call, that no one identified the voice on the tape as that of Defendant, that the evidence showed someone else had access to and had used the phone to which the call was made, and that the Commonwealth failed to disprove Defendant's alibi.

At trial, the evidence showed that while Eric Locke and Michael Riley were playing basketball in a public park in the afternoon of March 27, 2006, a male in a black hooded sweatshirt came up to them and shot Michael Riley in the back, in the process wounding another person who was also on the basketball court at the time. The perpetrator then ran from the scene. After briefly attempting to offer aid to Mr. Riley, Mr. Locke also ran from the scene and was stopped by police who were responding to calls regarding the shooting. Mr. Locke was questioned and indicated he witnessed the shooting, and that the shooter was a man who

went by the street name "Shark". Mr. Locke also indicated to police that he could call that person and get him to talk on the phone. The call was placed and recorded. During that call, the person who answered the phone and responded to the name "Shark", in effect confessed to the murder by way of a discussion regarding the motive; i.e., disrespect he felt had been shown him by Mr. Riley during an encounter at Mr. Locke's wife's residence a few days prior to the shooting.[1] The next day, police put together a photo array which included Defendant's picture, and Mr. Locke identified Defendant as the perpetrator .

Defendant's insufficiency of the evidence claim focuses on Eric Locke's recantation of his previous accusations, pointing out that Mr. Locke testified at trial that Defendant was not the shooter, N.T. March 13, 2007, at p. 33, and that he didn't believe it was Defendant to whom he spoke in the telephone call to the shooter, but a "different Shark." Id. The Court believes the evidence was nevertheless sufficient to support a finding of guilt, in spite of Mr. Locke's statements at trial. As noted above, Mr. Locke identified Defendant by nickname and then by picking out his photograph,[2] immediately after the shooting. Mr. Locke identified Defendant as the perpetrator before an investigating grand jury, and also at the preliminary hearing. Mr. Locke told police he could call the perpetrator and get him to talk on the phone, and then proceeded to place a call to the cell phone used by Defendant.[3] Mr. Locke had an eighteen-minute conversation with a person nick-named "Shark" who had been at his wife's house several days before the shooting and had been asked to take his shoes off by Mr. Riley,[4] and that person in effect admitted to shooting Mr. Riley.[5] Defendant had been at Mr. Locke's

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1 Mr. Locke and another witness, Desirae Cummings, testified that a few days prior to the shooting, Defendant came to the residence and was asked by Mr. Riley to remove his shoes before entering. Mr. Locke testified that Defendant gave Mr. Riley "a look, but it wasn't a good look", and then left, and that he believed Defendant was upset. N.T. March 13, 2007, at p. 8. According to Ms. Cummings, when asked to remove his shoes, Defendant replied "it's not your house", Mr. Riley asked, "what, your feet stink?", everyone began laughing and Mr. Riley and Defendant started arguing, Mr. Locke told them to "chill" and Defendant then left. N.T. March 13, 2007 at p. 101.

2 Mr. Locke testified that he had known Defendant since childhood and that Defendant had been at his home on previous occasions.

3 That the cell phone called by Mr. Locke was used by Defendant was established by several forms of evidence, including the testimony of the phone's subscriber, that she had obtained the phone for Defendant, and a receipt from a local dry cleaners, found in the pocket of Defendant's jacket, showing Defendant's name and that cell phone number.

4 Mr. Locke admitted that the person with whom he had the conversation was the person "at the house with the shoe incident". N.T. March 13, 2007, at p. 96.

5 Mr. Locke admitted that the person with whom he had the conversation was the person who shot Michael Riley.

wife's house several days before the shooting and had been asked to take his shoes off by Mr. Riley and Defendant had been upset by that request.[6] The Court was convinced beyond a reasonable doubt that the "shoe incident" testified to by Mr. Locke and Ms. Cummings, and the "shoe incident" discussed by Mr. Locke and "Shark" on the telephone were one and the same, and thus, that Defendant was the "Shark" to whom Mr. Locke was speaking in the recorded conversation, and who confessed to the murder.

While one is left to speculate why Mr. Locke chose to contradict his earlier version of events, his testimony at trial was itself so contradicting that it was not credible. For example, Mr. Locke testified first that he saw the shooter's face but he did not recognize him, N.T. March 13, 2007, at p.9, then he testified that he recognized him, but didn't know him, Id. at 44, then he testified that he didn't recognize him, Id. at p. 45, then he testified that he didn't see the shooter's face, Id. at p. 83, then he testified he saw the killing and he knew who did it, Id. at p. 87. He also blatantly contradicted himself when he first testified that he made the recorded phone call, Id. at p. 28, and then testified that he "didn't call nobody on the telephone," Id. at p. 52, but then admitted that he did make the call. Id. at p. 55. And, while Defendant argues that the earlier statements made by Mr. Locke are no more trustworthy than those made at trial, the Court believes the earlier statements are not really contradictory, and any differences are more a result of the question being posed than of a lie being told.

With respect to Defendant's assertion that no one identified the voice on the tape as that of Defendant, while Mr. Locke's trial testimony regarding to whom he was speaking in the recorded conversation was contradictory,[7] he did admit that he had listened to the tape with the District Attorney and the investigating officer and at that time had indicated that it was Defendant to whom he was speaking. Id. at p. 32. In any event, the circumstantial evidence regarding the "shoe incident", as well as evidence of Defendant's use of the phone, was more than sufficient to establish it was Defendant's voice on the tape. The evidence that someone else had access to and had used the phone in question had, in the Court's opinion, insignificant

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Id. at p. 84, 91.

6 See note 1, *supra*.

7 At one point, Mr. Locke said "the Shark I was talking to was this Shark right here", and when the District Attorney followed up with "So you were talking to him on this call, is that right?", Mr. Locke responded "Right", N.T. March 13, 2007, at p. 58. At another point, however, he testified that he was talking to "Shark, but not this

weight when compared to the other evidence as outlined above.

In his last argument regarding the sufficiency of the evidence, Defendant asserts the Commonwealth failed to disprove his alibi. Defendant presented the testimony of two friends of his, Markel Richardson and Antoine Larke, both of whom testified that they were with Defendant at the house of a third friend, Diamond Harris, on the day of the shooting, playing games on a Play Station, and that Defendant was there with them the entire day, from 11:00 a.m. or 12:30 p.m. until 6:00 p.m. or 7:00 p.m. There were some inconsistencies in their testimony, however, as Mr. Richardson said Mr. Larke was already there when he arrived, but Mr. Larke said Mr. Richardson was already there when *he* arrived. Further, Mr. Richardson said he stayed at the Colonial Motor Lodge the night before, in a room rented for him by someone else, but that he did not know that person's name, and said he took a cab from the motel to Diamond Harris' house on the day of the shooting. The Commonwealth presented the testimony of the manager of the only cab company in Williamsport, who testified there were no pick-ups that day at the Colonial Motor Lodge, nor were there any drop-offs in the area where Mr. Richardson said he was dropped off. The Commonwealth also presented the testimony of a corrections officer at the Lycoming County Prison, who said that on December 2, 2006, he overheard a conversation between Mr. Larke and Defendant, both of whom were inmates at the time, wherein Mr. Larke told Defendant he knew a girl who liked him and who wanted to help him out, and that Defendant seemed to be having trouble putting a face to the name. Defendant then presented the testimony of another individual, who testified he saw Mr. Richardson at Diamond Harris' house that day, as well as the testimony of Diamond Harris, who said Mr. Richardson was at her house that entire day.

In considering Defendant's alibi, the Court noted the inconsistencies in the testimony, the timing of the alibi notice,[8] and the testimony of the corrections officer, especially the observation that Defendant was having trouble putting a face to a name, an unlikely situation had he been with that person, a friend, the entire day of the shooting. Indeed, the whole conversation suggests the alibi was fabricated after the fact. The Court therefore believed the Commonwealth had proven beyond a reasonable doubt that Defendant was the shooter, and

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Shark." Id. at p. 79.

8 While Defendant was arrested on May 10, 2006, the alibi notice was not filed until January 31, 2007.

thus had disproved Defendant's alibi.

Next, Defendant contends the verdict was against the weight of the evidence. In order for this court to find that the verdict was against the weight of the evidence, it must be apparent from the record, "that the verdict was so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative." Commonwealth v. Fromal, 572 A.2d 711, 716 (Pa. Super. 1990), *quoting* Commonwealth v. Hunter, 554 A.2d 550, 555. Inasmuch as the Court was fact-finder in the instant case, this claim is somewhat rhetorical, but the Court will note that it weighed all the evidence before rendering a verdict and felt the great weight of the evidence supported a finding of Defendant's guilt.

Next, Defendant contends the Court erred in admitting the tape recorded conversation "after Mr. Locke testified that it was not the Defendant with whom he spoke during the call." As noted above,[9] the tape was played after Mr. Locke said, "the Shark I was talking to was this Shark right here," and it was only after the tape was played that Mr. Locke stated that it was not Defendant on the other end of the conversation. In any event, when seeking to introduce a telephone conversation, the identity of the other party may be established by circumstantial evidence. Commonwealth v. Stewart, 450 A.2d 732 (Pa. Super. 1982), citing Commonwealth v. Carpenter, 372 A.2d 806 (Pa. 1977). As noted above, the circumstantial evidence regarding the "shoe incident", as well as evidence of Defendant's use of the phone, was more than sufficient to establish it was Defendant's voice on the tape, and the Court found Mr. Locke's recantation in that regard[10] not credible. The Court does not believe it was error to admit the taped conversation into evidence.

Next, Defendant contends the Court erred in denying his renewed motion to suppress the recorded phone conversation when Mr. Locke testified that he did not voluntarily consent to the recording. Mr. Locke's testimony in this regard was as follows:

Q Obviously, we heard this morning, you made an intercepted phone call?
A Um-hum.
Q With the help of the police, is that correct?
A Yes.

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9 See footnote 7.

10 As noted above, Defendant admitted that he had listened to the tape with the District Attorney and the investigating officer and at that time had indicated that it was Defendant to whom he was speaking.

Q Did you voluntarily agree to that?

A Once again, if you'd have heard the conversation, if you would have been there – you know, it's like I didn't really had no choice.

Q Well, then again, yes or no. Did you voluntarily agree to that telephone intercept?

A Yeah, I had to, yes.

Q You had to. Why?

A Once again, if he was there, you know, I'm just trying to protect the well being of my wife and my children.

Q Would it be correct to say that you agreed to the intercept in order to avoid your wife and family suffering some consequences?

A Yes.

N.T. March 13, 2007 at p. 72-73. In contrast to this vague testimony, the Court also heard from the investigating officer who testified that "I believe actually the suggestion came from Mr. Locke that he stated that the individual that shot his friend on the basketball court was Shark. He knew him as Shark. Did not know a name for him, but he provided us with a phone number and stated that he could call him and get him to talk on the phone. He said we could actually record it." N.T. March 12, 2007, at p. 114. Additionally, the content of the conversation belies Mr. Locke's claim that the call was not made voluntarily. Mr. Locke participated fully in the conversation, which lasted eighteen minutes, and showed no hesitation or reticence. The Court believes the evidence weighed heavily in favor of finding the call was made voluntarily, and that it was not error to affirm the previous denial of Defendant's motion to suppress.

Next, Defendant contends the Court erred in admitting a transcript of Eric Locke's grand jury testimony and a transcript of his preliminary hearing testimony. As previously noted, Mr. Locke testified at trial that Defendant was not the shooter, and that he was not the Shark who essentially confessed to the murder on the telephone in the recorded conversation. The Commonwealth sought to introduce Mr. Locke's testimony at the two prior proceedings as inconsistent statements, since there he had testified that Defendant *was* the shooter. The Court allowed these transcripts into evidence under Pa.R.E. 803.1 (1), which provides, in pertinent part, as follows:

Rule 803.1 Hearsay exceptions; testimony of declarant necessary

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to

cross-examination concerning the statement:

> **(1) Inconsistent statement of witness.** A statement by a declarant that is inconsistent with the declarant's testimony , and (a) was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (b) …, or (c) … .

Pa.R.E. 803.1(1). Since the declarant, Mr. Locke, testified at trial and was subject to cross-examination concerning the statements, and since the statements were made at a grand jury proceeding and a preliminary hearing, respectively, and thus were under oath subject to the penalty of perjury at a hearing or other proceeding, the Court sees no error in their admittance.

Next, Defendant contends the Court erred in permitting Mr. Locke to consult with his wife in the middle of his trial testimony. When Mr. Locke stated, early on in his testimony at trial that he did not recognize the shooter, and then indicated that when he had previously told police and the District Attorney that Defendant had been the shooter that he had lied, defense counsel requested that Mr. Locke be appointed counsel. Counsel was appointed and after consulting with counsel, Mr. Locke requested to speak with his wife. Defense counsel objected, stating "What bothers me is my sense is the Court is --- wants to make this witness testify, find a way this witness will testify in the manner that is consistent with his prior statements. I don't think that's your job, to accomplish that. I don't think that's your goal to do that, and that's what I object to, that you're trying to facilitate that." N.T. March 13, 2007, at p. 23-24. As the Court explained at the time, the goal was to get Mr. Locke to testify at all,[11] not in any particular manner, as it was felt that his refusal to testify would not serve the interests of justice. Defendant has failed to indicate how such would constitute error and, in any event, Mr. Locke did not change his course after consulting with his wife; he continued to insist Defendant was not the shooter. Thus, if the Court did indeed err by letting Mr. Locke consult with his wife before resuming his testimony, it appears to have been a harmless error.

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11 While at that point Mr. Locke had not indicated he would not testify, there was some concern that his attorney might advise him to invoke his Fifth Amendment right to not incriminate himself.

Next, Defendant contends the Court erred in allowing Agent Leonard Dincher to testify that Eric Locke told him he was scared due to threats against his wife. At trial, when the Commonwealth's witness, Agent Leonard Dincher of the Williamsport Bureau of Police, testified that over the lunch hour Mr. Locke had stated to him that he was scared for his family, defense counsel objected, indicating "Mr. Locke was not --- was not questioned or confronted with any of this. The whole issue was about being scared. Nothing else. You can't go into it unless he's been confronted with it. I'd ask all the answers be stricken except for the part about him being scared." Id. at p. 111. The objection was overruled on the grounds that Mr. Locke had been confronted with the statement. On direct examination, the District Attorney asked Mr. Locke, "Sir, isn't it true that the reason that you are not identifying the Defendant as the shooter today is because you're afraid of repercussion against you and/or your family?" and "Sir, isn't it true over the lunch you indicated that to --- that you had concerns regarding that to Officer Dincher?" Id. at p. 59-60. Thus, the Court believes defense counsel's objection was properly overruled.

Next, Defendant contends the Court erred in admitting Commonwealth's Exhibit Nos. 26 and 26A, a photo of a bullet and the bullet found on the basketball court, as nothing connected them to the shooting. While Defendant is correct that nothing directly linked the bullet to the shooting, the Court believes it was inferentially relevant to the minor injury suffered by the other person wounded during the shooting death of Mr. Riley. In any event, the bullet was of such insignificant value to the Commonwealth's case that its admission into evidence, if indeed error, is believed to have been harmless.

Next, Defendant contends the Court erred in denying his request for a mistrial, claiming the Court should have granted a mistrial after expressing "frustration at Eric Locke's refusal to testify that the Defendant was the shooter". Defendant mischaracterizes the Court's "frustration". The Court was not expressing frustration at Mr. Locke's "refusal to testify that the Defendant was the shooter", but, rather, was expressing frustration at the obvious contradictions in Mr. Locke's trial testimony. Specifically, the Court reminded Mr. Locke of the serious nature of the matter when the

District Attorney referenced the recorded phone call and Mr. Locke stated "I didn't call nobody on the telephone," and "I don't have no knowledge of making no phone call," Id. at p. 52-52, when only minutes before that he testified that he *did* make the phone call. Id. at p. 28-31. The Court therefore believed a mistrial was not warranted.

Finally, Defendant contends the Court's use of the phrase "us against them" evidenced a lack of impartiality which requires the granting of a new trial. In rendering the verdict, the Court stated:

> Now, with the alibi witnesses I say this. That Mr. Miele during his closing read to me jury instructions which he asked me or reminded me that I should follow. One of the jury instructions which I always give to a jury is that a juror should use his common sense and he should use his experiences and he should draw such conclusions from his experiences in daily life which tells him can be drawn. Well, I have been sitting here for nearly ten years now. And the one thing that I have concluded and the one thing that perhaps does not bode well for Mr. Ball in his alibi witnesses is that there is a mentality that exists with prisoners that are charged with serious crimes. It is a "them against us mentality." In other words, if we can stick it to the police or the DA's office or to the courts, if we can do that, there is a code that seems to pervade that thinking that says, do it. And I look at this alibi witness and I look at the quality of the people that testified. I look at the – how late the alibi witness testimony was presented by the defense,[12] and I look at Corrections Officer Thompson's testimony, which I found not only credible, but I found – I've never met him before, never seen him before, but he impressed me on the stand with the way that he testified.

N.T. March 15, 2007, at p.6-7. As noted above, Defendant presented the testimony of Markel Richardson and Antoine Larke. Both men have been or are being prosecuted by the Williamsport Bureau of Police and the Lycoming County District Attorney's office, and both were in prison at the time of trial. The Court was referring to its perceived tendency of prisoners to support one another against the police and the District Attorney in explaining its doubts regarding their credibility, specifically the Court's consideration of any motive or interest the witness may have, and was not indicating any bias or impartiality toward Defendant. The Court's verdict was based solely on the evidence which, in the Court's

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12 The Complaint in this matter was filed March 28, 2006, one day after the murder. As noted above, Defendant was arrested May 10, 2006. Arraignment was waived August 7, 2006. Defendant's Omnibus Pre-trial Motion was filed November 1, 2006. The Notice of Alibi Defense was filed January 31, 2007.

opinion, proved beyond a reasonable doubt that Defendant was guilty of the charges against him.

Dated: November 29, 2007

Respectfully Submitted,

Dudley N. Anderson, Judge

cc: DA
William Miele, Esq.
Gary L. Weber, Esq.
Hon. Dudley Anderson