IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-36-2014**
v.	:	
	:	
DAVID ISAIAH JETT,	:	**CRIMINAL DIVISION**
Defendant	:	

OPINION AND ORDER

On June 16, 2014, a jury found the Defendant guilty of Robbery,[1] Simple Assault,[2] Theft by Unlawful Taking,[3] and Receiving Stolen Property.[4] On September 15, 2014, the Defendant filed a timely post-sentence motion. A conference on the motion was held on November 4, 2014.

I. Background

On December 15, 2012, a robbery occurred in the Quick Mart convenience store on Northway Road in Loyalsock Township. A store cashier, Desaree Wykoff (Wykoff), witnessed the robbery. During the preliminary hearing, Wykoff did not identify the Defendant as the robber. Before the Defendant's trial but on the same day as the trial, the prosecutor asked Defense Counsel if Wykoff could see the Defendant standing in the courtroom. Defense Counsel agreed to let Wykoff see the Defendant standing in the courtroom, and Wykoff then identified the Defendant as the robber.

A. Desaree Wykoff's Testimony

At approximately 7:45 P.M. on December 15, 2012, Wykoff was working in the Quick Mart. Wykoff heard the bell indicating that the store's door had opened. She turned towards the

[1] 18 Pa.C.S. § 3701(a)(1)(ii).
[2] 18 Pa.C.S. § 2701(a)(3).
[3] 18 Pa.C.S. § 3921(a).
[4] 18 Pa.C.S. § 3925(a).

door and saw a person wearing a black ski mask and holding a silver handgun with a black handle. Wykoff noticed that the person was wearing black pants and a black jacket. Wykoff could also see the blue hood of a garment that the person was wearing underneath the jacket. During the preliminary hearing, Wykoff testified that the person was a man with a height of 5'7'' to 5'10.'' During trial, Wykoff testified that the man had a height of 5'10'' to six feet.

The man told Wykoff to open the safe, but she was unable to open it. He then told her to empty the register. Wykoff complied and gave the man a little less than $600. The man put the money in what Wykoff believed was a black pillow case with a knot at the bottom. He then left the store.

Before the Defendant was charged with the robbery, Wykoff thought that the robber could have been Maurice Williams (Williams) because of the way that Williams moved his lips. However, Wykoff never identified Williams as the robber.

Wykoff recognized the Defendant at the preliminary hearing because she had seen him numerous times in the Quick Mart before the evening of the robbery. Wykoff did not identify the Defendant as the robber during the preliminary hearing because the Defendant was sitting, and she could not determine his height. When Wykoff saw the Defendant standing in the courtroom before trial, she noticed that he was the same height as the robber. Wykoff also testified that the Defendant's eyes matched the robber's eyes.

B. Jamison Markham's Testimony

Jamison Markham (Markham) lived at 1718 Randall Circle in Loyalsock Township. On December 14, 2012, the Defendant told Markham that he was going to rob the Uni-Mart. Markham thought the Defendant was joking.

At approximately 2:00 P.M. on December 15, 2012, the Defendant left Markham's residence. At approximately 8:00 P.M. on December 15, 2012, the Defendant returned to Markham's residence. Nicole Baney (Baney) was in Markham's residence when the Defendant returned. The Defendant was wearing black jeans and a blue hoodie. The Defendant called Markham into the bathroom. In the bathroom, the Defendant told Markham that he had robbed the Uni-Mart. The Defendant showed Markham a wad of about $500 of cash. When the Defendant left the bathroom, he was wearing a black puffy jacket and a black drawstring bag. After the Defendant left the bathroom, he again said that he had robbed the Uni-Mart. The Defendant gave Markham $20 of cash. The Defendant called someone to pick him up, and left 15 minutes after the call.

At the time of the robbery, Markham was best friends with Maurice Williams. Although Williams had been charged with the robbery of the Quick Mart, Markham did not contact police to tell them about his December 15, 2012 conversation with the Defendant.

Pennsylvania State Police (PSP) Trooper Tyson Havens (Havens) approached Markham. Havens told Markham that a gun had been found behind Markham's residence. Markham said that his DNA would be on the gun because on December 14, 2012, the Defendant handed a gun to Markham, and Markham "messed around with it for a little bit."

C. Nicole Baney's Testimony

Baney left work at 6:00 P.M. on December 15, 2012. She met Markham in the shopping plaza next to her place of work. Baney and Markham then went to Markham's residence. "A little later after" Baney arrived at Markham's residence, the Defendant entered Markham's

residence.[5] The Defendant was wearing a blue hoodie. The Defendant went into the bathroom and then called for Markham. Markham and the Defendant spent a little bit of time in the bathroom. After the Defendant exited the bathroom, Baney saw that the Defendant had a roll of money. Markham joked around and told the Defendant to give him some money. The Defendant gave Markham a 20 dollar bill. The Defendant then changed into a "vest, jacket thing" and put the blue hoodie into a black drawstring bag.

D. Trooper Christine Fye's Testimony

At approximately 12:30 P.M. on December 30, 2012, PSP Trooper Christine Fye (Fye) responded to a report of a firearm in a black safe in the dumpster located behind the residence at 1716 Randall Circle, Loyalsock Township. Fye removed a silver and black airsoft gun from the dumpster.

E. LeRoy Starr's Testimony

Approximately three months before the robbery, the Defendant told LeRoy Starr (Starr) that he owed people money and was thinking about robbing the Uni-Mart by Bonanza.[6] The Defendant asked if Starr could find a gun for the Defendant. Starr responded that he probably could not find a gun. The Defendant then asked Mary Fitzpatrick (Fitzpatrick) if she could get a gun for the Defendant.

The Defendant asked Starr to be the get-away driver for the robbery. Starr replied that "he didn't know because it's kinda sketchy." The Defendant then offered Starr money to be the driver. Starr thought about being the driver but was not the driver.

[5] During cross examination, Baney testified that she did not remember what time the Defendant entered Markham's residence.
[6] The Uni-Mart by Bonanza is not the convenience store that was robbed on December 15, 2012.

After the Defendant was arrested for the robbery, the Defendant called Starr. During the call, the Defendant said that he was going to shoot Starr and Fitzpatrick if they told police that the Defendant had committed the robbery.

F. Mary Fitzpatrick's Testimony

Before December 15, 2012, the Defendant told Fitzpatrick and Starr that he was going to rob a store. The Defendant did not tell Fitzpatrick the specific store that he was going to rob. The Defendant said that he needed a gun. He asked if Starr would be his ride.

After the Defendant was arrested, he called Starr's phone. Fizpatrick answered Starr's phone and put it on speaker so Starr could hear. The Defendant said that if Starr or Fitzpatrick told police that the Defendant had robbed the Uni-Mart, the Defendant was going to shoot up their house.

G. Trooper Tyson Havens' Testimony

On December 15, 2012, Havens responded to a robbery at the Quick Mart on Northway Road. Havens spoke with Wykoff, who told him that David Bean (Bean) was the last customer in the Quick Mart before the robber entered. Wykoff was familiar with Bean because he came to the store every day. Wykoff called Bean and told him to return to the store to talk with police.

Bean told Havens that on December 15, 2012, he saw a man pacing outside of the Quick Mart. Bean said the man was between 5'7'' and 5'9.'' Bean also said the man was wearing black jacket over a blue hooded sweatshirt. Bean was familiar with the man but did not know his name. Bean said that he would call Havens when he next saw the man.

A week later, Bean gave police the location of the man who he believed was outside of the Quick Mart on December 15, 2012. Police eventually arrested Maurice Williams. Bean was presented with a lineup and identified Williams as the man outside of the store.

Wykoff told Havens that she thought Williams could have been the robber because he had big lips.

Police obtained a warrant and searched Williams' residence for objects seen on the Quick Mart's surveillance video. They did not find the clothes that the robber was wearing or the objects that the robber was holding.

Havens compared Williams' walk to the robber's walk on the surveillance video. In Havens' opinion, Williams and the robber had different walking styles. Havens asked that the charges against Williams be dropped, and the charges were eventually dropped.

Months after the robbery of the Quick Mart, Havens talked with the Defendant.[7] The Defendant said that he knew the Quick Mart had been robbed but did not know exactly how it happened. The Defendant said that he frequently went to the Quick Mart because he had family members and friends who lived close to it. The Defendant also said that he did not have a good relationship with Markham because the Defendant had sex with two of Markham's girlfriends.

The Defendant initially told Havens that he was at Markham's residence on the night of the robbery. Later, he told Havens that he was not at Markham's residence during the night of December 15, 2012 but was there during the day of December 15, 2012. The Defendant said he went to Markham's residence during the day to get his toothbrush and phone charger, which he had forgotten after spending the night of December 14 and the morning of December 15 at Markham's residence. Havens asked the Defendant if he had gone to the Quick Mart on the night of December 15, 2012. The Defendant said that he had not. Havens asked how the

[7] The Defendant waived his *Miranda* rights.

Defendant could remember a specific night. The Defendant responded that he remembered the night of December 15, 2012 because he went to a birthday party.

Markham told Havens that the Defendant had thrown the gun somewhere. Markham also told Havens that Baney was at his residence between 8:00 P.M. and 10:00 P.M. on December 15, 2012. Markham said that the Defendant arrived at Markham's residence about a half hour before Baney left.

Baney told Havens that she left work at 6:00 P.M. on December 15, 2012. She said that she met Markham close to her work, and they walked to Markham's residence. Havens testified that a walk from Baney's work to Markham's residence would take at most five minutes. Baney said that the Defendant arrived at Markham's residence 30 to 45 minutes after Baney and Markham arrived. Baney told Markham that she could not remember the color of the sweatshirt that the Defendant was wearing when he entered Markham's residence. Baney said that the Defendant put on a dark blue or black hooded sweatshirt before leaving Markham's residence.

Police obtained a sample of the Defendant's DNA. They asked for a comparison of the Defendant's DNA and the DNA found on the airsoft gun from the dumpster. The lab, however, was unable make a comparison because the DNA of three to four people was on the gun. No fingerprint analysis was done.

Havens obtained a video of the Defendant walking. He compared the video to the December 15, 2012 surveillance video from the Quick Mart. In Havens' opinion, the Defendant walked the same way that the robber walked.

The Defendant's grandmother visited the Defendant in prison. Havens listened to the audio of the visit. The Defendant's grandmother told the Defendant that she was going to store

his hats at his uncle's house. The Defendant's grandmother asked the Defendant, "What about the black hat with the eyes cut out?" The Defendant then said, "No, not that one."

H. Trooper Kenneth Davis' Testimony

PSP Trooper Kenneth Davis (Davis) interviewed Markham. During the interview, Markham denied receiving money as a result of the robbery.

I. Arguments of Post-Sentence Motion

The Defendant argues that he was prejudiced by the introduction of Wykoff's identification of the Defendant before trial. Additionally, the Defendant argues that he was prejudiced because during closing argument, the prosecutor vouched for the credibility of the Commonwealth's witnesses.

The Defendant argues generally that the "evidence was insufficient to establish all the elements of each of the offenses charged," but his specific arguments reveal challenges to only the identity element of the offenses. Defendant argues that the evidence was insufficient for the following reasons. Wykoff suspected that Williams was the robber and could not identify the Defendant as the robber until the day of the trial. Wykoff said the robber used a black pillow case to store the money, but the Defendant had a black drawstring bag after the robbery. The gun used in the robbery was found outside Markham's residence, and Markham admitted that his DNA would be on the gun. The Commonwealth's witnesses testified inconsistently.

The Defendant argues that the verdict was against the weight of the evidence for the following reasons. Wykoff could not identify robber until the day of trial even though she had a previous opportunity to identify the Defendant. During the preliminary hearing, Wykoff testified that the robber was between 5'7'' and 5'10,'' but during trial Wykoff testified that the robber

was between 5'10'' and 6'00.'' Wykoff suspected that Williams was the robber. Markham gave inconsistent statements. Markham was wearing the same colored clothes as the Defendant and was in the area at the time of the robbery. The gun used in the robbery was found outside of Markham's house, and Markham admitted that his DNA would be on the gun. Wykoff said the robber used a black pillow case to store the money, but the Defendant had a black drawstring bag after the robbery.

Finally, the Defendant argues that the Court erred in allowing Havens to testify that the Defendant walked in the same way as the robber.

II. Discussion

A. The Defendant was not Unfairly Prejudiced by the Introduction of Wykoff's Identification of the Defendant Before Trial.

The Defendant was not unfairly prejudiced by the introduction of the identification before trial because the identification was admissible. "[W]here a defendant does not show that improper police conduct resulted in a suggestive identification, suppression is not warranted." Commonwealth v. Sanders, 42 A.3d 325, 330 (Pa. Super. 2012). In Sanders, the defendant argued that a witness "was not sufficiently cogent and lucid to make an accurate identification." Id. The Superior Court of Pennsylvania wrote, "We believe that [the defendant's] arguments about the circumstances in which [the witness] made his identification go to the weight of the evidence and not its admissibility." Id. at 331.

Here, the prosecutor asked Defense counsel if Wykoff could see the Defendant standing in the courtroom before the trial. Defense counsel agreed. Police were not involved in the procedure. Therefore, the identification is admissible.

B. The Prosecutor's Comments during Closing Argument did not Unfairly Prejudice the Defendant.

The Defendant argues that he was prejudiced because during closing argument, the prosecutor vouched for the credibility of the witnesses. The Defendant does not reference a specific portion of the prosecutor's closing argument. Therefore, the Court must assume the portions of the argument that the Defendant believes caused prejudice. The prosecutor made the following comments during his closing argument:

> [The Defendant] refused the DNA because he was afraid that it was going to be on the gun because he knew that Jamison Markham was telling the truth. He knew that D.J. Starr was telling the truth and he knew that Mary Fitzpatrick was telling the truth. He knew that Nicole Baney was telling the truth.

N.T., 6/16/14, at 24 (Closing Arguments). The prosecutor also made the following comments:

> None of these folks involved had a reason to be making up their stories, to come in a purger [*sic*] themselves, be – put themselves at a risk of being charged criminally themselves. And I submit to you that none of the witnesses – not you, Trooper, but none of the witnesses were that smart. They weren't sophisticated. They just came in and answered the questions and told you what happened.

N.T., 6/16/14, at 26 (Closing Arguments).

"In determining whether the prosecutor engaged in misconduct, [a court] must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel's conduct." Commonwealth v. Chmiel, 889 A.2d 501, 543 (Pa. 2005).

"It is settled that it is improper for a prosecutor to express a personal belief as to the credibility of the defendant or other witnesses. However, the prosecutor may comment on the credibility of witnesses. Further, a prosecutor is allowed to respond to defense arguments with logical force and vigor. If defense counsel has attacked the credibility of witnesses in closing, the prosecutor may present argument addressing the witnesses' credibility." Id. at 544. (citations omitted).

"[P]rosecutorial misconduct will not be found where comments . . . were only oratorical flair." Id. (quoting Commonwealth v. Hawkins, 701 A.2d 492, 503 (Pa. 1997)).

Here, Defense Counsel highlighted the inconsistencies in the testimony of the Commonwealth's witnesses. She asked the jury, "Who do you believe? What do you believe?" N.T., 6/16/14, at 12 (Closing Arguments). The prosecutor's comments on the credibility of the Commonwealth's witnesses were responses to Defense Counsel's arguments. The "telling the truth" comments are oratorical flair, and they do not exceed the bounds of a logically forceful and vigorous response.

The prosecutor's comment about the sophistication of the witnesses is more troubling. In effect, the prosecutor said that he did not believe the witnesses lied because they were not sophisticated enough to lie. No evidence of the witnesses' sophistication was presented. More fundamentally, no evidence linking sophistication and lying was presented. Therefore, the prosecutor expressed a personal belief about the credibility of the witnesses.

Even though the prosecutor expressed a personal belief about the credibility of the witnesses, prosecutorial misconduct did not occur. "Even if [comments] were an expression of personal opinion, they cannot be characterized as prosecutorial misconduct unless their effect was to 'prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict.'" Chmiel, 889 A.2d at 545 (quoting Commonwealth v. Paddy, 800 A.2d 294, 316 (Pa. 2002)). While the sophistication comment was inappropriate, the Court does not believe that it impeded the juror's ability to weigh the evidence objectively.

C. The Evidence was Sufficient for a Jury to Find Beyond a Reasonable Doubt that the Defendant was the Robber.

"When reviewing a sufficiency of the evidence claim, [the court] must review the evidence and all reasonable inferences in the light most favorable to the Commonwealth as the verdict winner, and . . . must determine if the evidence, thus viewed, is sufficient to enable the fact-finder to find every element of the offense beyond a reasonable doubt." Commonwealth v. Goins, 867 A.2d 526, 527 (Pa. Super 2004).

Here, the evidence was sufficient for the jury to find beyond a reasonable doubt that the Defendant was the robber. Wykoff identified the Defendant as the robber. She testified that the Defendant's eyes matched the robber's eyes and that the Defendant was the same height as the robber.

In addition, Markham testified that on the day before the robbery, the Defendant told him that he was going to rob the Uni-Mart. Wykoff testified that the robber was wearing black jeans and a garment with a blue hood. Markham testified that when the Defendant arrived at Markham's residence around 8:00 P.M. on the evening of the robbery, he was wearing black jeans and a blue hoodie. Baney testified that the Defendant was wearing a blue hoodie when he arrived at Markham's residence on the evening of December 15, 2012. Both Markham and Baney testified that the Defendant called Markham to the bathroom. Markham testified that in the bathroom the Defendant told Markham that he robbed the Uni-Mart. The Defendant showed Markham a wad of about $500 of cash.[8] Markham testified that after they left the bathroom, the Defendant gave Markham $20. Baney testified that the Defendant had a roll of money and gave Markham a 20 dollar bill. Both Markham and Baney testified that the Defendant changed out of a blue hoodie. Two weeks after the robbery, a gun was found near Markham's residence.

[8] Wykoff testified that the robber took a little less than $600.

Moreover, Starr testified that approximately three months before the robbery, the Defendant told Starr that he was thinking about robbing the Uni-Mart by Bonanza. Fitzpatrick testified that the Defendant told Fitzpatrick and Starr that he was going to rob a store. Starr testified that the Defendant asked Starr if he could find a gun for the Defendant. Starr also testified that the Defendant asked Fitzpatrick if she could find a gun for him. Fitzpatrick testified that the Defendant said he needed a gun. Starr testified that the Defendant asked him to be the get-away driver for the robbery. Fitzpatrick testified that the Defendant asked if Starr would be his ride. Starr testified that after the Defendant was arrested, the Defendant told Starr and Fitzpatrick that he would shoot them if they told police that the Defendant had committed the robbery. Fitzpatrick testified that the Defendant told Fitzpatrick and Starr that he was going to shoot up their house if they told police that he had robbed the Uni-Mart. The Court finds that the above evidence was sufficient.

D. The Verdict was not Against the Weight of the Evidence.

"The law in this Commonwealth has long been that a new trial may be ordered 'on the ground that the verdict is against the weight of the evidence, when the . . . verdict is so contrary to the evidence as to shock one's sense of justice, and the award of a new trial is imperative so that right may be given another opportunity to prevail.'" Commonwealth v. Murray, 597 A.2d 111, 113 (Pa. Super. 1991).

Some of the Defendant's arguments are based on inconsistent statements. "The weight of the evidence is a matter exclusively for the finder of fact . . . ." Commonwealth v. Cox, 72 A.3d 719, 722 (Pa. Super. 2013). "Traditionally, we have recognized not only the jury's ability to determine the credibility of the witnesses but also we have placed this determination within their

sole province." Commonwealth v. O'Searo, 352 A.2d 30, 32 (Pa. 1976). Given the evidence discussed in the above section, the verdict does not shock this Court's sense of justice.

Some of the Defendant's arguments are not based on inconsistent statements. By noting that (1) a gun was found in a dumpster by Markham's residence and (2) Markham admitted that his DNA would be on the gun, the Defendant implies that the evidence shows that Markham committed the robbery. However, both Markham and Baney testified that the Defendant was at Markham's residence on the evening of the robbery, so the jury could have found that the Defendant put the gun somewhere near Markham's residence. In addition, Markham testified that on December 14, 2012, the Defendant gave Markham a gun and Markham "messed around with it for a little bit." Therefore, the jury could have found that Markham's touching of the gun was unrelated to the robbery of the Quick Mart. Finally, the Defendant notes a perceived difference between Wykoff's testimony and the testimony of Markham and Baney. Wykoff testified that the robber put the money in what she believed was a black pillow case with a knot at the bottom, but Markham and Baney testified that the Defendant had a black drawstring bag on the evening of the robbery. Wykoff's testimony is not necessarily at odds with the testimony of Markham and Baney. Having a black drawstring bag does not preclude someone from also having a black pillow case. More critically, Wykoff testified that the Defendant put the money in what she believed was a black pillow case with a knot at the bottom. Given the similarity between and black pillow case with a knot and a black drawstring bag, the jury could have found that the Defendant had a drawstring bag but Wykoff believed it was a pillow case. Because there is evidence to rebut the Defendant's arguments, the verdict does not shock this Court's sense of justice.

E. The Court did not Err in Allowing Trooper Havens to Testify that the Defendant Walked in the Same Way as the Robber.

"If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Pa. R.E. 701.

In Commonwealth v. Huggins,[9] the Superior Court of Pennsylvania quoted the following portion of United States v. Christian,[10] a decision by the United States Court of Appeals for the Seventh Circuit:

> [L]ay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field. We have explained that [a] law-enforcement officer's testimony is a lay opinion if it is limited to what he observed . . . or to other facts derived exclusively from [a] particular investigation.

68 A.3d at 969.

Here, Havens' testimony was rationally based on his perception because he watched a video of the Defendant walking and a video of the robber walking. The testimony was not based on specialized knowledge because people are often able to identify known individuals from the way those individuals move. In addition, Havens' statement that the Defendant walked in the same way as the Defendant was helpful to clearly understanding the testimony. Without such a statement, the jury would have been less likely to understand why Havens was describing the walk of the Defendant and the walk of the robber.

[9] 68 A.3d 962 (Pa. Super. 2013).
[10] 673 F.3d 702, 709 (7th Cir. 2012).

III. Conclusion

The Defendant was not unfairly prejudiced by the introduction of Wykoff's identification because the identification was admissible. The prosecutor's comments during closing argument did not unfairly prejudice the Defendant. The evidence was sufficient for a jury to find beyond a reasonable doubt that the Defendant was the robber. Furthermore, the verdict was not against the weight of the evidence. Finally, the Court did not err when it allowed Trooper Havens to testify that he believed the Defendant had the same walk as the robber.

ORDER

AND NOW, this _____ day of December, 2014, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Post-Sentence Motion is hereby DENIED. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), the Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of this Order; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal in forma pauperis and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

By the Court,

Nancy L. Butts, President Judge