

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1712-2012
	:	
vs.	:	CRIMINAL DIVISION
	:	
	:	Opinion and Order re
BENJAMIN VILLANUEVA, III,	:	Defendant's Post-Sentence Motion
Defendant	:	
		<b><u>OPINION AND ORDER</u></b>

By Information filed on October 25, 2012, Defendant was charged with, among other charges, robbery, theft, receiving stolen property, conspiracy, simple assault and recklessly endangering another person. The charges arose out of an incident that occurred on October 11, 2009 when two masked individuals entered the A Plus Sunoco in South Williamsport and robbed the clerk of cigarettes and cash.

Defendant waived his right to a jury trial and following a non-jury trial on October 21, 2014 and October 22, 2014, the court found Defendant guilty of Count 1, robbery, a felony of the first degree; Count 2, criminal conspiracy, a felony of the first degree; Count 3, robbery, a felony of the second degree; Count 4, criminal conspiracy, a felony of the second degree; Count 5, theft by unlawful taking or disposition, a misdemeanor of the first degree; Count 6, criminal conspiracy, a misdemeanor of the first degree; Count 7, receiving stolen property, a misdemeanor of the first degree; Count 8, criminal conspiracy, a misdemeanor of the first degree; Count 9, simple assault by physical menace, a misdemeanor of the second degree; Count 10, criminal conspiracy, a misdemeanor of the second degree; and Count 11, recklessly endangering another person, a misdemeanor of the second degree.

Defendant's sentencing hearing was held on December 23, 2014. The court sentenced Defendant to an aggregate term of incarceration of five to twelve years in a state

correctional facility, consisting of three to seven years for Count 1, robbery, and a consecutive two to five years for Count 2, conspiracy to commit robbery.<sup>1</sup>

Defendant filed a motion for post-sentence relief on December 30, 2014, and argument was held before the court on January 16, 2015. The motion consisted of four counts: three which requested a new trial and one which sought arrest of judgment.

Defendant first asserts that the court erred in denying his omnibus pretrial motion which sought to suppress the seizure of hair and blood samples from Defendant. The court cannot agree. The court addressed the omnibus motion in its opinion and order dated May 22, 2013 and relies on that decision.

Defendant also contends that the court erred in denying his motion in limine filed on August 6, 2013, which sought to preclude the admission of his conviction of a prior robbery. Again, the court cannot agree, and it relies on its opinion and order dated October 15, 2013.

Defendant next alleges that the evidence was insufficient to establish that he was the perpetrator of the offenses to which he was convicted.

On October 11, 2009 Kimberly Frey was working as a cashier at Sunoco A-Plus in South Williamsport, Pennsylvania. (N.T., 10/21/14, at 12-13). Two individuals entered the store and robbed her of cigarettes and cash. She described the two assailants as one being shorter, like 5'7" or 5'8", and the other one probably about 6'. (Id. at 15). They had "Halloween masks on, gloves and like a duffle bag." (Id.). She described her height as 5'7". (Id. at 16).

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<sup>1</sup>The Court imposed a concurrent one month to two year state prison sentence on Count 9, simple assault by

On cross-examination, Ms. Frey admitted that she believed that the robbery was committed by two white males because the voices sounded familiar and “the eyes.” (Id. at 18, 19, 21).

The manager of the A-Plus Sonoco, Michael Gardner, testified that at the time of the offense the store had a video surveillance system. (Id. at 24). The video from the evening as well as still shots were shown to the court. The video depicted two individuals robbing Ms. Frey. The shorter individual wore a Halloween mask. The taller individual wore a black ski mask with something whitish or grayish or both under it. It did not appear to be flesh under the black ski mask. The taller individual also wore a green jacket and black gloves and was carrying a blue bag with white lettering.

Corporal Carl J. Finnerty of the South Williamsport Police Department testified that he responded to the robbery on October 11, 2009. He was informed that the actors turned left after they exited the store.

Citizens and Northern Bank was located in this area and he accessed video footage from the ATM at the front of the bank. (Id. at 33). A still photograph from the video was provided to the Court to view. It depicted an individual wearing a black ski mask with a white or gray material under the eyeholes. (Id. at 34).

Roy Snyder, a retired police officer from the city of Williamsport next testified on behalf of the Commonwealth. He was a canine handler and he and his police dog tracked the scent of the perpetrators. (Id. at 36-37). According to Mr. Snyder, the trail of the perpetrators went left out of the Sunoco, past the bank, across the street and then stopped.

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physical menace. Counts 3 through 8 merged with Count 1 and Counts 10 and 11 merged with Count 9.

The perpetrators apparently went south on Market Street to Parakeet Alley. (Id. at 45).

Terry O’Connell next testified. He was a Sergeant with the South Williamsport Police Department in October of 2009. On October 13, 2009, a few days after the A-Plus Sunoco incident, he was on duty and he was dispatched to the 700 block of Matthews Boulevard for a “suspicious person report.” (Id. at 49-50). It was approximately 7:21 in the morning and Sergeant O’Connell made a traffic stop of a Stephen Moore (Id. at 50, 51). At the time of the traffic stop, Sergeant O’Connell noticed Defendant “walking down the street on the other side of the street and...keeping a very close eye on [them].” (Id. at 51).

As a result of the suspicious circumstances as explained by Sergeant O’Connell, he and Chief Chris Miller of the Penn College Police Department searched a rectangular area near the stop. (Id. at 53). In the search area, they found a mask and gloves, another mask, a gun and a cell phone. All of the items appeared to have been placed there relatively recently. (Id. at 54-59).

Sergeant O’Connell also obtained a search warrant for the vehicle being driven by Mr. Moore. In the vehicle he uncovered numerous items of interest. They included a blue “grocery type carrying bag”, a black ski mask that had a strand of red “nylon hair” that was “in the one mask that was tucked under the wheel of the trailer”, a green jacket and a cell phone charger. (Id. at 59-62).

The court had an opportunity to view the physical evidence including but not limited to the black ski mask, the blue bag and the green coat. The eyeholes of the black ski mask appeared to have been cut out with the one eyehole smaller than the other. (Id. at 63, 64). The blue bag had white lettering on it as well as a white symbol. (Id. at 65). The green

coat had a patch on the right sleeve right shoulder area as well as some writing on the right upper chest area. (Id. at 66).

Chief Miller testified that he was assisting Sergeant O’Connell in connection with the traffic stop on October 13. (Id. at 87). He confirmed the location of the items that were found in connection with the search and the fact that they appeared to have been placed there recently because they were dry while the grass was wet. (Id. at 89-91). Furthermore, he actually came in contact with Defendant, who was seen “walking in the area of the levy.” (Id. at 92). Defendant was walking away from where the items were located. In fact, considering the direction that Defendant was walking when he first saw Sergeant O’Connell, it is reasonable to infer that Defendant backtracked past where the incriminating evidence was located and toward the levy where he was first confronted by law enforcement.

Sergeant David Pletz next testified. He was employed by the Penn College Police and was asked to assist in connection with the investigation of the incident that occurred after the A-Plus Sunoco robbery. (Id. at 96-97). That morning he came in contact with Defendant. When he asked Defendant for identification, Defendant falsely told him that his name was “Justin Gonzalez.” (Id. at 97). After confronting Defendant with the falsity of his representation, Defendant “changed a few things here and there.” (Id. at 97). As a result, Defendant was taken into custody where he eventually provided his “true name.” (Id. at 97-98).

Christine Hall testified that Stephen Moore and her son Phillip were friends, and Defendant was an “acquaintance” of Phillip but a friend of Mr. Moore. (Id. at 105-106).

Sergeant James Taylor testified. He was employed with the South

Williamsport Police Department in October of 2009. On October 11, 2009, he was called in to assist in connection with the A-Plus Sunoco robbery investigation. (Id. at 115). He confirmed that the taller of the two suspects had the “black hood or ski mask” and a “greenish jacket.” (Id. at 118, 119).

In connection with the investigation of the incident on October 13, 2009, Sergeant Taylor was present when the search warrant was served on the impounded vehicle being driven by Mr. Moore. (Id. at 120). Based upon what was recovered inside of that vehicle “it was apparent that those items – at least they appeared to have been used in the A-Plus robbery.” (Id.). The items that looked consistent included the “blue Giant tote bag”, “a black hood or ski mask” and “an olive drab green coat.” (Id. at 120, 121).

He also concluded that the masks found by Sergeant O’Connell were connected to the incident at Sunoco. (Id. at 121). The “flesh tone” mask appeared to be the same mask that the shorter of the two suspects was wearing, while the white mask appeared similar to what the taller suspect was wearing underneath the black ski mask. (Id. at 121-122).

Further, the still shot from the Citizen and Northern Bank video depicted the green jacket, the black ski mask and even the white coloration coming through the eyeholes. (Id. at 122). As well, a red fiber similar to that found on the one Halloween mask was found inside of the black ski mask. (Transcript, pp. 122, 123). Indeed, the green jacket and tote bag recovered from the vehicle appeared to be the same as those used in the A-Plus Sunoco robbery. (Id. at 124-125). Sergeant Pletz also obtained DNA samples from Defendant. (Id. at 125).

Sergeant Pletz testified regarding audio recordings from Defendant's prison phone calls. (Id. at 132). The recordings, while not transcribed in the record, were listened to by the court. He also testified that the prison intake documents listed Defendant's height as 6'4". (Transcript, p. 134).

Brunee Coolbaugh, a forensic scientist with the Pennsylvania State Police, testified as an expert in serology. (Id. at 148-149). She has worked in serology since 2004. She examined both of the Halloween masks and the black ski mask for saliva. She found saliva on each of the masks and cuts samples out of each mask to be sent for DNA testing. (Id. at 153-155). She consulted with a supervisor in DNA analysis and, in an effort to limit backlogs and time constraints, it was determined that only the Halloween masks would be submitted for DNA analysis because they were the better samples. (Id. at 159). She confirmed that the Halloween mask with hair on it and the red fibrous item that was found in the black ski mask were sent for trace analysis. (Id. at 161).

Nichols Plumley, a forensic scientist with the Pennsylvania State Police Crime Lab at the Harrisburg Regional Laboratory, testified as an expert in the field of trace analysis. (Id. at 165, 167). He scientifically compared the red fiber from the ski mask with the fibers from the Halloween mask. The red fibers were "visually, microscopically and chemically consistent." (Id. at 168).

Angela DiFiore, a forensic scientist who has worked for the Pennsylvania State Police DNA Division since June of 2010, testified as an expert in the field of forensic DNA. (Id. at 176). Ms. DiFiore compared a DNA profile from the one Halloween mask with a known profile from Phillip Hall. Mr. Hall was included as a contributor to that major

mixture and it was “5.1 billion times more likely to be from” him than another individual. (Id. at 185-186). She was also able to develop a DNA profile for the same cut from the front of the Halloween mask with red hair. (Id. at 187). This was a “mixture profile” which was “consistent with three or more contributors” although it had a “single major contributor.” (Id.). She explained that one individual contributed “distinctly more to the mixture.” (Id.). The major contributor’s profile was “more prevalent than the other’s profiles.” (Id. at 188). This major component from the mask with the red hair was a match to the known reference sample from Defendant. (Id. at 192).

On October 22, 2014, the trial continued. Among other witnesses, the Commonwealth called Kevin Rentzel a special agent with the Federal Bureau of Investigation. (N.T., 10/22/2014 at 8). He assisted in the investigation by obtaining relevant telephone records and analyzing them through “Pen-Link Software.” (Id. at 24). Candidly, the Court did not find his testimony to be particularly weighty, if at all.

In addressing a sufficiency of evidence claim, the court must determine whether the evidence introduced at trial and all reasonable inferences derived from the record, viewed in a light most favorable to the Commonwealth as the verdict winner, are sufficient to establish all elements of the offenses beyond a reasonable doubt. Commonwealth v. Sanchez, 36 A.3d 24, 37 (Pa. 2011). Moreover, the Commonwealth may sustain its burden by wholly circumstantial evidence and need not preclude every possibility of innocence. Commonwealth v. Orr, 38 A.3d 868, 872 (Pa. 2011)(citing Commonwealth v. Hansley, 24 A.2d 410, 416 (Pa. Super. 2011)). “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 facts may be drawn from the combined circumstances.” Id.

The court concludes that there was abundant circumstantial evidence sufficient to establish that Defendant was the perpetrator of the crimes to which he was convicted.

First, the Defendant pled guilty to a conspiracy to commit a robbery. This offense occurred on October 13, 2011 just two days after the October 11, 2009 incident at the Sunoco. Among the items found in Defendant’s co-conspirator’s vehicle were the same black ski mask, green jacket and blue tote bag used in the A-Plus Sunoco robbery. Near where the vehicle was stopped, the police found Halloween masks, one of which was identical to the Halloween mask used in the A-Plus Sunoco robbery.

This crime to which the Defendant pled guilty tended to prove not only a common scheme or plan but also the identity of the Defendant as one of the perpetrators in both incidents. The court considered the elapsed time between the crimes, the geographical proximity of the crime scenes and the manner in which the crimes were committed or to be committed. See, Commonwealth v. Judd, 897 A.2d 1224, 1232 (Pa. Super. 2006).

As the Superior Court recently noted in Commonwealth v. Tejada, 2015 PA Super 2 (January 6, 2015), “[t]he 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 finder 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.” Tejada, supra. at 6, citing Commonwealth v. Cahill, 95 A.3d 298, 300

(Pa. Super. 2014).

The video surveillance from the A-Plus Sunoco showed two individuals robbing the store on the date in question. The taller of the two suspects was wearing a black ski mask, a green coat with a patch on the right arm and blue jeans. He was carrying a blue tote bag with a white design on it. The shorter suspect was wearing a Halloween mask, black gloves and blue jeans. The court, as factfinder, had no doubt after reviewing the video surveillance as well as the still photographs from both the A-Plus and Citizens and Northern Bank videos that underneath the black ski mask was another facial covering, and not flesh. The color was whitish gray and not flesh colored.

Found in Mr. Moore's vehicle a few days later was, among other things, the green jacket. There is no doubt in the court's opinion that the jacket was the same jacket used in the A-Plus robbery. It was the same color and it had markings on it that were identical. A blue tote bag was also found in the back of Mr. Moore's car. The court had no doubt in finding that this item also was identical to that used in the A-Plus robbery. It was of the same color, had the same shape and had the same markings on it.

Of significance was the black ski mask found in the back of Mr. Moore's car. It too was identical to the ski mask that was used in the A-Plus robbery. Indeed, the eyeholes that were cut out were different sizes. This was verified on the videotape, the still photos and in viewing the black ski mask itself.

At the time Mr. Moore was stopped, Defendant was seen on the opposite side of the roadway walking in an easterly direction. Yet when he was apprehended shortly thereafter, he was walking in a westerly direction. He had an opportunity and the court could

infer that he walked past or near where the other incriminating items were located.

The one mask that was found was identical to the mask that was used in the A-Plus robbery. In comparing the still frames as well as the video, there were many similar characteristics such as the nose and the “half circle” on the profile.

The second mask that was found had red “fiber hair.” A red fiber was also found on the black ski mask which was worn by the taller suspect during the A-Plus robbery. The inference is that the black ski mask was placed over the second Halloween mask with the red fiber. The evidence was clear that the fibers were visually, microscopically and chemically consistent. It is clearly a reasonable inference based upon all of the circumstantial evidence that the taller suspect wore the white grayish mask with the red hair under the black ski mask.

As well, there was determinative DNA evidence. On the white Halloween mask with the reddish hair, Defendant’s DNA profile was a major contributor and the chances of the profile not being his were extremely small.

While Defendant argued that his DNA could have gotten on the mask from wearing it on the morning of the intended bank robbery, such does not make sense. In Defendant’s conversation with his mother that was recorded at the prison he stated he was “planning to wear it.” If Defendant had not worn it but as he stated was planning on wearing it, it is reasonable to infer that his DNA found its way on the mask because he had worn it previously.

Defendant also made another admission that the court found particularly relevant. During the conversation with this mother while he was in prison, she confronted

him about the mask and the fact that law enforcement was contending that it was the same mask. In what was an apparent slip-up, the Defendant stated “it ain’t mine. The mask I had for that, for the other... .” He said further that “the bank situation don’t got nothing to do with that situation.”

Although the court had a difficult time following some of the telephone evidence, it was fairly clear that during the timeframe of both incidents, Mr. Moore and Mr. Hall had telephone conversations with each other.

With respect to Defendant’s height, there was an abundance of evidence that he was in the height range as estimated by the victim. There was no doubt in the court’s mind that the individual on the surveillance tape and in the still photos was of a similar height to Defendant.

In considering all of this evidence, the court has no hesitation in concluding that it was sufficient to conclude beyond a reasonable doubt that Defendant was the perpetrator of the crimes to which he was found guilty.

Defendant’s final argument is that the guilty verdict was against the weight of the evidence. Similar to the argument set forth in connection with the sufficiency argument, Defendant submits that the verdict was against the weight of the evidence because: the store clerk believed the A-Plus was robbed by two “white guys”; the store clerk said the robbers were between 5’8” and 6’ and the Defendant is 6’4””; the black ski mask worn by the robber was not tested for DNA evidence; the video of the robbery does not reveal any features of a taller robber; the Halloween mask cannot be clearly seen on the video to determine that it was worn under the black ski mask and the DNA evidence on the Halloween mask was a

mixture.

A weight of an evidence claim enables a judge to reverse a verdict only when it is so contrary to the evidence as to shock one's sense of justice and the reward of a new trial is imperative so that right may be given another opportunity to prevail. Commonwealth v. Sanchez, 614 Pa. 1, 36 A.3d , 24, 39 (2011), citing Commonwealth v. Blakeney, 596 Pa. 510, 946 A.2d 645, 652-53 (Pa. 2008). "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part or none of the evidence and to determine the credibility of the witnesses." Commonwealth v. Small, 559 Pa. 423, 435, 741 A.2d 666, 672-73 (1999), cert. denied, 531 U.S. 829, 121 S. Ct. 80 (2000); see also Tejada, 2015 PA Super 2, citing Commonwealth v. Karns, 50 A.3d 158, 165 (Pa. Super. 2012).

Clearly, in light of the discussions set forth above, the verdict did not shock the court's conscience. Ms. Frey's belief that she was robbed by two white guys was speculative at best by her own admission. The height of the assailants as described by her was close to that of the Defendant with respect to the taller one. The fact that the black mask was not tested for DNA is also of no moment since the white mask worn under it was tested and it connected the Defendant to it. The failure of the video to allegedly not reveal any features of the taller robber is insignificant. The taller robber wore the black ski mask and the green jacket and carried the blue tote bag all of which were found in Mr. Moore's vehicle and all of which were intended to be used apparently by Defendant in the bank robbery. Defendant's contention that the Halloween mask could not be clearly seen on the video is correct. Circumstantially, however, the court concluded that it was worn under the black ski mask. Finally, the fact that the DNA evidence on the Halloween mask was a mixture

misstates the testimony of the DNA expert. Defendant was clearly identified as the major contributor. Accordingly, the following order is entered.

**ORDER**

**AND NOW**, this \_\_\_ day of January 2015, the court denies defendant's motion for post-sentence relief.

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
Trisha Hoover, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file