

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : CR-1431-2014
 : OTN: L 883605-2
v. :
 : 2036 MDA 2015
DARRYL HARRIS, :
Appellant : CRIMINAL APPEAL / 1925(a)

OPINION AND ORDER

Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

This Court issues the following Opinion and Order pursuant to P.R.A.P. 1925(a). This is an appeal from an Order imposing sentence upon Appellant, Darryl Harris, on October 28, 2015 after a jury convicted him as to all six counts for which he was tried. Specifically, on April 22, 2015, a jury convicted Harris of possession with intent to deliver a controlled substance, delivery of a controlled substance, criminal use of a communication facility, fleeing or attempting to elude a police officer, possession of a controlled substance, and conspiracy to deliver cocaine.¹ In his concise statement, Mr. Harris raises the following issues for appeal.

- a. The Defendant avers that the trial court erred by denying his motion for a mistrial during trial when the Commonwealth presented exhibits that the Attorney had not previously shown to defense counsel.
- b. The Defendant further submits that suppression court erred in denying his motion to suppress.
- c. The Defendant submits that the evidence presented at trial was insufficient to establish beyond a reasonable doubt that the Defendant committed the offense of delivery of a controlled substance based upon the confidential informant's inability to identify the defendant; her inconsistent version concerning from whom she received the controlled substances.
- d. The Defendant submits that the evidence was insufficient to prove beyond a reasonable doubt that he used a communication device in commission of a crime.

¹ 35 P.S. § 780-113 §§ A30; 18 Pa.C.S. § 7512 §§A; 75 Pa. C.S.A. §3733 §§A; 35 P.S. §679-113 §§ A16; 18 Pa.C.S. §903 §§ C. The information was amended as to Count 2 to reflect a charge of delivery of a controlled substance, an ungraded felony and Counts Seven and Eight, as added as part of the omnibus order, were withdrawn. N.T., *infra*, at 4-5 Count 2, delivery of a controlled substance, and count 5, possession, merged for sentencing purposes.

The Court will provide a brief factual background of the case and then discuss the issues raised in the Concise Statement.

FACTUAL BACKGROUND.

On August 14, 2014, Pennsylvania State Police Trooper (Tpr.) John Whipple filed criminal charges against Harris related to a controlled drug purchase that occurred on that same date. Between August 11 and August 14, 2014, Tpr. Whipple used a confidential informant, Allison Sander, to set up a controlled purchase of crack cocaine, which ultimately occurred on August 14, 2014. Notes of Testimony from Jury Trial held on April 22, 2015 (“N.T.”) at 17-18. From August 11 to August 14, 2014, Tpr. Whipple directed Sander in making exchanges of texts and phone contact for the controlled drug purchase. Whipple targeted Basil Hall for the drug purchase by directing Sander to use a phone number associated with Hall ((267) 243-8253) to attempt to arrange the drug deal. N.T. at 18; 111; 138. On August 13, 2014, Sander received texts from (570) 980-4234. Sander texted to that number a question as to whether that was the same person she was talking to the other day. In response she received a text from (570) 980-4234 that stated “no, but I’m his man. He gave me your number because I got some – some shit.” N.T. 23-24. Following preliminary exchanges, Sander texted (267) 243-8253 (number associated with Hall) a request for about \$300 worth of crack cocaine. A meeting was set up by text with (267) 243-8253. N.T. 24-27. At the meeting place, Sander received and sent texts about her location. N.T. 27-29. Then, Sander observed two males drive buy in a red car, with the passenger gesturing for her to follow them. N.T. 29. Sander pulled behind them on Louisa Street, waited, and then got in the back seat behind the driver. N.T. 29-30. Police observed Sander get into the rear driver’s side of the vehicle and then return to her own vehicle. N.T. 58-59. When Sander was in the vehicle, Sander handed the driver the money and the front passenger

handed her the drugs. N.T. 30-31; 34:20-22; 122. Sander identified the driver as Darryl Harris. N.T. 10-11.

During the controlled drug purchase, police surveilled the vehicle in which the drug purchase took place and identified it as a maroon Buick. N.T. 58-60; 73-78; 86; 87.² Corporal Jeff Paulhamus was in the area of the drug deal at the time it was scheduled to occur to assist the narcotics investigation. N.T. 85. Cpl. Paulhamus was in full duty uniform and in a marked police unit. N.T. 85. Cpl. Paulhamus observed and followed the Buick with the intention of stopping the vehicle and identifying the occupants. N.T. 86-87. When the Buick passed him, Cpl. Paulhamus observed and identified Darryl Harris as the person driving the vehicle. N.T. 90; 102. Cpl. Paulhamus also identified the front seat passenger as Marquis Askew. N.T. 89; 102:21-25. When Cpl. Paulhamus activated his lights, the Buick took off at a high rate of speed. N.T. 88. Police pursued the vehicle until it crashed. N.T. 88; 92-98.

After the crash, Cpl Paulhamus and Trooper Holmes observed Harris get out of the driver's seat and run. N.T. 94; 78. Cpl. Paulhamus also observed the front passenger, Askew, climb out the window and flee. N.T. 94. Cpl. Paulhamus chased Harris on foot and apprehended him. N.T. 90. When police took Harris into custody, Harris was holding the keys to the Buick in his right hand. N.T. 102:405. Police determined that Harris rented the Buick from the Alamo out of Philadelphia. N.T. 129. When apprehended, Harris possessed \$ 1,417 in cash. N.T. 79. N.T. 102:2-5.

Police searched the Buick. N.T. 61. They recovered one pink bag of .45 grams of crack cocaine from the Buick. N.T. 63; 125. Police also recovered two cell phones from the Buick, one from the driver's side floor board (AT &T phone) ((570) 506-9294). N.T. 62, 64; 134:19-25.

² Corporal Mitchell McMunn, with Tpr. Fishel, observed Sander get of get out of the rear driver's side of the Buick and observed the Buick take off at a high rate of speed during police pursuit. N.T. 58-59.

The other phone recovered had been wedged in between the center counsel and the driver's seat (Samsung Galaxy) ((267) 357-1970). N.T. 62; 134.

Police also pursued and apprehended the front passenger, Askew, after he climbed out the window of the Buick and fled. N.T. 94. Upon taking Askew into custody, Askew possessed a pink zip-lock type baggie containing crack cocaine. N.T. 123-124. The baggie was consistent with the two baggies sold to Sander. N.T. 123. Askew also possessed a Verizon flip phone with the phone number (570) 980-4234. N.T. 124, 126.

ISSUES RAISED IN THE CONCISE STATEMENT.

a. THE DENIAL OF THE MOTION FOR MISTRIAL WAS APPROPRIATE.

It is well-settled that the decision to declare a mistrial rests within the discretion of the trial court and is subject to review for an abuse of such discretion. Commonwealth v. Chamberlain, 30 A.3d 381, 422 (Pa. 2011); Commonwealth v. Wright, 961 A.2d 119, 142 (Pa. 2008); Commonwealth v. Simpson, 754 A.2d 1264, 1272 (Pa. 2000). Our Pennsylvania Supreme Court stated that “[a] trial court may grant a mistrial only “where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict.” Wright, 961 A.2d at 142, *quoting*, Simpson, 754 A.2d at 1272. “A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.” Wright, 961 A.2d at 142, *citing*, Commonwealth v. Spatz, 552 Pa. 499, 716 A.2d 580, 593 (Pa. 1998); Commonwealth v. Lawson, 519 Pa. 175, 546 A.2d 589, 594 (Pa. 1988). In general, “the law presumes that the jury will follow the instructions of the court.” Chamberlain, 30 A.3d at 422, *citing* Commonwealth v. Rega, 593 Pa. 659, 933 A.2d 997, 1016 (Pa. 2007); Commonwealth v. Brown, 567 Pa. 272, 786 A.2d 961, 971 (Pa. 2001).

In the present case, Defense counsel moved for a mistrial based upon Commonwealth Exhibit 19-A. Commonwealth Exhibit 19-A is a chart as to the information recovered from the flip phone taken off the person of Mr. Askew and was partially presented during Tpr. Whipple's testimony. N.T. 141. Defense Counsel objected that the document had not previously been shown to him and that the document contained comments that amounted to argument. The Commonwealth represented to the Court that the document was provided to Defense Counsel. 144:11-12, 17. ("Judge I'm certain that I provided this document to Mr. Hoffa (Defense Counsel) to avoid a problem like that." N.T. 145:19-21.) Defense Counsel represented to the Court that the document was not provided in discovery and that he had never seen the document. N.T. 143:14-15; 144:13. The Commonwealth contended that the information is taken straight from the phone records. N.T. 144:25; 145:1-2.

The Court appropriately denied the motion for mistrial. In denying the motion for mistrial, the Court stated the following on the record: "[t]he court does not see that any prejudicial information has been given to the Jury. In an abundance of caution the Court will exclude from evidence 19-A." N.T. 146:10-14. The Court added: "[i]f Mr. Hoffa (Defense Counsel) desires a curative instruction we'll give it at the time of the closing." N.T. 146:20-22. The presentation of Exhibit 19-A during some of Tpr. Whipple's testimony did not present prejudicial information to the jury and certainly was not of "such a nature that its unavoidable effect" was "to deprive the defendant of a fair trial." The information on the exhibit was not prejudicial as Tpr. Whipple could draw some conclusions for the Jury because he was admitted as an expert in the field of drug trafficking enforcement. N.T. 111:1-9. Commonwealth 19-A, illustrated contacts that occurred between phones involved in this case as well as some of Tpr. Whipple's conclusive notations as to those contacts. The notations were not very readable to the

Court. N.T. 144:1-2. Moreover, the exhibit was taken down from view and was not admitted as an exhibit. N.T. 145:16-17; 146, 146:10-14. Lastly, the Defense was offered the opportunity for a curative instruction. N.T. 146:20-22. The record reveals no request for a curative instruction. Therefore, the Court believes it was appropriate to deny the motion for mistrial.

b. THE CONCISE STATEMENT IS TOO VAGUE TO RAISE AND PRESERVE ANY SPECIFIC ERROR AS TO THE SUPPRESSION RULING.

“[I]ssues not included in a Pa. R.A.P. 1925(b) statement are deemed waived on appeal.” Commonwealth v. Lemon, 804 A.2d 34, 36 (Pa. Super. 2012), *citing*, Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998). “Issues raised in an overly broad and vague concise statement are waived as being the “functional equivalent” of not being raised at all. *See, e.g., Hess v. Fox Rothschild, LLP*, 2007 PA Super 133, 925 A.2d 798 (Pa. Super. 2007)(citations omitted). In Lemon, the Superior Court concluded that the defendant’s sufficiency claim was too vague to preserve the issue for appellate review. Lemon, supra, 804 A.2d at 37.

In the present case, the concise statement merely states that suppression court erred in denying his motion to suppress. It does not state what the motion to suppress involved or identify any errors in the ruling. To the extent the Court reviews the suppression Court’s ruling, this Court respectfully relies upon the Suppression Court’s opinion and Order entered on January 14, 2015 which provides comprehensive reasoning as to the Suppression Court’s rulings in this case.³

c. THERE WAS SUFFICIENT EVIDENCE THAT THE DEFENDANT DELIVERED A CONTROLLED SUBSTANCE.

The scope of review on appeal for sufficiency of the evidence “is limited to considering the evidence of record, and all reasonable inferences arising therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner.” Commonwealth v. Rushing, 99 A.3d

³ Sander identified Harris as the driver with certainty at trial. N.T. 52:7-18. No police misconduct was alleged.

416, 420-421 (Pa. 2014), *citing*, Commonwealth v. Diamond, 83 A.3d 119, 126 (Pa. 2013); Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 478 (Pa. 2004); Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006); Commonwealth v. Chapney, 832 A.2d 403, 408 (Pa. 2003). The standard of review for sufficiency is well settled and provided in case-law as follows. The scope of review on appeal for sufficiency of the evidence “is limited to considering the evidence of record, and all reasonable inferences arising therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner.” Commonwealth v. Rushing, 99 A.3d 416, 420-421 (Pa. 2014), *citing*, Commonwealth v. Diamond, 83 A.3d 119, 126 (Pa. 2013); Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 478 (Pa. 2004); Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006); Commonwealth v. Chapney, 832 A.2d 403, 408 (Pa. 2003). The standard of review for sufficiency is well settled and provided in case-law as follows.

The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. Commonwealth v. Velez, 51 A.3d 260, 263 (Pa. Super. 2012), *quoting*, Commonwealth v. Mobley, 14 A.3d 887, 889-890 (Pa. Super. 2011).

In the present case, the jury convicted Harris of delivery of a controlled substance under 35 P.S. § 780-113(a)(30), which is defined as follows.

Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance. 35 P.S. § 780-113(a)(30).

The charges arose from a controlled drug purchase that occurred on August 14, 2014. There is ample evidence, particularly when viewed most favorably to the Commonwealth, that the drug sale took place in a maroon Buick rented by Harris and driven by Harris at the time of the purchase. Police observed Sander get into the Buick without drugs and get out of the Buick. Police recovered 2 baggies of crack cocaine from Sander after she got out of the Buick.

Police identified Harris as the driver of the Buick shortly after the drug purchase. When Cpl. Paulhamus activated his lights, Harris took off at a high rate of speed and led police on a vehicle chase until Harris crashed the Buick. Then Harris got out of the Buick and ran. When taken into custody, Harris held keys to the Buick and had \$ 1,417 in cash on his person. A baggie of crack cocaine was recovered from the Buick. Sander testified with certainty that Harris was in the driver's seat and she handed Harris the money and then the front seat passenger gave her the drugs. It is reasonable to infer and conclude that at all relevant times, Harris had control over the Buick in which Sander purchased drugs and aided and abetted the sale of the drugs. It is reasonable to infer that Harris sat in the driver's seat when he took \$300 from Sander in exchange for the front seat passenger providing her with crack cocaine.

Appellant contends that there is insufficient evidence to support Harris' conviction for delivery of a controlled substance because the confidential informant, Sander, had failed to identify Harris from a photo array and because during the preliminary hearing in September of 2014 Sander testified mistakenly as to who she gave the money to as between the driver and front passenger, but also definitively corrected that testimony at that same preliminary hearing. While Sander did not identify Harris from a photo array, Sander did identify Harris as the driver after seeing his profile. N.T. 49-50. Sander explained that when she handed Harris the money from the back seat, with Harris in the driver seat, she did not have a front view of Harris but

instead a profile. Once she observed Harris profile, she was able to identify him. As to Sander's testimony at the preliminary hearing, Sander corrected the testimony in the same proceeding. Sander twice confirmed at the preliminary hearing that she handed the money to the driver and received the drugs from the passenger. N.T. 33-34. Moreover, Sander testified at trial that she was absolutely certain that she handed the money to Darryl Harris. N.T. 52:7-18. Sander had no doubt that she handed the money to the driver, Harris. N.T. 34, 52. The jury was free to find this testimony credible.

Furthermore, that there was significant independent evidence consistent with Sander's identification of Harris as the driver who took the money. Police identified Harris as the driver shortly after the drug transaction. Harris rented the Buick. Harris held the keys to the Buick. Harris possessed \$1,417 in cash at the time he was taken into custody. A baggie of crack cocaine was found in the Buick. Viewing the evidence and inferences in favor of the Commonwealth, this Court respectfully submits there was more than sufficient evidence to support the jury's determination that Harris was guilty of delivery of a controlled substance.

a. THERE WAS SUFFICIENT EVIDENCE THAT THE DEFENDANT USED A COMMUNICATION DEVICE IN COMMISSION OF A CRIME.

Applying the principles for review on appeal for sufficiency of the evidence as outlined above, there was sufficient evidence that Harris used a cell phone in the commission of the crime of selling crack cocaine. A person commits the offense of the criminal use of communication facility, 18 Pa.C.S. § 7512 as charged in this case, "if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under ... The Controlled Substance, Drug, Device and Cosmetic Act." 18 Pa.C.S. § 7512(a). A telephone is a communication facility. 18 Pa.C.S. § 7512(c).

Viewing the evidence and inferences from that evidence in favor of the Commonwealth, evidence supported reasonable inferences that Harris used, aided and abetted the use of, a cellular phone to sell crack cocaine in exchange for \$300 on August 14, 2014. There were five phones were connected up with the August 14, 2014 drug deal.⁴ First there is the original number associated with Hall ((267) 243-8253) that Tpr. Whipple originally targeted for the controlled buy. N.T. at 18; 111; 138. Second, there was the Verizon flip phone (580) 980-4234 recovered from the person of Askew, who was the front passenger of the Buick. N.T. 126; 137. Third, there was the AT&T phone, (570) 506-9294, that was recovered from the driver's side floor board, directly at Harris' feet. N.T. 134:19-25. Fourth, there was the other phone recovered from the Buick that had been wedged in between the center console and the driver's seat (Samsung Galaxy) ((267) 357-1970). N.T. 62; 134. Last, there was (267) 230-4536 which was an initial number that police had to target Basil Hall, N.T. 141, and which transmitted texts to Sander and to some of the other phones after the drug deal took place.

There was sufficient evidence to infer that Harris used the AT & T phone (570) 506-9294 for the drug deal on August 14, 2014. The AT & T phone was recovered from the driver's side floor board, directly at Harris' feet. N.T. 134:19-25. Harris rented the Buick and had the keys to the Buick. Harris did not have any phone on his person when he was apprehended. The AT&T phone and the Samsung Galaxy phone listed a contact number which Harris telephoned 12 times from prison. N.T. 151. The AT & T phone listed the number associated with Hall ((267) 243-8253) as a contact. N.T. 140. Between August 11 and August 13, there were 17 calls between the AT & T phone and the number associated with Hall ((267) 243-8253). During that time period, Sander had been exchanging texts with that number and ultimately set up controlled drug

⁴ These phones are prepaid cellular accounts without identifying information and which is normal to use in narcotics trafficking. N.T. 137. The AT&T phone could not be downloaded because it was password protected. N.T. 134.

purchase through that number. On the date of the drug sale, there were 14 calls between the AT & T phone and the number associated with Hall ((267) 243-8253).

The AT & T phone also listed the number of Verizon flip phone (580) 980-4234 that had been recovered on Askew's person as a "contact." N.T. 140. There were multiple calls between the Verizon flip phone and the AT & T phone between August 8 and 14. N.T. 142-143. On August 13, 2014, Sander received texts from that phone, included the text that stated "no, but I'm his man. He gave me your number because I got some – some shit." N.T. 23-24. During the police pursuit and shortly thereafter, the AT&T phone received calls from the last phone connected with the drug deal, (267) 230-4536. The AT&T phone and the Samsung Galaxy phone listed a contact number which Harris telephoned 12 times from prison. N.T. 151. From this evidence, the jury could reasonably infer that Harris used the phones that were recovered from the Buick that Harris rented and drove to facilitate the drug transaction which occurred in the Buick on August 14, 2014.

For these reasons, this Court respectfully submits that the jury verdict be affirmed.

BY THE COURT,

February 11, 2016
Date

Richard A. Gray, J.

cc: District Attorney's Office (KO/AC)
Public Defender's Office (WJM)
(Superior & 1)