

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :
:
vs. : No. CR-1109-2014
:
ELTON MOLINA, :
Defendant :

Jean Engler, Esquire Counsel for Plaintiff
District Attorney
Arley Kemmerer, Esquire Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - October 18, 2018

On May 9, 2018, a jury of his peers convicted the Defendant, Elton Molina (hereinafter "Molina") of four (4) of the five (5) charges filed in the information against him. On August 24, 2018, this Court sentenced the Defendant to a total sentence of not less than eleven (11) years to not more than twenty-two (22) years in a state correctional institution. An appeal was filed on August 30, 2018 and this Memorandum Opinion is in response to that appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Around 7:30 P.M. on September 10, 2014, a strong-armed robbery occurred at the Tresckow Superfood in Tresckow, Banks Township, Carbon County. Pennsylvania State Police obtained statements from various witnesses, one of whom identified, in general terms, what the two suspects were wearing.

This witness, Ashley Cannon (hereinafter "Cannon") testified that she was across the street from the Tresckow Superfood when she heard a commotion¹ and saw two individuals walking towards the Superfood. Cannon was able to initially identify these two individuals as African-American. One of these two individuals was wearing a darker jacket and dark pants. The jacket, as Cannon explained, had a hood which this individual had used to cover his head, and in the words of Cannon was "pulled tight", presumably in an attempt to obscure his face. Cannon next observed these individuals enter the store with the other shorter, stockier individual, striking the victim, Manoj Patel, with a gun. Molina was observed by Cannon, behind the counter. At that point Cannon ran to another location of the residence where she was visiting, but returned moments later to observe these same two individuals running from the store in the same direction from which they came.

The State Police also obtained a video from a nearby residence which depicts two similarly dressed individuals walking towards the scene prior to the time the robbery occurred and then moments later that same video shows what appears to be the same two individuals running away from the scene.

Found near the crime scene by the State Police was a right-handed glove and a CO2 gun which was seized and retained as

¹ Cannon described the "commotion" as whooping and clapping.

possible evidence in this investigation.

The victim, Manoj Patel, also testified regarding this incident. He described the attack by these individuals as well as the serious injuries he sustained from being struck. He also provided testimony that mirrored that of Cannon regarding general descriptions of the individuals but more specific information regarding what they were wearing. Patel also testified that the individual with the hood pulled up was also wearing ski goggles.

During an unrelated criminal investigation involving Molina's co-defendant, Amir Edwards (hereinafter "Edwards"), police seized items of evidence from a vehicle including a left-handed glove, that matched the right-handed glove found near the crime scene, and a set of ski goggles and a BC/BS card belonging to the victim, Manoj Patel. Edwards was a passenger in that vehicle at the time of the stop and prior to seizure of these items.

The Commonwealth then produced Michele Berger (hereinafter "Berger") as a witness. Berger was the ex-girlfriend of Molina and mother of his child, and was still friendly with him. Berger testified that at some time after this incident she had occasion to be in Molina's company and testified that Molina told her that the police wanted to talk to him about a robbery. Berger also

testified that Molina showed her a selfie² of himself dressed in a black sweater (as Berger describes it) and wearing goggles. Molina asked Berger "if [she] could recognize him?" She testified that she could tell it was him. Berger also testified that Molina asked her for money to go to Canada and that Edwards³ pistol whipped a man. Berger also testified that while being questioned by the police, she was shown the surveillance video from that same neighborhood camera and that one of the individuals in that video was wearing the same clothing that was worn by Molina in the selfie.

The Commonwealth also called Lauren Force from the Bureau of Forensic Sciences at the Wyoming State Police Lab. Ms. Force was qualified as an expert in DNA analysis. She testified that she received two known DNA samples, one each from Molina and Edwards. She further testified that she analyzed several pieces of evidence including the gloves and ski goggles. It was her expert opinion that the sample piece taken from the left-handed glove contained DNA compatible to that of both Molina and Edwards. She further opined that neither of these individuals could be excluded as possible sources of the DNA found on this glove and based on her analysis that the likelihood of two other African-Americans

² A selfie, for those who are not technologically advanced, is a picture of oneself taken by oneself.

³ Berger testified that Molina referred to Edwards as "BooBoo" and that she knew Edwards by that nickname.

providing that combination of DNA was one in 790 quadrillion and of two Hispanic individuals, one in 2.8 quintillion. Force also testified that, as to the goggles, she could not provide an opinion as the results of her testing were "uninterpretable", meaning there were too many overlaps in the DNA she found to specifically identify a source of the DNA found on the goggles.

At the conclusions of this testimony, the Commonwealth rested its case in chief. Thereafter, Molina attempted to present Daniel Shitovich, an employee of Giant Foods in Hazelton. Mr. Shitovich was being called to establish a foundation for the presentation of a video purportedly showing another individual wearing clothing similar to that of one of the individuals involved in this incident. This witness would then set the stage for the testimony of a private investigator, Joseph Chillari. Through an offer of proof, Molina's counsel explained that the investigator would testify that the person in the video was wearing the exact same clothing that the Defendant was wearing when the robbery took place. The following relevant portions of a discussion between the Court and Counsel, which took place during a sidebar and thereafter in Chambers, read as follows:

KEMMERER: I would like to call Daniel Shitovich.

MS. ENGLER: May we approach, Judge?

(Discussion held at sidebar.)

MS. ENGLER: Your Honor, I believe the last time we were here and in chambers and other places, Counsel said she had one witness. My understanding was it was Mr. Chillari. Now she is calling someone else. I ask for an offer of proof.

MS. KEMMERER: It will establish the foundation for the video I want to show.

. . .

MS. KEMMERER: I need someone -- he works for Giant Foods and he's establishing the foundation for the video.

. . .

THE COURT: What's the relevance? Beyond foundation, the relevance of the tape is what?

MS. KEMMERER: He is using the victim's credit cards.

THE COURT: Who is he?

MS. KEMMERER: The person in the video.

THE COURT: Okay.

MS. KEMMERER: The same day as the robbery.

MS. ENGLER: He might be guilty of receiving stolen property, but that's not relevant to this.

THE COURT: Who is the person in the video?

MS. KEMMERER: His name is Seth Hughes.

THE COURT: How do we know Seth Hughes used the credit cards?

MS. KEMMERER: The person in the video used the credit cards, per Trooper Surmick's investigation. Then the identification of Seth Hughes comes from Mr. Chillari meeting him. He met with him. He saw him. He can identify him. He spent time with him.

MS. ENGLER: Why is that relevant to this prosecution?

MS. KEMMERER: He used the credit cards of the victim and he is wearing the exact same outfit that the Defendant was allegedly wearing when the robbery took place.

MS. ENGLER: Why would that be relevant, unless if you are saying that he was not -- that Mr. Molina was not the person committing the crime and he was? That is an alibi defense.

. . .

MS. KEMMERER: An alibi is saying that Mr. Molina was somewhere else.

MS. ENGLER: And that's what you are saying.

THE COURT: If you are trying to present testimony that this person was the person in the video, then you are suggesting that the person in the video is not Mr. Molina. I am talking about the video from Mr. Lamonica with the identification, albeit the general identification, by Miss -

MS. ENGLER: Berger.

THE COURT: No, the first one, the first witness.

MS. ENGLER: Ashley Cannon.

THE COURT: Right, and Mr. Patel being able to identify the clothing. They don't specifically identify the person.

MS. KEMMERER: The common thread is the clothing. There's another person wearing the same clothing using the victim's credit cards.

. . .

MS. KEMMERER: And the only thing that is identifying Mr. Molina is the clothing.

MS. ENGLER: And Michelle Berger's statements.

. . .

MS. KEMMERER: But that's how she identified the person in that video. So there's another person in a video the same day with the same outfit using the victim's credit cards.

. . .

THE COURT: When you want to establish that someone else was the perpetrator of a crime, you are suggesting to the jury that your client was not there. And my understanding of how alibi works is if you are going to argue your client wasn't at the scene of the crime and he was elsewhere, you are establishing it through some sort of backdoor means with the video. This claim that this other person was the person who could have committed the crime, you are not placing Mr. Molina at the scene, and it is in a sense an alibi, a backdoor alibi.

MS. KEMMERER: But I am not saying whether he was or wasn't at the scene. I am saying that this person who was identified through an outfit is a different person. That's the nuance there.

THE COURT: A different person -

MS. KEMMERER: He could have been the person in the white shirt. I don't know. But the person in the tan pants and the black jacket, there's another person in that exact outfit using the victim's credit cards. So I am not saying whether Molina was there or not or what he did or didn't do. I am just saying that this person who used the card had the victim's card in his possession and he is wearing that same outfit.

. . .

He also could have been the one that did the robbery.

. . .

But the point is I am not saying whether he was there or not. I don't know where Mr. Molina was.

MS. ENGLER: You are saying it could be and -

MS. KEMMERER: He could have still been part of it.

THE COURT: If your argument is not that he was there, he just happens to be wearing the same clothes that your client had, then what's the relevance? Lots of people could be wearing the same clothes that your client had on, allegedly, at the time of the crime.

. . .

MS. KEMMERER: Okay. So then, you know what, maybe he was wearing -- maybe Mr. Molina was the one wearing a white t-shirt. I don't know who was. That's the thing. I am not saying where he was or where he wasn't. I am not presenting evidence about that.

. . .

MS. KEMMERER: Well, you can argue it another way, maybe Seth Hughes was part of the crime as well.

MS. ENGLER: There were only two individuals.

. . .

(Now in Chambers)

THE COURT: Let me first turn to Attorney Kemmerer and ask; what do you have to support the fact that this is not alibi testimony that you are presenting?

MS. KEMMERER: There's several cases where the concept of alibi is defined as a defense that places the Defendant at the relevant time at a different place than the scene involved, and so removed from there as to render it impossible for him to be guilty.

I don't have anybody preparing to place Mr. Molina anywhere yay or nay at the scene. I can't do that. I don't have anybody that has firsthand knowledge of that.

THE COURT: Okay. Then let me follow up with this question. The witness that you intend to call would be Mr. Chillari to try to establish that in the video, there is a person using credit cards belonging to the victim wearing similar clothing to that worn by one of the persons in the video.

MS. KEMMERER: Correct.

THE COURT: And that that person is not Mr. Molina, is that correct?

MS. KEMMERER: Well, Mr. Chillari can only testify as to the identity of the person in the Giant surveillance video.

. . .

MS. KEMMERER: That there was an individual wearing the same clothing description as the person who -- as one of the people who performed the robbery.

THE COURT: And what are you attempting to establish by that?

MS. KEMMERER: That that person who used the credit cards is Seth Hughes.

THE COURT: Okay. And as it relates to the trial, what type of defense are you trying to establish with this evidence, that it was Seth at the scene or was not Mr. Molina at the scene or neither of those?

MS. KEMMERER: It's just identified as, basically, exculpatory evidence.

. . .

THE COURT: Well, exculpatory in what sense? What does it establish from a defense standpoint?

MS. KEMMERER: That this person that we are honing in on in this trial wearing a black hoodie and tan pants could be a different person. I don't know if it is or not.

. . .

MS. KEMMERER: But I am not placing Mr. Molina there or not there.

. . .

THE COURT: When you go to the jury, assuming this evidence gets in, what is your argument to the jury going to be as it relates to this video that you are purporting to present?

MS. KEMMERER: I want them to look at the person in the video using the credit card and compare that person to what they are seeing in the Dustin Lamonica surveillance video.

. . .

THE COURT: Then what?

MS. KEMMERER: Even if I didn't know who the person in the credit card video is, okay, so let's remove that factor for a second, there is a very clear shot of that person's face that looks different, I would think to a lay person, or to anybody, than Mr. Molina. So it is up to the jury.

THE COURT: After you argue to the jury that this person in this Giant Foods video is wearing the same clothing, and you need to compare that to the person who's in the Lamonica video, what are you then going to say to them, that that person could have been the one that committed the crime?

MS. KEMMERER: It is up for them to decide if they think my client is that person in the video.

THE COURT: Isn't that an alibi?

MS. KEMMERER: No, because I am not placing him there or not there. I am not -

. . .

MS. KEMMERER: But I am not placing him -- when you read the definition of an alibi, it's placing -- it is a witness who is placing the Defendant somewhere else. Not one of my witnesses is going to make that placement, not one of them. They don't know where he was.

THE COURT: But you are removing him from the scene of the crime by suggesting to the jury that this other person is the one that was at the scene of the crime.

MS. KEMMERER: I am not removing him from the scene of the crime. I am not removing him from there. There were two actors. There could have been more people. There's

only two people in the video. There could have been eight people doing it.

THE COURT: He is only wearing one set of clothing, and it's the clothing that -- I am assuming you are trying to establish it was the same that Mr. Molina is alleged to have worn based upon the testimony presented so far.

MS. KEMMERER: It is the same.

THE COURT: Okay.

MS. ENGLER: What's the same? I am sorry.

THE COURT: The jacket and pants.

MS. ENGLER: You're saying it is the same? You have these clothes in your possession?

MS. KEMMERER: The same description.

THE COURT: Similar to, similar to.

. . .

THE COURT: If all you are trying to establish with this witness, Mr. Chillari, is that there's a gentleman that he met that he was able to identify somehow through this video wearing similar clothing, if that's all he is going to do, I don't even know if or how that is relevant to the case, other than to throw up a smoke screen that says; there are possibly dozens or thousands of other people, and this is one of them, who wore similar clothing to that of the Defendant.

MS. KEMMERER: Well, it is not just about the clothing he was wearing. This is the same -- this person used the victim's credit cards less than four hours later, on the same day, wearing the same outfit. It's not just a person off the street. We are not pulling just any random surveillance video.

The Police must have thought it was relevant because they pulled it from Giant Foods. So this isn't just a random person. This is a person who was wearing the outfit which the thread of the Commonwealth's case has been from each witness, from Ashley Cannon to Mr. Patel

to Michelle Berger, that this person was wearing a dark jacket and tan pants. The only person who was able to identify that the person was Mr. Molina was Michelle Berger. Her only way to identify him in the video, I am talking visually, physically identify him, is she said yesterday; I identified him in the video because of the outfit he was wearing. That is exactly what she said and that is all she said.

ENGLER: And then she went on to give eight or nine different admissions that he made to her.

MS. KEMMERER: Well, I think there's a potential credibility issue there.

MS. ENGLER: You can argue that to the jury.

MS. KEMMERER: That's not my decision. But she didn't identify in that surveillance video Mr. Molina by the way he walked or any other visual queue. It was just his outfit. So that is why I don't believe this is alibi. I don't know. I don't know if that was him or not.

MS. ENGLER: That's the point.

MS. KEMMERER: But I think it raises enough of a reasonable doubt as to whether or not it is this person.

MS. ENGLER: That's the point. That's the point.

MS. KEMMERER: But I am not placing him somewhere else.

THE COURT: But you are trying to place this Seth individual there by saying; look, he has got the credit cards that were taken from Mr. Patel. Look, he has got the same type of clothing on that's in the video and described by all these people.

What other purpose would there be than to establish that as the relevance for presenting these witnesses?

MS. KEMMERER: That is the relevance. But that doesn't mean that -

THE COURT: But placing him in the shoes -- the place of Mr. Molina removes Mr. Molina from that location. There's no other testimony that says there was a third person there who did this.

MS. KEMMERER: I understand that, but I don't think that it places Mr. Molina somewhere else.

THE COURT: Well, where does it place him? If he is not removed from the scene where everybody else in some way, shape or form has circumstantially placed him, where does it place him?

MS. KEMMERER: Because I think the jury has to decide if they think it's the same person or not.

. . .

MS. KEMMERER: But I think it is germane to an alibi defense to be placing an individual at -- to have someone testify that this person was somewhere else and I do not have anybody here today who's going to place Mr. Molina somewhere else.

. . .

THE COURT: If that's the reason -- if what you said before is the reason you are trying to present this testimony, to me, it sounds like, as I said before, a backdoor alibi and I am not going to permit it because notice wasn't given.

MS. KEMMERER: I don't think that it's an alibi. I don't think it meets even the definition of an alibi.

. . .

THE COURT: Well, I have to make a judgment call based on my belief and understanding of the law and the offer of proof that you have presented. I have ruled accordingly.

The request of Molina to present this testimony was denied by the Court on the basis that the testimony to be presented by Chillari was tantamount to an alibi witness and no notice of alibi defense was ever filed by Molina.

Thereafter, upon completing deliberations, the jury returned guilty verdicts on the following charges: conspiracy to commit aggravated assault⁴, robbery⁵, conspiracy to commit robbery⁶, and thefts by unlawful taking.⁷ The jury found Molina not guilty of simple assault.⁸

On August 24, 2018, after ordering and receiving a pre-sentence investigation, this Court sentenced Molina to an aggregate sentence of eleven (11) years to twenty-two (22) years in a State Correctional Institution. Thereafter, on August 30, 2018, Molina filed the instant appeal. On September 4, 2018, this Court directed Molina to file a concise statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), which he did on September 18, 2018. In that concise statement, Molina claimed a single error of the Court during trial as follows:

The Trial Court erred by ruling that Defendant's proposed evidence was an alibi defense and thus excludable evidence because no Notice of Alibi Defense was filed where Defendant attempted to present evidence demonstrating the possibility of mistaken identity as it related to the alleged perpetrators of the offenses in question.

LEGAL DISCUSSION

The sole issue for the Appellate Court to decide is whether the trial court erred in excluding testimony proffered by Molina

⁴ 18 Pa.C.S.A. §903

⁵ 18 Pa.C.S.A. §3701(a)(1)(i)

⁶ 18 Pa.C.S.A. §903

⁷ 18 Pa.C.S.A. §3821(a)

⁸ 18 Pa.C.S.A. §2701(a)(1)

which would have been nothing more than evidence of a witness who would state the he viewed a video from a local store showing someone wearing clothing similar to that worn by one of the individuals alleged to have been involved in this incident. The Commonwealth's initial response to this offer of proof was to object on the basis that this testimony was tantamount to an alibi defense. The Commonwealth retorted that the defense wanted to suggest to the jury that there existed someone wearing similar clothing that could be the person in the videos presented by the Commonwealth and identified by three (3) independent individuals, including the mother of Molina's child, and thus Molina was not present at the scene of the crime. As indicated herein, the Court agreed with the Commonwealth believing this to be an attempt to present an alibi without providing notice prior thereto. This testimony was disallowed. "Alibi is defense that places the Defendant at the relevant time in a different place than the scene involved as so removed therefrom as to render it impossible to be the guilty party." *Comm. v. VanWright*, 378 A.2d 382, 385 (Pa. Super 1977) (citations omitted).

Since Molina was attempting to show that the person in the store video was the person who committed the crime and was present at the scene of the crime wearing clothing similar to that observed by eyewitnesses and on a video and on Molina's selfie and was someone other than himself, he is therefore placing himself

elsewhere. By doing this, he was attempting to present an alibi defense or as this Court called it, a "back door alibi" by attempting to show someone else was at the scene wearing clothing observed and proving to be worn by the perpetrator as shown by the Commonwealth.

Even if this evidence was not indicative of a true alibi defense and mistaken identity as claimed by Molina, the quantity of the evidence proffered by Molina would have been limited to testimony that someone in the general population of the world, happened to be caught on video wearing clothing similar to the person depicted in the Commonwealth's evidence. The Court could have limited or denied this testimony on pure relevancy or hearsay grounds as well. Chillari could not have testified to any more than that he observed a person wearing similar clothing. He would not have been able to identify the person in the store video; he would not be able to make a comparison of the person in that video to the person in the other video; he would not be able to testify as to what that other person was doing . . . all of that would be inadmissible hearsay and properly excluded. Further, the quality of the evidence was suspect as well. As proffered by Molina, all Chillari would testify to would be that the clothing was "similar" to that worn by the person identified by Commonwealth witnesses. There were no identifying logos or insignias on the clothing worn by the person in the Commonwealth video. Thus, it would be pure

speculation for Chillari to say definitely that it was the exact same clothing worn by the individual in the Commonwealth's video, Molina's selfie shown to Berger as well as the testimony of the eyewitnesses and the victim himself.

The admissibility of evidence is within the sound discretion of the trial court, and this appellate court will not reverse a trial court's decision concerning admissibility of evidence absent an abuse of the trial court's discretion. An abuse of discretion will not be found based on a mere error of judgment, but rather exists where the court has reached a conclusion which overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Alicia, 92 A.3d 753, 760 (Pa. 2014)

(internal citations omitted).

"When reviewing a trial court's decision regarding the admissibility of evidence, [the appellate court] use[s] an abuse of discretion standard and will only reverse 'upon a showing that the trial court clearly abused its discretion'." *Comm. v. Savage*, 157 A.3d 519, 523 (Pa. Super. Ct. 2017) citing *Commonwealth v. Schoff*, 911 A.2d 147, 154 (Pa. Super. Ct. 2006).

Even if Molina was attempting to show "misidentification" as a defense here, his proffered testimony falls woefully short to evidence this defense. The clothing worn by the individuals is not on trial; the Defendant, Elton Molina, is and the testimony proposed to be elicited from Chillari was not going to the issue

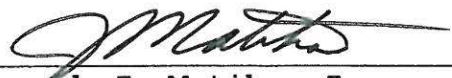
of misidentification of the person involved. Thus, it was properly excluded.

Lastly, even if the trial court was incorrect in its ultimate ruling, the refusal to allow this evidence is harmless error in light of the cumulative testimony identifying Molina as the perpetrator of these offenses, including Berger's testimony, DNA evidence and Molina's statements to Berger.

CONCLUSION

Based on the foregoing, this Court respectfully requests the Appellate Court to deny the appeal of Elton Molina and to allow all convictions to stand as rendered and all sentences to remain as imposed.

BY THE COURT:



Joseph J. Matika, J.