

February 18, 2016.

Subsequently, Defendant appealed the jury verdict. This memorandum opinion is submitted in accordance with Pennsylvania Rule of Appellate Procedure 1925(a). For the reasons stated below, this Court requests the Honorable Superior Court to affirm the judgment of sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On September 15, 2015, Defendant was found guilty of intentionally taking the property of Jason Green, more specifically a Colt .380 pistol, by unlawfully gaining access to Green's vehicle. Defendant was also found guilty of receiving stolen property for receiving, retaining, or disposing of said pistol.

The evidence proffered at trial established that the victim, Jason Green, (hereinafter "Green"), was employed at Mallard Market in Lehigh, and was working there on October 17, 2014. (N.T. 9/14/15 at p. 81). On that same day, Defendant entered the market and walked to the back of the store where the public restrooms are located. *Id.* On his way to and from the bathroom, Defendant passed an area where the employees of Mallard Market keep their personal belongings, such as their jackets, wallets, and key rings. *Id.* at p. 81-82. Green testified that when he retrieved his keys at the end of the workday and went to his vehicle, the wireless "key fob" that allows access to the vehicle had been stolen. *Id.*

at 149-152. Upon further investigation, Green noticed that his firearm, which was located in the center console of the vehicle, was missing. *Id.* at 153-54.

Officer Bruce Broyles of the Lehighton Police Department testified that he dealt with Green when Green came to the Lehighton Borough Police Station to file a report of this stolen firearm.³ *Id.* at 93. Officer Broyles also testified that there were no signs of forced entry into Green's vehicle.⁴ *Id.* at p. 99-100. The Commonwealth also introduced video footage from various security cameras inside and outside of Mallard, the admittance and authenticity of which were stipulated to by Defendant. *Id.* at p. 100-102. Officer Broyles testified as to the video footage, stating that an individual matching the Defendant's physical description and wearing similar clothing was seen walking out of the store towards Green's vehicle.⁵ (N.T. 9/14/15 at p. 103). The individual can be seen walking through the parking lot until a vehicle responds due to the activation of some type of remote-entry device. *Id.* at 104. Officer Broyles stated that he was able to observe on the surveillance video movement within the

³ Officer Broyles also testified as to, and the Commonwealth entered into evidence, the Colt .380 pistol's serial number, showing ownership of a .380 caliber pistol registered in Green's name. (N.T. 9/14/15 at p. 93-94).

⁴ The Commonwealth introduced a number of photographs of Mallard Market, the adjoining parking lot, and Miller's vehicle, which were collectively marked as Exhibit Commonwealth-2. (N.T. 9/14/15 at p. 95-100).

⁵ Officer Broyles testified that he had previous dealings with Defendant, and was able to identify him in the video based on those prior dealings. (N.T. 9/14/15 at p. 106-107).

vehicle, and that the same individual is seen exiting the driver's side of the vehicle. *Id.* at 103.

A second Lehighton Borough Police Officer, Officer Robert DeFuso, also testified that he had had prior dealings with Defendant, and upon his initial viewing of the security footage, it was also his belief that the individual in the video was Defendant. *Id.* at 122-124. Officer DeFuso further testified that when he spoke to Defendant the day after the theft, Defendant had similar shoes to the individual in the video. *Id.* at 123.

Store Manager Judy Miller (hereinafter "Miller") testified as to Defendant's presence in the store on the date of the theft. Miller stated that she saw Defendant in the store, and she was able to identify him as she has known Defendant "probably over five years now." (N.T. 9/14/15 at p. 127).⁶ Miller testified she observed Defendant walk into the back, where the restrooms are located, past the area where the staff keeps their personal items. *Id.* at p. 127-131. Miller also stated that the individual in the surveillance footage was wearing the same clothes that Defendant was wearing when he came into the market. *Id.* at 132.

The Commonwealth also offered the testimony of Steven Nace (hereinafter "Nace"), who was also working at the market on October

⁶ Throughout the trial, Defendant repeatedly proffered the idea that Defendant was not in the store on the date in question, but that it was in fact his brother, Jeffrey, who had been in the store. Miller testified that it was actually Defendant who was at the Mallard Market on October 17, 2014, and not Defendant's brother, Jeffrey. (N.T. 9/15/15 at p. 127-128).

17, 2014. Nace stated that at approximately 9:30 that morning, he attempted to use the restroom, only to find it occupied. *Id.* at 144-145. Nace commented that the individual in the restroom was "in there for longer than I thought would be a normal bathroom visit", and that the individual in the restroom had placed dark-colored clothing on the floor. *Id.* at 145. Later, Nace estimated that the individual in the restroom was in the room with the door locked for "maybe five minutes". *Id.* at 147.

Finally, Green testified that it would have been impossible to gain access to his keys unless someone was physically in the area where they were located, as they were hidden in a plastic tray. (N.T. 9/14/15 at p. 150-151). Green also testified that he always locked his car doors and none of his windows were open when he went into the store that morning. *Id.* at 153. Green stated that his Colt .380 pistol was taken, as well as his wallet. *Id.* at 154. Green also testified that the vehicle had no tool marks or other indications of a forced entry. *Id.*

As a result of the investigation conducted by the Commonwealth and the Lehigh County Borough Police Department, a criminal complaint was filed against Defendant on February 24, 2015. The Defendant was charged with one count of Theft by Unlawful Taking of Movable Property and one count of Theft by Receiving Stolen Property. A jury trial began on September 14, 2015, and after hearing and viewing the above stated evidence, a jury found Defendant guilty

on both charges.

Thereafter, a pre-sentence investigation ("PSI") report was ordered. Defendant filed a Motion for New Trial on September 25, 2015, and also made an oral motion for Judgment of Acquittal. After argument thereon, this Court denied Defendant's motions on January 25, 2015. Upon completion of the PSI report, the Court sentenced Defendant on February 18, 2016, to a period of incarceration of not less than twenty-one (21) months nor more than four (4) years in a state correctional institution, and also sentenced him to pay the cost of prosecution and make restitution to the victim, Jason Green, in the amount of five hundred (\$500) dollars.

Subsequently, on March 17, 2016, Defendant appealed his judgment of sentence. In his "Concise Statement of Matters Complained of on Appeal", Defendant raises a number of issues⁷. Upon review of the matters complained of, this Court believes there are three (3) main "issues" that are central to Defendant's appeal. Those issues are:

- 1) That the verdict is contrary to law in that the Commonwealth's witnesses were not sufficiently credible to warrant the jury's verdict⁸;

⁷ This Court would note that Defendant's "concise" statement includes twenty-three (23) items, though many can be grouped into particular areas of law or fact, as discussed in the body of this Opinion.

⁸ Of the twenty-three (23) items complained of on appeal, this Court believes that items 1, 11, 20, and 22 relate to credibility of the witnesses, and will therefore be addressed together.

- 2) That the verdict is contrary to law in that the weight and sufficiency of the evidence presented is fundamentally contrary to the jury's verdict of guilt and that said verdict cannot be sustained⁹; and
- 3) That the court erred, abused its discretion, or otherwise ruled improperly in denying Defendant's Motion for New Trial¹⁰.

DISCUSSION

I. Weight and Sufficiency of Evidence

a. Credibility of the Witnesses

In Defendant's Matters Complained of on Appeal, he challenges the credibility of nearly every Commonwealth witness, including Officer Broyles (Items 1, 11), Officer DeFuso (Item 1), Judy Miller (Items 20, 22), and Steven Nace (Item 20). Defendant avers that their testimony was "subjective and fundamentally contradictory", and thus warrants a reversal of his convictions.

When a Defendant challenges the jury's verdict based on witness credibility, the Superior Court has clearly held this is a matter for the finder of fact:

[i]t is true that the Commonwealth bears the unshifting burden of proving each and every element of the crime charged beyond a reasonable doubt, but it is also true that the credibility of witnesses is a matter exclusively within the province of the jury, and that in

⁹ Of the twenty-three (23) items complained of on appeal, this Court believes that items 3, 5, 7, 9, 13, 15, 17, and 19 relate to the weight and sufficiency of the evidence, and will therefore be addressed together.

¹⁰ Of the twenty-three (23) items complained of on appeal, this Court believes that items 2, 4, 6, 8, 10, 12, 14, 16, 18, 21, and 23 all relate to whether the court erred, abused its discretion, or otherwise rules improperly in denying Defendant's Motion for New Trial and Motion for Judgment of Acquittal, and will therefore be addressed together.

passing on the weight and credibility to be accorded to witness testimony the jury is free to believe all, part, or none of any witness's testimony.

Commonwealth v. Bailey, 469 A.2d 604, 614-15 (Pa. Super. Ct. 1983) (*internal citations omitted*). "Although guilt cannot be found from mere surmise, conjecture, or speculation, circumstantial evidence may sustain a conviction if the totality of the evidence establishes guilt beyond a reasonable doubt." *Commonwealth v. Spencer*, 639 A.2d 820, 822-83 (Pa. Super. Ct. 1994), *citing Commonwealth v. Chambers*, 599 A.2d 630, 635 (Pa. 1991).

In the case *sub judice*, Defendant raises a number of issues regarding the testimony of Commonwealth's witnesses, including questioning whether the officers could identify Defendant in the security footage, Officer Broyles' statement that there is not actually any criminal activity observable in the security footage, and Judy Miller's "speculative" testimony as to what she observed Defendant doing in Mallard Market.

"When the challenge to the weight of the evidence is predicated on the credibility of trial testimony, our review of the trial court's decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review."

Commonwealth v. Trippett, 932 A.2d 188, 198 (Pa. Super. Ct. 2007).

During the trial, the jury heard testimony from five (5) witnesses and viewed four (4) exhibits. Both Officer Broyles and Officer DeFuso stated that their observations of the security

footage along with their familiarity with Defendant from previous dealings led them to believe Defendant was the individual seen on the video. Judy Miller testified that she had known Defendant for over five years and recognized him in the store that day. An individual wearing clothing matching the description of Defendant given by Miller can be seen walking through the parking lot, inside of Green's vehicle, and then exiting Green's vehicle.

The jury's choice not to believe Defendant's version of the events and to find the Commonwealth's witnesses credible was purely within its discretion and should not be disturbed on appeal. Further, the evidence presented in this case shows that the verdict does not shock one's sense of justice. For these reasons stated, this Court finds that the jury did not err in this respect, and their findings should not be reversed.

b. Sufficiency of the Evidence

Defendant also contends that the evidence presented by the Commonwealth is insufficient to sustain the jury's verdict, including the surveillance footage¹¹ (Items 3, 5, and 9), the lack

¹¹ Item 3 also seems to raise an issue regarding the admissibility of the surveillance footage itself, and reads, in its entirety "Whether the Commonwealth's and the investigating officer's failures to view or even request all of the raw, unedited surveillance video of the premises during the relevant time period, and to provide the same to Defendant and his counsel during the course of discovery, so prejudiced Defendant and affected the outcome of his trial that the jury's verdict cannot be sustained, and warrants a reversal of Defendant's convictions." It should be noted that not only did Defendant not raise any issues regarding a failure to receive discovery prior to trial or raise any objections to the video being played during the trial, but Defendant went as far as to stipulate to the video's admission and authenticity at the

of a recovered pistol (Item 13), the lack of recovered bank cards or a wallet (Item 15), and the lack of any recovered fingerprints (Item 17). Defendant avers that the insufficiencies are "so fundamentally contrary" to the jury's verdict that the verdict cannot be sustained.

Just as with witness credibility, the Superior Court has a clear standard of review for the sufficiency of the evidence:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of evidence. 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 fact may be drawn from the combined circumstances. The 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 trier 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.

Commonwealth v. Caban, 60 A.3d 120, 132-33 (Pa. Super. Ct. 2012), quoting *Commonwealth v. Quel*, 27 A.3d 1033, 1037-38 (Pa. Super. Ct. 2011).

time of trial. This Court, accordingly, is confused as to what issue Defendant is raising with regards to the content or timeliness of the video at this point in the proceedings.

Contrary to the arguments of Defendant, the Commonwealth presented sufficient evidence to prove Defendant committed Theft by Unlawful Taking. All evidence is viewed in the light most favorable to the Commonwealth as the verdict winner, and all reasonable inferences must be taken in favor of the Commonwealth. *Commonwealth v. Hall*, 830 A.2d 537, 541-42 (Pa. 2003).

18 Pa.C.S.A. § 3921 defines Theft by Unlawful Taking or Disposition and provides, in relevant part, that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa.C.S.A. § 3921(a). Movable property is defined as "[p]roperty the location of which can be changed." 18 Pa.C.S.A. § 3901.

In order to convict Defendant of Theft by Receiving Stolen Property, it was necessary for the Commonwealth to show three elements beyond a reasonable doubt. The evidence must establish that the property was stolen, that Defendant was in receipt, possession or control of it, and that Defendant had "guilty knowledge", that is, that he knew or had reason to know that the property was stolen. See *Commonwealth v. Carson*, 592 A.2d 1318, 1321 (Pa. Super. Ct. 1991).

The Commonwealth presented sufficient evidence that the Defendant took or exercised control over Green's weapon, albeit through circumstantial evidence. Judy Miller identified Defendant

as being in the store on the date of the theft while wearing dark clothing, as well as seeing him pass by the area where Green kept his keys. Steven Nace stated someone with dark clothes was in the restroom for an extended period of time. The security footage introduced by the Commonwealth showed an individual in dark clothing walking through the parking lot and a similarly dressed individual exiting Green's vehicle.

Officers Broyles and DeFuso viewed the security footage and formed beliefs that Defendant was the individual in the video based on their prior dealings with him. Officer DeFuso also stated that Defendant was wearing similar sneakers to the individual in the video when he spoke to Defendant the next day. Green testified that the pistol and his wallet were in his locked vehicle when the day began but were no longer there once he reached his vehicle and discovered his key fob had been stolen.

Defendant's argument that the Commonwealth failed to establish that Defendant took the weapon from Green's car intimates that each witness's testimony should be viewed independently, and any and all inconsistencies warrant a reversal of his conviction. Although Defendant sought of the jury, and now seeks on appeal, to have the Appellate Court evaluate each piece of evidence in a vacuum, the jigsaw puzzle the Commonwealth presented in establishing its case was not complete until all evidence and testimony was presented and the jury was able to review each piece

of evidence in concert with one another. In other words, a jigsaw puzzle is complete once all the pieces are in place and the puzzle depicts the picture on the box. Here, once all the pieces of evidence were presented by the Commonwealth, the jigsaw puzzle, as a whole, supports the jury's findings.

II. Failure to Grant Defendant's Motion for New Trial

In addition to the credibility and weight & sufficiency issues regarding the evidence, Defendant raises eleven (11) items (2, 4, 6, 8, 10, 12, 14, 16, 18, 21, and 23) which all relate to whether the court erred, abused its discretion, or otherwise rules improperly in denying Defendant's Motion for New Trial.¹² Defendant filed his Motion for New Trial on September 25, 2015, and also made an oral motion for Judgment of Acquittal. After argument thereon, this Court denied Defendant's motions by Order on January 25, 2015.

The Pennsylvania Supreme Court has stated that "[o]ur scope of review in considering an order granting a new trial is limited.

¹² Each of these eleven (11) items is identical to the item raised immediately before it, but with "error of law" language added. For example, Item 11 reads "Whether Officer Broyles' testimony acknowledging that there is no observable criminal activity on any of the video surveillance footage is so fundamentally contrary to the jury's verdict of guilt on the basis of that video surveillance footage that the said verdict cannot be sustained and warrants a reversal of Defendant's conviction." Item 12 then reads "Whether the Court committed an error or law, abused its discretion, or otherwise rules improperly in denying Defendant's Motion for New Trial on the aforesaid grounds that Officer Broyles' testimony acknowledging that there is no observable criminal activity on any of the video surveillance footage is so fundamentally contrary to the jury's verdict of guilt on the basis of that video surveillance footage that the said verdict cannot be sustained and warrants a reversal of Defendant's conviction."

Even though evidence in the record may be conflicting, the law is well-settled that a grant or denial of a motion for a new trial will not be reversed unless there has been a clear abuse of discretion or an error of law." *Commonwealth v. Morales*, 326 A.2d 331, 332 (Pa. 1974), citing *Commonwealth v. Jones*, 317 A.2d 233 (Pa. 1974). Under the "abuse of discretion" standard:

It is not sufficient to persuade the appellate court that it might have reached a different conclusion; it is necessary to show an actual abuse of the discretionary power. 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 that 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. Brown, 134 A.3d 1097, 1105-06 (Pa. Super. Ct. 2016), quoting *Commonwealth v. Christine*, 125 A.3d 394, 398 (Pa. 2015).

In reaching its decision to deny Defendant's Motion for a New Trial, this Court used much of the same rationale as stated above in the weight and sufficiency sections of this Opinion. Defendant raised many of the same issues in his Motion for New Trial, and this Court found that the jury, as the finder of fact, had properly heard and reviewed all the evidence in reaching their verdict. Simply citing to conflicting testimony or the lack of direct evidence, Defendant has failed to show how this Court committed an error of law or abused its discretion in denying Defendant's Motion for New Trial. Thus, this Court requests that the Superior Court

find no merit in this claim, and the claim should be dismissed.

CONCLUSION

Based upon the foregoing, this Court respectfully asks that Defendant's issues raised on appeal be dismissed as meritless. Accordingly, this Court respectfully recommends that the jury verdict be allowed to stand and that the Order of Court dated February 18, 2016, imposing upon Defendant a period of incarceration in a state correctional institution of not less than twenty-one (21) months nor more than four (4) years, as well as the cost of prosecution and restitution to the victim, Jason Green, in the amount of five hundred (\$500) dollars, be affirmed.

BY THE COURT:

Joseph J. Matika, J.