

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-CF-1349

MUSONDA MULENGA
AKA EMMANUEL GUZEH,* APPELLANT,

V.

UNITED STATES, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CF1-15299-11)

(Hon. Jennifer M. Anderson, Trial Judge)

(Argued January 9, 2017)

Decided May 25, 2018)

Before GLICKMAN, *Associate Judge*, and FARRELL and WASHINGTON,**
Senior Judges.

MEMORANDUM OPINION AND JUDGMENT

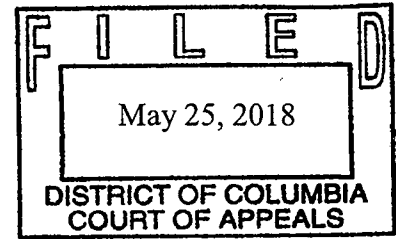
PER CURIAM: On September 29, 2015, a jury found appellant Musonda Mulenga guilty of second-degree murder, a lesser-included offense of first-degree premeditated murder,¹ and one count of possession of a firearm during a crime of violence or dangerous offense ("PFCV")² stemming from the 2010 death of

* Appellant's name in court records is Musonda Mulenga; at trial, he was referred to as Emmanuel Guzeh.

** Judge Washington was the Chief Judge at the time this case was argued. His status changed to Senior Judge on March 20, 2017.

¹ D.C. Code §§ 22-2101, -4502 (2012 Repl.).

² D.C. Code § 22-4504 (b) (2012 Repl.).



Michaeldeon Talley ("Talley"). On appeal, Mulenga raises three claims of error: (1) that the trial court abused its discretion in refusing to strike the testimony of a witness who violated the Rule on Witnesses; (2) that the trial court erred in denying Mulenga's motion to suppress all evidence seized as a result of improperly obtaining his cellphone number; and (3) that his second-degree murder charge should be reversed because the jury's verdict on that charge was inconsistent with the verdicts on other charges. Finding no error, we affirm.

I. Facts

Around February 2010, Mulenga, Latonya Hall ("Hall") and Natasha Adams ("Adams") discussed finding someone they could rob with Mulenga.³ Hall and Adams suggested one of their acquaintances, Talley. At Mulenga's urging, they contacted Talley and arranged to meet him at his apartment. Mulenga drove Hall and Adams to the apartment building, located at 917 48th Street, N.E., and waited in the car as Hall and Adams went up to Talley's apartment to case the apartment and determine whether there were valuables worth stealing. At some point, Mulenga called them to find out whether Talley was worth robbing and, despite their comments to the contrary, Mulenga went up to the apartment. In addition to Talley, Hall, and Adams, there were two other individuals in the apartment when Mulenga arrived, Nathan Pree and Genae Gregg.

All of those present on the night of the shooting testified to similar versions of the events that unfolded. The evidence, viewed in a light most favorable to the government, was that: Mulenga entered the apartment claiming to be looking for Hall and Adams, preceded to kick open a bedroom door, and when verbally confronted by Talley, he shot him and then struggled with him in the hallway. While struggling on the ground, Mulenga shot Talley three more times before fleeing the apartment with Hall and Adams.

³ Half-sisters Latonya Hall and Natasha Adams were associates of appellant on the day of the murder. They testified to assisting appellant carry out this crime and both pleaded guilty to crimes in connection with this case. Natasha Adams pled guilty to second-degree theft and Latonya Hall pled guilty to conspiracy to commit robbery and attempted robbery.

II. Rule on Witnesses

Before trial, the trial court invoked the rule on witnesses, thus restricting the witnesses from discussing their testimony at trial with any other witnesses. *See generally, Sanchez v. District of Columbia*, 102 A.3d 1157, 1160 (D.C. 2014). After Hall testified, and during the cross-examination of Adams, it was established that Hall had discussed her trial testimony with Adams prior to Adams being called as a witness. When Mulenga's counsel became aware that they had violated the court's ruling, he asked the court to strike Hall's testimony. The trial court considered Mulenga's request, and ruled that while Hall's testimony would not be stricken, the jury would be informed on the violation and instructed that they could consider the violation into consideration in assessing her credibility. In addition, the trial court allowed Mulenga's counsel to re-cross Hall and subsequently provided the jury with an instruction that it could consider Hall's violation of the rule on witnesses in assessing Hall's credibility.

Mulenga contends that the trial court abused its discretion when it denied his request to strike Hall's testimony. However, the trial court, recognizing that striking the prior witness's testimony was inconsistent with the objective of the rule on witnesses, appropriately "resort[ed] to lesser sanctions." *Benn v. United States*, 801 A.2d 132, 140, 141 (D.C. 2002). The instruction crafted by the trial court, commenting to the jury on the witness' conduct and allowing opposing counsel to cross-examine the witness on the nature of the violation, was consistent with the type of remedy that this court has previously concluded is sufficient to address any general harm caused by a violation of the rule. Here, the trial court adequately remedied the violation by permitting the defense to recall and impeach Hall for the violation and by giving the jury an appropriate instruction on how to consider the violation in evaluating Hall's testimony. *See Benn*, 801 A.2d at 143; *Hawes v. Chua*, 769 A.2d 797, 810 (D.C. 2001) (finding an appropriate remedy to a sequestration order violation where the trial court commented on the witness's violative conduct to the jury and allowed opposing counsel to cross-examine the witness on the nature of the violation). Under the circumstances, we can discern no abuse of discretion in the trial court's refusal to strike Hall's testimony.

III. Cellphone Records

Mulenga next contends that his Fourth Amendment privacy rights were violated when the police illegally obtained his cellphone number from the registration records of the motel where he was staying, and that the cell tower evidence that was obtained from that information should have been suppressed as

the fruit of the poisonous tree. More specifically, he asserts that the trial court erred in denying his motion to suppress evidence that a call from his cellphone was made to Hall from an area near Talley's apartment around the time of the murder. However, we need not reach the issue of whether the cell tower evidence was illegally obtained, and should have been suppressed, because even assuming the trial court erred in its ruling, we are satisfied that the error was harmless. Here, four eyewitnesses placed Mulenga in the apartment on the night of the murder so the evidence of his making a phone call from right outside the apartment building was merely corroborative evidence that he was in the area that evening and did not meaningfully contribute to his being found guilty of murder in this case.

IV. Second-Degree Murder Verdict

Mulenga next asserts that the verdicts rendered by the jury were inconsistent and therefore, his conviction for second-degree murder should be vacated. More specifically, he argues that because the jury found Mulenga not guilty of first-degree murder and guilty of the lesser included offense of second-degree murder, the verdicts raise questions as to whether the jury found that there was proof beyond a reasonable doubt that it was he who was the gunman on the night of the murder. "It is well established that 'a not guilty verdict to one count of an indictment that is inconsistent with a guilty verdict to another count cannot invalidate the guilty verdict so long as the guilty verdict is based upon sufficient evidence.'" See *Richardson v. United States*, 116 A.3d 434, 443 (D.C. 2015) (quoting *Ransom v. United States*, 630 A.2d 170, 172 (D.C. 1993)). "We review sufficiency of the evidence claims *de novo*," *Parker v. United States*, 155 A.3d 835, 842 (D.C. 2017), and "in the light most favorable to the government." *Price v. United States*, 985 A.2d 434, 436 (D.C. 2009).

In this case, there is more than sufficient evidence to support the jury's verdict that Mulenga was guilty of second-degree murder. Both Hall and Adams provided strong circumstantial evidence that Mulenga was the shooter on the evening in question. Genae Gregg testified that she witnessed Mulenga fire a gun at Talley, heard them fighting, and then observed Talley's dead body as she fled the apartment. Another witness, Nathan Pree, testified that he heard the commotion and then saw Mulenga holding a gun while he struggled with Talley. He further testified that he heard something that sounded like firecrackers, saw two to three flashes of light, smelled gun smoke, and then saw Talley collapse. Finally, Hall and Adams both testified that Mulenga admitted that he shot Talley when they were in the car after the incident as he was claiming that he did it because he was "trying to protect [them]." Based on this evidence, we have no trouble concluding

that the evidence was sufficient for a jury to find Mulenga guilty of murder beyond a reasonable doubt.

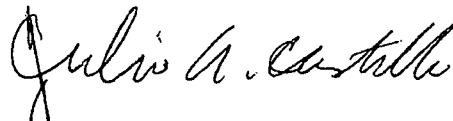
Mulenga also asserts that his conviction should be vacated because he lacked the requisite *mens rea* to be found convicted of second-degree murder. Mulenga contends that the record lacked any evidence that he had the specific intent to kill Talley. However, based on the testimony of Hall and Adams that he helped plan the robbery, when coupled with evidence that he entered the apartment with a gun in his hand and subsequently admitted to shooting Talley to protect his accomplices, the jury's finding that Mulenga intended to "kill or seriously injure Talley, or acted in conscious disregard of an extreme risk of death or serious bodily injury" is amply supported by the evidence. *Herbin v. United States*, 683 A.2d 437, 443 (D.C. 1996); see *Walker v. United States*, 167 A.3d 1191, 1201 (D.C. 2017) ("Second-degree murder is a killing done with 'malice aforethought,' a term meaning 'either specific intent to kill or inflict serious bodily harm, or a conscious disregard of the risk of death or serious bodily injury.'") (internal citations omitted).

V. Conclusion

For the reasons stated above, the judgment of the trial court is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Jennifer M. Anderson
Director, Criminal Division

Copies e-served to:

Elizabeth Trosman, Esquire
Assistant United States Attorney

Steven R. Kiersh, Esquire