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IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

vs.

JERRY HORTON,  
Defendant

: No. CR-2049-2006

: CRIMINAL DIVISION

: 1925(a) Opinion

WILLIAM J. BURD  
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COURTS

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FILED  
LYCOMING COUNTY

OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Judgment of Sentence dated December 7, 2007. The relevant facts follow.

In 1997 Scott Wicks transferred the ownership of his guns to his mother Shirley Wicks. In the late summer or early fall of 2005, Mr. Wicks was suffering from drug and alcohol problems. Mr. Wicks did not have money to purchase drugs, so he was loaning his vehicle to an individual he knew as "Mar" in exchange for drugs. Mr. Wicks overheard Mar show interest in getting a gun, so he took one of the guns he had transferred to his mother, a Smith and Wesson Model 66 .357 magnum handgun with the serial number AUY8841, and provided it to Mar in exchange for \$180 worth of crack cocaine. Two other individuals were present with Mar during the transaction, but Mr. Wicks did not know who they were. Mar took the gun and placed it in the waistband of his trousers, where it could not be seen. Mr. Wicks went home, smoked the crack and got high.

During the night of October 13-14, 2005, the Smith and Wesson gun was

found in the possession of a shooting victim, Andre Spinks, who was crouched behind some bushes in the 1500 block of Memorial Avenue. Officer Delker ran the serial number of the Smith and Wesson and it came back to someone with the last name of Wicks.

On February 18, 2006, Shirley Wicks went to the police department and reported that two guns were missing from her home. She was not sure which two were missing because a few had been sold. Ms. Wicks said all the guns were sold at Sauers' Sporting Goods and she was going to get a list of those guns. The police prepared a report, but did not initially list the gun as stolen.

Eventually, the police received the information regarding which guns were sold and discovered the Smith and Wesson was one of the two that were missing.

On May 18, 2006, Agent Raymond Kontz was doing a follow-up investigation of the October 14, 2005 shooting incident in the 1500 block of Memorial Avenue. As part of that investigation, he interviewed Scott Wicks regarding the missing Smith and Wesson and his knowledge of its disappearance. Mr. Wicks indicated to Agent Kontz that he had a drug problem and he had traded the gun with a person he knew as "Mar" for \$180 in crack cocaine.

On June 24, 2006, Mr. Wicks gave a handwritten statement to Agent Kontz. Agent Kontz also showed Mr. Wicks three photo arrays to see if he could identify Mar or the two other individuals who were with him on the day the gun was traded for drugs. Mr. Wicks immediately identified a photograph of Defendant as the individual he knew as "Mar." He did not pick out the two other individuals in any of the arrays.

In March 2006, Defendant was the victim of a shooting in the 600 block of

Sixth Avenue, but he failed to appear as a witness at the preliminary hearing for that case on June 27, 2006.

On June 28, 2006, Agent Kontz filed charges of person not to possess a firearm, carrying a firearm without a license and delivery of a controlled substance against Defendant, and Magisterial District Judge Carn issued a warrant for Defendant's arrest.

On October 17, 2006, the police were investigating another shooting on Sixth Avenue. During this investigation, Defendant was taken to the police station and placed in an interview room. The police initially did not realize Defendant had a warrant outstanding for his arrest because he had given them a fake name. Agent Kontz saw Defendant in the interview room, and realized who he was and that there was a warrant for his arrest. Agent Kontz retrieved the warrant and allowed Defendant to read the warrant and a packet of associated paperwork. Defendant then made the following statement: "Yah... I knew this was coming... I did it but you've got to understand why I ran. They (referring to the suspects in the shooting of which Defendant was the victim) threatened my family...my kids... I couldn't stay."

A jury trial was held on October 26, 2007. The jury found Defendant guilty of carrying a firearm without a license and delivery of a controlled substance.<sup>1</sup> The Court sentenced Defendant on December 7, 2007 to incarceration in a state correctional institution for an aggregate of 24 to 55 months.<sup>2</sup>

Defendant filed a post sentence motion on December 14, 2007 wherein he asserted the verdict was against the weight of the evidence, the Court erred in denying

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1 The person not to possess a firearm charge was severed from this trial and ultimately nol prossed.

2 The Court imposed a 15 to 35 month sentence for carrying a firearm without a license and a consecutive 9 to

counsel's request for a mistrial when Agent Kontz testified that Defendant provided a false name when he was questioned on an unrelated matter, and the evidence was insufficient to support the jury's verdict. The post sentence motion was denied by operation of law on April 15, 2008.

Defendant filed a timely appeal. In his appeal, Defendant raises the same three issues he raised in his post sentence motion.

Defendant avers the evidence was insufficient to support the verdict based on the lack of credibility of Scott Wicks and no corroborating evidence. This Court cannot agree. The credibility of a witness is within the sole province of the jury who is free to believe all, part or none of any witness's testimony. Commonwealth v. Spotz, 552 Pa. 499, 510, 716 A.2d 580, 585 (Pa. 1998); Commonwealth v. Gibson, 553 Pa. 648, 664, 720 A.2d 473, 480 (Pa. 1998). Here, the jury accepted the credibility of Mr. Wicks and rejected the credibility of Defendant, which was their prerogative.

Defendant also claims the verdict was against the weight of the evidence. Again, the Court cannot agree. An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. Commonwealth v. Sullivan, 820 A.2d 795, 805-806 (Pa.Super. 2003). A new trial is awarded only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. Id. at 806. The jury's verdict did not shock the Court's sense of justice. In essence, this case revolved around the credibility of Mr. Wicks and Defendant. The jury chose not to believe Defendant and with good reason. Defendant claimed he did not make his statement to Agent Kontz

until after his preliminary hearing, but the police report documenting that statement was prepared and filed with the records department before that date. Defendant also asserted that he ran because the police kept warning him that if he didn't testify the police would make it hard for him and they did by filing these charges. See N.T., at p. 90. This assertion came off as ridiculous and contrived. The more Defendant said in his defense, the worse things went for him. By the end of his testimony, it became apparent that Defendant did not think he could be convicted without the police catching him red-handed with the gun or the drugs. Unfortunately for Defendant, the jury could (and did) convict him based on Mr. Wicks' testimony, which was completely within their province as the finder of fact.

Defendant's final contention on appeal is that the Court erred by denying his request for a mistrial when Agent Kontz testified that Defendant provided a false name when questioned in an unrelated matter. Agent Kontz' testimony regarding Defendant providing a false name was responsive to defense counsel's questioning. Defense counsel asked Agent Kontz if Defendant was arrested and incarcerated at the time Defendant gave his statement. Agent Kontz explained how Defendant initially was in custody, but was not under arrest. Defendant was brought to the police station for questioning about a shooting. Although there was an outstanding warrant for Defendant's arrest, he wasn't arrested because he gave the police a false name. Agent Kontz saw Defendant at the station and realized who he was and that there was a warrant for his arrest. When Defendant was shown the warrant for his arrest and the criminal complaint, he made the statements that he knew this was coming and explaining why he ran. See N.T., at pp. 65-66, 68.

The Court finds this evidence was admissible under the "res gestae" exception

to rule against admission of evidence of other crimes or bad acts. This exception was explained in Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460 (Pa. 2004) as follows:

Evidence of distinct crimes are not admissible against a defendant being prosecuted for another crime **solely** to show his bad character and his propensity for committing criminal acts. However, evidence of other crimes and/or violent acts may be admissible in special circumstances where the evidence is relevant for some other legitimate purpose and not merely to prejudice the defendant by showing him to be a person of bad character . . . . [One such] "special circumstance" where evidence of other crimes may be relevant and admissible is where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. This special circumstance, sometimes referred to as the "*res gestae*" exception to the general proscription against evidence of other crimes, is also known as the "complete story" rationale, i.e., evidence of other criminal acts is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.

Id. at 215-216, 864 A.2d at 496-497, quoting Commonwealth v. Lark, 518 Pa. 290, 543 A.2d 491 (Pa. 1988). Since the evidence showed how Defendant was arrested in this case, it was relevant and admissible;<sup>3</sup> thus, a mistrial was not warranted.

The Court denied the mistrial request but indicated if counsel wanted a cautionary or curative instruction to provide such an instruction to the Court. N.T., at 72. Counsel never requested or provided such an instruction. At the end of the case, the Court asked counsel if there were any objections to the jury instruction or if there was anything that was omitted, misstated or overlooked. N.T., at 113-114. Both counsel responded in the negative. Since counsel did not request a cautionary instruction and did not indicate the Court omitted or overlooked such an instruction, the Court believed counsel did not want to

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<sup>3</sup> The Court also notes that this evidence would have been admissible in rebuttal after Defendant testified that he was arrested on Second Street.

draw attention to Agent Kontz' passing reference that Defendant provided a false name to the police.

DATE:

*28 July 08*

By The Court,

*Clinton W. Smith*  
Clinton W. Smith, Senior Judge

cc: District Attorney  
Nicole Spring, Esquire  
Work File  
Gary Weber, Esquire (Lycoming Reporter)  
Superior Court (original & 1)