IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-1662-2012**
	:	**CP-41-CR-1990-2013**
vs.	**:**	
	:	
	:	
KENNETH MARTIN,	**:**	
Appellant	**:**	**1925(a) Opinion**

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 July 7, 2016. The relevant facts follow.

On June 19, 2012 at approximately 11:13 a.m. three black males entered Noor Ford's hotel room, Room 214, at the Econo Lodge in Williamsport, Pennsylvania. Although the door was open because the air conditioner was not working, the individuals entered without Ford's permission or consent. Ford knew two of the individuals as "Snoop" and "Dark." After viewing the video from the hotel's surveillance/security system, Trooper Tyson Haven subsequently identified the third individual as Terrance Forshyte or "Tee-Pain."

Ford had been selling heroin for Snoop and owed him money. Snoop pointed a black semi-automatic pistol at Ford. Snoop said he was going to "pop" Ford and demanded the money. Ford told Snoop he didn't have the money. Snoop pistol-whipped Ford, knocking him to the ground. Then he, Tee-Pain, and Dark punched and kicked Ford in the head and upper body. At one point, Ford was knocked unconscious. At least one of the

individuals rifled through Ford's pockets but they were empty. The three individuals then began rifling through the room. They took money, heroin, Ford's iPhone, his Xbox, a backpack, and a gray duffle bag containing a video game and numerous music CDs. Video surveillance from the Econo Lodge showed the individuals leaving the second floor of the Econo Lodge via the stairway, carrying the backpack and duffle bag.

After the individuals left, Ford called a friend to take him to the hospital. Ford was beaten badly. His face was bloodied and swollen. His right eye was swollen shut. His lip was cut, as if one of his teeth went into or through it. Ford had a severe headache and was in a lot of pain. Hospital personnel treated his injuries and called the police.

Trooper Tyson Haven responded to the hospital and investigated the matter. During the course of his investigation, he interviewed Ford three times, portions of which were recorded. Ford also signed a written statement. Ford described Snoop as a skinny, 6'2" or 6'3" tall black male in his thirties who was wearing a grey sweatshirt with the words "Live Strong" in yellow. According to Trooper Havens, during a portion of one of the interviews that was not recorded, Ford also described Snoop as having the number 13 tattooed between his eyes.

As part of the investigation, Trooper Havens obtained the video surveillance tape from the Econo Lodge, which depicted the individuals walking down the stairway from the second floor of the Econo Lodge carrying Ford's backpack and duffle bag.

One of the individuals used Ford's iPhone to take photographs of Ford during and after the incident. The images were subsequently posted on Instagram. There was a photo of Appellant wearing a gray sweatshirt and throwing a punch that struck Ford in the

head. The comment posted with the photo said, "this [sic] what happens when you f--- with rock money." N.T., 9/18/12, at52. There was another photograph depicting Appellant counting a few stacks of cash posted by somebody that goes by the name of Snoop_Rock. An image of Ford post-assault had the comment, "Noor Ford I do this sh-t bitch f--- nigga up about that money" Another comment posted by Snoop_Rock using Ford's phone said, "oh, oh sh-t this the nigga right here. I put the right hook down on him. His face f---ed up. I didn't know it was you am I right bad bro. PS get that f---in money right my man."

Based on his investigation and his previous knowledge of Appellant, Trooper Havens concluded that Appellant was Snoop.

Appellant was arrested and charged with burglary, two counts of robbery, two counts of conspiracy to commit robbery, criminal trespass, terroristic threats, theft by unlawful taking, receiving stolen property, aggravated assault, simple assault, and recklessly endangering another person.

A jury trial was held January 28-29, 2016. The jury convicted Appellant of all of the charges.

On July 7, 2016, the court sentenced Appellant to serve an aggregate term of 15 to 30 years' incarceration in a state correctional institution.[1]

Appellant filed a post sentence motion and a supplemental post sentence motion, which the court denied in its Opinion and Order entered on November 8, 2016.

Appellant filed a notice of appeal on December 5, 2016. In his concise statement of errors complained of on appeal, Appellant asserted eleven issues:

[1] Sometime after trial, Appellant hired current counsel, who entered his appearance on April 22, 2016 and requested a continuance of Appellant's sentencing hearing, which had been scheduled for April 27, 2016.

1. The court erred both procedurally and substantively in determining that witness Ford was unavailable as a declarant based on Appellant's wrongdoing.

2. The court erred in finding forfeiture by wrongdoing in the following manners:
   A) in failing to conduct a hearing outside the presence of the jury to determine whether Ford was available;
   B) in concluding that witness Ford was unavailable as defined by the Pennsylvania Rules of Evidence;
   C) in concluding that the Commonwealth had established that Ford was unavailable based upon limited questioning; and
   D) in preventing defense counsel from cross-examining Ford to determine whether he was in fact unavailable.

3. The court erred in precluding defense counsel from calling Ford as a witness on behalf of Appellant.

4. The court erred in denying Appellant's motion to dismiss based upon the Commonwealth's misconduct in the ex parte communication with the president judge to have the trial judge assigned, removed from hearing the case.

5. The court erred in denying Appellant's motion for judgment of acquittal at the close of the Commonwealth's case.

6. The court erred in permitting the Commonwealth to utilize the term "pistol whipped" to describe the alleged assault.

7. The court erred in permitting witness Helena Yancey to testify as to the social media network, Instagram.

8. The court erred in permitting testimony concerning Appellant's firearm ownership.

9. The court erred in failing to sustain the objection relating to the authenticity of the photographs from Instagram as well as permitting the certification for Instagram to be utilized.

10. The court erred in admitting Commonwealth Exhibits 26 through 37 as well as 43 and 44 on a lack of foundation as well as the authenticity of the evidence.

11. The court erred in giving the accomplice liability charge to the jury.

In his first two issues, Appellant challenges the court's ruling regarding Appellant's forfeiture by wrongdoing. Under Rule 804 (b) (6) of the Pennsylvania Rules of Evidence, a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness is admissible. Pa. R. E. 804(b)(6). The rule is intended to ensure that a party does not benefit from preventing the factfinder from hearing the testimony. ***Commonwealth v. Paddy***, 569 Pa. 47, 800 A.2d 294, 310 n.10 (2002). "The language of the Rule requires that the party against whom the statement is offered acted wrongfully and that the wrongful conduct was intended to, and did in fact, procure the unavailability of the declarant as a witness." ***Commonwealth v. Santiago***, 822 A.2d 716, 731 (Pa. Super. 2003), *appeal denied*, 843 A.2d 1237 (Pa. 2004), *cert. denied*, 542 U.S. 942 (2004). Furthermore, the constitutional protection of the confrontation clause is also forfeited. ***Commonwealth v. King***, 959 A.2d 405, 416 (Pa. Super. 2008). "The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him." ***Id.*** (*quoting* ***United States v. White***, 116 F. 3d 903, 911 (D. C. Cir. 1997)).

Appellant first contends that despite prior rulings declaring that he forfeited by wrongdoing his hearsay and confrontation rights, the court should have conducted yet another hearing outside the presence of the jury immediately prior to Mr. Ford's trial testimony.

Ford failed to appear for Defendant's preliminary hearing. The Honorable Nancy L. Butts held a hearing on September 13, 2012 and concluded that Ford's statements would be admissible at Appellant's preliminary hearing under the exception to the hearsay

rule for forfeiture by wrongdoing. As a result, all counts were held for court except the burglary charge.

The Commonwealth refiled that charge and a second preliminary hearing was held. By the time of the second preliminary hearing, the police had located Ford and he was held on a material witness warrant. Ford was transported to the preliminary hearing, but he allegedly could not recall the assault or any of the statements he made to Trooper Tyson Havens. His statements to Trooper Havens were admitted and the charge was held for court.

Appellant filed an omnibus pretrial motion, which included a motion to suppress physical evidence and a petition for writ of habeas corpus.

At the hearing on the omnibus motion and in particular, Appellant's request for habeas relief, his counsel objected to the court considering any hearsay. The Commonwealth responded that Judge Butts admitted certain testimony at Appellant's preliminary hearing based on a finding of forfeiture by wrongdoing which rendered that evidence non-hearsay and that this court was bound by Judge Butts' ruling. Appellant's counsel argued on the contrary, that a finding of forfeiture of wrongdoing does not continue indefinitely especially when the alleged victim did not testify before Judge Butts because he could not be located but he had since been found. Appellant's counsel also contended that Judge Butts' finding did not allow a wholesale quashing of his confrontation rights.

This court held in an opinion and order dated September 17, 2014 that it was not bound by the ruling of Judge Butts. Nonetheless, after considering all of the evidence, the court concluded that Ford's prior testimony would be admitted under the forfeiture by wrongdoing exception.

It is important to note that this court conducted the hearing pursuant to Rule 104 of the Pennsylvania Rules of Evidence. The court was required to decide a preliminary question as to whether certain evidence was admissible. Critically, and so deciding, this court was not bound by the evidence rules. Pa. R. Evid. 104.

The Commonwealth presented audio and written statements from Ford and testimony from Trooper Havens that Ford left town and refused to disclose his whereabouts because he was concerned for his safety and the safety of his family. Although Ford was physically present to testify because he was being detained on a material witness warrant, he claimed that he could not remember any of the conversations or statements he made to Trooper Havens. He also would not reveal where he was living or say if he had any problems being in a Philadelphia jail "for personal reasons." When confronted with his previous audio and written statements that he was in fear for his life, Ford claimed his fear was because the Commonwealth was forcing him to testify and he did not trust cops. He tried to explain his previous statements "you guys offer me death" and he was "in fear for his life" as something that could happen to him if he testified, but that "could be from whatever."

It was apparent to the court that Ford was feigning a lack of memory to avoid admitting anything in the presence of Appellant and his supporters.[2] In fact, in several of the previous written and recorded statements, Ford specifically asked Trooper Havens if the statements would be disclosed to Appellant. Notably, Ford never denied making the statements that Trooper Havens had attributed to him.

Despite Ford's claim of lack of memory, he admitted that it was his signature

[2] There was a small group of young adult black males that were present and sat behind or near Appellant during most of his court proceedings.

on the letter admitted as Commonwealth's Exhibit 4. This letter stated in relevant part: "You expect me to testify on your behalf then get shipped to a Philly jail where I'm told more than once someone will get to me? This is where doing the right thing can depend on how you view things. If I was to do what you ask me then I risk putting myself and possibly my family in danger…do you guys think it should come a time when I should look out for my wellbeing? Or should I be more concerned about the DA who probably won't even come to my funeral whether it be months or years from now. I mean I don't think you guys understand I know who and what exactly I am dealing with. No matter how much you all try to downplay it, I know what's going on. This has nothing about street code or anything; that stuff left me over a year ago. The fact of the matter is I will have to live life looking over my shoulders regardless of the outcome and I already have come to agreement with that."

This letter was also consistent with and similar to recorded statements Ford made to Trooper Havens and Williamsport Bureau of Police agent Steven Sorage, as well as another letter that was sent to Judge Butts, which the Commonwealth admitted as exhibits through a motion to reopen the record.

In addition to these written and recorded statements by Ford, Trooper Havens testified at a September 13, 2012 hearing before Judge Butts that Ford told him he had received numerous phone calls from Appellant, in which Appellant threatened him not to cooperate with police. Trooper Havens obtained Appellant's phone records, as well as the records for Ford's stolen iPhone. The records showed numerous phone calls to and from the phone number Ford was using after the incident.

The court concluded based upon all of this evidence that the Commonwealth

established forfeiture by wrongdoing and that Ford's statements would not be considered hearsay and were admissible pursuant to Rule 804 (b) (6).

This case was first called to trial on June 11, 2015 before the Honorable Dudley Anderson. Judge Anderson concluded that Mr. Ford was unavailable for trial and, based on the prior decision of this court, Appellant had forfeited his confrontation rights as well as his right to object to any hearsay testimony of Mr. Ford.

During trial, an issue arose with respect to a spectator's conduct. A juror testified in-camera that this spectator, who was present in the courtroom both days of the trial, had an interaction with her the day before. (N.T., June 11, 2015, at 73). This spectator was physically pushing the juror away as they approached the elevator. (*Id.* at *75*). It "could be" that the spectator was trying to send the juror a message. (*Id.* at 76).

As well, some other jurors that were closely following behind her may have been privy to the incident. (*Id.* at 85). In fact, the juror that was "bumped" told another juror about it. (*Id.* at 108). Other than this other juror, maybe three or four others knew about the bumping incident. (*Id.* at 109). Still another juror was concerned that during the testimony, Appellant and his apparent supporters would make eye contact, make comments and even laugh. (*Id.* at 124, 125). Further, while the jurors were waiting at the elevator to leave, the supporters stared, nudged one juror and made her "feel uncomfortable." (*Id.* at 125).

A different juror indicated that while she was at the elevator, one of Appellant's supporters was standing near the elevator pushing the button and specifically said "we got you" which bothered her. (*Id.* at 128).

Appellant's counsel argued that the spectator, sitting behind the defense table,

"looks like he's with us." (*Id.* at 92). As a result of the above incidents, Judge Anderson granted a defense motion for a mistrial.

The case next came before visiting Senior Judge Michael Williamson on January 21, 2016. Judge Williamson had previously been assigned to the case by President Judge Nancy Butts and was handling pretrial motions. Appellant requested that Judge Williamson revisit this court's prior forfeiture by wrongdoing decision.

Appellant argued that the issue should be revisited because the victim, Mr. Ford, was now "available" because he was present under subpoena. (Transcript, January 21, 2016, at 6). Judge Williamson concluded that he was bound by this court's prior forfeiture by wrongdoing decision. (*Id*. at 9). In deciding the procedure by which Judge Williamson would consider Mr. Ford's unavailability, defense counsel requested, and Judge Williamson agreed, that Mr. Ford would be called and questioned in front of the jury. (*Id*. at 18).

In this particular case, Mr. Ford was again summoned to appear pursuant to a material witness warrant. He was held without bail for a short period of time and subsequently posted bail. He appeared in court and testified before the jury as requested by Appellant's counsel. He testified that he did not remember anything and claimed that he had been on drugs the entire time.

The court considered all of the evidence, including the evidence presented at the prior hearings, and concluded that Appellant had forfeited his rights to claim that Mr. Ford's prior testimony was hearsay and to confront Mr. Ford.

Appellant first asserts that the court erred in having Mr. Ford testify before the jury. However, Appellant did not make a timely objection at the time of Mr. Ford's

testimony. In fact, it was Appellant's counsel who insisted that Mr. Ford testify in the presence of the jury. (Transcript, January 18, 2016, at 28). As the Commonwealth noted in its brief in opposition to Defendant's post-sentence motion, "far from objecting to Judge Lovecchio's procedure to determine unavailability, Defendant insisted upon it." (Commonwealth brief in opposition to Defendant's post-sentence motion, p. 5). Appellant asserted this issue in his post sentence motion, but that was not sufficient to properly preserve this claim. Instead, Appellant's failure to make this specific objection at the time of Ford's testimony results in waiver. ***Commonwealth v. Bruce***, 916 A.2d 657, 671 (Pa. 2007); see also ***Commonwealth v. Spell***, 28 A.3d 1274, 1280 (Pa. 2011); ***Commonwealth v. Baumhammers***, 960 A.2d 59, 73 (Pa. 2008); ***Commonwealth v. Richard***, 150 A.3d 504, 511-12 (Pa. Super. 2016); ***Commonwealth v. Tucker***, 143 A.3d 955, 961 (Pa. Super. 2016).

Appellant also argues that this court erred in concluding that Mr. Ford was unavailable as defined by the Pennsylvania Rules of Evidence. Rule 804 (a) of the Pennsylvania Rules of Evidence specifically states that a declarant is considered to be unavailable as a witness if the declarant testifies to not remembering the subject matter. Pa.R.E. 804(a)(3). In this case, Mr. Ford took the stand and under oath indicated that he did not remember anything because he had been on drugs the entire time. Clearly, this meets the unavailability standard. See ***Commonwealth v. Graves***, 398 A.2d 644, 648 (Pa. 1979); ***Commonwealth v. Fink***, 791 A.2d 1235, 1245 (Pa. Super. 2002); ***Commonwealth v. Nelson***, 652 A.2d 396, 398 (Pa. Super. 1995), ***Commonwealth v. Melson***, 637 A.2d 633, 636 (Pa. Super. 1994).

Without citing any cases whatsoever in connection with his post sentence

motions, Appellant argued that "the [c]ourt should have required the Commonwealth to establish through additional evidence whether it be by Trooper Havens or other witnesses that the loss of memory at the time of trial was based on a wrongful act of the [Appellant]." (Appellant's brief in support of post-sentence motion, p. 8). Appellant seemed to suggest that during the course of a criminal case each and every time a new hearing or proceeding is convened, a hearing must be held to determine whether the witness at that particular proceeding was unavailable because of the wrongful conduct of Appellant.

The court fully agreed with the Commonwealth's position on this matter as set forth in its brief. Once a forfeiture by wrongdoing decision is made, it "extinguishes confrontation claims." ***Commonwealth v. King***, 959 A.2d 405, 416 (Pa. Super. 2008) (quoting ***Crawford v. Washington***, 541 U. S. 36, 62 (2004)). This language clearly supported the conclusion that Appellant's confrontation rights and hearsay objections were terminated, ended, eliminated and/or erased. Moreover and in connection with the substantive conclusion of forfeiture by wrongdoing, the court considered all of the evidence and rightfully reaffirmed its decision.

The forfeiture by wrongdoing rule withdraws Appellant's rights to confront and to assert a hearsay objection. It is based on Appellant's behavior. Appellant's wrongdoing or behavior in this case was not only proven by the requisite preponderance of evidence but was manifest. While direct evidence of intent is virtually impossible in these types of cases, the circumstantial evidence was overwhelming.

Appellant's argument that a hearing needed to be held on each occasion prior to the victim being called to testify is not only without merit, but contrary to the principles

underlying the doctrine, contrary to the specific language of the doctrine, contrary to established case law, and contrary to logic. See for example, ***Giles v. California***, 544 U.S. 353 (2008); ***Davis v. Washington***, 547 U.S. 813, 833 (2006) (one who obtains the absence of a witness by wrongdoing forfeits the right to confrontation); ***U.S. v. Emery***, 186 F. 3d 921 (8th Cir. 1999).

Appellant next asserts the court erred in finding forfeiture by wrongdoing in this case when the court prevented defense counsel from cross-examining Ford to determine whether he was in fact unavailable. When the Commonwealth called Ford as a witness and tried to elicit testimony from him regarding this incident, Ford could not remember anything about the incident. Ford stated that he was "getting high," "wasn't in the right state of mind" to remember, and "2012 was dark times" for him, implying not only that he could not remember the incident in question but he could not remember much of anything from the year 2012. Ford also indicated that neither a photograph of him from that day nor a letter he wrote would refresh his memory. In light of Ford's stated inability to recall anything about the incident, the court declared Ford unavailable as a witness. (Transcrtipt, January 28, 2016, at 97-99. Furthermore, the court specifically asked defense counsel what he would cross examine Ford on relating to his unavailability. Defense counsel could not give any specifics; he just indicated that he would have to review his notes. (*Id.* at 123). Instead, defense counsel's focus appeared to be having Ford state that his testimony (or lack thereof) was not the product of any wrongdoing by Appellant. However, the unavailability of the declarant was the separate, preliminary question or condition precedent for Ford's testimony to be admissible under the forfeiture by wrongdoing exception contained in Pa. R. Evid. 804(b).

Appellant avers that the court erred in precluding defense counsel from calling Ford as a witness on behalf of Appellant. Ford indicated that he had no memory of the incident. Based on Ford's testimony, he was unavailable to be called as a witness for either party. The Pennsylvania Rules of Evidence expressly state that a declarant is considered to be unavailable as a witness if the declarant testifies to not remembering the subject matter. Pa. R. Evid. 804(a)(3). Therefore, the mere fact that Ford was present in the courtroom did not mean that he was available as a witness.

Appellant next contends that the court erred in denying his motion to dismiss based upon the Commonwealth's misconduct in the ex parte communication with the president judge to have the trial judge assigned, removed from hearing the case.

Appellant asserted in his post sentence motion that the Commonwealth engaged in ex parte conversations with President Judge Butts to "steer" the case away from another judge who had questioned the propriety of a determinative pretrial ruling. Appellant contended that the Commonwealth "judge shopped" the case and was prejudiced because the trial judge ruled consistently with his prior ruling.

This case was assigned to the undersigned for trial set to being on January 28, 2016. Prior to the trial commencing, before the jury was brought in and sworn, Appellant objected to the trial not being held before visiting Senior Judge Michael Williamson to whom the trial had previously been assigned. Trial counsel asserted wrongdoing in the transfer alleging that the District Attorney spoke directly and ex parte with President Judge Butts for the purpose of getting the case reassigned from Judge Williamson.

Curiously, trial counsel argued that he was prejudiced because Judge

Williamson had previously questioned the propriety of this court's forfeiture by wrongdoing decision. Appellant essentially argued that Judge Williamson's tipping of his hand, so to speak, motivated the Commonwealth to contact President Judge Butts.

Contrary, however, to what Appellant argued, Judge Williamson did not at all question the propriety of this court's forfeiture by wrongdoing decision. Judge Williamson specifically said "I don't see that I can change Judge Lovecchio's decision." (Transcript, January 21, 2016, at 5). Judge Williamson went on to say "I think [Appellant] loses on the coordinate jurisdiction rule, I mean, I think I'm bound by Judge Lovecchio's Opinions." (*Id*. at 9).

In connection with this claim, the court permitted Appellant to establish a record. Appellant called District Attorney Eric Linhardt to the stand. Mr. Linhardt admitted that he contacted President Judge Butts directly and expressed "concerns about his [Judge Williamson's] conduct" in prior trials. (*Id*. at 15).

He indicated that he was aware that Judge Williamson was scheduled to preside over Appellant's trial and he requested Judge Butts thank Judge Williamson for his service and inform him that he would no longer be needed and that he not preside over anymore trials. (*Id*. at 16). Mr. Linhardt specifically explained that he did not ask that judges or cases be shuffled. He did not ask that Judge Williamson be reassigned to other cases. Specifically, he "was asking that [Judge Williamson] not preside over any more cases in this county for the balance of the week." (*Id*. at 19).

Trial counsel did not call any other witnesses. Instead, he argued that the ex parte communication smacked of "judge shopping" and the charges should be dismissed. (*Id*.

at 22). He further argued that under the circumstances he did not need to show prejudice but if so, prejudice "can be presumed." (*Id*. at 25).

The court denied Appellant's motion to dismiss indicating that there was no sufficient reason to do so. The court reasoned that it was speculative at best that President Judge Butts changed the assignment for trial because of Mr. Linhardt's telephone call. President Judge Butts was never called as a witness. Further, the court did not find any prejudice. (*Id*. at 27). Quite simply, Appellant has failed to establish the required prejudice. ***Commonwealth v. Bradley***, 459 A.2d 733, 734 (Pa. 1983); ***Commonwealth v. Barnyak***, 639 A.2d 40, 44 (Pa. Super. 1994).

Although this court does not know President Judge Butts' specific reasons for changing the judge and courtroom assigned for this trial, there are other circumstances that could have played a role in her decision. As previously discussed in this opinion, there were issues with individuals who appeared to be Appellant's supporters approaching the jurors in the hallway near the elevator which resulted in a mistrial when this case was being tried before Judge Anderson. Judge Williamson was presiding over cases in Judge Anderson's courtroom. To get to Judge Anderson's courtroom, the jury had to be brought to the other side of the courthouse through a public hallway in front of the public elevators. The undersigned's courtroom is much closer to the juror's lounge. In fact, the courtroom is adjacent to the juror's lounge, and the jurors can be brought into the courtroom directly from the juror's lounge without using any public hallway. Perhaps President Judge Butts decided that it would be easier or more efficient to switch the cases assigned to the judges than have the judges switch courtrooms, especially since the undersigned had handled most of the

pretrial matters in this case. Trial counsel could have presented testimony from President Judge Butts to establish what effect, if any, District Attorney Linhardt's phone call had on the reassignment, but he elected not to do so.

Appellant avers the court erred in denying his motion for judgment of acquittal at the close of the Commonwealth's case. A motion for judgment of acquittal is a challenge to the sufficiency of the evidence to sustain a conviction. *See* Pa. R. Crim. P. 606.

> In determining whether there was sufficient evidentiary support for a jury's finding, the reviewing court inquires whether the proofs, considered in the light most favorable to the Commonwealth as the verdict winner, are sufficient to enable a reasonable jury to find every element of the crime beyond a reasonable doubt. The court bears in mind: the Commonwealth may sustain its burden by means of wholly circumstantial evidence; the entire trial record should be evaluated and all evidence received considered, whether or not the court's rulings thereon were correct; and the trier of fact, while passing upon the credibility of the witnesses and the weight of the evidence, is free to believe all, part or none of the evidence.

Commonwealth v. Diggs, 949 A.2d 873, 977 (Pa. 2008)(citations omitted).

With respect to the burglary count, trial counsel argued that the Commonwealth did not present sufficient evidence that Appellant intended to commit a crime at the time of entry into the hotel room. He also noted that there was no forcible or surreptitious entry. Citing ***Commonwealth v. Lester***, 722 A.2d 997 (Pa. 1998), trial counsel argued that the mere fact that a crime occurred after entry was insufficient. N.T., 1/29/16, at 97.

This offense occurred on June 19, 2012. At that time, burglary was defined as follows:

> A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises at the time are open to the public or the actor is licensed or privileged to enter.

18 Pa. C. S. A. §3502(a).[3] Forcible or surreptitious entry is not part of the definition of burglary, but rather criminal trespass. See 18 Pa. C. S. A. §3503(a).

When viewed in the light most favorable to the Commonwealth, the evidence and the reasonable inferences deducible from the evidence show that Appellant entered Ford's hotel room with the intent to commit an assault to collect a debt. This was not some unintended fight that occurred after friends had been drinking or horsing around. This was an immediate beat down to send a message. Three other individuals went to the room with Appellant. One of the individuals, Michael Wills, was posted outside the door to keep other individuals from entering the room while the assault was occurring. During and after the assault, Appellant and two other individuals looked for items of value. At least one of the individuals rummaged through Ford's pockets. When he did not find anything of value in Ford's pockets, they took other property of Ford's such as his Xbox game system, his iPhone, and CDs. The assault was also videotaped by one of Appellant's cohorts and posted to Instagram to make sure that Ford received the intended message about repaying the debt he owed to Appellant. Appellant even made comments on Instagram about the assault and the

[3] Act 201 of 1990.

need for Ford to get him his money. When the totality of the facts and circumstances are considered in the light most favorable to the Commonwealth, there was ample evidence from which the jury could reasonably conclude that Appellant entered Ford's hotel room with the intent to commit a crime therein.

Trial counsel contended that the evidence was insufficient to send Count 2, robbery, a felony of the first degree, to the jury because there was no allegation that Appellant took or stole anything himself. Furthermore, trial counsel asserted there was no threat or intent to put Ford in fear of serious bodily injury in that there was no testimony regarding the part of the body at which the gun was pointed, whether the gun was real, or whether it was even loaded. N.T., 1/29/2016, at 98. The court understood and appreciated that trial counsel was zealously advocating for his client, but these arguments lacked merit.

Robbery, graded as a felony of the first degree, occurs if, in the course of committing a theft, a person: (i) inflicts serious bodily injury upon another; (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury; or (iii) commits or threatens immediately to commit any felony of the first or second degree. 18 Pa. C. S. A. §3701(a)(1). An act is "in the course of committing a theft" if it "occurs in an attempt to commit theft or in flight after the attempt or commission." 18 Pa. C. S. A. §3701(a)(2). Serious bodily injury is bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa. C. S. A. §2301.

It was not necessary that Appellant take anything himself, because Appellant was not acting alone. Appellant and the two other individuals who entered Ford's hotel room

were accomplices and co-conspirators. The videotape from the security cameras at the hotel clearly showed Terrance Forshyte (a.k.a. "Tee-Pain") leaving the hotel carrying Ford's duffle bag and backpack.

The evidence presented at trial, specifically Ford's recorded statements to Trooper Havens, showed that Appellant entered Ford's hotel room, pointed a firearm at Ford, and threatened to kill him by saying "Don't move or I'll pop you." Regardless whether the firearm was actually loaded or real, a reasonable person in Ford's situation would believe he had been threatened with being shot, which would put the person in fear of death or immediate serious bodily injury.

A person commits an aggravated assault graded as a felony of the second degree if he "attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon." 18 Pa. C. S. A. §2702(a)(4). Therefore, even if the gun was not pointed at one of Ford's vital organs, the statement would be a threat to cause bodily injury with a deadly weapon, which would constitute a threat to immediately commit a felony of the second degree.

Furthermore, even without the firearm and threat to "pop" Ford, the evidence showed that Appellant hit Ford in the face which knocked Ford down, and then Appellant and two other individuals struck and kicked Ford repeatedly in the head. The evidence included photographs of Ford's bruised and swollen face that were taken while he was at the hospital and photographs from Appellant's Instagram account that included, but were not limited to, photographs of Appellant's fist holding a black object and striking Ford in or near his eye. In the hospital photographs, Ford's lips and one of his eyes were swollen and

lacerated. His eye was so swollen that it was completely shut. Ford looked like he had just lost a prize fight. Any individual being subject to such a pummeling would be afraid that he would suffer serious bodily injury. Ford was fortunate that he did not suffer any fractured or broken bones. The facts and circumstances of this case were such that the jury could draw a reasonable inference that Appellant, with the aid of his cohorts, attempted to cause serious bodily injury to Ford.

Trial counsel also argued that the evidence was insufficient to permit the aggravated assault charge to be submitted to the jury because there was no evidence that Ford's bodily injury was caused by the deadly weapon.

Bodily injury is defined as impairment of physical condition or substantial pain. 18 Pa. C. S. A. §2301.

Although Appellant never fired the pistol, the Commonwealth's evidence established that Appellant pistol-whipped Ford. Appellant struck Ford in his face, and more particularly in his eye, with the butt of a pistol. Photographs were admitted into evidence that showed Ford's eye swollen shut. The jury could reasonably infer from the facts and circumstances of this case that the pistol-whipping impaired Ford's physical condition or caused him substantial pain.

Trial counsel argued that the conspiracy counts should not be submitted to the jury because there was no proof of any agreement and there was no evidence that there was any plan on committing a crime. He noted that mere association or presence at the scene of the crime was insufficient.

Direct evidence of the defendant's criminal intent or the conspiratorial

agreement is rarely available. "Consequently, the defendant's intent as well as the agreement is almost always proven through circumstantial evidence, such as by 'the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators.'" ***Commonwealth v. Murphy***, 844 A.2d 1228, 1238 (Pa. 2004).

The Commonwealth presented ample evidence from which the jury could conclude that Appellant was engaged in a conspiracy with Michael Wills and Terrence Forshyte to assault Ford and take whatever items of value they could find inside the hotel room.

Michael Wills guarded the door and kept Robert Diehl from entering the room while Appellant and Forshyte were inside the hotel room assaulting Ford and taking his property. Diehl testified that he saw Ford earlier in the day and he was fine. When he returned to the Econo Lodge and went up the stairs to go to Ford's room, Michael Wills was standing at the top of the steps. Diehl heard a lot of banging coming from Ford's room. Wills pulled up his shirt and Diehl saw a black object, which he believed was a gun. Wills told Diehl if he didn't want anything to do with his brother to leave, so Diehl turned around and left. When he came back later, Ford was beat up and stuff was all over the place in the room. (Transcript, January 28, 2016, at 82-86).

Ford gave statements to Trooper Havens in which he indicated that Appellant and two other individuals entered his room. Appellant pointed a gun at Ford and threatened to "pop" him. Then Appellant struck Ford in the eye with the butt of the gun and knocked him down. Then all three individuals were punching and kicking him in the head. Appellant was looking for money. Ford indicated that these three individuals took $500, his Xbox

game system, a basketball game for the Xbox, numerous music CDs, his gray duffle bag and his backpack.

Videotape from the security cameras at the Econo Lodge showed Appellant, Wills, Forshyte and "Dark" going up the stairs to the second floor together. When they descended the stairs together, Forshyte was carrying Ford's gray duffle bag and back pack.

The court found that this evidence was more than sufficient to establish a conspiratorial agreement between Appellant, Forshyte, Wills, and "Dark."

Finally, trial counsel argued that the evidence was insufficient to submit the charges of theft and receiving stolen property to the jury, because there was no evidence that Appellant unlawfully took or exercised control over Ford's property.

In his recorded statements to Trooper Havens, Ford indicated that all three individuals who entered his room took his property.

Even if Appellant did not take or exercise control of Ford's property himself, the evidence clearly showed that Terrance Forshyte (a.k.a. "Tee-Pain") took Ford's property, and that Appellant and Ford were accomplices and co-conspirators. A defendant is liable for the acts of his accomplices and co-conspirators. 18 Pa. C. S. A. §§306, 903; ***Murphy***, 844 A.2d at 1238.

Appellant claims that the court erred in permitting the Commonwealth to utilize the term "pistol-whipped" to describe the alleged assault. During the trial, Trooper Tyson Havens of the Pennsylvania State Police testified that he previously spoke with Ford and that Ford gave an audio recorded interview. (Transcript, January 28, 2016, at 123). Trial counsel raised an objection to the jury hearing a portion of the recording in which Ford

claimed he was pistol-whipped. (*Id*. at 168). Trial counsel argued that the term "pistol-whipped" was Trooper Havens' interpretation as to what happened. (*Id*. at 168).

Trial counsel's characterization was wrong. In his recorded statements, Mr. Ford told Trooper Havens that Snoop held a square style, black pistol in his right hand, and Snoop hit him with the butt of the pistol. Trooper Havens asked Ford if he was pistol-whipped and Ford said that he was. Both the photographs and Ford's statements established that Ford was struck in the face.

Pistol-whip means to hit or beat someone with a handgun. In many instances it involves hitting or striking a person in the head with the handle of a handgun.

Since the evidence showed that Mr. Ford was pistol-whipped, the court overruled the objection. Appellant's claim that it was an error is without merit. Any other claim of error was not raised on the record and, therefore, was waived.

Appellant next contends the court erred in permitting witness Helena Yancey to testify regarding Instagram.

Over the objection of trial counsel, Ms. Yancey explained during trial how in her experience Instagram was used. Trial counsel's objection related to Ms. Yancey not being qualified as an expert to talk about how the particular social media site works. (*Id*. at 174). Upon questioning by the court, Ms. Yancey indicated that Instagram is a social media thing for people to communicate by "putting stuff on or other people putting stuff on" and then somebody else accessing it." (*Id*. at 183).

The admissibility of evidence is within the discretion of the trial court. ***Commonwealth v. Johnson***, 42 A.3d 1017, 1027 (Pa. 2012). The determinative standard is

relevancy. See Pa. R. E. 402 ("All relevant evidence is admissible, except as otherwise provided by law"). Evidence is relevant if it tends to prove or disprove a fact at issue. See Pa. R. E. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

The court disagreed with trial counsel's contention. The witness's opinion lay testimony was clearly within the scope of Rule 701 of the Pennsylvania Rules of Evidence. It was rationally related to the witness's perception and helpful to communicating a narrative or description. The opinion helped to decide a fact in issue. Finally, it was not based on scientific, technical or other specialized knowledge within the scope of the rule regarding expert testimony.

Appellant contends the court erred in permitting testimony concerning his firearm ownership. Trooper Havens testified that he heard Appellant make a statement that he owned a firearm in an earlier hearing. (N.T., January 28, 2016, at 189). Appellant's trial counsel objected on the grounds of relevancy. Specifically, defense counsel argued that most people in this county own a gun and he did not think it was relevant whether or not his client owned a gun. (*Id*. at 190).

The court properly overruled the objection. Appellant was charged with using a gun to assault someone. Clearly whether or not Appellant owned a gun was relevant in this case.

Appellant asserts the trial court erred in failing to sustain the objection relating to the authenticity of the photographs from Instagram as well as permitting the

certification for Instagram to be utilized and in admitting Commonwealth Exhibits 26 through 37 as well as 43 and 44 on a lack of foundation as well as the authenticity of the evidence.

During trial, Appellant's trial counsel objected to the Instagram certification and Instagram photos on authenticity grounds. (N.T., January 28, 2016, at 206-215). The court was satisfied that the authenticity of the documents was properly established by circumstantial evidence. The Commonwealth set forth in great detail the supporting circumstantial evidence. (*Id.* at 219-228). In overruling trial counsel's objection, the court also set forth in great detail its reasoning and supporting case law. (N.T., January 29, 2016, at 3-7).

Appellant's final assertion is the trial court erred in giving the accomplice liability instruction to the jury.

"The purpose of jury instructions 'is to furnish guidance to the jurors, by stating and explaining the law of the case, clarifying the issues of fact and pointing out the essential facts which must be established.'" ***Butler v. DeLuca***, 478 A.2d 840, 843 (Pa. Super. 1984). "The trial judge has the sole responsibility for instructing the jury on the law as it pertains to the case before them. The function of elucidating the relevant legal principles belongs to the judge…." ***Commonwealth v. Bricker***, 525 Pa. 362, 581 A.2d 147, 153 (1990).

The court finds that the Commonwealth presented sufficient facts such that the jury could find Appellant liable under the theory of accomplice liability. In other words, the Commonwealth presented sufficient facts to prove that with the intent of promoting or facilitating the commission of the crimes, Appellant aided or agreed or attempted to aid

another in planning or committing these offenses. 18 Pa. C.S.A. § 306. Accordingly, the accomplice liability charge was proper.

DATE: May 23, 2017

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Robert Hoffa, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)