

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

ANDREW GRADEL

Appellant

No. 378 EDA 2013

Appeal from the Judgment of Sentence November 20, 2012  
In the Court of Common Pleas of Bucks County  
Criminal Division at No(s): CP-09-CR-0001783-2012

BEFORE: PANELLA, J., MUNDY, J., and FITZGERALD, J.\*

MEMORANDUM BY MUNDY, J.:

**FILED DECEMBER 23, 2013**

Appellant, Andrew Gradel, appeals<sup>1</sup> from the November 20, 2012 aggregate judgment of sentence of one and one-half to three years' imprisonment, to be followed by four years' probation, imposed after a jury found him guilty of simple assault, possessing instruments of crime (PIC), and driving under the influence (DUI) – high rate of alcohol.<sup>2</sup> After careful review, we affirm the judgment of sentence.

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> We note that although Appellant purports to appeal from the January 2, 2013 order denying his post-sentence motion for reconsideration of sentence, a direct appeal in a criminal case is properly taken from a judgment of sentence. ***Commonwealth v. Borovichka***, 18 A.3d 1242, 1246 n.1 (Pa. Super. 2011). We have amended the caption accordingly.

<sup>2</sup> 18 Pa.C.S.A. §§ 2701, 907, and 75 Pa.C.S.A. § 3802(b), respectively.

The relevant facts of this case were accurately summarized by the trial court in its opinion and need not be reiterated here. **See** Trial Court Opinion, 4/30/13, at 1-3. On January 22, 2012, Appellant was arrested following a physical altercation with his former next-door neighbor, Daniel Elwell, outside his estranged wife's residence. **See** N.T., 8/31/12, at 99-110, 193-195. On January 29, 2012, Appellant was charged with aggravated assault, simple assault, terroristic threats, harassment, and two counts of DUI in connection with this incident. At the preliminary hearing, the Commonwealth was granted leave to add the charge of PIC. On August 30, 2012, Appellant proceeded to a jury trial and was subsequently found guilty of simple assault, PIC, and one count of DUI – high rate of alcohol, following three-day jury trial. The jury found Appellant not guilty of aggravated assault and terroristic threats, and the Commonwealth withdrew the charge of DUI - general impairment. Sentencing was deferred at that time pending the completion of a pre-sentence investigation (PSI) report.

As noted, on November 20, 2012, the trial court sentenced Appellant to an aggregate term of one and one-half to three years' imprisonment, to be followed by four years' probation. On November 28, 2012, Appellant filed a timely motion for reconsideration of his sentence. Following a hearing, the

trial court denied Appellant's motion on January 2, 2013. This timely appeal followed on January 30, 2013.<sup>3</sup>

On appeal, Appellant raises the following issues for our review.

- A. Whether a justification jury instruction should have been given to the jury when there was ample evidence to support the defense of justification?
- B. Whether the [trial] court erred in its response to the jury question regarding the ability of the jury to convict [] Appellant of simple assault?

Appellant's Brief at 4.

Our standard of review in addressing challenges to jury instructions is an abuse of discretion. ***Commonwealth v. Leber***, 802 A.2d 648, 651 (Pa. Super. 2002). "[A] trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." ***Commonwealth v. Williams***, 959 A.2d 1272, 1286 (Pa. Super. 2008) (citation omitted), *affirmed*, 9 A.3d 613 (Pa. 2010). "[W]hen evaluating the propriety of jury instructions, this Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper." ***Id.*** We will not find an abuse of the trial court's discretion unless "the instruction under review contained fundamental error, misled, or confused the jury[,]" or Appellant has suffered prejudice. ***Commonwealth***

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<sup>3</sup> Appellant and the trial court have complied with Pa.R.A.P. 1925.

**v. McRae**, 5 A.3d 425, 430-431 (Pa. Super. 2010) (citation omitted), *appeal denied*, 23 A.3d 1045 (Pa. 2011).

In the instant matter, Appellant contends the trial court abused its discretion in failing to instruct the jury on the issue of justification, and by re-instructing the jury following an inquiry concerning the simple assault charge. Appellant's Brief at 11-17. For the following reasons, we reject Appellant's claims.

The record reveals that Appellant's counsel failed to lodge a formal and specific objection to the trial court's jury instructions at the time they were given. Notably, during the course of the trial court's discussions about whether a justification charge should be given to the jury, Appellant had the opportunity to object to the trial court's decision not to instruct the jury in this fashion and elected not to. N.T. 9/4/12, at 120-125. Rather, it appears that Appellant's counsel acknowledged on his behalf that a justification jury instruction was not appropriate. **See id.** at 121-122. Additionally, the record reveals both parties consented, following a lengthy discussion with the trial court regarding the jury's inquiry on simple assault, that the best course of action would be for the trial court to instruct the jury on the charge of simple assault. N.T., 9/5/12, at 1-17; **see also** Trial Court Opinion, 4/30/13, at 10-11. The record further reflects that Appellant did not object during the course of the trial court's actual instructions to the jury in this

case, or during the trial court's second instruction clarifying the charge of simple assault. N.T., 9/4/12, at 126-154; N.T., 9/5/12, at 17-20.

This Court has long recognized that the failure to offer a "timely and specific objection" results in waiver of the claim. **Commonwealth v. Moury**, 992 A.2d 162, 178 (Pa. Super. 2010) (citation omitted). Additionally, "issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Accordingly, we conclude Appellant's claim that he is entitled to a new trial on these grounds is waived.

In any event, we further note that our review of the record reveals that the trial court's jury instructions, when viewed as a whole, "clearly, adequately, and accurately" reflected the applicable law. **Williams, supra; see also** N.T., 9/5/12, at 126-154. Furthermore, the trial court's decision to clarify the law on simple assault in order to dispel any confusion on the part of the jury was fully within its discretion. Specifically, the record reflects that the trial court properly re-instructed the jury on the charge on simple assault after the jury made the following inquiry.

If we believe that the defendant was struck first, but still took a substantial step toward causing bodily injury to Daniel Elwell, is the defendant guilty of simple assault?

N.T., 9/4/12, at 165; **see also** N.T., 9/5/12, at 17-20.

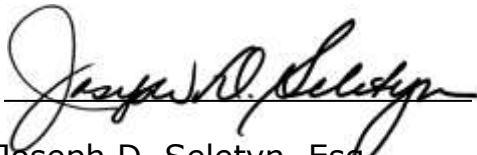
Accordingly, Appellant's claim of trial court error in this regard would nonetheless fail. **See Commonwealth v. Davalos**, 779 A.2d 1190, 1195

(Pa. Super. 2001) (stating, “[t]he scope of supplemental instructions given in response to a jury’s request rests within the sound discretion of the trial judge. ... [W]here a jury returns on its own motion indicating confusion, the court has the duty to give such additional instructions on the law as the court may think necessary to clarify the jury’s doubt or confusion[.]”) (citations omitted), *appeal denied*, 790 A.2d 1013 (Pa. 2001).

For all the foregoing reasons, we reject Appellant’s claim that the trial court abused its discretion in its instructions to the jury. Therefore, we affirm Appellant’s November 20, 2012 judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/23/2013