**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>BRIAN RANDOLPH<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 1006 EDA 2013 |

Appeal from the Judgment of Sentence January 25, 2013
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0000867-2012

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

MEMORANDUM BY MUNDY, J.: **FILED DECEMBER 03, 2013**

Appellant, Brian Randolph, appeals from the January 25, 2013 aggregate judgment of sentence of 19 to 38 years' imprisonment, to be followed by five years' probation, after he was found guilty of one count each of attempted homicide, firearms not to be carried without a license, aggravated assault, and persons not to possess firearms.[1] After careful review, we affirm.

We summarize the relevant factual and procedural background of this case as follows. On March 8, 2012, the Commonwealth filed an information charging Appellant with the above-mentioned offenses as well as one count

* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S.A. §§ 901(a) (to commit 18 Pa.C.S.A. § 2501(a)), 6106(a)(1), 2702(a), and 6105(a)(2)(i), respectively.

each of recklessly endangering another person (REAP), possessing an instrument of a crime (PIC), and simple assault.[2] On November 8, 2012, Appellant proceeded to a two-day jury trial, at the conclusion of which the jury found Appellant guilty of attempted homicide, firearms not to be carried without a license, aggravated assault, and persons not to possess firearms. The Commonwealth withdrew the charges of REAP, PIC and simple assault. On January 25, 2013, the trial court imposed an aggregate sentence of 19 to 38 years' imprisonment, to be followed by five years' probation.[3] On February 4, 2013, Appellant filed a timely post-sentence motion, which the trial court denied on February 27, 2013. On March 26, 2013, Appellant filed a timely notice of appeal.[4]

On appeal, Appellant raises one issue for our consideration.

> Whether the [t]rial [c]ourt erred when it overruled an objection to statements made at trial by a Commonwealth witness that he "was tired of all the shootings in Chester", that he was "tired of hearing all these shootings and people getting away with what they did" and that he "wanted to make sure justice was served", since these statements were

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[2] 18 Pa.C.S.A. §§ 2705, 907(a), and 2701(a), respectively.

[3] The trial court imposed a sentence of 15 to 30 years' imprisonment for attempted homicide, four to eight years' imprisonment for persons not to possess firearms, five years' probation for firearms not to be carried without a license, and no further penalty for aggravated assault. All sentences were to run consecutively.

[4] Appellant and the trial court have complied with Pa.R.A.P. 1925.

> irrelevant, not responsive to any of the questions posed to him and unfairly prejudicial to the defense?

Appellant's Brief at 5.

As Appellant's sole issue on appeal pertains to the admission of evidence, we begin by noting our well-settled standard of review.

> The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record. Furthermore, if in reaching a conclusion the trial court over-rides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error.

***Commonwealth v. Fischere***, 70 A.3d 1270, 1275 (Pa. Super. 2013) (*en banc*) (internal quotation marks and citations omitted).

At trial, one of the Commonwealth's witnesses was Andrew Green, who was an eyewitness to the shooting. On cross-examination, the following exchange occurred between Green and defense counsel.

> Q: Now as part of the statement that you gave at the Chester police station you provided a physical description of the person that you saw involved in this shooting. Correct?
>
> A: Yes.
>
> Q: The shooter, not the victim. You provided a physical description of that shooter. Correct?
>
> A: Yes, what he was wearing.

Q: Yeah, okay. And you told the police at that time -- and you gave this statement on November 21st of 2011. Correct?

A: Yes.

Q: Okay. And let me ask you just approximately what time did you arrive at the police station and start giving your statement Andrew?

A: Roughly about 5:20.

…

Q: Now today -- so it's a year later and you still got a lot of details. You still remember a lot of details about this day. Correct?

A: Yes.

Q: Okay. And you would agree with me that on November 21st of 2011, it was right after the shooting occurred. Correct?

A: Yeah.

Q: And the details were even fresher in your mind at that point. Correct?

A: Yes.

Q: Okay, now, when you wrote in your statement -- well let's just talk about the firearm. You wrote in your statement that you believed it to be a .40 or a .45 caliber pistol. Correct?

A: Yes.

Q: Okay. And you also told the police that the gun had an eight-inch barrel. Correct?

A: It appeared to have an eight-inch barrel?

> Q: Okay. And you were paying attention that closely that you were able to see that. Correct?
>
> A: Yes, because I was tired of all the shootings in Chester. I wanted …
>
> [Defense Counsel]: Objection Your Honor, I'm going to ask that …
>
> [Commonwealth]: This is responsive Your Honor.
>
> The Court: Overruled
>
> [Green]: Because I was tired of hearing -- I'm tired of hearing all these shootings and people getting away with what they did, so I wanted to make sure justice was served.
>
> Q: So -- and you paid attention?
>
> A: Yes.

N.T., 11/8/12, at 74-76. Appellant believes the trial court should not have allowed the jury to consider Green's statements pertaining to other shootings in Chester and his feelings about the shooters getting away with them. Appellant's Brief at 15.

It is axiomatic that "a party may not object to improper testimony which he himself elicits." ***Commonwealth v. Puksar***, 740 A.2d 219, 227 (Pa. 1999), *cert. denied*, ***Puksar v. Pennsylvania***, 531 U.S. 829 (2000); ***accord Commonwealth v. Manley***, 985 A.2d 256, 270 (Pa. Super. 2009), *appeal denied*, 996 A.2d 491 (Pa. 2010). In ***Manley***, defense counsel was cross-examining a federal cellmate of appellant's when the following exchange took place.

> [Defense Counsel]: Sir, you talked to the-you decided to speak with the federal authorities about this case; is that correct?
>
> WITNESS: Yes.
>
> [Defense Counsel]: And you did that when?
>
> WITNESS: When [Appellant] came into federal custody and he was telling me about his federal case.
>
> [Defense Counsel]: Objection, Judge, Objection.
>
> THE COURT: You asked the question, Counsel.

***Id.*** (internal citation omitted). This Court concluded that "[t]he trial court correctly denied Appellant's motion for a mistrial because Appellant may not object to, or have stricken, otherwise inadmissible evidence that defense counsel elicits on cross-examination." ***Id.***, *citing* ***Puksar***, ***supra***.

Appellant acknowledges the principles in ***Puksar*** and ***Manley***, but nevertheless argues that the trial court should have sustained the objection. Appellant's Brief at 15. This Court has held that "[w]hen … defense counsel puts a question to a witness that cannot be answered fairly without a statement of fact as explanation, then the explanation is deemed to be invited by counsel, and complaint that it was added to the answer cannot be made." ***Commonwealth v. Miller***, 481 A.2d 1221, 1222 (Pa. Super. 1984). Under this reasoning, the cardinal inquiry becomes "whether the answer should have been reasonably anticipated and whether it was

manifestly invited." ***Commonwealth v. Rivers***, 357 A.2d 553, 555-556 (Pa. Super. 1976).

In ***Miller***, the appellant was found guilty of third-degree murder, PIC, and criminal conspiracy. ***Miller***, ***supra***. During the Commonwealth's case, it presented the testimony of Otis Canty, who testified on direct that "he and appellant were 'a little bit' friendly." ***Id.*** On cross-examination, "[d]efense counsel decided to probe further into the nature of [Miller and Canty's] relationship[.]" ***Id.*** As a result, the following exchange took place.

> Q. You say that on the 30th of November, 1980, you were a little bit friendly with John Miller. What's that mean, you were a little bit friendly?
>
> A. A little bit.
>
> Q. Is that what you said?
>
> A. Yes, that's what I said.
>
> Q. All right. What's that mean, you were a little bit friendly?
>
> A. See, me and him, we had went through this thing because I didn't come to see him *while he was in jail the last time.* So he seemed like every time-
>
> [Defense Counsel]: Objection, Your Honor. Objection. I'm sorry, Mr. Canty. I have an objection. Ask to see the court at sidebar.

***Id.*** (emphasis in original). This Court concluded that Appellant was not entitled to a mistrial as a result of Canty's remark.

> Defense counsel clearly wanted the witness to explain why he was only "a little bit" friendly with appellant, and counsel persisted in the face of the

> witness' reluctance to explain until he received a full answer. The witness' answer was responsive to the question, and the question could not be answered fairly without some reference to the facts behind the rift in the friendship between the witness and the appellant. Having demanded a complete answer, counsel must accept the answer given.

***Id.*** at 1222-1223.

In the instant case, defense counsel engaged in a detailed exchange with Green as to the level of detail he was able to recall about the shooter and the caliber of gun used on the night in question. ***See generally*** N.T., 11/8/12, at 74-76. In an effort to implicitly call the veracity of Green's memory into question, as noted above, defense counsel then asked if Green "[was] paying attention that closely that [he was] able to see [the gun's barrel]." ***Id.*** at 76. In our view, Appellant should have "reasonably anticipated" that Green would pick up on his suggestion and respond with a more detailed explanation as to why his memory was so detailed and specific. ***Rivers***, ***supra***. As a result, Appellant must accept the answer Green gave. ***See Miller***, ***supra***; ***Commonwealth v. Gilliard***, 446 A.2d 951, 954 (Pa. Super. 1982) (stating, "[i]t is well settled that the defendant must assume the risk of his counsel's questions and he cannot benefit on appeal when his own cross-examination elicited an unwelcome response[]") (citations omitted). Based on these considerations, we conclude the trial court did not abuse its discretion in overruling Appellant's objection to Green's statements. ***See Fischere***, ***supra***.

Moreover, even if we were to conclude that the trial court should have sustained Appellant's objection, any error committed by the trial court would have been harmless.[5] "[A]n error may be considered harmless only when the Commonwealth proves beyond a reasonable doubt that the error could not have contributed to the verdict. Whenever there is a 'reasonable possibility' that an error 'could have contributed to the verdict,' the error is not harmless." ***Commonwealth v. Luster***, 71 A.3d 1029, 1046 (Pa. Super. 2013) (*en banc*) (citation omitted).

> This burden is satisfied when the Commonwealth is able to show that: (1) the error did not prejudice the defendant or the prejudice was *de minimis*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial [e]ffect of the error so insignificant by comparison that the error could not have contributed to the verdict.

***Commonwealth v. Green***, --- A.3d ---, 2013 WL 4736711, *6 (Pa. Super. 2013) (citation omitted; italics added).

In the case *sub judice*, the Commonwealth presented the testimony of three different eyewitnesses to the shooting. All three of these witnesses positively identified Appellant as the shooter. One of these witnesses,

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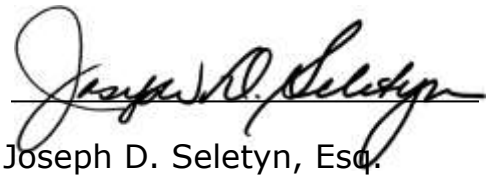
[5] "This [C]ourt may affirm [the lower court] for any reason, including such reasons not considered by the lower court." ***Commonwealth v. Clemens***, 66 A.3d 373, 381 n.6 (Pa. Super. 2013) (citation omitted).

Hakeem Smith, the victim in this case, had known Appellant for about ten years. N.T., 11/8/12, at 197. Smith was able to see Appellant since he was shot at close range. ***Id.*** at 205-206. In addition, Andrew and Eugene Green had a clear view of Appellant's face from their home right above the location of the shooting. ***Id.*** at 52, 54, 59, 98, 104. As a result, we conclude that any prejudice suffered by Appellant in the trial court not sustaining his objection was *de minimis*. ***See Green***, ***supra***. As a result, we deem this error harmless. ***See Luster***, ***supra***.

Based on the foregoing, we conclude that Appellant's sole issue on appeal is devoid of merit. Accordingly, the trial court's January 25, 2013 judgment of sentence is affirmed.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013