NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
IAN TAPPER, Appellant	:	No. 128 EDA 2010

Appeal from the Judgment of Sentence December 8, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-1302757-2006,
CP-51-CR-0841941-2006

BEFORE: GANTMAN, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MAY 22, 2013**

Appellant, Ian Tapper, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas following his jury conviction, after a mistrial, of robbery.[1] He raises eight issues for our review: (1) a Pa.R.Crim.P. 600-speedy trial violation; (2) double jeopardy; (3) the admission of Appellant's neighbor's statement to police, where the neighbor died prior to trial, allegedly killed at Appellant's behest; (4) the limit on his cross-examination of a detective concerning the deceased neighbor's statement; (5) limits on his cross-examination of another

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 3701(a)(1)(ii).

Commonwealth witness; (6) the court's error in sustaining one of his objections at sidebar rather than in the presence of the jury; (7) the sustaining of an objection to his closing argument concerning a Commonwealth witness' motivation to testify; and (8) prosecutorial misconduct for a statement in the Commonwealth's closing argument. We find no merit to any of Appellant's claims and affirm.

On September 1, 2006, a criminal complaint was filed, charging Appellant with the robbery and non-fatal shooting of Edward Roberts. Roberts' neighbor, Karl Rone, gave a statement to the police implicating Appellant in the shooting. Rone later died, allegedly killed at Appellant's behest.[2] The Commonwealth filed a pre-trial motion to admit Rone's statement under the forfeiture by wrongdoing exception to the hearsay rule.[3] After several hearings, the court allowed the evidence.[4]

On December 4, 2007, Appellant filed a motion to dismiss, alleging a speedy-trial violation under Pa.R.Crim.P. 600(G). The court heard the motion on December 10th and denied it, and the case immediately

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[2] The instant matter concerns only Appellant's shooting of Edward Roberts, and not the alleged murder of Karl Rone.

[3] ***See*** Pa.R.E. 804(b)(6).

[4] The court granted the motion in part, ruling that "hearsay statements attributed to Edward Roberts, who is an available witness," were not admissible. Order, 10/30/07.

proceeded to a jury trial on the charges of attempted murder,[5] aggravated assault,[6] robbery/threaten immediate serious bodily injury, and possessing an instrument of crime[7] ("PIC"). During trial, the court granted a judgment of acquittal for attempted murder, and the jury subsequently found him not guilty of aggravated assault and PIC. However, the jury was hung on the count of robbery, and a mistrial was declared as to that charge.

A second jury trial for the robbery charge commenced on August 19, 2009.[8] The trial court summarized the Commonwealth's evidence as follows:

> On August 26, 2006, at about 2:15 A.M., Edward Roberts and Jeffery Branson[9] stopped to get take-out food at the corner of 54th and Arlington Streets in West Philadelphia. Branson, the driver, remained in the car while Roberts went into the store. [N.T. Trial, 8/20/09, at 47.] As Roberts exited the store with his food, he was grabbed from behind by a man who demanded that Roberts hand over his money. When Roberts attempted to fight off his assailant, the man shot him three times. ***Id.*** at 62-65. Roberts ran back to Branson's car, and Branson rushed him to the hospital. ***Id.*** at 79. Roberts was in surgery for approximately six hours. ***Id.*** at 159.

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[5] 18 Pa.C.S. §§ 901(a), 2502.

[6] 18 Pa.C.S. § 2702(a).

[7] 18 Pa.C.S. § 907(a).

[8] The Hon. William J. Mazzola presided over the first trial on 2007. The Hon. Rosalyn K. Robinson presided over the second trial in 2009.

[9] At the time of trial, Jeffery Branson was deceased. N.T. Trial, 8/20/09, at 47.

While Roberts was in surgery, Philadelphia Detective David Baker examined the crime scene and recovered three 9mm fired cartridge casings on the sidewalk; they were near a bag of food and a bloodstain that ran down the street. ***Id.*** at 136-137. The next day, August 27, Detective Baker interviewed Edward Roberts. Roberts told Detective Baker that he did not know who the shooter was. ***Id.*** at 143.

On August 28th, Detective Timothy McCool interviewed Edward Roberts's neighbor, Karl Rone. Rone told Detective McCool that Edward Roberts had known the shooter and that he knew this person as "Ian Sanchez." ***Id.*** at 123. Rone identified [Appellant, Ian Tapper,] in a photo array as the person he was talking about. ***Id.*** Rone also said that he had seen [Appellant] carrying a gun around midnight on August 27; he believed it to be a 9mm weapon. ***Id.*** Detective McCool forwarded the interview to Detective Baker.

Based on this information, Detective Baker decided to interview Roberts again on August 29. [***Id.*** at 144.] Edward Roberts picked [Appellant] out of a photo array prepared by Detective Baker and identified him as the shooter. ***Id.*** at 146. When Detective Baker asked Roberts why he had not divulged the name of the shooter during the previous interview, Roberts replied, "Because I was pissed the [f---] off." ***Id.*** Edward Roberts later recanted at trial, claiming that he did not remember these events.

On August 31, 2006, [Appellant] was arrested and remained in custody . . . until his trial. ***Id.*** at 147. On February 9[,] 2007, Karl Rone was killed. [Appellant's] third cousin, Amir Sanchez, gave a statement to Philadelphia Police that he had conversations with [Appellant] on February 12, 2007, while both were in custody at the same prison[.] According to Sanchez, after [Appellant] heard from his attorney that Karl Rone had provided information to Detective Baker, he called his friend Darylmir Larkin and told Larkin to "handle that" situation. Sanchez explained that "handling" the situation meant murdering Karl Rone. [Appellant] also discussed his plans to kill "Rollie," as Edward Roberts was known. After Sanchez was back out on the street, he had a conversation

> with Darylmir Larkin in which Larkin discussed having killed Rone as well as his plans to kill Roberts. Larkin stated that he did this out of "loyalty to his man."

Trial Ct. Op., 3/8/12, at 1-3.

We add that at trial, Detective McCool read aloud the statement that the late Karl Rone made to him, as written by Detective McCool and reviewed by Rone. N.T., 8/20/09, at 122-25. Appellant did not testify or present evidence.

The jury found Appellant guilty of robbery/threaten immediate serious bodily injury, a felony of the first degree. On December 8, 2009, the court imposed a sentence of nine to twenty years' imprisonment. Appellant did not file a post-sentence motion, but took this timely appeal. The court directed that he file a Pa.R.A.P. 1925(b) statement. However, after trial counsel successfully petitioned to withdraw and new counsel, Raymond D. Roberts, Esq., was appointed, the court permitted an extension of time, and Attorney Roberts filed the statement.[10] As stated above, Appellant presents eight claims for our review.

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[10] The trial court observed that Attorney Robert's 1925(b) statement presented fourteen numbered claims, which "rais[ed] approximately 25 issues by incorporating several issues into some of his paragraphs." Trial Ct. Op. at 3. The court commented that the statement "comes perilously close to triggering . . . waiver" for a high number of issues. ***Id.*** However, the court acknowledged, "[C]urrent counsel was not trial counsel and, therefore, did not have the benefit of having been present at the trial itself." ***Id.*** at 4. The court "therefore consider[ed] that it was perhaps not bad faith, but misguided appellate strategy, that led counsel to file an inappropriately lengthy 1925(b) Statement[,]" and opted to address the merits of the claims. ***Id.***

In Appellant's first issue, he avers the court erred in denying his Pa.R.Crim.P. 600(G) motion to dismiss because of the untimely commencement of trial.[11] Appellant's Brief at 16-17. Specifically, he asserts the following periods are not explained nor excused: September 9 to November 29, 2006; November 30, 2006 to February 9, 2007; and June 26 to August 20, 2007. ***Id.*** at 19. Appellant calculates there was "411 days includable time." ***Id.*** at 17. Appellant maintains that the Commonwealth failed to exercise due diligence. We find no relief is due.

This Court has stated:

> In evaluating Rule [600] issues, our standard of review of a trial court's decision is whether the trial court abused its discretion. . . .
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> The proper scope of review . . . is limited to the evidence on the record of the Rule [600] evidentiary hearing, and the findings of the [trial] court. An appellate court must view the facts in the light most favorable to the prevailing party.
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> Additionally, when considering the trial court's ruling, this Court is not permitted to ignore the dual purpose behind Rule [600]. Rule [600] serves two equally important

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[11] Appellant also provides discussion of the procedural history leading to his **second** trial. Appellant's Brief at 16-17. However, he makes no argument that the second trial was commenced untimely, and his own calculation indicates that he was retried 325 days after his first trial ended. ***See id.*** at 17. Nevertheless, as the Commonwealth points out, Appellant filed only one Rule 600 motion, which pertained to the first trial. Accordingly, to the extent he raises any Rule 600 claim pertaining to his second trial, that claim is waived for failure to present it to the trial court. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

> functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. . . .
>
> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule [600] must be construed in a manner consistent with society's right to punish and deter crime. . . .

Commonwealth v. Tickel, 2 A.3d 1229, 1233 (Pa. Super. 2010) (citation omitted).

In a "case in which a written complaint is filed against the defendant [and] when the defendant is at liberty on bail," trial "shall commence no later than 365 days from the date on which the complaint is filed." Pa.R.Crim.P. 600(A)(3). Rule 600(C) provides in part:

> (C) In determining the period for commencement of trial, there shall be excluded therefrom:
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> * * *
>
> (3) such period of delay at any stage of the proceedings as results from:
>
> (a) the unavailability of the defendant or the defendant's attorney;
>
> (b) any continuance granted at the request of the defendant or the defendant's attorney.

Pa.R.Crim.P. 600(C)(3)(a)-(b). A defendant "may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated." Pa.R.Crim.P. 600(G).

This Court has explained,

> As provided by Rule 600, the trial must commence by the mechanical run date, which is calculated by adding 365 days to the date on which the criminal complaint was filed. The mechanical run date can be adjusted by adding any "excludable" time when the delay was caused by the defendant under Rule 600(C). If the trial begins before the adjusted run date, there is no violation and no need for further analysis.
>
> However, if the defendant's trial is delayed until after the adjusted run date, we inquire if the delay occurred due to "excusable delay," circumstances beyond the Commonwealth's control and despite its due diligence pursuant to Rule 600(G).

Tickel, 2 A.3d at 1234 (citations omitted). This Court has held that a Commonwealth continuance due to the unavailability of a witness was excusable delay. ***See Commonwealth v. Hunt***, 858 A.2d 1234, 1242-43 (Pa. Super. 2004) (*en banc*); ***Commonwealth v. Staten***, 950 A.2d 1006, 1010 (Pa. Super. 2008).

In the instant matter, Appellant assigns a lapse of two days for the period between his August 31, 2006 arrest and the September 1, 2006 filing of the complaint. Appellant's Brief at 16. However, Rule 600 clearly provides that the time for trial tolls from the filing of a criminal complaint. Pa.R.Crim.P. 600(A)(3). We add 365 days to September 1, 2006, and determine the mechanical run date was September 3, 2007.[12] ***See Tickel***, 2 A.3d at 1234. Trial commenced ninety-nine days thereafter, on December

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[12] The 365th day was Saturday, September 1, 2006. Accordingly, we hold the next court business day, Monday, was the mechanical run date. ***See*** 1 Pa.C.S. § 1908.

10, 2007. Thus, we determine whether the mechanical run date can extended by any excludable or excusable time. ***See id.***

At the Rule 600 hearing on December 10, 2007, Appellant's counsel argued that the period between August 20 and December 4, 2007, with the exception of five days,[13] was attributable to the Commonwealth for filing of the motion to admit Karl Rone's statement. ***See*** N.T. Motion, 12/10/07, at 5. The Commonwealth responded that on August 20th, "there was another [assistant public] defender[,]" "[i]t was her request and" the court found that time was excludable. ***Id.*** at 6-7. Appellant did not object, and the December 10th transcript does not provide more information about a defense request for a continuance. The trial docket, however, includes the following entry for August 20, 2007: "Commonwealth's motion to admit statement. 10-19-07, **def request 10-19-07 time rule excludable**." Docket at 8 (emphasis added).

Furthermore, we note statements made at hearings on October 19, 26, and 30, 2007 for the Commonwealth's motion to admit Rone's statement. At the October 30th hearing, the court stated:

> On August 20th was defense request [sic]. It was continued to 10/19 for motion only. Time was ruled excludable. . . .
>
> It is a combination of events. It was a defense request on August 20th, but also the Commonwealth filed a

[13] Appellant's counsel conceded, "It was stipulated that the time from [August] 26th to the 30th was excludable." N.T. Motion, 12/10/07, at 5.

> motion. So time ruled excludable would only go to the time the motion was heard, which was on the 19th.

N.T. Motion, 10/30/07, at 20. Significantly, Appellant likewise did not object to these statements. In the absence of any discussion in Appellant's brief disputing these statements, and viewing the facts in the light most favorable to the Commonwealth, we hold that the sixty-one days between August 20 and October 19, 2007 are excludable. ***See Tickel***, 2 A.3d at 1233.

In addition, at the Rule 600 hearing, Appellant stated that the complaining witness failed to appear on June 25, 2007. N.T. 12/10/07, at 5. The Commonwealth responded that it was "not ready" on that date because the complainant's uncle had passed away, and it argued, "And that brought us to the August 20th date, which was time ruled excludable already on the Quarter Sessions file." ***Id.*** at 8. Appellant did not object. The trial court "agree[d] that it was excusable time from June 25th because of the death in the family of the complaining witness." ***Id.*** at 10.

On appeal, Appellant's sole dispute to this finding is, "A witness failed to show up on June 25, 2007, thus the time period between June 26, 2007, until August 20, 2007 is neither explained nor excused." Appellant's Brief at 19. Because this Court has held that the unavailability of a Commonwealth witness was excusable delay, however, we decline to disturb the court's ruling. ***See Staten***, 950 A.2d at 1010; ***Hunt***, 858 A.2d at 1243.

We count the number of days in the two periods discussed above—June 25 to August 20, 2007, and August 20 to October 19, 2007—to be 117

days. This exceeds the 99 day-delay between the mechanical run date and the date trial commenced. Accordingly, we hold Appellant is not entitled to relief.[14] ***See Tickel***, 2 A.3d at 1234.

In Appellant's second issue, he avers the trial court erred in denying his motion to dismiss the robbery charge on double jeopardy grounds. Appellant claims that at his first trial, the Commonwealth's theory of the case was that he "approached the victim, Edward Roberts," demanded money, "produced a gun" and shot the victim three times. Appellant's Brief at 25-26. Appellant reasons:

> [He] was found not guilty of both Aggravated Assault and PIC, with the bills of information specifically charging that [Appellant] had a gun for purposes of the PIC charge and that [he] shot at the complainant for purposes of the aggravated assault and robbery charges, while in the course of committing the theft. **The jury's verdict can only be interpreted to mean that [Appellant] did not have a gun on the date and time charged or that the gun was not used in pursuit of the robbery.** In the subsequent prosecution, the Commonwealth offered the same proof to the second jury as it did to the first.

Id. at 26 (emphasis added). Appellant contends, "The issue of whether [Appellant] could have produced a gun and shot the victim, allegations which gave rise to the aggravated assault, PIC, and robbery charges, was

[14] In light of our analysis, we do not reach Appellant's claim that the court erred in holding "that continuances requested by the Commonwealth at the preliminary hearing should be excused [where] the defendant did not object to them." ***See*** Appellant's Brief at 20, 21.

therefore precluded by the first jury's verdict[.]"[15] ***Id.*** He also alleges, "There simply is no other evidence in this case from which it could be reasonably inferred that [Appellant] placed the victim in danger of immediate serious bodily injury or inflicted serious bodily injury on the victim during the course of a theft, but for the allegation that he had a gun and shot him." ***Id.*** at 27. We find no relief is due.

"As this [issue] presents a pure legal question to this Court, our scope of review is plenary." ***Commonwealth v. States***, 891 A.2d 737, 740 (Pa. Super. 2005). "The double jeopardy protections afforded by the United States and Pennsylvania Constitutions are coextensive and prohibit successive prosecutions and multiple punishments for the same offense." ***Id.*** at 741 (citations omitted). "Generally, mistrial because of the inability of the jury to reach a verdict does not fall within these protections and, therefore, is not a bar to reprosecution." ***Commonwealth v. Harris***, 582 A.2d 1319, 1321 (Pa. Super. 1990) (*en banc*) (citation omitted).

This Court has explained,

> Included in the double jeopardy protections is the doctrine of collateral estoppel.[ ] ***See Ashe v. Swenson***, 397 U.S. 346 . . . (1970). The phrase "collateral estoppel," also known as "issue preclusion," means that when an issue of law, evidentiary fact, or ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future lawsuit.[ ] Collateral estoppel does not automatically bar a

[15] Appellant does not dispute that he was "in the course of committing a theft." ***See*** 18 Pa.C.S. § 3701(a)(1)(ii).

> subsequent prosecution, but rather, it bars redetermination in a second prosecution of those issues **necessarily** determined between the parties in a first proceeding that has become a final judgment.

States, 891 A.2d at 741 (some citations omitted).

> ***Ashe*** established that once an accused has been acquitted, a state cannot prosecute him a second time for a related offense having a common issue of ultimate fact essential to conviction which the previous acquittal had determined in his favor. The ***Ashe*** prohibition may even apply where the jury returns a verdict of acquittal on some counts but is unable to agree on others if an issue of fact common to all counts was necessarily determined by the acquittal.

Harris, 582 A.2d at 1322 (citations omitted). In other words, "retrial of charges on which a jury has been unable to agree is not barred unless the jury made findings on one or more other charges which must be interpreted as an acquittal of the offense for which the defendant is to be retried." ***Id.***

At the first trial, Appellant was acquitted of aggravated assault as a felony of the first degree, which is defined as follows: "A person is guilty of aggravated assault if he . . . **attempts to cause serious bodily injury to another**, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life[.]" ***See*** 18 Pa.C.S. § 2702(a)(1); ***see also*** 18 Pa.C.S. § 2702(b) (grading). Appellant was also acquitted of PIC, which is defined as the

possession of "any instrument of crime with intent to employ it criminally."[16] ***See*** 18 Pa.C.S. § 907(a). The first jury was deadlocked on, and Appellant was retried on, the following subsection of the robbery statute: "A person is guilty of robbery if, in the course of committing a theft, he . . . threatens another with or intentionally puts him in fear of immediate serious bodily injury." ***See*** 18 Pa.C.S. § 3701(a)(1)(ii).

We find that Appellant's argument—that the first "jury's verdict can only be interpreted to mean that [he] did not have a gun . . . or that the gun was not used in pursuit of the robbery"—is over simplistic. ***See*** Appellant's Brief at 26. Furthermore, Appellant's argument glosses over the differences in the elements of the offenses. For robbery, the actor **threatens** another with or intentionally puts him in fear of immediate serious bodily injury, while for aggravated assault, the actor **attempts** to cause serious bodily injury or **causes** such injury intentionally, knowingly or recklessly." ***See*** 18 Pa.C.S. §§ 2702(a)(1), 3701(a)(1)(ii). The jury's finding of acquittal for aggravated assault in the first trial could have been based on any combination of factors. Furthermore, the robbery statute does not require the actor to use a gun. ***See*** 18 Pa.C.S. § 2702(a)(1). Accordingly, a sole finding that Appellant did not have or use a gun is not dispositive of whether robbery was established at the second trial. Accordingly, we find no relief is

[16] An "instrument of crime" is defined in part as "[a]nything specially made or specially adapted for criminal use." 18 Pa.C.S. § 907(d) (definitions).

due.

Appellant's third claim is that the court erred in allowing hearsay evidence—Detective McCool's testimony about the statement he took from Karl Rone. Appellant maintains that the detective testified that Rone told him "that [A]ppellant habitually carried a gun[,] was seen with a gun in his waistband 24 hours before the complainant was shot[,]" and was "hot tempered." Appellant's Brief at 29. Appellant contends these statements were "unfair and prejudicial," and that "[h]e had no ability to test the veracity of [Rone's] alleged statements" because of Rone's unavailability at trial. ***Id.*** at 29, 30. We find no relief is due.

Preliminarily, we consider the Commonwealth's contention that Appellant has waived this issue by failing to object contemporaneously at trial. Appellant claims he preserved this issue as follows:

> Defense attorney Gillison objected and later renewed his objection to the statement of Rone being admitted **thereby preserving the issue for appeal**. (Id p. 195). The trial court, obviously respecting the Law of the Case Doctrine, allowed this same testimony to be introduced over objection at the second trial and at the request of the Commonwealth, even gave [sic] an access to weapons instruction based on this excerpt from Rone's statement. (8-21-09 p. 9 L. 14-19); (N.T. 8-20-09 p. 123 L. 25).

Appellant's Brief at 29 (emphasis added). Although Appellant does not explicitly explain so, Attorney Gillison was his attorney at the first trial, but not at his second. The Commonwealth reasons that "[t]he grant of a new trial on the robbery charge erased any prior objection [Appellant] may have

lodged to Rone's statement." Commonwealth's Brief at 11 (citing ***Commonwealth v. Oakes***, 392 A.2d 1324, 1326 (Pa. 1978)). The Commonwealth then recounts that although Appellant objected to Detective McCool's testimony at the first trial, he failed to do so at the second trial. We find neither party's argument is completely correct, and that Appellant has preserved the issue for appeal.

Our Supreme Court has noted,

> "When a court grants a new trial, the necessary effect thereof is to set aside the prior judgment and leave the case as though no trial had been held . . . . By the operation of an order granting a new trial, the cause, in contemplation of law, is precisely in the same condition as if no previous trial had been held."

Oakes, 392 A.2d at 1326-27 (citation omitted). However, "both a suppression motion and a motion *in limine* 'settle, before trial, issues regarding the exclusion or admission of evidence.'" ***Commonwealth v. Padilla***, 923 A.2d 1189, 1194 (Pa. Super. 2007) (citation omitted). Furthermore, Pennsylvania Rule of Evidence 103 provides in part: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Pa.R.E. 103(a).

We reject Appellant's reasoning that his objection at the first trial preserved the issue for appeal, and thus obviated a need to object again at the second trial. ***See Oakes***, 392 A.2d at 1326-27. However, both parties overlook that the admission of this evidence was litigated in the

Commonwealth's motion *in limine*, and that the court issued a **pre-trial** ruling. Although the commencement of second trial had the effect of "leav[ing] the case as though no trial had been held," ***see Oakes***, 392 A.2d at 1326, we hold it did not expunge or invalidate any **pre-trial** ruling. Accordingly, we hold that Appellant's pre-trial objection to the Commonwealth's motion preserved a challenge on appeal. ***See*** Pa.R.E. 103(a).

This Court has stated,

> "The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Thus our standard of review is very narrow. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party."

Commonwealth v. Lopez, 57 A.3d 74, 81 (Pa. Super. 2012) (citation omitted), *appeal denied*, 62 A.3d 379 (Pa. 2013).

The Commonwealth sought the admission of Rone's statement under the forfeiture by wrongdoing exception to the hearsay rule; it argued that Appellant "knew about, encouraged, and/or acquiesced in [Darylmir Larkin's] homicide of Karl Rone for the purpose of silencing him as a witness for trial." Commonwealth's Mot. to Admit Out of Court Statement, 10/7/07, at 3-4. The trial court allowed Rone's statement under this theory.

"Hearsay is not admissible except as provided by [the Rules of

Evidence], by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802. The forfeiture-by-wrongdoing exception to the hearsay rule provides, "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." Pa.R.E. 804(b)(6). Pennsylvania Supreme Court decisions "have read the language [of this rule] plainly to mean that the exception applies only when a party's wrongdoing is done with the intention of making the declarant unavailable to testify as a witness." ***Commonwealth v. Santiago***, 822 A.2d 716, 730 (Pa. Super. 2003) (citing ***Commonwealth v. Paddy***, 800 A.2d 294, 310 n.10 (Pa. 2002); ***Commonwealth v. Laich***, 777 A.2d 1057, 1062 n.4 (Pa. 2001)). "[A] defendant . . . forfeits his confrontation right by wrongdoing where the wrongful act was committed for the purpose of preventing the witness's trial testimony." ***Commonwealth v. Wholaver***, 989 A.2d 883, 900 n.12 (Pa. 2010) (citing ***Giles v. California***, 554 U.S. 353 (2008)).

On appeal, Appellant's sole discussion of the forfeiture by wrongdoing exception is in one sentence summarizing the procedural history, where he acknowledges the Commonwealth sought to admit the statement under this exception. Appellant's Brief at 31. Thus, when reviewed as a whole, Appellant's argument does not challenge the trial court's application of the forfeiture-by-wrongdoing exception.

The remainder of Appellant's argument is that he "had no prior

opportunity to cross-examine Rone," and thus Rone's statement

> was inadmissible under ***Crawford v. Washington***, 541 U.S. 36 . . . (2004), which held that testimonial statements by witnesses who are absent from trial are barred under the Confrontation Clause of the Sixth Amendment, unless the witnesses are unavailable and the defendant had a prior opportunity to cross-examine them. . . .

Id. at 31. However, again, where Appellant does not challenge the trial court's application of the forfeiture by wrongdoing exception, we hold Appellant forfeited his confrontation rights. ***See Wholaver***, 989 A.2d at 900 n.12. Accordingly, his claim is without merit. ***See id.***

In his fourth issue, Appellant alleges the trial court erred in sustaining the Commonwealth's objection during his cross-examination of Detective David Baker.[17] The objection at trial arose as follows. Appellant presented Detective Baker with a copy of the statement which **Detective McCool** took from Karl Rone. N.T., 8/20/09, at 159. Detective Baker testified that he had never met or spoken to Karl Rone. ***Id.*** at 160. Appellant reviewed on the record Rone's statements that Rone "found out [his] neighbor was shot about two a.m." and that he spoke to the victim "[a]bout six hours later."[18]

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[17] Appellant's brief merely refers to "the detective," "the officer," and "the witness," without identifying him by name. Appellant's Brief at 36-38. However, by investigating Appellant's citations to the trial transcripts, we surmise that the witness is Detective Baker. ***See*** N.T., 8/20/09, at 162.

[18] The Commonwealth argues that the premise of Appellant's argument is flawed. It correctly quotes the notes of testimony for Detective McCool's testimony as follows:

Id. at 160-61. Detective Baker testified that he knew that the shooting victim, Roberts, "was in surgery until 10:30, 11 that morning[.]" ***Id.*** at 161. The following exchange occurred:

> [Appellant's Counsel:] Can you tell me how Mr. Rone was able to speak to Edward Roberts six hours after the shooting at two a.m. when Mr. Roberts was still being operated on?
>
> [Commonwealth:] Objection.
>
> THE COURT: What basis?
>
> [Commonwealth:] No personal knowledge.
>
> THE COURT: Sustained.

N.T., 8/20/09, at 161-62.

On appeal, Appellant identifies the following alleged inconsistency:

> [Rone's] answer was, ". . . I found out my neighbor was shot at about two a.m. I was told of the shooting about six hours later. I spoke to the victim and he told me what had happened."

Commonwealth's Brief at 14 (quoting N.T., 8/20/09, at 122). We would agree that this testimony, as stated, indicated that "Rone never claimed to have spoken to the victim six hours after the shooting[, but instead] Rone merely reported that he was told of the shooting about six hours" later. ***See id.*** at 13.

However, our review of the written statement reveals that the court transcription merely misplaced punctuation, resulting in altered meaning. Rone's statement said, verbatim: "Saturday morning, I found out my neighbor was shot about 2:00 AM, was the time I was told of the shooting. About, six hours latter I spook to the victim and he told me what had happened." Commonwealth's Trial Ex. C4, Investigation Interview Record, at 1 (misspellings in original). Accordingly, Appellant's summary of Rone's statement—that Rone spoke to the victim about six hours after the shooting—was correct.

"[T]he detective knew that Roberts . . . was in the hospital in surgery until 10:30 or 11:00 am. This would mean that Rone spoke to Roberts while he was being treated or operated on in the operating room." Appellant's Brief at 37. Appellant asserts, "This attack on Rone's credibility was essential to [A]ppellant's defense because [Rone's] statement . . . was essential and instrumental in causing [A]ppellant's conviction." ***Id.*** at 36.

We find no error in the court's sustaining the objection on the ground that Detective Baker had "[n]o personal knowledge." ***See id.*** at 162. As Detective Baker had just testified moments earlier, in response to Appellant's own questioning, he had never met or spoke to Karl Rone. Instead, Detective Baker merely testified that Karl Rone's written statement, which was taken by Detective McCool, was "given to [him]" for review. ***See id.*** at 159. We do not disturb the court's ruling that Detective Baker had no personal knowledge as to how Rone came to talk to Edwards after the shooting. ***See id.*** at 162.

In his fifth issue, Appellant raises a litany of trial court errors in the limiting of his cross-examination impeachment of Commonwealth witness Amir Sanchez.[19] As stated above, this witness implicated Appellant in the

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[19] The certified record transmitted to this Court did not include the transcript for the second day of trial, August 21, 2009. Although there was a transcript with that date on its cover, the contents of that transcript were instead identical to the notes of testimony for the first day of trial on August 20th. Upon informal inquiry by this Court, the trial court procured and provided the correct volume. We remind Attorney Roberts, "Our law is

killing of Karl Rone. Appellant contends the court erred when it: (1) sustained an objection during his attempt to impeach Sanchez about an alleged prior inconsistent statement; (2) allowed the Commonwealth to "prop[ ] up" Sanchez "as a truthful witness, yet . . . simply would not let [A]ppellant use cross-examination, the only weapon he had, to dispel that notion[;]" (3) sustained an objection to Appellant's question to Sanchez of whether it was "foolish" for him to "try[ ] to fool the government" "by using a false identification" "when they [sic] also match the fingerprints[;]" (4) sustained objections to Appellant's questions, "You're dealing crack—," and "You were prepared to use that gun in that robbery, weren't you?[;]" and (5) "admonished defense counsel not to editorialize on cross examination when defense counsel's ability to use oratorical flair in questioning was essential to his ability to rebut the prosecution['s] assertions of truthfulness." Appellant's Brief at 43-48. Appellant argues that each of these rulings were prejudicial and not harmless error. He also asserts that the court's "interrupt[ion]" of Sanchez's testimony with its rulings allowed Sanchez "to escape exhibiting the body language and demeanor the jury would have seen that would have convinced [it] that he was being untruthful." ***Id.*** at 45. We find no relief is due.

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unequivocal that the responsibility rests upon the appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty." ***See Commonwealth v. B.D.G.***, 959 A.2d 362, 372 (Pa. Super. 2008) (citations omitted).

After review of the notes of testimony, we disagree with Appellant's bald conclusion that the court allowed the Commonwealth to "prop[ ] up" Sanchez "as a truthful witness." ***See*** Appellant's Brief at 43, 45. The Commonwealth's direct examination of Sanchez comprised about four pages of testimony. ***See*** N.T. Trial, 8/21/09, at 42-46. The Commonwealth elicited testimony from Sanchez that he had pleaded guilty to robbery charges in federal court, was awaiting sentencing, and as a part of his plea deal, had "come forward with information regarding the robbery" charge against Appellant in this case." ***Id.*** at 44. The remainder of the direct examination consists of: (1) Sanchez' statements that Appellant is his cousin and Sanchez knew Edward Roberts and Karl Rone "from the neighborhood;" (2) Sanchez's identification of Appellant, Edwards, and Rone in photographs; and (3) the Commonwealth's introduction of these exhibits: Sanchez's statement to police, photographs, and Sanchez's federal plea agreement. ***Id.*** at 43, 45-46. In light of this direct examination questioning, we disagree that the Commonwealth's examination was so prejudicial as to warrant relief.

Furthermore, Appellant wholly ignores the extent of his cross-examination of Sanchez. Appellant elicited the following testimony from Sanchez: (1) Sanchez had a prior conviction for theft, and another conviction for unsworn falsification to authorities, ***id.*** at 46-47; (2) Sanchez has used nine aliases, including Imir H. Reaves, Imir Robert Burton, Imar

Sanchez, Imer Birbon, Thomas Moore, Dalmir Larkin,[20] and Ross, ***id.*** at 47-49; (3) Sanchez agreed the question, "[W]hen you get arrested, your first inclination is to use somebody else's name because you don't want them to know who you really are[?,]" ***id.*** at 49; (4) Sanchez was on probation for theft in 2006 and 2007, was arrested in Delaware County for loitering and public drunkenness, was placed on probation again, "spen[t] a period of time in Philadelphia County[,]" and was on probation again, ***id.*** at 51; and (5) while on probation, Sanchez robbed a diner with a gun, which led to his pending federal case for robbery, carrying and using a firearm during a crime of violence, and "being a felon in possession of a firearm," ***id.*** at 50-51.

We also reject Appellant's claim that the court erred in not allowing Sanchez to respond to the question of whether it was foolish for him to use an alias when arrested. As noted above—and ignored by Appellant on appeal—he had already extensively cross-examined Sanchez about the many aliases he had used in the past when arrested. Likewise, although Appellant complains that the court sustained an objection to his question, "You're dealing crack—," he completely ignores the immediately preceding exchange:

> [Appellant's counsel:] And you're dealing drugs on that street?

[20] We note that Darylmir Larkin is the name of the person alleged to have killed Rone at Appellant's behest.

[Sanchez:] Yes.

See N.T., 8/21/09, at 52. Thus, the court **allowed** testimony that Sanchez was a drug dealer. Appellant offers no argument why the jury's lack of knowledge of the specific type of drug sold by Sanchez was prejudicial.

Thus, after reviewing Sanchez's entire cross-examination, we disagree with Appellant's claim that he was prevented from "reveal[ing] the true demeanor of the witness" and "dispelling [the] false notion and fabricated perception of Sanchez" that "he was such a good guy." ***See*** Appellant's Brief at 44, 46. Accordingly, we find these evidentiary claims are without merit. ***See Lopez***, 57 A.3d at 81.

In Appellant's sixth issue, he claims the court erred in sustaining a defense objection at sidebar, when it instead should have done so in the presence of the jury. Appellant's Brief at 51. Although Appellant does not clearly identify the ruling,[21] we glean from citations elsewhere in his argument that the ruling arose in the Commonwealth's direct examination of Police Detective William Holmes, who investigated the homicide of Karl Rone

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[21] Although Appellant quotes the Commonwealth's question at trial which prompted his objection, he does not provide a citation to any part of the three-volume trial notes of testimony. ***See*** Pa.R.A.P. 2119(c) (requiring argument section of brief to set forth citation to place in record for any reference to matter appearing in record), 2132 (requiring citation to reproduced record or original record for references in brief to part of record). Furthermore, Appellant does not identify the witness on the stand, nor explain the context of the question, which, when quoted in isolation as Appellant does, is not clear. ***See*** Appellant's Brief at 51.

and eventually arrested Darylmir Larkin. ***See id.***; N.T., 8/21/09, at 72-75. The Commonwealth asked Detective Holmes, "The information that [Agent Amy Nelson] gave, did it also concern a potential threat to the victim in this robbery case, Edward Roberts?" N.T., 8/21/09, at 75. At this point in trial, Amir Sanchez had already testified that he provided information about the robbery in this case to federal agent Amy Nelson. ***See id.*** at 44.

On appeal, Appellant complains that by the court's not sustaining the objection in the jury's presence, "the jury did not know [it was] not allowed to consider that there was a threat made to Edward Roberts." Appellant's Brief at 51. He contends that "[t]his untrue information . . .was inadmissible and extremely prejudicial and caused [him] to be convicted." ***Id.*** We find this issue is waived for failure to raise before the trial court.

Following the sidebar discussion, where presumably the trial court sustained Appellant's objection to the Commonwealth's question, Appellant raised no request for the court to announce its ruling to the jury or explain that it could not consider the contents of the Commonwealth's question. ***See*** N.T., 8/21/09, at 75. Appellant's brief does not state whether he subsequently requested a cautionary instruction on this specific issue. ***See*** Pa.R.A.P. 2117(c) (requiring statement of case to specify state of proceedings at which issue sought to be reviewed on appeal was raised), 2119(e) (requiring same of argument section of appellate brief). Accordingly, we find this issue is waived. ***See*** Pa.R.A.P. 302(a).

Appellant's seventh claim is that the trial court erred in sustaining the Commonwealth's objections during his closing argument. Appellant had argued to the jury that Commonwealth witness Amir Sanchez "should not be believed [because] he was receiving a volume discount for fabricating a lie against [A]ppellant." Appellant's Brief at 54. The following exchange ensued:

> [Appellant's counsel, addressing the jury:] Your freedom is not impacted by the legislature like Amir Sanchez'. You're not looking to go in front of a Judge later on who's going to take years off your sentence—
>
> [Commonwealth:] Objection.
>
> THE COURT: That's sustained.

N.T. Trial, 8/24/09, at 28.

On appeal, Appellant avers that his trial counsel was "simply stating true facts" and that his "argument was a fair response to the prosecutor's suggestion that the witness had not fabricated his testimony in response to a self-serving motivation to ameliorate his legal situation regarding charges he was facing." Appellant's Brief at 54. Appellant concludes that the court's sustaining of the Commonwealth's objection "impeded upon the province of the jury and thereby caused reversible error by impacting on [his] right to a fair trial." ***Id.*** at 56. We disagree.

"Counsels' remarks to the jury may contain fair deductions and legitimate inferences from the evidence presented during the testimony."

Commonwealth v. Johnson, 42 A.3d 1017, 1039 (Pa. 2012) (citation omitted), *cert. denied*, 2013 U.S. LEXIS 3009 (U.S. 2013).

The trial court reasons that defense counsel's statement "violated the 'golden rule' that attorneys cannot ask jurors to place themselves in the shoes of witnesses." Trial Ct. Op. at 17-18. ***See Commonwealth v. Stafford***, 749 A.2d 489, 498 (Pa. Super. 2000) (addressing defendant's claim that prosecutor's closing argument statement violated "Golden Rule" prohibition against asking jurors to put themselves in place of witness in order to inflame their passions). We agree.

Furthermore, we disagree with Appellant's premise that his trial counsel was "stating true facts" in arguing the judge in Sanchez's case would "take years off [his] sentence." ***See*** Appellant's Brief at 54. At trial, Appellant cross-examined Sanchez extensively on the possible sentences he faced, and twice confirmed that Sanchez was exposed to a life sentence. N.T., 8/21/09, at 52, 53 ("[Q. T]hat period of sentence that you're going to get can be up to life, right?" [A.] "Yes."), 54-59, 60 ("[Q.] You're looking at life in prison, correct? [A.] Yes, that's the mandatory [sic], the maximum amount."). Appellant also extensively questioned Sanchez about the condition in his plea deal that he provide information in this case against Appellant. ***Id.*** at 52-60. Appellant read aloud the provision in Sanchez's plea agreement "that if the government determines that [Sanchez] has failed to cooperate," it could do "a number of things." ***Id.*** at 57.

Accordingly, defense counsel's argument to the jury—that the court was "going to take years off [Sanchez'] sentence"—was not a fair deduction or legitimate inference of the evidence. ***See*** N.T. Trial, 8/24/09, at 28; ***Johnson***, 42 A.3d at 1039. Thus, we do not disturb the trial court's sustaining the Commonwealth's objection to this statement.[22]

In Appellant's final issue, he argues the Commonwealth committed misconduct by making the following statement in its closing argument:

> Let's look at Karl Rone's statement: The law says that although Karl Rone was killed and not able to come up here and testify, the law says that you still get to hear his statement because the defendant doesn't get the benefit for having a witness silenced and killed.

Appellant's Brief at 57; ***see*** N.T., 8/24/09, at 34. Both the trial court and the Commonwealth point out—and Appellant ignores—that his trial counsel objected to this statement and the trial court **sustained** his objection. ***See*** N.T., 8/24/09, at 34; Trial Ct. Op. at 18; Commonwealth's Brief at 21.

The Commonwealth alleges that Appellant's claim on appeal is waived pursuant to ***Commonwealth v. Manley***, 985 A.2d 256 (Pa. Super. 2009). In that case, the defendant objected to testimony given during the

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[22] The trial court also reasons this issue is waived for failure to "make an an offer of proof as required by Pa.R.E. 103[.]" Trial Ct. Op. at 17. We disagree that the Rules of Evidence apply, as statements made in closing arguments are not evidence. ***See Commonwealth v. Page***, 965 A.2d 1212, 1223 (Pa. Super. 2009) ("Closing argument is not evidence."). Nevertheless, we may affirm on any basis. ***See Commonwealth v. Charleston***, 16 A.3d 505, 529 n.6 (Pa. Super.), *appeal denied*, 30 A.3d 486 (Pa. 2011).

Commonwealth's examination of a witness. ***Id.*** at 267 n.8. The court sustained the objection, and the defendant "did not request a mistrial." ***Id.*** The Superior Court held, "In such a case where the trial court has sustained the objection, even where a defendant objects to specific conduct, the failure to request a remedy such as a mistrial or curative instruction is sufficient to constitute waiver." ***Id.***

With respect to the claim raised in the instant appeal—that the Commonwealth's statement was improper—the trial court **agreed with Appellant and sustained his objection**. To the extent that Appellant argues the court's ruling was not sufficient and further relief was required, we agree with the Commonwealth that such a claim is waived. ***See id.***

For the foregoing reasons, we find no merit to any of Appellant's claims.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/22/2013