NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. NORMAN HARVEY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1462 WDA 2012

Appeal from the Judgment of Sentence April 30, 2012
In the Court of Common Pleas of Lawrence County
Criminal Division at No.: CP-37-CR-0000954-2010

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: March 12, 2013

Appellant, Norman Harvey, appeals from the judgment of sentence imposed after his conviction of criminal attempt-burglary, possession of instrument of crime with intent (PIC), and loitering and prowling at night time.[1] We affirm.

The trial court aptly set forth the factual background of this case in its November 14, 2012 opinion:

> [A]t approximately 9:30 P.M. on September 19, 2010, the New Castle Police Department received a telephone call that an individual was observed meddling with the front door of Mr. Greek Devasil's (hereinafter "Mr. Devasil") jewelry store located

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 901(a), 18 Pa.C.S.A. § 907(a), and 18 Pa.C.S.A. § 5506, respectively.

> in the city of New Castle. The store being closed at that time, Officer Richard Ryhal (hereinafter, "Officer Ryhal") of the New Castle Police Department telephoned the owner of the store, Mr. Devasil, on his cell phone and advised him of the telephone call. Mr. Devasil immediately checked the video surveillance of his store and reported that the video surveillance showed that an individual was at the front door of the store and was trying to gain entrance. Officer Ryhal immediately terminated the telephone call and proceeded directly to Mr. Devasil's store, arriving at the store in approximately one minute.
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> Mr. Devasil observed [Appellant] at the front door of his store attempting to gain entrance. When Officer Ryhal arrived at the scene, [Appellant] began walking towards the police cruiser. At this time, Mr. Devasil came outside the store and confirmed to Officer Ryhal that [Appellant] was the person he saw on the video surveillance and at his front door attempting to gain entrance. At the time of his arrest, [Appellant] was wearing a dark blue sweatshirt with the hood over his head, black pants, black shoes, and a camouflage mask over his face. Subsequent to placing [Appellant] under arrest, Officer Ryhal searched [Appellant's] person and retrieved a pair of pliers, a screwdriver, a penlight, and a pair of black gloves.

(Trial Court Opinion, 11/14/12, at 3-4). On September 20, 2010, the Commonwealth filed a criminal complaint against Appellant and, on January 20, 2012, a jury convicted Appellant of the aforementioned charges. On April 30, 2012, the trial court sentenced Appellant to an aggregate term of incarceration of no less than four and one-half nor more than fourteen years' incarceration. Appellant filed a timely post-sentence motion that was denied by operation of law on September 21, 2012. This timely appeal followed.[2]

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[2] The record reflects that the court did not order Appellant to provide a Rule 1925(b) statement of errors, but the court filed a Rule 1925(a) opinion on November 14, 2012. ***See*** Pa.R.A.P. 1925.

Appellant raises five issues for this Court's review:

> 1. Was the trial court's determination that the prosecutor did not exclude a potential juror due to race, clearly erroneous?
>
> 2. Was the trial court's factual findings regarding [] Appellant's Motion to Suppress Evidence unsupported by the record, thereby requiring a reversal of the suppression court's actions?
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> 3. Did the trial court abuse its discretion in failing to grant a new trial due to insufficient evidence?
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> 4. Should the Court grant a new trial because the verdict was against the weight of the evidence?
>
> 5. Did the trial court abuse its discretion in failing to permit the jurors to take notes?

(Appellant's Brief, at 5).

In Appellant's first issue, he raises a ***Batson***[3] claim in which he argues that the court erred in failing to grant his motion for a new trial after he alleged that the Commonwealth exercised a discriminatory preemptory challenge to strike an African American man from the jury. (***See id.*** at 11-18). Specifically, Appellant claims that prospective Juror No. 19 was upset by the court's questioning of him about an expunged charge and that, therefore, the Commonwealth's use of the juror's conduct as a reason to strike him was not a neutral explanation. (***See id.*** at 16). Appellant's issue lacks merit.

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[3] ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986) (holding that "the Equal Protection Clause forbids [a] prosecutor to challenge potential jurors solely on account of their race.").

It is well-settled that the framework for evaluation of a ***Batson*** claim is as follows:

> [F]irst, the defendant must make a *prima facie* showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race; second, if the *prima facie* showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue; and third, the trial court must then make the ultimate determination of whether the defense has carried its burden of proving purposeful discrimination. ***Batson***, 476 U.S. at 97, 106 S.Ct. 1712.
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> To establish a *prima facie* case of purposeful discrimination . . . the defendant [must] show that he [i]s a member of a cognizable racial group, that the prosecutor exercised a peremptory challenge or challenges to remove from the venire members of the defendant's race; and that other relevant circumstances combine [ ] to raise an inference that the prosecutor removed the juror(s) for racial reasons. ***Batson***, 476 U.S. at 96, 106 S.Ct. 1712. . . .
>
> The second prong of the ***Batson*** test, involving the prosecution's obligation to come forward with a race-neutral explanation of the challenges once a *prima facie* case is proven, does not demand an explanation that is persuasive, or even plausible. Rather, the issue at that stage is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.
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> > If a race-neutral explanation is tendered, the trial court must then proceed to the third prong of the test, *i.e.*, the ultimate determination of whether the opponent of the strike has carried his burden of proving purposeful

> discrimination. It is at this stage that the **persuasiveness** of the facially-neutral explanation proffered by the Commonwealth is relevant.
>
> [T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal and will not be overturned unless clearly erroneous. Such great deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. There will seldom be much evidence bearing on the decisive question of whether counsel's race-neutral explanation for a peremptory challenge should be believed. [T]he best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.

Commonwealth v. Cook, 952 A.2d 594, 602-03 (Pa. 2008) (quotations marks, most citations, and footnote omitted; emphasis in original).

As aptly explained by the trial court:

> In the instant case, a ***Batson*** challenge was raised during the *voir dire* process. After interviewing Juror No. 19, the assistant district attorney indicated to the court that he planned to use a peremptory strike on this juror, an African American male who had indicated that he was charged with a crime, but was acquitted after a jury trial. (N.T., 1/17/12, at 286). [Appellant] objected to the Commonwealth's peremptory challenge. [He] argued that Juror No. 19 would be a competent juror who "looked to the court as something that had rectified a wrong that had been done to him." (***Id.*** at 295). The Commonwealth argued that Juror No. 19 was one of two African Americans in the jury panel[, it had not stricken the other African American,] and "striking him because of his reaction to being charged with a crime which perhaps any one of us would do . . . would necessarily prejudice the selection." (***Id.*** at 295).
>
> The assistant district attorney stated that he did not use race as a consideration; rather, he wished to strike Juror No. 19

> because during the discussions, "he was visibly bothered to the point of wiping tears away from his face . . . He was clenching his fists, he was highly bothered by it." (***Id.*** at 288). Additionally, "he had made a statement during questioning that he felt he was wrongly accused . . . by the people who brought the charges." (***Id.*** at 291). Moreover, Juror No. 19 was "very angry when he was relating to this incident that he went through in his life[.]" (N.T., 1/18/12, at 8). Juror No. 19 would not voluntarily disclose to the court the charges that were brought against him; and the assistant district attorney argued that "this is something that continues to weigh on him personally." (***Id.*** at 9).
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> Th[e trial] court noted that Juror No. 19 "was very emotional, did refuse to divulge the crime for which he was charged . . . and had to go to trial." (***Id.*** at 10). Also, the court noted that Juror No. 19 "did clench his teeth, perspired, rather visibly was emotional and had trouble, the [c]ourt's mind, maintaining control." (***Id.*** at 11). After securing information relating to Juror No. 19's charges, the court called him back into the examining room. At that time, the court noted that 30 to 60 minutes had elapsed, and he appeared to be somewhat more relaxed. (***See id.*** at 11). In viewing the totality of these circumstances, th[e trial] court overruled [Appellant's] objection to the peremptory challenge and allowed the Commonwealth to strike Juror No. 19.

(Trial Ct. Op., 11/14/12, at 10-12 (record citation formatting provided)).

Upon careful review, we find that the trial court's conclusions are supported by the record and free of legal error. Even assuming, *arguendo*, that Appellant, an African American male, met his burden to make a *prima facie* showing that the Commonwealth struck Juror No. 19 on the basis of race, the Commonwealth presented a race-neutral reason for its peremptory challenge; namely, the emotional state of the juror during *voir dire* discussions. In considering the totality of the circumstances, the court made a credibility determination that "the Commonwealth exercised its

peremptory challenge without prejudice." (Trial Ct. Op., 11/14/12, at 13). Based on our independent review, and under our standard of review, we conclude that the record supports the court's decision. Appellant's first issue lacks merit.

In Appellant's second issue, he argues that the trial court erred in denying his motion to suppress evidence seized at the time of his arrest where "[t]here was no direct evidence . . . that the Appellant was attempting to break into [the] jewelry store." (Appellant's Brief, at 19). Appellant's issue does not merit relief.

Our standard of review of a challenge to the denial of a motion to suppress is well-settled:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous.

Commonwealth v. Farnan, 55 A.3d 113, 115 (Pa. Super. 2012) (citation omitted). Further, "[i]t is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given their testimony. The suppression court is free to believe all, some or none of the evidence presented at the suppression hearing." ***Commonwealth v.***

Elmobdy, 823 A.2d 180, 183 (Pa. Super. 2003), *appeal denied*, 847 A.2d 58 (Pa. 2004) (citation omitted).

> Probable cause to arrest exists when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. Probable cause justifying a warrantless arrest is determined by the totality of the circumstances.

Commonwealth v. Dommel, 885 A.2d 998, 1002 (Pa. Super. 2005), *appeal denied*, 920 A.2d 831 (Pa. 2007) (citations and quotation marks omitted).

In this case, the trial court denied Appellant's motion to suppress, finding that: "Officer Ryhal had sufficient probable cause to arrest [Appellant]. Searching [Appellant] incident to that arrest [was] therefore legal and not in violation [of] his constitutional rights." (***See*** Trial Ct. Op., 11/14/12, at 5). We agree.

Our review of the record establishes that, at approximately 9:30 p.m. on September 19, 2010, an individual informed the New Castle Police Department that someone was attempting to break into Mr. Devasil's closed jewelry store. (***See*** N.T., 1/18/12, at 27; N.T., 1/19/12, at 60). Officer Ryhal called Mr. Devasil, who was sleeping in the back room of the establishment, where he lives. (***See*** N.T., 1/18/12, at 27; N.T., 1/19/12, at 60). Mr. Devasil confirmed, after watching surveillance, and then looking through the store window, that someone was trying to break the lock on the

front door of his store. (***See id.*** at 27-28, 30). Officer Ryhal arrived at the scene approximately one to two minutes later. (***See*** N.T., 1/19/12, at 61). Appellant, who was wearing a hooded dark blue sweatshirt, black pants and shoes, and a camouflage mask over his face, was the only individual at the scene. (***See id.*** at 61-62). Appellant walked toward the police officer, who subsequently placed Appellant under arrest. (***See id.*** at 62). Mr. Devasil identified Appellant as the person he saw attempting to break into his store. (***See id.*** at 17, 25).

Based on the foregoing, we conclude that the record supports the trial court's finding that, under the totality of the circumstances, Officer Rydal had probable cause to arrest Appellant. Therefore, the trial court did not err in denying Appellant's motion to suppress the evidence seized incident to that arrest. ***See Farnan***, ***supra*** at 115; ***Dommel***, ***supra*** at 1002. Appellant's second issue lacks merit.

In his third issue, Appellant challenges the sufficiency of the evidence to support his conviction. (***See*** Appellant's Brief, at 5, 23-27). This issue is waived and would lack merit.

The argument section of Appellant's brief addressing this issue violates the requirements of the Pennsylvania Rules of Appellate Procedure. (***See*** Appellant's Brief, at 23-27). Pursuant to Pennsylvania Rule of Appellate Procedure 2119(a), an appellant's brief must contain "such discussion and citation of authorities as are deemed pertinent." Pa.R.A.P. 2119(a); ***see***

also Pa.R.A.P. 2119(b). However, Appellant's brief contains only boilerplate law on the standard of review of sufficiency of the evidence challenges. (***See*** Appellant's Brief, at 23-27). Also, although Appellant was convicted of three crimes, he fails to provide pertinent discussion identifying which element of which crimes were not established and instead provides a recitation of the facts that he believes make the evidence insufficient. (***See id.***). Therefore, this issue is waived. Moreover, it would not merit relief.

It is well-settled that:

> [i]n reviewing sufficiency of evidence claims, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all the elements of the offense. Additionally, to sustain a conviction, the facts and circumstances which the Commonwealth must prove, must be such that every essential element of the crime is established beyond a reasonable doubt. Admittedly, guilt must be based on facts and conditions proved, and not on suspicion or surmise. Entirely circumstantial evidence is sufficient so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The fact finder is free to believe all, part, or none of the evidence presented at trial.

Commonwealth v. Moreno, 14 A.3d 133, 136 (Pa. Super. 2011), *appeal denied*, 44 A.3d 1161 (Pa. 2012) (citations omitted).

Here, Appellant was convicted of criminal attempt—burglary, PIC, and loitering and prowling at night time.

> "A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S.A. § 901(a). "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 are at the time open to the public or the actor is licensed or privileged to enter." 18 Pa.C.S.A. § 3502(a). Intent may be proved by direct evidence or inferred from circumstantial evidence.

Commonwealth v. Galindes, 786 A.2d 1004, 1009 (Pa. Super. 2001), *appeal denied*, 803 A.2d 733 (Pa. 2002) (case citation and some quotation marks omitted). Also, section 907 of the Crimes Code, Possessing instruments of crime, provides, in relevant part, that "[a] person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally." 18 Pa.C.S.A. § 907(a). Finally, section 5506 of the Crimes Code, Loitering and prowling at night time, provides, "[w]hoever at night time maliciously loiters or maliciously prowls around a dwelling house or any other place used wholly or in part for living or dwelling purposes, belonging to or occupied by another, is guilty of a misdemeanor of the third degree." 18 Pa.C.S.A. § 5506.

In this case, Appellant argues first that Officer Ryhal's failure to produce the evidence log cast "grave doubt . . . that [he] possessed any

instruments of crime at the time of his arrest." (Appellant's Brief, at 24). This argument would not merit relief.[4]

"The Commonwealth need not show a complete chain of custody; it is sufficient to show evidence establishing a reasonable inference that the identity and condition of the evidence have remained the same from the time it was received until the time of trial." ***Commonwealth v. Reardon***, 443 A.2d 792, 794 (Pa. Super. 1981).

Here, our review of the record reveals that Officer Ryhal testified effectively about the seizure of the instruments of crime found on Appellant's person at the time of his arrest; namely a pair of pliers, a screwdriver, a penlight, and a pair of black gloves. (***See*** N.T., 1/19/12, at 63-64). Additionally, the officer provided thorough testimony regarding the protocol he followed to log in the evidence at the New Castle Police Department. (***See id.*** at 64-65). Specifically, he stated that he took the seized evidence "straight to station," placed it in a manila envelope, did a property sheet, and put it in an evidence locker. (***Id.*** at 65; ***see id.*** at 65-66). The evidence was removed from the locker only for the officer to bring it to the

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[4] We note that Appellant's argument regarding Mr. Devasil's inconsistent identification testimony goes to the weight of the evidence, not its sufficiency. (***See*** Appellant's Brief, at 23-27); ***see also Commonwealth v. Small***, 741 A.2d 666, 672 (Pa. 1999), *cert. denied*, 531 U.S. 829 (2000) (noting that inconsistent testimony goes to the weight of the evidence). Accordingly, this argument in support of Appellant's sufficiency of the evidence challenge must fail. ***See Small***, ***supra*** at 672.

trial in this matter. (***See id.*** at 66). Appellant presented no evidence to establish that there was a gap in the chain of custody.

Based on the foregoing, we conclude that the Commonwealth produced sufficient evidence that Appellant was in possession of an instrument of crime and this argument would not merit relief. ***See Moreno***, ***supra*** at 136.

Appellant next argues that the evidence was insufficient because "there was no evidentiary link between the video of the perpetrator attempting to gain access to the store and [Appellant]." (Appellant's Brief, at 26). This argument does not merit relief because the video surveillance was not the only evidence offered linking Appellant to the incident.

As stated previously, the evidence of record established that Mr. Devasil, who had retired to his sleeping quarters on the jewelry store premises, observed, both on surveillance **and through the store's window**, an individual attempting to enter the closed store illegally. Within one to two minutes, Officer Ryhal arrived at the scene, finding Appellant, the only individual present, wearing a dark blue sweatshirt with a hood, black pants and shoes, and a camouflage mask over his face. Mr. Devasil immediately came outside and identified Appellant as the individual he had seen moments before on the surveillance video and through the window. Appellant had a pair of pliers, a screwdriver, a penlight, and a pair of black gloves in his possession.

Based on the foregoing, and viewing the evidence in the light most favorable to the Commonwealth as verdict winner, even assuming *arguendo* that the video surveillance failed to create an evidentiary link between the perpetrator and Appellant, we conclude that the jury properly found that the Commonwealth established that Appellant was the perpetrator of the crimes at issue. ***See Moreno***, at 136. Appellant's third issue would not merit relief, even were it not waived.[5]

In Appellant's fourth issue, Appellant challenges the weight of the evidence to support his convictions. (***See*** Appellant's Brief, at 28-29). This issue is waived and would not merit relief.

Preliminarily, we note that the argument section of Appellant's brief on this issue does not contain any pertinent citation to authority and discussion, references to the record, or a statement of where this issue was preserved. (***See id.***); ***see also*** Pa.R.A.P. 2117(c); Pa.R.A.P. 2119(a)-(c), (e); ***Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa. Super. 2007), *appeal denied*, 982 A.2d 509 (Pa. 2007) (noting that this Court will not "scour the record to find evidence to support an argument."). Accordingly, we deem this issue waived.

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[5] We find Appellant's conclusory allegation that the evidence was insufficient because the Commonwealth failed to admit the clothes Appellant was wearing on the night of the incident to be equally unpersuasive. (***See*** Appellant's Brief, at 26); ***see also Moreno***, ***supra*** at 136.

Moreover, to the extent that the issue can be reviewed, it would not merit relief. Our standard of review of a challenge to the weight of the evidence is equally well-settled:

> [T]he weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.

Moreno, ***supra*** at 135 (citation omitted). To succeed on a challenge to the weight of the evidence "the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the [C]ourt." ***Commonwealth v. Shaffer***, 722 A.2d 195, 200 (Pa. Super. 1998), *appeal denied*, 739 A.2d 165 (Pa. 1999) (citation omitted).

In this case, Appellant states in a conclusory fashion, without any citation to the record, that the verdict was against the weight of the evidence because of inconsistencies in Mr. Devasil's identification testimony, the questionable accuracy of the video surveillance, lack of evidence regarding Appellant's possession of an instrument of crime, and the fact that the premises at issue were not a dwelling place for purposes of the charge of loitering and prowling at night time.[6] (***See*** Appellant's Brief, at 28). Appellant's cursory allegations would not merit relief.

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[6] We note that Appellant's argument that the premises at issue were not a dwelling place for purposes of the charge of loitering and prowling at night
(Footnote Continued Next Page)

As stated above, the evidence established that the police received a telephone call regarding an individual attempting to break into Mr. Devasil's closed jewelry store. Mr. Devasil then observed Appellant, both on video surveillance and through a store window, illegally attempting to enter the premises. Moments later, at the time of Appellant's arrest, Officer Ryhal recovered instruments of crime.

Based on the foregoing, we conclude that the evidence was not "so tenuous, vague and uncertain that the verdict shocks the conscience of the [C]ourt." ***Shaffer***, ***supra*** at 200 (citation omitted); ***see Moreno***, ***supra*** at 135. Appellant's issue would not merit relief.

In Appellant's fifth issue, he claims that the trial court abused its discretion in failing to allow the jurors to take notes during trial. (***See*** Appellant's Brief, at 30). This issue is waived and would not merit relief.

Preliminarily, we note that Appellant dedicates one paragraph of his brief to this issue. (***See id.*** at 30). He provides no pertinent citations to authority or discussion, references to the record, or statement regarding the place of raising this issue. (***See id.***); ***see also*** Pa.R.A.P. 2117(c); 2119(a)-(c), (e). Accordingly, this issue is waived.

(Footnote Continued) ———————————

time would go to the sufficiency of the evidence, not its weight. Accordingly, it also is waived on this basis. Likewise, it would not merit relief because the record reflects that Mr. Devasil testified that he maintained a bed in the storage room behind the store and he lives there. (***See*** N.T., 1/18/12, at 27) Accordingly, there was sufficient evidence to support the charge and this issue would lack merit. ***See Moreno***, ***supra*** at 136.

Moreover, it would not merit relief. Pursuant to Pennsylvania Rule of Criminal Procedure 644(A), "[w]hen a jury trial is expected to last for more than two days, jurors shall be permitted to take notes during the trial for their use during deliberations." Pa.R.Crim.P. 644(A). The record reflects that the jury was sworn at approximately 1:16 p.m. on January 18, 2012. (***See*** N.T., 1/18/12, at 92). Testimony concluded on January 19, 2012. (***See*** N.T., 1/19/12, at 142-43). On January 20, 2012, the jury began deliberating at approximately 11:28 a.m., after closing arguments and the court's closing jury charge. (***See*** N.T., 1/20/12, at 76).

Therefore, because it is not clear from the record before us that the parties expected the trial to last for more than two days, and, in fact, it did not, we conclude that the trial court did not abuse its discretion or commit an error of law when it did not permit the jury to take notes during the trial. This issue would not merit relief.

Judgment of sentence affirmed.