

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

LUIS HERNANDEZ-NUNEZ

Appellant

No. 1537 EDA 2012

Appeal from the Judgment of Sentence May 8, 2012  
In the Court of Common Pleas of Lehigh County  
Criminal Division at No(s): CP-39-CR-0001824-2011

BEFORE: LAZARUS, J., OLSON, J., and FITZGERALD, J.\*

MEMORANDUM BY LAZARUS, J.

**FILED JUNE 05, 2013**

Luis Hernandez-Nunez appeals from the judgment of sentence, entered in the Court of Common Pleas of Lehigh County, after a jury found him guilty of robbery,<sup>1</sup> conspiracy,<sup>2</sup> burglary,<sup>3</sup> criminal trespass,<sup>4</sup> and theft.<sup>5</sup> We affirm.

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 18 Pa.C.S.A. § 3701(a)(1).

<sup>2</sup> 18 Pa.C.S.A. § 903.

<sup>3</sup> 18 Pa.C.S.A. § 3502.

<sup>4</sup> 18 Pa.C.S.A. § 3503(a)(1)(ii).

<sup>5</sup> 18 Pa.C.S.A. § 3921.

In the pre-dawn hours of January 15, 2011, Hernandez-Nunez's co-conspirator, Chrissy Martinez, lured two men ("the victims") to a vacant apartment undergoing renovations in Allentown. At the apartment, three other men ("the assailants") assaulted the victims, striking them with a handgun, and robbed them of approximately \$600, their cellphones, and their wallets. Hernandez-Nunez, Martinez, and the three assailants had broken into the apartment earlier that evening. Hernandez-Nunez was waiting outside the apartment during the robbery. He had been involved in planning the robbery, provided the handgun the assailants used, and after the robbery, drove Martinez, then his girlfriend, away from the scene.

After the guilty verdict, the trial court sentenced Hernandez-Nunez to serve an aggregate sentence of 7 to 16 years of incarceration. On appeal, Hernandez-Nunez challenges both the weight and sufficiency of the evidence presented on all of the charges, and complains that the trial court erred in barring the jury from taking the weapon used in the robbery into the jury room during deliberations.

The central thrust of Hernandez-Nunez's weight of the evidence arguments is that the Commonwealth's chief witness against him, his co-conspirator Martinez, should not be believed, and thus the verdict was "so contrary to the evidence as to shock one's sense of justice." ***Commonwealth v. Hawkins***, 701 A.2d 492, 501 (Pa. 1997). In its Pa.R.A.P. 1925(a) opinion, the trial court notes that it was the prerogative of the jury to believe or disbelieve testimony and that it cannot "shock one's

sense of justice” where the jury has simply chosen to believe the testimony of one witness over the testimony of another. We agree with this statement, and accordingly we affirm. The trial court also addresses Hernandez-Nunez’s sufficiency arguments, reviewing the elements of each charge and demonstrating how the testimony and evidence presented could reasonably lead a jury to find Hernandez-Nunez guilty. Again, we affirm.

Finally, Hernandez-Nunez’s challenge to the trial court’s decision not to allow the jury to take the weapon allegedly used in the robbery into deliberations is also without merit. “A trial court’s decision as to which exhibits may be taken out with the jury is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion.” ***Commonwealth v. Hawkins***, 701 A.2d 492, 512 (Pa. 1997). Additionally, “the jury may take with it such exhibits as the trial judge deems proper . . .” with the exception of trial transcripts, confessions, and the information or indictment. Pa.R.Crim.P. 646. The decision not to include the weapon with the rest of the evidence was within the sound discretion of the trial court. Accordingly, this claim also fails.

We rely on the Honorable Kelly Banach’s Rule 1925(a) opinion in affirming Hernandez-Nunez’s sentence on appeal. We instruct the parties to attach a copy of Judge Banach’s decision in the event of further proceedings in the matter.

Judgment of sentence affirmed.

J-S14012-13

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 6/5/2013

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

LUIS HERNANDEZ-NUNEZ,  
Appellant

No. 1824/ 2011  
1537 EDA 2012

OPINION

**KELLY L. BANACH, J.:**

On June 13, 2011, the Appellant was arraigned on charges of Robbery (18 Pa.Con.Stat. Ann. §3701(a)(1)(ii and iv)), Conspiracy to Commit Robbery (18 Pa.Con.Stat. Ann. §903), Burglary (18 Pa.Con.Stat. Ann. §3502), Criminal Trespass (18 Pa.Con.Stat. Ann. §3503(a)(1)(ii)), Aggravated Assault (18 Pa.Con.Stat. Ann. §2702(a)(4)), Theft by Unlawful Taking (18 Pa.Con.Stat. Ann. §3921), Simple Assault (18 Pa.Con.Stat. Ann. §2701(a)(1)), and Criminal Mischief (18 Pa.Con.Stat. Ann. §3304(a)(5)).

On March 13, 2012, jury selection began in this matter.<sup>1</sup> A jury trial was held from March 14, 2012 until the jury came to verdict on March 19, 2012. The Appellant was found guilty of all counts, except one count of Aggravated Assault and two counts of Simple Assault. On the same day, the Court determined that the Appellant was not guilty of summary offense of Criminal Mischief.

<sup>1</sup> The Appellant was tried with his co-defendant Alexander Castro.

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On May 8, 2012, the Appellant was sentenced to pay the costs of prosecution and restitution and to serve an aggregate sentence of not less than 7 years nor more than 16 years in a State Correctional Institution.

On May 29, 2012, the Appellant filed a Notice of Appeal and on June 11, 2012, filed a Concise Statement of Matters Complained of on Appeal. This Opinion follows.

#### SUMMARY OF THE FACTS

On January 5<sup>th</sup>, 2011, at approximately 1:24 a.m., Allentown Police responded to 724 Gordon Street, Allentown, Lehigh County, Pennsylvania for a report of an armed robbery in which the victims were reportedly struck with a handgun. The victims in this matter, brothers Justo and Mario Rodriguez, were later interviewed by Detective Stephen Milkovits at police headquarters. Justo Rodriguez related that he and two of his friends went to the B&B Piano Bar located at 248 North Ninth Street, Allentown, at approximately 8 p.m. on January 4, 2011. He was later joined by his brother, Mario, and his nephew at approximately 10:20 p.m. While at the Piano Bar, the men consumed some beer and were approached by an unknown Hispanic female, later identified as the Appellant's co-defendant Chrissy Martinez. The men and Ms. Martinez spoke at the bar and drank beers together. Justo Rodriguez stated he provided Ms. Martinez with his cellular telephone number and that of his nephew prior to her leaving the bar. After Ms. Martinez left the bar, Justo Rodriguez received a telephone call from Ms. Martinez, inviting him and Mario Rodriguez to 724 Gordon Street.

The victims arrived at 724 Gordon Street and Ms. Martinez met them outside and invited them inside the residence. Upon entering, the victims

stated they were confronted by a group of males, later identified as the Juan Ramos, Jose Diaz and Alexander Castro.<sup>2</sup> At least one of the males was armed with a handgun, though the victims could not identify which man had the gun. One of the co-conspirators pointed the handgun at both of the victims. Justo Rodriguez was struck in the face and Mario Rodriguez was struck in the head. During the course of the robbery, the co-defendants took two cell phones and approximately \$600.00 in U.S. currency from the victims. Additionally, their wallets were stolen, which contained bank and identification cards.

As a result of being struck in the head with the handgun, Mario Rodriguez sustained a laceration, requiring medical attention and several staples to his scalp to close the laceration.

Further investigation by Allentown police revealed that prior to Ms. Martinez going to the piano bar, and as testified to at trial by Ms. Martinez, the Appellant had directed Ms. Martinez to lure the victims from the bar to the vacant residence located at 724 Gordon Street. Additionally, the gun that was used during the robbery was provided to the co-defendants by the Appellant. The Appellant waited outside of 724 Gordon Street while the robbery occurred and then drove Ms. Martinez from the scene after the robbery.

Detective Milkovits, during the course of his investigation, spoke with the owner of the property, Yolanda Mohr, who stated that the residence had been vacant for approximately two months while maintenance work was done and that no one had her permission to be inside of the residence. Detective Milkovits observed damage to a first floor window to the residence as well as what appeared to be shoe prints on the toilet seat below the window. Ms. Mohr

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<sup>2</sup> Juan Ramos and Jose Diaz were later charged as co-conspirators.

stated the damage was new and that she did not know the exact value of the damage at the time. Detective Milkovits did not observe any other signs of forced entry to the residence.

DISCUSSION AND CONCLUSIONS OF LAW

In his Concise Statement of Matters Complained of on Appeal, the Appellant argues that the verdict rendered was against the weight of the evidence and that the evidence was insufficient to sustain convictions in this matter. Specifically, he asserts that:

- a. The victims did not identify the Appellant as one of the actors;
- b. Conflicting testimony was presented as to the description of the gun used in the robbery;
- c. Ms. Martinez initially gave statements to the police that did not implicate the Appellant;
- d. Ms. Martinez's testimony was that of an accomplice and should not have been believed;
- e. Juan Ramos, one of the co-defendants, testified at trial that the Appellant was not involved in crime and his testimony should have been believed; and,
- f. Testimony was presented that 724 Gordon Street was vacant at the time of the incident and should not have been designated as a residence or occupied structure.

App.Stmt. ¶1, 2.

In addition, the Appellant argues that the Court erred in refusing to allow the BB gun entered into evidence to go out with the jury as they deliberated.



### *Weight of the Evidence*

In his Statement, the Appellant first argues that the Court erred in denying his Motion for a New Trial. "A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence." *Commonwealth v. Hodge*, 658 A.2d 386, 388 (Pa. Super. 1995)(citing *Commonwealth v. Taylor*, 471 A.2d 1228, 1230 (Pa. Super. 1984)). "The decision whether to grant a new trial on this basis rests within the discretion of the trial court." *Hodge* at 1230 (citing *Commonwealth v. Hunter*, 554 A.2d 550, 555 (Pa. Super. 1989)). "A trial court should award a new trial on the ground that the verdict is against the weight of the evidence only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and [makes] the award of a new trial [ ] imperative so that right may be given another opportunity to prevail." *Hodge* at 1230 (citing *Commonwealth v. Whitney*, 512 A.2d 1152, 1155-1156 (Pa. 1986)).

It is well settled that "[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." *Commonwealth v. Moreno*, 14 A.3d 133, 135-136 (Pa. Super. 2011)(citing *Commonwealth v. Champney*, 832 A.2d 403, 409 (Pa. 2003); see also *Commonwealth v. Johnson*, 668 A.2d 97, 101 (Pa. 1995). "An appellate court cannot substitute its judgment for that of the finder of fact." *Commonwealth v. Pronkoskie*, 445 A.2d 1203, 1206 (Pa. 1982). A verdict rendered will only be reversed on appeal "if it is so contrary to the

evidence as to shock one's sense of justice." *Commonwealth v. Hawkins*, 701 A.2d 492, 501 (Pa. 1997).

After examining the evidence in this case, as presented to the jury at trial, we find that the Appellant's assertions that the verdict was against the weight of the evidence to have no merit. First, the Court is aware that neither of the victims of the robbery were able to identify the Appellant as participating in the robbery; however, the testimony of Ms. Martinez, although she is an accomplice, was quite clear in establishing that the Appellant had a vital role in the robbery. She testified that it was his idea to commit the robbery, he supplied the weapon ultimately used, and he assisted in her escape after the crime was committed. The jury could easily have accepted Ms. Martinez's testimony, and, by the same token, could have easily *not* believed the testimony of Juan Ramos, another accomplice. As has been previously stated, credibility of the witnesses is solely for the jury to determine. Therefore, it did not shock the Court's sense of justice when the jury returned guilty verdicts in this matter.

#### *Sufficiency of the Evidence*

Although the Appellant has conceded that "there is sufficient evidence to sustain the verdict rendering his sufficiency claim futile" by alleging that the Court erred by not granting a Motion for New Trial, we will still address the merits of his claim. *Moreno* at 136.

In reviewing sufficiency of evidence claims, [the Appellate Court] 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. See *Commonwealth v. Bullick*, 830 A.2d 998, 1000 (Pa.Super.2003).

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. See *Commonwealth v. Hargrave*, 745 A.2d 20, 22 (Pa.Super.2000), appeal denied, 563 Pa. 683, 760 A.2d 851 (2000). Admittedly, guilt must be based on facts and conditions proved, and not on suspicion or surmise. See *Commonwealth v. Swerdlow*, 431 Pa.Super. 453, 636 A.2d 1173 (1994). Entirely circumstantial evidence is sufficient so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. See *id.*; see also *Commonwealth v. Chmiel*, 536 Pa. 244, 247, 639 A.2d 9, 11 (1994). 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. See *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa.Super.2001), appeal denied, 569 Pa. 716, 806 A.2d 858 (2002). The fact finder is free to believe all, part, or none of the evidence presented at trial. See *Commonwealth v. Nicotra*, 425 Pa.Super. 600, 625 A.2d 1259, 1261 (1993).

*Moreno* at 136.

In the case at bar, the Appellant was ultimately convicted of Robbery (18 Pa.Con.Stat. Ann. §3701(a)(1)(ii and iv)), Conspiracy (18 Pa.Con.Stat. Ann. §903), Burglary (18 Pa.Con.Stat. Ann. §3502), Criminal Trespass (18 Pa.Con.Stat. Ann. §3503(a)(1)(ii)), and Theft by Unlawful Taking (18 Pa.Con.Stat. Ann. §3921). In his Concise Statement, the Appellant alleges the same errors as those alleged in his weight of the evidence argument.

Under the Robbery subsections charged in this case, “[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, or inflicts

bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury.” 18 Pa.Con.Stat.Ann. §3701(ii), (iv).

“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.Con.Stat.Ann. §3502.<sup>3</sup>

Under the Crimes Code, “[a] person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.” 18 Pa.Con.Stat. Ann. §903(a). Furthermore, “if a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.” *Id.* at §903 (c). See also *Commonwealth v. Savage*, 566 A.2d 272, 276-277 (Pa.Super. 1989)).

“The essence of criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. *Commonwealth v. Wilson*, 296 A.2d 719 (Pa. 1972); *Commonwealth v. Henderson*, 378 A.2d 393, 398 (Pa. Super. 1977). The crime by its very nature is frequently not susceptible of proof except by circumstantial evidence. *Commonwealth v. Kwatkoski*, 406 A.2d 1102 (Pa. Super. 1979); *Commonwealth v. Adams*, 385 A.2d 525 (Pa.Super. 1978). ‘A conspiracy may

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<sup>3</sup> It is noted that the definition of Burglary was amended by 2012 Pa. Legis. Serv. Act 2012-122 (S.B. 100) (PURDON’S) on July 5, 2012.

be inferentially established by showing the relationship, conduct or circumstances of the parties, and the overt acts on the part of co-conspirators have uniformly been held competent to prove that a corrupt confederation has in fact been formed.” *Commonwealth v. Carter*, 416 A.2d 523, 524 (Pa.Super. 1979)(internal citations included).

“The decided cases have held that mere association or mere presence at the scene of the crime is insufficient to prove a conspiracy unless the defendant had prior knowledge of his alleged co-conspirators criminal intent. Similarly, the defendant's mere knowledge of the proposed crime is insufficient to convict him of conspiracy absent proof that he became an active participant in the criminal enterprise and that he had knowledge of the conspiratorial agreement.” *Commonwealth v. Swerdlow*, 636 A.2d 1173, 1177 (Pa. Super. 1994)(citations omitted). “A defendant may be convicted of both conspiracy and the offense that was the object of the conspiracy.” *Commonwealth v. Rios*, 684 A.2d 1025, 1030 (Pa. 1996).

“A person commits [criminal trespass] if, knowing that he is not licensed or privileged to do so, he ...breaks into any building or occupied structure or separately secured or occupied portion thereof.” 18 Pa.Con.Stat.Ann. §3503 (a)(1)(ii).

Under the theory of accomplice liability, a person can be held responsible for criminal conduct “without proof that the accomplice actually performed any criminal act.” *Commonwealth v. Wagaman*, 627 A.2d 735, 740 (Pa. Super. 1993)(citing *Commonwealth v. Rosetti*, 469 A.2d 1121, 1123 (Pa. Super. 1983)). 18 Pa.C.S. § 306 provides:

(a) General rule. A person is guilty of an offense if it is committed by his own conduct or by the conduct

of another person for which he is legally accountable, or both.

(b) Conduct of another. A person is legally accountable for the conduct of another person when...

(3) he is an accomplice of such other person in the commission of the offense.

(c) Accomplice defined. A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it ...

"Accomplice culpability is established through a two-step analysis: first, that the accomplice acted in such a way that he solicited or aided another's criminal conduct and, second, that any act was committed with the intent of promoting or facilitating the crime." *Wagaman* at 740 (referring to *Commonwealth v. Woodward*, 614 A.2d 239 (Pa. Super. 1992); *Commonwealth v. Potts*, 566 A.2d 287 (Pa. Super. 1989), allocatur granted, 525 Pa. 656, 582 A.2d 322 (1990). However, more than mere presence at the scene is required. *Wagaman* at 740. Additionally, "[t]o convict a defendant of accomplice culpability, the Commonwealth must establish that the crime has been committed and must prove every material element." *Wagaman* at 741 (citations omitted).

The testimony presented at trial, viewed in the light most favorable to the Commonwealth as verdict winner, demonstrated that the entire criminal enterprise, from the time that Ms. Martinez was sent into the piano bar to make contact with the target victims, until the robbery was completed at 724 Gordon Street and Ms. Martinez was driven from the scene by the Appellant, not only *involved* the Appellant but tended to prove that he was a willing participant, and fulfilled the requirements of accomplice liability.

Prior to the incident, Ms. Martinez and the Appellant had been in a romantic relationship. During the course of the relationship, Ms. Martinez had occasion to see the Appellant with a handgun, which she also saw the Appellant place in the glove compartment of his father's vehicle prior to the date of the incident. On the day in question, Ms. Martinez testified that while driving around the city of Allentown in the Appellant's father's vehicle, she and the Appellant encountered Jose Diaz, Juan Ramos and Alexander Castro (all co-defendants). The Appellant requested that Mr. Diaz return money that he owed the Appellant and Mr. Diaz told the Appellant that he did not have the money. The five went to 724 Gordon Street, which they knew was vacant at the time, spent about 15 minutes in that location smoking marijuana, where the Appellant again requested the money owed. They then proceeded to the piano bar. Mr. Diaz explained that he could get the money by robbing someone there. Mr. Diaz went into the bar, zeroed in on the two victims, and came back outside to report to the others. The Appellant then directed Ms. Martinez to go into the bar, look for "Mexicans," believing that the "Mexicans" had money, and to try to lure the victim(s) to 724 Gordon Street. The Appellant assured Ms. Martinez that he loved her and cared for her and that everything would "be alright."

Ms. Martinez, following the Appellant's instructions, made contact with the victims and was engaged in conversation with them as the Appellant entered the bar, bought a beer, and remained for approximately two minutes. Ms. Martinez then left the bar and met with the Appellant outside in the ally. There, the Appellant reassured her and aggressively asked if Ms. Martinez was able to get the victims' cellular phone numbers. Ms. Martinez returned to the bar and the Appellant returned to the vehicle. After speaking with the victims

and getting their telephone number(s), Ms. Martinez returned to the Appellant's vehicle, where all five co-defendants remained inside of the vehicle. While in the vehicle, the Appellant insisted that she call the victim to arrange a meeting.

After discussing a proposed meet-up with the victim, the Appellant, Ms. Martinez, and the others return to 724 Gordon Street. When the victims did not immediately arrive, the five co-defendants returned to the piano bar and discovered that the victims were no longer there. The Appellant then insisted that Ms. Martinez call the victims, which she did. After the victims assured Ms. Martinez that they were on their way to 724 Gordon Street, the five co-defendants returned to Gordon Street as well. The Appellant parked his vehicle in front of the house and stayed in the car, having instructed Ms. Martinez to take the victims into the house where the others would meet her. He then instructed Ms. Martinez "to get the fuck out" of the house.

When the victims arrived 15 minutes later, Ms. Martinez led them to the kitchen area of the residence. She saw Mr. Diaz, with a gun in hand, grab one of the victims and heard him tell her to leave. She left immediately and returned to the Appellant's car. The Appellant and Ms. Martinez left together and went to a friend's house.

At trial, the jury was shown surveillance video of the piano bar which tended to corroborate Ms. Martinez's testimony. Ms. Martinez did inform the members of the jury that her criminal case concerning her involvement in this incident was still pending and that when initially interviewed by police, she did not tell this version of the events. Ms. Martinez testified that she initially did not tell police about the Appellant's involvement because she was very scared of



what would happen to her and what sort of retaliation she may face if she did point the finger at the Appellant.

The Court notes that in order to believe Ms. Martinez's testimony regarding the Appellant's participation and orchestration of the crimes, the jury would have had to discredit or not believe the testimony provided by one of the other co-defendants, Juan Ramos. Such was their prerogative. See *Commonwealth v. Shaver*, 460 A.2d 742, 745 (Pa. 1983) ("It is solely the province of the trier of fact to pass upon the credibility of witnesses and to give it such weight as may be accorded to the evidence therein produced. The factfinder is free to believe all, part or none of the evidence.") Mr. Ramos testified that the Appellant was not involved in the incident and that he committed the robbery of the Rodriguez brothers by himself. Further, he only admitted to receiving \$130.00. Detective Milkovitz testified that he interviewed Mr. Ramos, who declined to be audio or video recorded. Detective Milkovitz recalled that Mr. Ramos told the police that all five of the co-defendants were involved in the robbery and gave a similar story to the one testified to by Ms. Martinez at trial, although his written statement did not mention any other individuals by name.

As to the premises at 724 Gordon Street properly giving rise to a burglary of the first degree, the Appellant argues that because it was vacant at the time of the incident, without beds and furnishings, it was not a "residence or occupied structure" as required by the elements of Burglary. "Under the burglary statute, a defendant commits first degree burglary if the location illegally entered: (1) is adapted for overnight accommodation but no individual is present; (2) is not adapted for overnight accommodation but an individual is

present; or (3) is adapted for overnight accommodation and an individual is present.” *Commonwealth v. Waters*, 988 A.2d 681, 683 (Pa. Super. 2009)(citations omitted). In this case, there is no dispute that no person was present at the time the burglary occurred at 724 Gordon Street. Therefore, “ in order to prove that the burglaries were first-degree offenses, the Commonwealth [is] required to prove that the ‘building, structure or portion entered’ was adapted for overnight accommodation.” *Waters* at 683. “To determine whether a structure is adapted for overnight accommodation, a court considers ‘the nature of the structure itself and its intended use, and not whether the structure is in fact inhabited.’” *Commonwealth v. Rivera*, 983 A.2d 767, 769 (Pa. Super. 2009) (quoting *Commonwealth v. Nixon*, 801 A.2d 1241, 1247 (Pa. Super. 2002) (holding unoccupied row-house, undergoing renovation, that had no electricity or running water constituted structure adapted for overnight accommodation)).

In the case at bar, the jury heard testimony from Yolanda Mohr, the owner of the property located at 724 Gordon Street. She testified that it is a rental property. On January 4, 2011, there was no tenant in the residence, although she was in the process of preparing the house for a future tenant. Although no appliances or furnishings were in the residence, the electricity was still on and at the time of the incident, the windows were closed. As a result of the crimes occurring at the property, Ms. Mohr had to repair a window in the powder room. She further testified that no one had her permission to be inside the home. The Court is satisfied that the Commonwealth has met its burden in relation to the crime of Burglary as a felony of the first degree.

It would appear that the jury found the Appellant guilty of the crimes based upon his role as an accomplice. The Court believes that the evidence presented by the Commonwealth substantiated this belief and was sufficient to support the verdict rendered.

*Court's Decision Not to Send BB Gun into Deliberation Room*

The Appellant argues that the Court erred in not allowing the BB gun admitted into evidence to into the deliberation room while the jury was deciding the case. Pursuant to Pa.R.Crim.Pro. 646, "[u]pon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (C)(pertaining to trial transcripts, confessions or the Information/Indictment)." "A trial court's decision as to which exhibits may be taken out with the jury is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion." *Commonwealth v. Hawkins*, 701 A.2d 492, 512 (Pa. 1997); *Commonwealth v. Bango*, 742 A.2d 1070, 1072 (Pa. 1999). The trial court will be deemed to have abused its discretion "only if [the Appellate Court] determine[s] that the trial court's ruling exhibited manifest unreasonableness, partiality, prejudice, bias or such lack of support as to render it clearly erroneous." *Bango* at 1072.

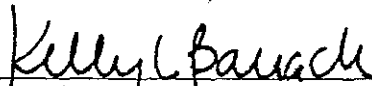
In the case at bar, the court determined that the jury need not have the actual BB gun in the jury deliberation room as they debated and considered their verdict. During the final jury instruction and just prior to the jury retiring to the deliberation room, the Court alerted the jury that there were pieces of evidence which had been admitted at trial but would not be sent back with them during their deliberations, such as the BB gun. The Court went on to tell the jury that if, in fact, they wished to reexamine the evidence which would *not*

be automatically sent back to the deliberation room, they needed only to request to see the item(s) again and they would be returned to the courtroom where they could review the requested item(s). Because the Court did not abuse its discretion in restricting the BB gun from being sent back with the jury to deliberate and also because the jury was made aware that they could examine the BB gun again, if requested, there was no abuse of discretion.

CONCLUSION

After consideration of the Appellant's arguments presented in his Concise Statement, the Court believes that the instant Appeal ought to be denied and dismissed for the forgoing reasons.

By the Court:

  
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Kelly L. Banach, J.