NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. FRANK DUANE SWARTZ Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1708 EDA 2012

Appeal from the Judgment of Sentence February 3, 2012
In the Court of Common Pleas of Carbon County
Criminal Division at No(s): CP-13-CR-0000104-2009

BEFORE: GANTMAN, OLSON and PLATT,* JJ.

MEMORANDUM BY OLSON, J.: **FILED MAY 24, 2013**

Appellant, Frank Duane Swartz, appeals from the judgment of sentence entered on February 3, 2012, as made final by the denial of post-sentence motions on June 6, 2012, following his jury trial convictions for 60 counts of arson-related offenses, including 14 counts of arson endangering persons, one count of arson endangering property, 15 counts of possession of explosive or incendiary materials or devices, 15 counts of risking catastrophe, and 15 counts of maliciously setting or causing fire.[1] Upon careful consideration, we affirm.

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[1] 18 Pa.C.S.A. §§ 3301(a), 3301(c), 3301(f), and 32 P.S. § 344, respectively. The trial court sentenced Appellant to an aggregate term of 216 to 432 months of incarceration for his convictions.

*Retired Senior Judge assigned to the Superior Court.

The trial court summarized the facts and procedural history of this case as follows:

> From March 17, 2008 until April 18, 2008, sixteen separate brush fires were intentionally set in three adjoining municipalities in Carbon County: Lower Towamensing Township, Franklin Township, and the Borough of Parryville. Approximately thirty-one incendiary devices – consisting of a lit cigarette inserted in a matchbook, held together with a rubber band – were recovered at these sites. Forensic testing of three of the devices revealed a DNA profile recovered from the cigarette filter matching that of [Appellant], and on one of these devices, a latent fingerprint recovered from the matchbook match[ed Appellant's] right index finger.
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> Using this information, Trooper David Klitsch, a fire investigator with the Pennsylvania State Police, obtained a search warrant for [Appellant's] residence in Summit Hill, his vehicle, and to obtain a DNA sample. Trooper Klitsch and other officers executed the warrant on November 24, 2008, in the presence of [Appellant's] fiancée, Carol Nickerson. At the time of the search, [Appellant] was hunting with his fiancée's two sons[.] As a result of the search, police seized two clear plastic bags of colored rubber bands and two white in color matchbooks matching those used on the incendiary devices. Upon completion of their search, police waited outside of [Appellant's] residence for [Appellant] to return home.
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> [Appellant] returned shortly after 5:00 p.m. At that time, Trooper Klitsch informed [Appellant] that the police had executed a search warrant of his residence, that they needed him to provide a DNA sample, and that they wished to speak with him regarding a series of brush fires. [Appellant] denied any knowledge of the fires, however, he agreed to meet the trooper at the Summit Hill Police Station. While at the station, and after being given his

> ***Miranda***[2] warnings, [Appellant] confessed, both through oral and written statements, to being involved in sixteen of the nineteen fires for which he was questioned. As a result, a criminal complaint was then filed against [Appellant] on December 29, 2008. That same day, he was arrested.
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> On January 8, 2010, [Appellant] entered a plea of guilty. However, on February 25, 2010, he filed a *pro se* motion to withdraw his guilty plea. Following a hearing on the matter, [the trial court] granted [Appellant's] motion and allowed him to proceed to trial.
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> A jury trial began on December 5, 2011, and ended on December 13, 2011, when the jury returned a verdict of guilty on sixty of the sixty-six counts charged. On January 30, 2012, following a pre-sentence investigation report, [Appellant] was sentenced [to an aggregate term of 216 months to 432 months of imprisonment]. On February 6, 2011, [Appellant] filed [a] post-sentence motion. [Following a hearing, the trial court denied relief in an order filed June 6, 2012.]

Trial Court Opinion, 6/6/12, at 2-4 (footnote omitted). This timely appeal ensued.[3]

On appeal, Appellant presents the following issues for our review:

> I. Was [Appellant] denied a fair trial as both the oral and written incriminating statements attributable to [Appellant] of November 24, 2008 were the product or result of improper and unconstitutional agreements

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1969).

[3] Appellant filed a notice of appeal on June 13, 2012. Upon review of the certified record, there is no order directing Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Regardless, Appellant filed a Rule 1925(b) statement on July 6, 2012. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on July 25, 2012, largely incorporating its earlier opinion of June 6, 2012, wherein the trial court explained the denial of Appellant's post-sentence motions.

> on the part of a law enforcement officer designed to induce [Appellant] to waive ***Miranda***, as well as improper assistance rendered by that same officer, and therefore should have been suppressed?
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> II. Did a violation of Pennsylvania Rule of Criminal Procedure [] 646 and the right to a fair trial occur when, following the commencement of deliberations, [the trial court] ultimately determined to read aloud to the jury on more than one occasion the entire content of a November 24, 2008 written statement allegedly attributable to [Appellant]?
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> III. Should the trial court have declared a mistrial, either upon defense request, or *sua sponte*, based upon prejudicial remarks elicited during voir dire, testimony forthcoming from a Commonwealth witness, a remark by the prosecutor during cross-examination of [Appellant] and the representation by the jury that it was unable to reach a unanimous decision?
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> IV. Was the verdict returned by the jury against the weight of the evidence as there was a break in the chain of custody of the physical evidence that was submitted for fingerprint and DNA analysis which calls into question the results following from such analysis and which thereby eliminates all physical evidence proof linking [Appellant] to any of the subject sixteen fires?

Appellant's Brief at 7 (complete capitalization omitted).

In his first issue presented, Appellant asserts the trial court erred by not suppressing statements he made to police. ***Id.*** at 25. Initially, he claims that police did not give him ***Miranda*** warnings despite being subject to custodial interrogation. ***Id.*** at 26. Appellant disputes when police administered ***Miranda*** warnings. ***Id.*** at 29-31. He suggests police misconduct, asserting, "the time reflected or written on the ***Miranda*** waiver

form is **not** the time it was actually signed by [Appellant]." ***Id.*** at 31 (emphasis in original).

Appellant also claims the police induced an involuntary confession. First, he maintains police created a fictitious family emergency to persuade Appellant to return home from hunting, wherein police surrounded him and he was "able to observe the condition of the interior of his home after it was torn asunder vi[s]-a-vis execution of the [s]earch [w]arrant." ***Id.*** at 35. Next, Appellant maintains he was convinced to confess when police offered "an arrangement whereby [Appellant] would remain free during the holiday season" if he voluntarily surrendered later.[4] ***Id.*** at 40-45. Further, Appellant avers that police told him he "would be free to leave the police station whether he admitted his involvement in the subject fires or denied such involvement" which ultimately encouraged him to speak so as to derive "some benefit or favorable treatment." ***Id.*** at 46, 47. Finally, Appellant argues that police furnished all of the details of his written statement. ***Id.*** at 49. Thus, he argues the written statement was not a "free and independent recollection of events" by Appellant. ***Id.*** at 50.

Additionally, Appellant contends the trial court should have suppressed his statements to police because they continued questioning him despite his

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[4] Appellant was interviewed by police on November 24, 2008, three days before Thanksgiving. On December 26, 2008, police contacted Appellant and asked him to voluntarily turn himself into their custody.

constitutional request for an attorney. ***Id.*** at 36-37. Appellant posits police told him he would remain incarcerated through Thanksgiving and Christmas pending appointment of counsel. ***Id.*** at 39-40.

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. Where, [however], the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Jones, 988 A.2d 649, 654 (Pa. 2010) (citations and quotations omitted).

Moreover,

> [w]hen deciding a motion to suppress a confession, the touchstone inquiry is whether the confession was voluntary. Voluntariness is determined from a totality of the circumstances surrounding the confession. The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess. The Commonwealth has

> the burden to proving by a preponderance of the evidence that the defendant confessed voluntarily.
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> ...When assessing the voluntariness pursuant to the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion.

Commonwealth v. DiStefano, 782 A.2d 574, 581 (Pa. Super. 2001) (citation omitted).

Appellant essentially challenges the sequence of events and police action that ultimately led to his confession. First, we address Appellant's claims that police coerced his waiver of ***Miranda*** warnings and subsequent confession by creating a family emergency and then promising to postpone his arrest on formal criminal charges until after the holidays.

If deception is used by law enforcement,

> the deception must not pertain to the consent itself, in some sense it must be collateral to the content of the permission voluntarily granted. Thus, the accused must know what is being consented to, and if the police exceed the scope of that consent, then they have passed their limits of permissible deception. This is consistent with the line of cases which have held that if the accused does not understand what it was that was consented to, then the consent is invalid.

Commonwealth v. L.N., 787 A.2d 1064, 1068 (Pa. Super. 2001) (citations omitted).

At the suppression hearing, Appellant testified that he was out in the woods hunting with his fiancée's two sons when police located him. Police

initially told Appellant to return home for a family emergency. N.T., 11/12/2010, at 103. When he arrived at his home, however, police told Appellant they "needed to talk to [Appellant] in regards to the fires in Lower Towamensing Township." ***Id.*** at 114. At that point, Appellant concedes that he "was aware that there was no family emergency[.]" ***Id.*** at 142. Police told Appellant that they had "hard evidence" of Appellant's connection to the fires, "consisting of DNA and fingerprints." ***Id.*** at 115. Appellant agreed to speak with police at the local police station. ***Id.*** When Appellant arrived at the police station, the investigating officers again asked Appellant what he knew about the subject fires. ***Id.*** at 120-122. Moreover, police had Appellant read a copy of the search warrant and the attendant affidavit of probable cause, which listed the series of intentionally lit fires and the evidence recovered linking Appellant to them. ***Id.*** at 28-29.

Based on the foregoing, it is clear that police apprised Appellant of the crimes they were investigating at the moment he returned to his residence. Moreover, the notion of a family emergency was dispelled immediately upon Appellant's return from his hunting excursion. Thus, we determine that police did not use a fictitious family emergency to persuade Appellant to waive his rights. Any perceived deception regarding a family emergency was extinguished prior to Appellant's waiver of his ***Miranda*** rights. Accordingly, we reject Appellant's argument that a police-created emergency induced Appellant to waive his ***Miranda*** rights and coerced an involuntary confession.

Likewise, we reject Appellant's argument that the police coerced his confession by telling him that they would postpone his arrest from the day of the police interview until after Thanksgiving and Christmas. As the record reflects, the investigating officer told Appellant he would be released regardless of a confession or an assertion of innocence "because of [] the volume of information, such as the 16 fires, all the associated victims, all that information with regard to charges" and, thus, police "were in no position at that point to be typing up paperwork, court documents, and taking [the case] to the next level." ***Id.*** Appellant does not explain how such statements were so manipulative and coercive as to have deprived him of his free will. Police did not threaten to arrest Appellant if he did not confess. Instead, police made clear that Appellant was to be released regardless of what course of action he chose. No relief is due on this aspect of Appellant's current claim. We turn now to examine Appellant's remaining contentions pertaining to the timing of ***Miranda*** warnings and his alleged invocation of his right to counsel.

Appellant claims that he invoked his right to counsel prior to police ***Miranda*** warnings. The law is clear:

> The Fifth Amendment right to counsel was recognized in ***Miranda v. Arizona***, [***supra***]; this right protects a suspect's desire to deal with police only through counsel and is not offense-specific; it attaches upon custodial interrogation, and once invoked, prohibits any further questioning of a suspect until counsel is present. For this right to attach, it must be **specifically invoked by the**

> **suspect**; once it attaches, the suspect cannot waive it unless counsel is present.

Commonwealth v. Keaton, 45 A.3d 1050, 1065 (Pa. 2012) (citations and quotations omitted) (emphasis added). "The defendant [] is required to establish that he did indeed invoke his Fifth Amendment right to counsel." ***Commonwealth v. King***, 721 A.2d 763, 774 (Pa. 1998).

At the suppression hearing, the investigating officer testified that Appellant never requested an attorney. N.T., 11/12/2010, at 78. Appellant testified that before his ***Miranda*** rights were given "and after the third time of denying [] involvement, [Appellant] told [police] that **maybe** [he] should talk to an attorney." ***Id.*** at 123 (emphasis added). The suppression court "accept[ed] as credible Trooper Klitsch's testimony that [Appellant] never requested counsel and agreed to cooperate once apprised of his situation." Trial Court Opinion, 6/21/2011, at 8. In the alternative, the suppression court found that Appellant's aforementioned statement would not qualify as "an unequivocal request for counsel." ***Id.*** at 7, *citing* ***Commonwealth v. Hubble***, 504 A.2d 168, 175 (Pa. 1986) ("To hold that every utterance of the word 'lawyer' automatically erects [a] 'cone of silence' around the accused, thus insulating him from all further police-initiated questioning and communication, would be far too rigid and would not serve the interests or needs of justice."). We discern no abuse of discretion or error of law and this Court will not disturb the trial court's credibility determinations. Hence, the trial court did not err in denying suppression based on Appellant's purported request for counsel claim.

Appellant next claims that he gave an oral confession before police gave him ***Miranda*** warnings. The principles surrounding ***Miranda*** warnings are well settled:

> The prosecution may not use statements stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel. Thus, ***Miranda*** warnings are necessary any time a defendant is subject to a custodial interrogation. As the United States Supreme Court explained, the ***Miranda*** safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. Moreover, in evaluating whether ***Miranda*** warnings were necessary, a court must consider the totality of the circumstances.
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> In conducting the inquiry, we must also keep in mind that not every statement made by an individual during a police encounter amounts to an interrogation. Volunteered or spontaneous utterances by an individual are admissible even without ***Miranda*** warnings. Similarly, [] the police [are not] under a blanket prohibition from informing a suspect about the nature of the crime under investigation or about the evidence relating to the charges against him.

Commonwealth v. Gaul, 912 A.2d 252, 255 (Pa. 2006) (citations and quotations omitted).

In this case, there is no dispute that police subjected Appellant to custodial interrogation. ***See*** Trial Court Opinion, 6/21/2011, at 6 ("Here, there is little question that [Appellant] was in custody once he arrived at the police station and was taken to be interviewed."). However, the suppression court determined that police administered ***Miranda*** warnings **before** Appellant confessed. First, the suppression court noted that Appellant

initially denied involvement with the fires at issue. Police gave Appellant a copy of the search warrant containing information that Appellant's DNA was collected at the scene of one of the fires. Police then administered ***Miranda*** warnings and Appellant signed a written waiver of his rights before confessing. ***Id.*** at 10 ("[W]e have determined that no incriminating statements were made by [Appellant] before his ***Miranda*** rights were given. To the contrary, after reading his ***Miranda*** rights, these rights were waived at 5:40 P.M., before any questioning concerning the fires began.").

We will not disturb the trial court's factual findings. Looking at the totality of circumstances based on the certified record, we conclude the investigating officer testified consistently with the suppression court's ruling regarding the sequence of events in administering ***Miranda*** warnings. Appellant confessed, but only after police made him aware of his rights and he expressly waived them. While Appellant claims that police could not have given him ***Miranda*** warnings at the time reflected on the signed written waiver form, Appellant has not offered any contrary evidence. Appellant was not wearing a watch and did not otherwise note the time. N.T., 11/12/2010, at 156. Moreover, Appellant presented testimony from his fiancée and her two sons, who were present when Appellant returned home from hunting and accompanied him to the police station. None of these witnesses could specify the precise timing of events. Accordingly, suppression was not warranted on the basis of failing to give ***Miranda*** warnings prior to Appellant's confession.

Finally, we reject Appellant's argument that his subsequent confession was not voluntary because police furnished information contained in his written confession. Appellant admitted that he voluntarily signed the statement at issue and initialed each page therein. N.T., 11/12/2010, at 150-151. Thus, he adopted its contents. ***See Commonwealth v. Peay***, 806 A.2d 22, 27 (Pa. Super. 2002) (Defendant's confession was voluntarily given, even though defendant claimed he had been coerced and that his failure to initial every page undermined any presumed voluntariness; defendant's signature on confession appeared legibly, statement was signed by defendant, and defendant offered nothing to undermine legal conclusion that his confession was voluntarily given). For all of the foregoing reasons, the trial court properly denied suppression and Appellant's first issue fails.

In his second issue presented, Appellant argues that the trial court violated Pa.R.Crim.P. 646 when it twice read Appellant's written confession to the jury, upon their request, during deliberations. Appellant's Brief at 51-55. Appellant concedes "the [t]rial [c]ourt concluded that it would advise the jury that the written statement could not be sent to the deliberation room" but argues that reading the statement twice "evidenced a means to circumvent" Pa.R.Crim.P. 646 that prohibits a jury from having a copy of the written statement of an accused during deliberations. ***Id.*** at 52, 54.

Pennsylvania Rule of Criminal Procedure 646 states, in pertinent part:

> (A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (C).

* * *

> (C) During deliberations, the jury shall not be permitted to have:
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> (1) a transcript of any trial testimony;
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> (2) a copy of any written or otherwise recorded confession by the defendant;
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> (3) a copy of the information; and
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> (4) except as provided in paragraph (B), written jury instructions.

Pa.R.Crim.P. 646. Here, there is no dispute that the jury did not have any written materials during its deliberations. Therefore, Rule 646 is inapplicable.

Moreover, this Court has specifically stated that Rule 646 does not apply to the reading of the confession by the trial court after the jury deliberations begin. ***Commonwealth v. Gladden***, 665 A.2d 1201, 1205-1206 (Pa. Super. 1995) (*en banc*). "When a jury requests that recorded testimony be read to it to refresh its memory, it rests within the trial court's discretion to grant or deny such request." ***Commonwealth v. Manley***, 985 A.2d 256, 273 (Pa. Super. 2009), *citing* ***Gladden,*** 665 A.2d at 1205. As long as there is not a flagrant abuse of discretion, we will not overturn the decision on appeal. ***Id.*** Upon review, the trial court read the statement twice in its entirety to the jury, upon its request. We discern no abuse of discretion. Appellant's second issue fails.

In his third issue to this Court, Appellant asserts the trial court should have declared a mistrial at his request or *sua sponte* based upon four purported trial errors. First, Appellant claims the trial court should have granted his requested mistrial during *voir dire* when two potential jurors stated they knew things about Appellant prior to trial. The first prospective juror, who knew Appellant's family, declared that his "mind was made up when [the juror] heard who [Appellant] was." Appellant's Brief at 57. Appellant refutes the trial court's determination that the remark could be considered favorable to him. ***Id.*** Appellant also takes issue with another potential juror's statement that he also knew Appellant's family "and some other stuff." ***Id.*** at 58. Appellant claims cautionary instructions were not enough to cure the taint in both instances. ***Id.*** at 59. Second, Appellant claims the trial court should have declared a mistrial *sua sponte* when an investigating officer testified that he submitted a fingerprint taken from an incendiary device into a criminal database and it was a match with Appellant. ***Id.*** at 60. Third, Appellant claims he was prejudiced, on two occasions, when the jury heard evidence that he was in prison. ***Id.*** at 62. Finally, Appellant claims the trial court erred by denying a requested mistrial after prolonged deliberations and a question regarding what to do in the event they could not reach a unanimous decision. ***Id.*** at 64-66.

On these sub-issues pertaining to Appellant's claim that he was entitled to a mistrial, we have reviewed the parties' briefs, applicable law, and the trial court's opinion dated June 6, 2012. Regarding *voir dire*, the

trial court concluded that the potential jurors were rendering neutral opinions about Appellant, but it immediately issued cautionary instructions, and all chosen jurors indicated their ability to remain fair and impartial. Trial Court Opinion, 6/6/2012, at 9-10. Ultimately, the two veniremen who commented about their familiarity with Appellant and his family were not seated on the jury panel. NT., 12/5/2011, at 97. Next, the trial court noted that Appellant did not object to the testifying police officer's reference to any match between the latent fingerprint recovered from one of the crime scenes and an image of Appellant's fingerprints maintained in a criminal database. Trial Court Opinion, 6/6/2012, at 12. Further, the trial court concluded that mere mention of Appellant's fingerprint in a criminal database was indirect and that any ensuing prejudice was lessened by evidence that Appellant's fingerprints taken at the time of Appellant's eventual arrest matched the latent crime scene fingerprint. ***Id.*** at 14. Concerning reference to Appellant's imprisonment, the trial court determined that the two statements were made in passing, not intentionally elicited, and any prejudice was cured by issuing cautionary instructions in both instances. Finally, in response to Appellant's jury deliberation claim, the trial court concluded: (1) deliberation was proportionate to the five and one-half day trial, (2) the jury was tasked with examining 66 criminal counts pertaining to 16 discrete fires, (3) eight hours of deliberation over the course of two days was not unduly burdensome, and (4) at no time did the jury indicate deadlock. Moreover, the Commonwealth charged Appellant with offenses related to sixteen

separate fires. The jury ultimately found Appellant guilty of crimes related to only 13 of the 16 fires. N.T., 12/12/2011, at 368-375. Under these circumstances, it was reasonable to infer that the jury's reference to their inability to reach a unanimous verdict related to some, but not all of the criminal counts lodged against Appellant. The trial court's opinion adequately and accurately disposes of Appellant's issues pertaining to a request for mistrial; thus, we adopt the trial court's rationale as our own.[5] Appellant's third issue fails.

In his final issue presented, Appellant contends that his verdicts were against the weight of the evidence. More specifically, Appellant maintains that there was a break in the chain of custody of the physical evidence, rendering the results unreliable.[6] Appellant's Brief, at 67-76. "Any gaps in

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[5] We also note that aside from setting forth Pa.R.Crim.P. 605 dealing with mistrial and the standard of review in his appellate brief, Appellant did not provide any legal authority for his individual sub-issues.

[6] In his post-sentence motion, Appellant raised a multitude of reasons why his verdicts were against the weight of the evidence; however, he did not specifically challenge the chain of custody. Ostensibly, however, Appellant raised the issue in his brief in support of his post-sentence motion, because the trial court ultimately addressed it in its opinion and order dismissing Appellant's post-sentence motion. We are unable to confirm whether the issue was contained in Appellant's post-sentence brief, however, because it is not contained in the certified record. We remind Appellant that our law is 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. ***Commonwealth v. Kleinicke***, 895 A.2d 562, 575 (Pa. Super. 2006) (*en banc*). In this case, we decline to find waiver, because the trial court reached the issue in its opinion addressing post-sentence motions and
(Footnote Continued Next Page)

testimony regarding the chain of custody go to the weight to be given the testimony, not to its admissibility." ***Commonwealth v. Cugnini***, 452 A.2d 1064, 1065 (Pa. Super. 1982). The Pennsylvania Supreme Court recently reiterated our standard and scope of review of weight of the evidence claims as follows:

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.
>
> This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is unfettered. In describing the limits of a trial court's discretion, we have explained:
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> > The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary

(Footnote Continued) ———————————

before Appellant filed a notice of appeal. Because the trial court still retained jurisdiction over the case when it addressed the current claim, we examine the merits of the issue.

> actions. Discretion is abused where the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.

Commonwealth v. Clay, 2013 WL 474441, at *5 (Pa. Feb. 8, 2013) (internal citations and emphasis omitted).

Here, the trial court opinion thoroughly examined the chain of custody of the physical evidence collected from the crime scenes – a matchbox cover and cigarette butts – and concluded that the DNA and fingerprint testing was not compromised. Trial Court Opinion, 6/6/2012, at 25. More specifically, the trial court found that minor discrepancies in the expert testimony regarding the circumstances and condition of the evidence sent and received did not indicate tampering. ***Id.*** at 26. As such, the trial court opined, "[u]nder these circumstances, absent evidence indicating that either the matchbox from which the [finger]print was lifted or that the three cigarette butts submitted for DNA analysis were altered, a reasonable inference exists that the identity and physical condition of these items remained unimpaired from the time they were recovered until they were presented in court at trial." ***Id.*** at 27.

Based upon our narrow standard of review, we discern no abuse of discretion. The trial court found the Commonwealth's forensic experts credible and determined that the chain of custody was without defect. Such

a decision was not manifestly unreasonable. Accordingly, Appellant's final claim is without merit.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/24/2013