NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RAYMOND BOOZER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1075 EDA 2013

Appeal from the Judgment of Sentence October 26, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0003027-2011

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.: **FILED JULY 01, 2014**

Appellant, Raymond Boozer, appeals from the judgment of sentence entered in the Montgomery County Court of Common Pleas, following his jury trial convictions for robbery, simple assault, and theft by unlawful taking or disposition.[1] We affirm and grant counsel's petition to withdraw.

In its opinion, the trial court fully and correctly set forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

As a preliminary matter, appellate counsel seeks to withdraw his representation pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct.

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[1] 18 Pa.C.S.A. §§ 3701, 2701, 3921, respectively.

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*Former Justice specially assigned to the Superior Court.

1396, 18 L.Ed.2d 493 (1967) and ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009). ***Anders*** and ***Santiago*** require counsel to: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal; and 3) furnish a copy of the brief to the appellant and advise him of his right to obtain new counsel or file a *pro se* brief to raise any additional points the appellant deems worthy of review. ***Santiago, supra*** at 173-79, 978 A.2d at 358-61. Substantial compliance with these requirements is sufficient. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1290 (Pa.Super. 2007). "After establishing that the antecedent requirements have been met, this Court must then make an independent evaluation of the record to determine whether the appeal is, in fact, wholly frivolous." ***Commonwealth v. Palm***, 903 A.2d 1244, 1246 (Pa.Super. 2006) (quoting ***Commonwealth v. Townsend***, 693 A.2d 980, 982 (Pa.Super. 1997)).

In ***Santiago, supra***, our Supreme Court addressed the briefing requirements where court-appointed appellate counsel seeks to withdraw representation:

> Neither ***Anders*** nor ***McClendon***[2] requires that counsel's brief provide an argument of any sort, let alone the type of

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[2] ***Commonwealth v. McClendon***, 495 Pa. 467, 434 A.2d 1185 (1981).

> argument that counsel develops in a merits brief. To repeat, what the brief must provide under ***Anders*** are references to anything in the record that might arguably support the appeal.
>
> * * *
>
> Under ***Anders***, the right to counsel is vindicated by counsel's examination and assessment of the record and counsel's references to anything in the record that arguably supports the appeal.

Santiago, supra at 176, 177, 978 A.2d at 359, 360. Thus, the Court held:

> [I]n the ***Anders*** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Id. at 178-79, 978 A.2d at 361.

Instantly, counsel filed a petition for leave to withdraw representation. The petition states counsel diligently researched the record and controlling law, and he concluded the appeal would be wholly frivolous. Counsel indicates he advised Appellant of the withdrawal request. Counsel also supplied Appellant with a copy of the withdrawal petition, the brief, and a letter explaining Appellant's right to proceed *pro se* or with new privately retained counsel to raise any additional points Appellant deems necessary. In his ***Anders*** brief, counsel provides a summary of the facts and procedural history of the case with citations to the record. Counsel refers to evidence in

the record that may arguably support the issues raised on appeal, and he provides citations to relevant law. The brief also provides counsel's reasons for his conclusion that the appeal is wholly frivolous. Thus, counsel has substantially complied with the requirements of ***Anders*** and ***Santiago***.

As Appellant has filed neither a *pro se* brief nor a counseled brief with new privately retained counsel, we review this appeal on the basis of the issues raised in the ***Anders*** brief:

> ARE APPELLANT'S CONVICTIONS AS AN ACCOMPLICE FOR ROBBERY WITH THREAT OF SERIOUS BODILY INJURY, THEFT, AND SIMPLE ASSAULT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE OF RECORD?
>
> WAS APPELLANT UNABLE TO FORMULATE THE NECESSARY *MENS REA* TO BE AN ACCOMPLICE IN THE ROBBERY AS A RESULT OF HIS VOLUNTARY INTOXICATION RESULTING FROM HIS SMOKING MARIJUANA?

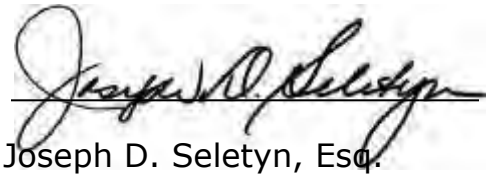
(***Anders*** Brief at 4).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Gary S. Silow, we conclude Appellant's issues merit no relief. The trial court opinion comprehensively discusses and properly disposes of the questions presented. (***See*** Trial Court Opinion, filed November 26, 2013, at 5-9) (finding: **1)** Appellant drove two cohorts to store where offenses occurred; Appellant parked vehicle in manner to facilitate quick getaway; Appellant remained in driver's seat and kept engine running when co-defendant approached with stolen merchandise; Appellant kept trunk unlocked so co-

defendant could easily insert stolen merchandise; physical evidence recovered from vehicle, including packaging for toy guns used in robbery, indicated Appellant's knowledge of robbery scheme; Commonwealth presented additional evidence regarding nature of relationship between Appellant and co-defendant, which supported jury's conclusion that they were accomplices; although Appellant did not enter store during robbery, his intent and participation in offenses could be inferred from his conduct and attendant circumstances; sufficient evidence supported Appellant's convictions as accomplice; **2)** Appellant waived claim regarding voluntary intoxication where he did not raise claim at trial or present evidence of intoxication for jury's consideration; moreover, voluntary intoxication is relevant only to reduce degree of crime in murder cases and cannot negate intent for crimes of which Appellant was convicted). Accordingly, we affirm on the basis of the trial court opinion and grant counsel's petition to withdraw.

Judgment of sentence affirmed; counsel's petition to withdraw is granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	1075 EDA 2013
V.	:	
RAYMOND D. BOOZER	:	CP-46-CR-0003027-2011

SUPPLEMENTAL OPINION

SILOW J. **November 26, 2013**

INTRODUCTION

Appellant Raymond D. Boozer ("Appellant") appeals to the Superior Court of Pennsylvania from the judgment of sentence entered on October 26, 2012 and levied upon his conviction of the offenses of Robbery – Fear of Serious Bodily Injury, 18 Pa.C.S.A. § 3701(a)(1)(ii); Simple Assault – Attempted Bodily Injury, 18 Pa.C.S.A. § 2701(a)(3); and Theft by Unlawful Taking, 18 Pa.C.S.A. § 3921(a). Appellant was sentenced to a term of three (3) to ten (10) years' imprisonment.

FACTUAL AND PROCEDURAL HISTORY

The instant case arises out of events that occurred on March 10, 2011, in Cheltenham, Montgomery County, Pennsylvania. That evening, Appellant drove Tyson Blount ("Blount") and an unidentified male ("Male 3") to the corner of Cheltenham Avenue in Elkins Park. (Notes of Testimony ("N.T."), June 15, 2012, 83-90.) Appellant remained in the vehicle, while Blount and Male 3 used plastic toy guns wrapped in black electrical tape to rob approximately 74 cartons of Newport cigarettes from the Tobacco Town store on Cheltenham Avenue. (*Id.* at 17, 69-74.) Male 3 was never apprehended by law enforcement officials. (*Id.* at 61.) Blount and Appellant were arrested when Blount returned to the vehicle immediately after the robbery. (N.T., June 13, 2012, 24.) Blount pleaded guilty to the robbery. (N.T., June 15,

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2012, 71.) Appellant was subsequently tried upon the theory that he was an accomplice of Blount and Male 3.

At trial, the tobacco store's 24-hour surveillance videos showed that Blount and Male 3 entered the store at 7:04 p.m. with guns and black trash bags. (*Id.* at 31.) They wore hooded sweatshirts, gloves, and face masks that exposed only their eyes and tattooed necks. (N.T., June 13, 2012, 32-35; N.T. June 15, 2012, 73.) They threw the trash bags on the counter in front of store employee Susan Tang ("Tang"), and yelled for her to fill the bags with Newport cigarettes. (N.T., June 13, 2012, 37.) She began to fill the bags with Newport cigarettes while Male 3 and Blount threatened to shoot her and her customers. (*Id.* at 34, 39-40.) At one point during the robbery, Male 3 placed his gun on the counter to grab the bag full of cigarette cartons. (*Id.* at 38.) He then ran out of the store with the bag, but never retrieved his gun from the counter. (*Id.* at 43.) Blount also grabbed a bag full of cigarette cartons, and exited the store. (*Id.* at 38.)

At this time, Officer David Marcellino ("Marcellino") of the Philadelphia Police Department and his partner were on vehicle patrol duty on Cheltenham Avenue, when Marcellino observed a male, who was later identified to be Blount, running on the sidewalk toward the intersection of Oak Lane and Cheltenham Avenue. (*Id.* at 53-58.) Blount had a black trash bag slung over his back and a mask halfway up his face. (*Id.*) Marcellino heard police sirens and observed a Cheltenham police car traveling in the same direction as Blount. (*Id.* at 54.) Marcellino, who was operating the vehicle, turned and began following Blount. (*Id.*) He observed as Blount approached a green Buick sedan on the corner of Oak Lane and Cheltenham Avenue. (*Id.*) The sedan was running, and there was a male, who was later identified to be Appellant, sitting in the driver's seat. (*Id.* at 58.) Blount ran around the back of the sedan, immediately lifted the trunk, slung the trash bag into the trunk, closed the trunk door, and jumped into the rear passenger seat of the sedan. (*Id.*) Appellant and Blount were searched and arrested at the scene. (*Id.* at 59.)

In total, law enforcement officials retrieved three plastic toy guns wrapped in black electrical tape: one in the tobacco store, and two from the person of Blount. (N.T., June 15, 2012, 11-13.) Additionally, they located a trash bag with cartons of cigarettes in the trunk of

the sedan. (N.T., June 13, 2012, 84.) They also found a roll of black electrical tape and an open pack of Newport cigarettes in the center console next to the driver's side seat. (*Id.* at 94-96.) Stowed between the center console and one of the front seats was a large, black plastic-handled knife with the point down toward the ground. (*Id.* at 96-97, 100-01.)

On the driver's side rear passenger seat compartment, there was a plastic bag containing cardboard packaging for a plastic toy MP5-A5 gun, black electrical tape, wrapping for electrical tape, and broken pieces of a toy gun. (*Id.* at 105-09.) In this bag, there was also a broken orange safety plug which, according to Detective Harry Hall ("Hall") of the Cheltenham Township Police Department in Montgomery County, toy manufacturers place on the front barrel of a toy gun to signal that it is not capable of firing. (*Id.* at 106-07.) Sticking out of the driver's side rear passenger seat was more cardboard packaging for a second toy MP5-A5 gun. (*Id.* at 107-09.) On the floor in front of the driver's side rear passenger seat was another broken piece of a toy gun. (N.T., June 15, 2012, 10.)

In the trunk of the sedan, there was an advertising poster for the "Culture Boyz" rap group which depicted Appellant and Blount as two of the members of the group. (*Id.* at 18-19.) Blount and Appellant have identifiable neck tattoos with the letters "C" and "B" and musical notes on either side. (*Id.* at 21-22.) Finally, there were four cell phones retrieved from the sedan. Law enforcement officials were unable to identify the ownership of two of the phones, but Blount identified one of the cell phones recovered from the back seat to be his, and investigators determined that a cell phone recovered from the front passenger seat belonged to Appellant. (*Id.* at 23-27.) The screen of Appellant's phone displayed an image of Appellant, Blount, and the other members of the Culture Boyz rap group. (*Id.* at 27.) Appellant's phone indicated three outgoing calls at 7:02 p.m., 7:04 p.m., and 7:06 p.m. to Blount's phone, each lasting between thirty seconds and one minute. (*Id.* at 28-30.)

At trial, Appellant took the stand and testified that he had no involvement in the robbery, and never met Male 3 before that day. He claimed that he was on his way to a car dealership near Cheltenham Avenue, when Blount asked Appellant to drive Blount and Male 3 to Cheltenham Avenue. (*Id.* at 83-93.) Blount also took the stand to testify that Appellant had

no involvement in the robbery, and that neither he nor Appellant knew the identity of his accomplice. (*Id.* at 72-81.)

On June 15, 2012, at the conclusion of a two-day trial, a jury convicted Appellant of Robbery – Fear of Serious Bodily Injury, 18 Pa.C.S.A. § 3701(a)(1)(ii); Simple Assault – Attempted Bodily Injury, 18 Pa.C.S.A. § 2701(a)(3); and Theft by Unlawful Taking, 18 Pa.C.S.A. § 3921(a). On October 26, 2012, this Court sentenced Appellant to a term of three (3) to ten (10) years' imprisonment.

On April 9, 2013, Appellant filed a *pro se* Notice of Appeal. That same day, this Court entered an Order directing Appellant to submit a Concise Statement of Errors Complained of on Appeal ("Concise Statement") pursuant to Pa.R.A.P. 1925(b). On April 16, 2013, Appellate Counsel, Timothy P. Wile, filed an Entry of Appearance as Appellate Counsel and Amended Notice of Appeal. Appellate Counsel failed to submit a Concise Statement, precluding this Court from addressing the merits of the appeal. On June 7, 2013, this Court filed a 1925(a) Opinion indicating that this Court was unable to provide a meaningful review of any issues that Appellant might raise on appeal because Appellate Counsel failed to submit a Concise Statement. On September 10, 2013, Appellate Counsel filed a Petition for Limited Remand ("Petition"). On September 30, 2013, the Superior Court granted Appellant's Petition and remanded the certified record to the trial court for a period of sixty (60) days. On November 1, 2013, Appellate Counsel filed a Concise Statement. This Court issues the instant Supplemental Opinion, pursuant to Pa.R.A.P. 1925(a) and in accordance with the Superior Court's September 30, 2013 Order.

For the reasons stated below, this Court respectfully submits that Appellant's judgment of sentence should be affirmed.

ISSUES

Appellant's Concise Statement raises the following allegation of error against this Court:

I. **Whether Defendant's conviction for the offenses of Robbery with threat of serious injury and Simple Assault are supported by legally sufficient evidence of the record in that:**

a. **The evidence adduced at trial established that Defendant Boozer never entered the establishment during the robbery and was never in a position to threaten serious bodily injury to the victim, Susan Tang;**

b. **Appellant Boozer lacked the requisite intent to be convicted under the theory of accomplice liability in that Appellant lacked the requisite intent to facilitate or encourage the commission of any robbery or assault as a result of Appellant's voluntary intoxication from alcohol and marijuana.**

DISCUSSION

I. Evidence adduced at trial was sufficient to support Appellant's conviction for the offenses of robbery with threat of serious injury and simple assault.

Appellant asserts on appeal that the Commonwealth failed to present sufficient evidence to support the jury's verdict of guilty on the charges of robbery and simple assault because a) there was no evidence that Appellant entered the tobacco store, and b) Appellant lacked the requisite intent to be an accomplice of the offenses as a result of his voluntary intoxication from alcohol and marijuana. This claim is entirely meritless.

In reviewing a sufficiency of the evidence claim, the standard to be applied is whether, viewing all of the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Passmore*, 857 A.2d 697, 704 (Pa. Super. 2004) (citing, *Commonwealth v. Bullick*, 830 A.2d 998, 1000 (Pa. Super. 2003)) (citations omitted). In applying this test, the reviewing court may not weigh the evidence and substitute its judgment for that of the factfinder. *Commonwealth v. Sinnott*, 30 A.3d 1105, 1110 (2011). "[T]he critical inquiry is not whether the court believes the evidence established guilt beyond a reasonable doubt, but whether the evidence believed by the fact-finder was sufficient to support the

verdict. The proper question is not whether the defendant's contentions are supported by the record, but whether the verdict is so supported." *Id.*

To sustain a conviction, the Commonwealth need not have presented evidence such as would preclude every possibility of the defendant's innocence. *Commonwealth v. Sanders*, 42 A.3d 325, 329 (Pa. Super. 2012) (citation omitted). Any doubts regarding a defendant's guilt may be resolved by the jury 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. *Id.* The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. *Commonwealth v. Causey*, 833 A.2d 165, 172 (Pa. Super. 2003) (citations omitted). Finally, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. *Id.*

Appellant was convicted of, *inter alia*, robbery with threat of serious bodily injury and simple assault. A person is guilty of robbery with threat of serious injury if, in the course of committing a theft, he threatens another with or intentionally puts him in fear of immediate serious bodily injury. 18 Pa.C.S.A. § 3701(a)(1)(ii). A person is guilty of simple assault with attempted bodily injury if he attempts by physical menace to put another in fear of imminent bodily injury. 18 Pa.C.S.A. § 2701(a)(3).

a. Appellant's failure to enter the tobacco store during the robbery is not dispositive of his liability for the crimes committed therein.

Here, Appellant does not contest that either of these offenses occurred. Rather, Appellant argues that evidence adduced at trial never established that he entered the tobacco store during the robbery and was never in a position to threaten serious bodily injury to the victim, Susan Tang. Appellant overlooks the fact that the Commonwealth advanced the theory of accomplice liability at trial, which makes Appellant, as an accomplice, equally culpable as Blount and Male 3, the principals, for the robbery and simple assault that occurred.

The principal and accomplice share equal responsibility for the commission of a criminal offense. 18 Pa.C.S.A. § 306(b)(3). A person is an accomplice of another person in the

commission of an offense if, with the intent of promoting or facilitating the commission of the offense, he aids, or agrees, or attempts to aid such other person in planning or committing it. 18 Pa.C.S.A. § 306(c)(1)(ii). The Pennsylvania Supreme Court has held that "[t]here is no doubt that one who acts as lookout and driver of a getaway car is as guilty as those who carry out the planned crimes." *Commonwealth v. Finley*, 383 A.2d 1259, 1260 (Pa. 1978) (citation omitted).

To establish accomplice liability, the analysis turns on whether there was sufficient evidence to establish that the appellant had knowledge of the planned crimes and aided and abetted the commission of the crimes. *Id.* A shared criminal intent between the principal and the accomplice may be inferred from a defendant's words or conduct, or from attendant circumstances. *Commonwealth v. Spotz*, 716 A.2d 580, 586 (Pa. 1998) (citation omitted). The amount of aid need not be substantial; "[t]he least degree of concert or collusion in the commission of the offense is sufficient to sustain a finding of responsibility as an accomplice." *Commonwealth v. Graves,* 463 A.2d 467, 470 (Pa. Super. 1983) (citation omitted).

Here, there is sufficient evidence to implicate Appellant as an accomplice in the robbery and simple assault. The evidence adduced at trial shows that Appellant drove Blount and Male 3 to the corner of Cheltenham Avenue, where the offenses occurred, and specifically parked his vehicle in a manner that facilitated the quickest getaway. Appellant was already in the driver's seat, and his vehicle was already running when Blount approached with the stolen cigarettes. Also, the trunk was already unlocked so that Blount only had to lift it to throw the bag in, and jump in the car. (N.T., June 13, 2012, 53-58.)

The physical evidence recovered from various locations in the vehicle immediately after Appellant's arrest indicates his knowledge of and aid in the scheme. The center console next to the driver's seat where Appellant was seated contained a roll of black electrical tape and a pack of Newport cigarettes, the very object of Blount and Male 3's robbery at the tobacco store. There were scattered broken pieces of plastic toy guns throughout the vehicle, several rolls of black electrical tape used to wrap the toy guns, and the cardboard packaging for toy guns. In total, there were three toy guns recovered, and three accomplices to this scheme. The location where all this physical evidence was recovered strongly suggests that Appellant had knowledge of and aided in the plan. (*Id.* at 84-109; N.T., June 15, 2012, 10-13.)

Further, the Commonwealth introduced sufficient evidence to suggest that the nature of the relationship between the men was such that a jury could find, in light of other circumstantial evidence, that these men were accomplices. Images depicted in advertisement posters in the trunk and on Appellant's cell phone establish that Blount and Male 3 were two members of the Culture Boyz rap group. Appellant and Blount both had neck tattoos with musical notes and the letters "C" and "B," the initials of the name of their rap group. (N.T., June 15, 2012, 18-27.)

While it is true that there was no direct evidence that Appellant entered the tobacco store, his intent and participation in the robbery and simple assault can be inferred from his conduct and the attendant circumstances. A jury may make such a finding based entirely on circumstantial evidence. *Spotz*, 716 A.2d at 586 (Pa. 1998). The jury had sufficient circumstantial evidence to enable it to find that Appellant had knowledge of and aided or abetted the commission of the crimes. Thus, a jury properly could find that Appellant is criminally liable for the conduct of Blount and Male 3. Accordingly, Appellant should be denied relief on this ground.

b. Appellant's voluntary intoxication does not negate the requisite intent for criminal liability.

Appellant contends, for the first time in the history of this case, that he lacked the requisite intent to be convicted under the theory of accomplice liability as a result of his voluntary intoxication from alcohol and marijuana.

This Court respectfully submits that this argument should be quashed as waived. "It is axiomatic that claims not raised in the trial court may not be raised for the first time on appeal." *Commonwealth v. Johnson*, 33 A.3d 122, 126 (Pa. Super. 2011) (citation omitted). Here, there is absolutely no evidence of record that Appellant ever raised this issue with this Court, let alone any evidence that would lead the jury to find that Appellant lacked intent.

Alternatively, even if this claim had been properly preserved, Appellant would not be entitled to relief. It is well-settled that:

> Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.

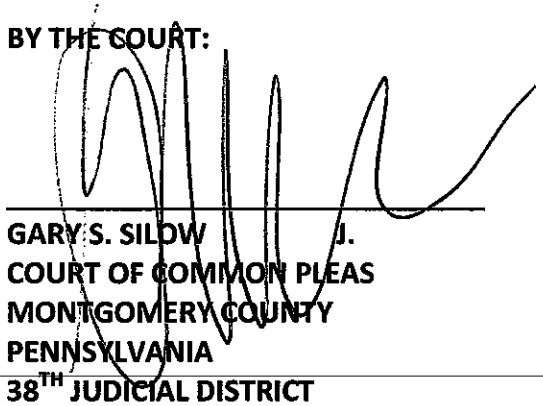
18 Pa.C.S.A § 308; See *Commonwealth v. Boyd*, 412 A.2d 588 (Pa. Super. 1979) (finding that a defendant charged with offenses other than first degree murder was not entitled to an instruction concerning the defense of intoxication or of a drugged condition).

Moreover, the Pennsylvania Supreme Court has held that "it is obvious that an actor should not be insulated from criminal liability for acts which result from a mental state that is voluntarily self-induced." *Commonwealth v. Ellis*, 581 A.2d 595, 604-05 (1990) (citing *Commonwealth v. Hicks,* 396 A.2d 1183, 1186 (1979)). Thus, even if Appellant were voluntarily intoxicated or in a voluntary drugged condition at the time as he now claims, his intoxication would not negate intent. Accordingly, Appellant's claim is devoid of merit on this ground.

CONCLUSION

Based upon the foregoing, this Court respectfully requests that the Superior Court affirm the October 26, 2012 judgment of sentence against Appellant.

BY THE COURT:



GARY S. SILOW J.
COURT OF COMMON PLEAS
MONTGOMERY COUNTY
PENNSYLVANIA
38TH JUDICIAL DISTRICT

Copies sent on November 26, 2013
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