

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
ALEKSANDE SHWARZ,	:	No. 1847 EDA 2012
	:	
Appellant	:	

Appeal from the Judgment of Sentence, June 7, 2012,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0004424-2011

BEFORE: FORD ELLIOTT, P.J.E., WECHT AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 15, 2014**

Following a jury trial, Aleksande Shwarz was convicted of unsworn falsification, false imprisonment, official oppression, false reports, and obstruction of administration of law. On June 7, 2012, he was sentenced to serve one to two years' incarceration followed by eight years of probation. Upon review, we are constrained to reverse.

The facts and procedural history of this case follow. In January of 2010, a stolen U-Haul rental truck was found in the parking lot at the Philadelphia International Airport. The U-Haul was towed to a rental center on Roosevelt Boulevard in Philadelphia. Thereafter, the rental center's general manager, Dominic Catalano ("Catalano"), called 911 to request police assistance removing the truck from a law enforcement database of stolen vehicles so that it could be rented out again.

Appellant and his partner, John Loisch ("Loisch"), both Philadelphia police officers, were dispatched to assist Catalano. Loisch, however, wrongly told Catalano that they could not assist him as the tow truck company used to bring the vehicle to the rental center was based in Delaware County. Loisch averred that the Philadelphia Police could not assist him in clearing the status of a stolen vehicle recovered in another county. They suggested Catalano contact the Delaware County police.

Catalano was frustrated by what he felt was the officers' willful refusal to help. He wrote down the officers' badge numbers and then stepped outside to write down the license plate number so he could file a complaint with their supervisor. Appellant attempted to grab Catalano by the arm, but Catalano ducked away and stated that appellant had no right to touch him. At this point, appellant grabbed Catalano by the throat, slammed him against the door, and forced him to the ground. He then placed Catalano under arrest for assaulting him.

Appellant returned to the police station, completed a "use of force" form, and gave it to his supervisor, Sergeant Nancy Quinn. Sergeant Quinn testified as a Commonwealth witness regarding appellant's submission of a form and in what situations force may be used by a police officer. In the form, appellant justified his actions averring that Catalano's behavior became aggressive towards him. Appellant claimed that Catalano ran up to the police vehicle and hit appellant with his shoulder. Appellant also

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submitted an incident report in which he claimed Catalano ran out to the police car screaming and then used his shoulder to push appellant in the left side for no reason.

Meanwhile, Catalano spent 21 hours in police custody as a result of a baseless arrest. During that time, his attorney obtained the surveillance video from the rental center and submitted it to the Philadelphia District Attorney's office. The video depicted the encounter occurred exactly as Catalano had described; it was appellant who attacked Catalano. Consequently, the charges against Catalano were not approved, and charges were filed against appellant.

During the jury trial, the Commonwealth presented video evidence of the encounter as well as the testimony of Catalano. A U-Haul employee, Arun Varkey, and two customers, Vanderlyn Neal-Campbell and Desmond Walker, also testified. Varkey averred that he saw appellant run up to Catalano, choke him, and force him to the ground. Neal-Campbell testified that Catalano had been polite to the officers; appellant, in contrast, had displayed an "attitude" toward Catalano during the discussion. Neal-Campbell also stated that the attack was entirely unprovoked. Walker testified that the only physical contact was initiated by appellant. Walker explained that he was so shocked by appellant's behavior that he recorded it on his cell phone camera.

Detective Lawrence Grimm testified regarding his investigation of Catalano's accusations. He interviewed Catalano and appellant; but appellant's partner, Loisch, refused to be interviewed by the investigating detective as he averred he had not seen anything. Additionally, testimony was presented from two other officers who were involved in the investigation and appellant's arrest.

Appellant took the stand in his own defense and insisted that Catalano intentionally bumped into him with his shoulder. (Notes of testimony, 4/18/12 at 170-171.) He testified that he believed he had been assaulted; and when Catalano refused his verbal commands to stop, he decided to use a pressure point to take Catalano into custody and secure him with handcuffs. (*Id.* at 174-176.) Appellant averred that when he reported that Catalano "ran" towards him, he was using the verb in the "generic sense," as the video did not depict such an event. (*Id.* at 179-180, 218-220.) Appellant also claimed he made a clerical error when he reported that Catalano hit him on the left side of his body, as the video showed that appellant's left side was against the patrol car. (*Id.* at 180.) The defense also presented the testimony of appellant's partner, Loisch.

The jury found appellant guilty of false imprisonment, official oppression, unsworn falsification to authorities, submitting false reports to authorities, and obstructing the administration of law. On June 7, 2012, Judge Trent sentenced appellant to an aggregate term of one to two years'

incarceration to be followed by eight years' probation. Appellant's post-sentence motion was denied on June 19, 2012. A timely notice of appeal was filed, and appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. The trial court has filed an opinion.

Appellant presents the following issues for our review:

- I. Did the trial court abuse its discretion in granting the Commonwealth's request to present evidence of the Appellant's motive by bringing out the Appellant's alleged prior acts of police misconduct?
- II. Did the trial court abuse its discretion in allowing the Commonwealth to present testimony that the prosecutors and police investigators had concluded that the Appellant was untruthful and was guilty?
- III. Did the trial court abuse its discretion by evidencing judicial bias against the Appellant?

Appellant's brief at 3.

At the outset, we observe that appellant has failed to conform to the Rules of Appellate Procedure. An appellate brief is to contain a "statement of the case." Pa.R.A.P. 2111(a)(5). Rule 2117, which details what must be contained in a statement of the case, provides, in part:

A closely condensed chronological statement, in narrative form, of all the facts which are necessary to be known in order to determine the points in controversy, with an appropriate reference in each instance to the place in the record where the evidence substantiating the fact relied on may be

found. See Rule 2132 (references in briefs to the record).

Pa.R.A.P. 2117(a)(4). Rule 2117 also clearly states that the statement of the case must inform this court where the appellant raised or preserved the appellate issues in the trial court. Pa.R.A.P. 2117(c).

We note with displeasure that appellant's statement of the case is devoid of any factual recitation. In addition, he fails to state how and where in the record his appellate issues were raised and/or preserved in the trial court. We decline to quash this appeal, however, as his brief is not so defective that it precludes review of the claims presented.

We will now address appellant's third issue, as it is dispositive of this appeal. Appellant claims the trial court evidenced a bias in examining the witnesses, which suggested to the jury that it had rejected appellant's theory of defense as lacking in credibility. Appellant contends that the trial judge's questioning prejudiced his right to a fair and impartial trial by jury.

At the outset, we note that the Commonwealth argues that this issue is unreviewable because appellant has failed to preserve it below. As this court has repeatedly explained, "to preserve an issue for review, a party must make a timely and specific objection at trial." ***Commonwealth v. Montalvo***, 641 A.2d 1176, 1184 (Pa.Super. 1994). ***See also*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); ***Commonwealth v. Brinkley***, 480 A.2d 980, 985-986 (Pa. 1984) (failure to make objection

when reference is made results in waiver). These requirements apply with equal force to objections regarding alleged misconduct by the trial judge as well as to the court's evidentiary rulings. **See Commonwealth v. Johnson**, 719 A.2d 778, 790-791 (Pa.Super. 1998) (appellant waived claim that court was biased by failing to seek recusal below).

Our review of the record reveals that defense counsel continuously lodged objections to the court's questioning.¹ For instance, appellant twice asked to speak with the court at sidebar during the court's examination of witnesses and the court refused. (Notes of testimony, 4/17/12 at 212; 4/18/12 at 133.) After the second request was denied and counsel was told to sit down, counsel interrupted and stated, "I want to put something on the record." (**Id.**) The trial court responded, "You'll do it later." (**Id.**) Defense counsel also specifically objected to the court's questioning of Officer Loisch and appellant; the objections were each overruled. (**See id.** at 154-156, 235.)

We also observe that during a sidebar, counsel objected to the way the court had examined Sergeant Quinn. (Notes of testimony, 4/17/12 at 258-265.) Defense counsel also commented that the court's voice "sounded incredulous" and observed that the court was "telling her that what she had

¹ At the close of the case, defense counsel was permitted to place on the record all objections to the testimony and questioning. While one might suggest that counsel failed to provide a more comprehensive list of objections, it cannot be disputed that counsel repeatedly objected to the trial court's questioning of various witnesses.

to say was not believed by you.” (*Id.* at 263.) Defense counsel asserted that the court’s questioning of Sergeant Quinn would influence the jury notwithstanding a cautionary instruction. (*Id.* at 264.) Moreover, after the trial court questioned appellant when he took the stand, defense counsel put on the record his objections to the court’s comments which had reflected adversely upon appellant’s credibility. (*Id.* at 266-267.) We find that counsel’s actions of repeatedly objecting to the court’s prejudicial comments and witness interrogations sufficiently preserve this claim for our review.

We now turn to the merits of appellant’s claim and recognize a well-settled principle of law.

A trial judge has the right and sometimes the duty to examine a witness for the purpose of clarifying or making more certain important points. The questioning, however, should not show bias or feeling nor should it be unduly protracted. A major reason for the restrictions on a trial judge’s questioning is the concern that his conduct may lead the jury to conclude that the court has made up its mind on the question of the defendant’s guilt, and that the jury should follow the judge’s opinion. It is therefore better to permit counsel to bring out the evidence and clear up disputed points on cross-examination unaided by the court. Ultimately, the question is whether the trial court has abused its discretion in interrogating the witness.

Commonwealth v. Whiting, 517 A.2d 1327, 1331 (Pa.Super. 1986), ***appeal denied***, 529 A.2d 1080 (Pa. 1987) (citations and quotations omitted).

“The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance, and from whom the litigants expect absolute impartiality.”

Commonwealth v. Myma, 123 A. 486, 487 (Pa. 1924). In ***Commonwealth v. Seabrook***, 379 A.2d 564, 567 (Pa. 1977), the court recognized that this statement retains its importance.

Witnesses should be interrogated by the judge only when he conceives the interest of justice so requires. It is better to permit counsel to bring out the evidence and clear up disputed points on cross-examination unaided by the court; but where an important fact is indefinite or a disputed point needs to be clarified, the court may see that it is done by taking part in the examination. . . . Judges should refrain from extended examination of witnesses; they should not, during the trial, indicate an opinion on the merits, a doubt as to the witnesses's credibility, or do anything to indicate a leaning to one side or the other, without explaining to the jury that all these matters are for them.

Seabrook, supra at 567, ***citing Myma***, 123 A. at 487.

That does not mean that a trial judge must sit idly by, a mere evidential technician, silenced in the face of the impossible, absurd, ambiguous or the frivolous. Nor should he leave unasked or unanswered questions that center the matter or amplify relevant testimony on the question or issue. It is a false and dangerous neutrality that would allow loss of liberty or property when another question at further inquiry would gain the fact, expose a false or improper premise, interest or bias of a witness, or correct insinuation unfounded in the record. It is not partisan to maintain the wheel, steering evenly, between competing and often

aggressive counsel, anxious to set the course. Nor should a judge yield the gavel to zealous partisans or allow counsel to impose their contentions by contumelious conduct. When others than the trial judge control the proceedings, one side has lost their day in court.

Commonwealth v. Roldan, 572 A.2d 1214, 1215 (Pa. 1990). A new trial is required “only when the trial court’s questioning is prejudicial, that is when it is of such nature or substance or delivered in such a manner that it may be reasonably be said to have deprived the defendant of a fair and impartial trial.” **Commonwealth v. Manuel**, 844 A.2d 1, 9 (Pa.Super. 2004), **appeal denied**, 859 A.2d 768 (Pa. 2004).

We recognize that drawing the line between appropriate and inappropriate judicial questioning presents a challenging task as appellate records often fail to convey nuance and tone. **See Commonwealth v. Britton**, 482 A.2d 1294, 1297-1298 (Pa.Super. 1984). However, following our review, we are constrained to agree with appellant.

In order to determine if the trial judge abused his discretion we have carefully evaluated the entire record with particular emphasis on the court’s participation in questioning witnesses. Initially, we note that the judge’s opening remarks properly instructed the jury as to their role in the case; *i.e.*, the jurors are the sole judge of the facts and the credibility of witnesses. (Notes of testimony, 4/17/12 at 24-28.) The court also instructed the jury at the end of the trial that its questions did not reflect any opinion about the case and that the jury should disregard any opinion it

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believed the court held. (Notes of testimony, 4/18/12 at 384.) Notwithstanding these instructions, we find that the trial court's questioning of the witnesses reflected its belief that appellant's version of events was not credible. **See *United States v. Tilghman***, 134 F.3d 313, 421 (1998) (new trial granted where trial judge's questioning "telegraphed to the jury that he disbelieved appellant" whose credibility was the key issue in the case; generic cautionary instruction at end of trial was "too little too late.").

During the cross-examination of Sergeant Quinn, she was asked to watch the video of appellant's actions with Catalano. Thereafter, she testified to her belief that appellant was entitled to use force to arrest Catalano. (Notes of testimony, 4/17/12 at 193-197.) On redirect examination, the prosecutor attempted to show Sergeant Quinn's assessment of the video depicted was incorrect and the following exchange occurred:

BY MS. EHRLICH:

Q. So you just said, if he used his shoulder. So
- -

A. Correct.

Q. - - if you believe hypothetically that if - - if a civilian brushes off - - hypothetically, if the civilian passes the officer and brushes him off - - that's not what happened in the case; but, hypothetically, if a civilian passes the officer and brushes him, then the officer is justified in throwing the civilian against the wall and choking him?

MR. STANSHINE: Objection, Your Honor. Asked and answered.

THE COURT: All right. Objection overruled. What is your answer?

THE WITNESS: Your Honor, I think that if someone is in an agitated state, if they do come at me or a person in full uniform and - - and - - and there is touching, yes.

THE COURT: Did you see that on that video?

THE WITNESS: Touching?

THE COURT: Yes.

THE WITNESS: I've only watched - -

THE COURT: Did you see him in an agitated state coming after the police officer?

THE WITNESS: It looked as if the - - the - - Dominic - - Dominic was agitated walking out.

THE COURT: And he went after the police officer with his left shoulder. Is that what you saw?

THE WITNESS: Yeah. It's not a good angle, to be honest with you. It's not a good angle. They're both like this when she had stopped it.

THE COURT: His right shoulder is towards the officer, but you saw him come after the police officer with his left shoulder in that video?

MR STANSHINE: Your Honor, can I see you at sidebar?

THE COURT: No, you can't. Sit down until I get finished. Please answer.

THE WITNESS: No. I see the right shoulder.

THE COURT: We all did.

THE WITNESS: Yeah. But I wasn't there. So reading this - -

THE COURT: None of us were there.

THE WITNESS: Right. But reading this - -

THE COURT: But we have to use common sense and our human experiences in life - -

THE WITNESS: I agree.

THE COURT: -- in evaluating what occurred.

THE WITNESS: I agree.

THE COURT: And using your common sense and your human experience, you saw Mr. Catalano hit that officer with his left shoulder and you saw Mr. Catalano instigate what was necessary to have a choke hold to restrain him?

THE WITNESS: I signed off on a use of force, Your Honor, from the officer who stated that he used his left shoulder. Alex worked for me for five years. I've never had a problem with - -

THE COURT: So whatever he said was okay with you?

THE WITNESS: For the use of force, yes. I wasn't - -

THE COURT: Okay.

THE WITNESS: - - there.

THE COURT: Okay.

THE WITNESS: - - and I sign off on all of them.

THE COURT: That's all we need.

THE WITNESS: Watching this, it is possible.

THE COURT: After watching this, you have a change of heart?

THE WITNESS: Watching this, I don't know if the angle - - if he did come and hit him because it's at an angle - -

THE COURT: You might not have signed off on that if you had seen this?

THE WITNESS: I might - - I might have signed off if he had the right shoulder in the right shoulder.

THE COURT: Okay.

THE WITNESS: Uh-huh.

Id. at 210-214.

As noted previously in this memorandum, at a subsequent sidebar, defense counsel objected to the court's examination of Sergeant Quinn. (***Id.*** at 258-265.) Counsel stated that the trial court's voice "sounded incredulous" and was "telling her what she had to say was not believed by you." (***Id.*** at 263-264.) We find that the court's questioning of Sergeant Quinn, at length, regarding her assessment of the video was to the point that the court seemed to be challenging her testimony. We do not find the court's questions to be neutral in content.

Also, during the defense's case, appellant's partner, Officer Loisch, testified regarding the incident at the U-Haul store. Officer Loisch testified that Catalano nudged Officer Loisch. The officer averred that appellant employed "appropriate use of force" in dealing with Catalano. (Notes of

testimony, 4/18/12 at 109-111.) During cross-examination, the following exchange occurred between the trial court and Officer Loisch.

Q. And I ask you the next question. I say to you. Officer, can you help me to find out who would be the next person who I need to ask? In fact, Officer, could you be so kind to pick up the phone and make a phone call for me? I'm just a civilian. I don't know how the system operates, all I need to do. You are working. Can you help me? Would you help me?

A. That never happened. Okay?

Q. That never happened?

A. That never happened. I was trying to explain to [Catalano] the system and what has to be done. That vehicle - - if - - you're neglecting to put in there that that vehicle was gone for three months. What was being done with that vehicle? Okay? That could have been involved in a hit and run. There's a lot of things that could be - - had occurred in that time.

Q. And how would he know? He's a civilian. Who would have this information?

A. That's why you would have it recovered in the jurisdiction. They would investigate it. That would be a crime scene.

Q. Who would have this information? A civilian or a police officer?

MR. STANSHINE: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: I'm not sure I understand your question.

THE COURT: You're not sure?

THE WITNESS: Yeah, I'm not sure.

THE COURT: Okay. And you've been on the police force for 36 years and -

MR. STANSHINE: Your Honor, he said he doesn't - - not sure he understands the question.

THE COURT: I have a - - your objection is overruled.

MR. STANSHINE: But he said he didn't understand the question.

THE COURT: I said, your objection is overruled. Go ahead. You've been on the force for 36 years?

THE WITNESS: That's correct.

THE COURT: And you don't know what you would do to help this person?

THE COURT: I have a - - your objection is overruled.

MR. STANSHINE: But he said he didn't understand the question.

THE COURT: I said, your objection is overruled. Go ahead. You've been on the force for 36 years?

THE WITNESS: That's correct.

THE COURT: And you don't know what you would do to help this person?

THE WITNESS: I advised him to go back to the jurisdiction that it was recovered in and we report it recovered there.

THE COURT: Could you have done more there?

THE WITNESS: I'm sorry?

THE COURT: In this particular situation, could you have assisted the civilian -

THE WITNESS: I would give - -

THE COURT: - - in terms of getting the information that he needed.

THE WITNESS: I would have give him whatever information he asked for, but that's not what occurred.

THE COURT: And you could not have taken this out of - - taken this off of the stolen status?

THE WITNESS: No. I could not. I could not have. Okay? That - - that wouldn't have happened there. I would be circumventing the system. I don't know the circumstances that that vehicle - -

THE COURT: Well, we just heard from another police official who disagrees with that, an inspector.

THE WITNESS: Okay. What can I say? If an inspector gave me an order and said to do it, I would do it. Okay? Without that order, I would advise him, that individual, which would be [Catalano], to go to the jurisdiction and have it recovered there.

CROSS EXAMINATION (RESUMING)

BY MS. EHRLICH:

Q. Right. Because Dominic Catalano is nobody. He's not a - -

A. No. Because I follow orders. It's a paramilitary situation. I would follow an order.

THE COURT: So you would tell him just to call 9-1-1?

THE WITNESS: I would tell him to go back to the jurisdiction that it occurred at. And that's what I told him.

THE COURT: All right. - - Okay any other questions?

Id. at 122-129.

Later, during further cross-examination of Loisch, the following exchange occurred.

THE COURT: Is it your statement that your --now that you've seen the tapes, you can tell us the truth?

THE WITNESS: No. I can better tell you what happened. I was always telling you the truth. The truth was what I knew at the time. A month later I never gave a statement. Therefore, I would not have known. I didn't take any notes, okay? I'm relying on that film.

Id. at 138-139. Clearly, the trial court challenged the credibility of this witness, and the extended exchange appears to be contentious at times.

Perhaps most importantly, the court also directly challenged appellant's credibility when he took the stand.

Q. When you said that you felt threatened as he came around the counter because he was saying things in an agitated way - - is that correct?

A. That's correct.

Q. And then as he came close to you where you put your elbow up to keep him away from where your items were on your belt, that was a point that you still felt - -

A. I did feel threatened, yes. I was going - -

- Q. So you tried to maintain - - I'm sorry.
- A. - - to keep him away.
- Q. So you tried to maintain that safety distance by putting your arm up?
- A. That's correct.
- Q. Okay. And although that's not the full five feet, it was giving you some different - - some difference of space between you and him?
- A. He moved on me too fast.
- Q. Okay. And then you said that when you went outside, you were no longer feeling threatened by him because there was now a greater distance between you and him?
- A. That's correct.
- Q. And you can see that he hadn't done anything when he went by you?
- A. That's correct.
- Q. He didn't try to reach around or he didn't try to do anything?
- A. That is correct.
- Q. So that's why outside you no longer felt there was any threat?
- A. That's correct.
- Q. So am I correct to say that your concern is that you're perceiving or looking to perceive any potential of a possible threat to you up until the point that you see that that potential is gone because now he's outside and going to the back of the car and you're no longer perceiving him as a threat?

A. That's correct.

MR. STANSHINE: I have no further questions.

THE COURT: When did you feel you should have arrested him?

THE WITNESS: I should have arrested him when he came up on - - behind me and he was climbing over me to get past - -

THE COURT: When he walked up behind you, you should have arrested him?

THE WITNESS: He was moving quite fast.

THE COURT: You raised your elbow to push him - -

THE WITNESS: I was trying to keep him away from him. He was on top of me.

THE COURT: He was on top of - -

THE WITNESS: He made contact with me, yes.

THE COURT: Was that before or after you raised your elbow?

THE WITNESS: It was at the same time.

THE COURT: Okay. The same time. So you should have arrested him for that?

THE WITNESS: I should have, yes. To my shame, I didn't. And to tell you the truth, I look at that video and I - - I'm not - - I'm really upset.

THE COURT: You made that decision after you saw the video?

THE WITNESS: That's correct, you know. You have a tendency to perceive things - -

THE COURT: Didn't occur to you at the time?

THE WITNESS: You know, I took the path of least resistance. I didn't think it going to go anywhere. You know what I mean? It was - - it was - - it was - - you've been demoralized in this department to the point that, you know, you don't want to - - you're afraid to do anything, okay? You're actually afraid to take steps, okay, because I might be sitting where my partner is right now had I arrested him at that point in time.

THE COURT: You have a problem with the leadership of the department?

MR. STANSHINE: Objection, Your Honor.

THE WITNESS: I never said that.

THE COURT: Oh, you said you're demoralized - -

MR. STANSHINE: Objection, Your Honor.

THE COURT: Overruled. You're demoralized?

THE WITNESS: I said that I was afraid at that point, okay, and that, yes, you know, I am demoralized to a certain point. I'm embarrassed by the situation.

THE COURT: All right. Thank you.

Id. at 152-156.

On cross-examination, the court again interjected questions alluding to appellant's credibility:

BY MS. EHRLICH:

Q. And do you recall me asking every one of them, did Mr. Catalano curse at the police?

A. Probably. But he did.

Q. And every witness said, no, he was respectful. No, he didn't curse.

A. No.

Q. Okay. So everybody else who was there said that he did not curse, but you say that Mr. Catalano said to you within a minute after you walk into the store, You fucking cops, you don't want to do your job.

A. Well - -

Q. According to your partner, he said, You lazy cops.

MR. STANSHINE: Objection; compound question, Your Honor.

THE COURT: Well, she's trying to get him to remember what was said.

MR. STANSHINE: Well, Your Honor, he said that what he recalls and what his testimony is and other people have different - -

THE COURT: Well, he said he didn't recall hearing any of it.

MR. STANSHINE: I don't think he said that.

THE COURT: Did you hear all of the witnesses who testified here?

THE WITNESS: I heard all of the witnesses, but I can't testify on their behalf of their perception of what they heard.

THE COURT: Okay. In other words, they all lied?

THE WITNESS: No.

MR. STANSHINE: Objection.

THE COURT: Well, what is your testimony then - -

THE WITNESS: My testimony - -

THE COURT: - - with respect to what they said?

THE WITNESS: To what they said - -

THE COURT: Yes.

THE WITNESS: - - what happened?

THE COURT: Yes.

THE WITNESS: Being honest, Your Honor - -

THE COURT: Yes. We want you to be honest.

THE WITNESS: One had x-ray vision, from what I gather.

THE COURT: Okay. And the other?

THE WITNESS: And the others told the jury that I was beating - - beating up on the poor defendant, mauling him down and wailing his person. And that was (indicating) - -

THE COURT: That's what you heard?

THE WITNESS: That's what I heard.

THE COURT: Okay. That's what he heard.

MS. EHRLICH: Okay. I'll move on, Your Honor.

Id. at 233-236. From our review of the record, we find the court made clear to the jury that it doubted appellant's credibility. We find the court's extended exchange to be prejudicial. **See Manuel, supra.**

In its opinion, the trial court states that its questions were meant to clarify ambiguities and expound on questions asked. (**See** trial court opinion, 4/25/13 at 8-9.) Additionally, the court explained that it was not “incredulous, but merely exploring the glaring discrepancy between [appellant] with regard to whether [Catalano] addressed the officer in a disrespectful manner upon entering the store.” (**Id.** at 10.) Upon our review of the entire record, we cannot agree that the questions posed to the witnesses were posed only to clarify and develop testimony. Rather, our review of the record convinces us that the trial judge’s questions had the effect of negating appellant’s defense and may have given the jury the impression that the judge doubted appellant’s credibility and the credibility of other witnesses.

It is fundamental that the trial court must take great care not to allow the jury to infer that the trial court believes or disbelieves the testimony offered by one of the parties. **United States v. Wyatt**, 442 F.2d 858, 859-61 (D.C.Cir. 1971) (court’s questioning of defendant and his alibi witnesses damaged defendant’s credibility and therefore was reversible error). We cannot say that the questioning by the trial judge did not influence the jury’s opinion of the witnesses credibility. Since appellant’s defense came down to credibility, the judge’s action prejudiced appellant’s case. Moreover, the evidence presented in this case, including the video, would support the jury’s

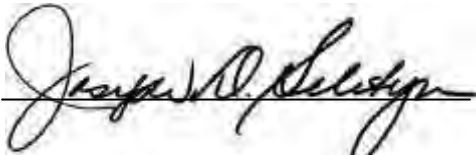
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determination of guilt; it is only the trial court's actions that require reversal in this matter.

Because this issue is dispositive, we need not reach the other arguments raised by appellant. This remand is without prejudice to appellant's raising the issue of recusal on retrial.

Judgment of sentence reversed and case remanded for a new trial.
Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014