NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DAMIEN WALTO,	:	No. 2115 EDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, June 14, 2012,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0013101-2010

BEFORE: FORD ELLIOTT, P.J.E., OTT AND STRASSBURGER,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 02, 2014**

Appellant appeals the judgment of sentence entered following his conviction for simple assault. Appellant was acquitted on a charge of aggravated assault, and the jury was unable to reach a verdict as to charges of possession of an instrument of crime and terroristic threats. Finding no merit in the issues on appeal, we will affirm the judgment of sentence.

The charges against appellant arose from an incident at the Tip Top playground in Philadelphia on July 17, 2010. At that time, a group of approximately 40 people were engaging in a street hockey tournament and barbeque picnic from around noon to eleven o'clock that night. Appellant, an off-duty Philadelphia police officer, was an organizer and participant in the event. Appellant, the victim, Denise Janssen, as well as many other participants drank alcoholic beverages during the picnic.

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* Retired Senior Judge assigned to the Superior Court.

As the night wore on, people gradually left the event until only appellant, Janssen, and three other men remained: James Kanagie, Eric Flint, and George Fogarty. Janssen, Kanagie, and Flint all testified consistently as to the actions that transpired at this point. Appellant, who had been sleeping, awoke and overheard Janssen make a sexual overture to Kanagie. Appellant became angry and started calling Janssen a slut and a whore, asking her if she was aware that Kanagie had a girlfriend and children. Janssen responded by throwing a can of beer against appellant's back. Janssen then struck him in the face with a second beer can.

Appellant seized Janssen from behind, lifted her off of the ground, and slammed her headfirst into the ground. Appellant had his knee on Janssen's head and grabbed her arms and pulled them behind her as though he was going to handcuff her. At the same time, appellant yelled that he was a Philadelphia police officer and "don't put your hands on me." Appellant also threatened to lock Janssen up. At this point, Flint and Kanagie pulled appellant away from Janssen. Appellant grabbed a hockey stick, shattered it, and threatened to stab Janssen with it. Ultimately, Flint remained with appellant while Kanagie and Fogarty transported Janssen to the hospital.

Although appellant's Statement of the Questions Involved lists only two issues,[1] we discern five separate assignments of error within the argument section of his brief:

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[1] Appellant's brief at 11.

1. That the prosecutor improperly argued during his opening and through repeated references during trial and during the examination of witnesses that police officers should be held to a higher standard of behavior than other persons.

2. That the trial court improperly permitted the prosecution to elicit prejudicial and irrelevant evidence from appellant that he had been dismissed from the police, and that he would be reinstated if acquitted.

3. That the prosecution erred during closing when it argued that Janssen had suffered a concussion when the evidence at trial did not support that fact.

4. That the prosecution erred during closing by referring to appellant with intemperate language such as "a wolf in sheep dog's clothing."

5. That the prosecution erred during closing by telling the jury that appellant had packed the courtroom with supporters in order to intimidate the prosecution witnesses.

We will address these matters in the order presented.

Appellant first raises an issue of prosecutorial misconduct in the prosecutor's repeated refrain at trial that a police officer is held to a higher standard of behavior than other persons.

> Our standard of review for a claim of prosecutorial misconduct is limited to whether the trial court abused its discretion. In considering this claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one. Not every inappropriate remark by a prosecutor constitutes reversible error. A prosecutor's statements to a jury do not occur in a vacuum, and we must view them in

> context. Even if the prosecutor's arguments are improper, they generally will not form the basis for a new trial unless the comments unavoidably prejudiced the jury and prevented a true verdict.

Commonwealth v. Toritto, 67 A.3d 29, 37 (Pa.Super. 2013), ***appeal denied***, 80 A.3d 777 (Pa. 2013), quoting ***Commonwealth v. Lewis***, 39 A.3d 341, 352 (Pa.Super. 2012), ***appeal denied***, 51 A.3d 838 (Pa. 2012) (internal quotes and citations omitted).

Appellant identifies three instances where the prosecution referred to a police officer having a higher standard of behavior: 1) during the opening statements; 2) during the examination of eyewitness Flint when Flint was asked if he believed that a police officer should be held to a higher standard; and 3) during the examination of internal affairs police captain Roland Lee when Captain Lee was asked to read from an official police directive pertaining to the proper conduct of off-duty police officers. Appellant's argument implies that by arguing that police officers are held to a higher standard of behavior, the prosecution diminished the standard of proof required to convict appellant.

As the Commonwealth notes, appellant has waived his objection to the prosecution's comments during the opening statement because appellant failed to object at the time. "The failure to raise a contemporaneous objection to a prosecutor's comment at trial waives any claim of error arising from the comment." ***Commonwealth v. Ali***, 10 A.3d 282, 293 (Pa. 2010). Nonetheless, even if not waived, we see no error. Although the prosecution

did make reference to a higher standard for police officers, the prosecutor also made it clear to the jury that was not how they were to judge appellant:

> Now, police officers are held to a different standard, but it's essentially a different standard that they adhere to themselves as part of their profession. They are require[d] to do certain things. <u>That's not an issue in this case, whether he violated any police rules or regulations.</u>
>
> <u>The question here is whether he violated the law. And the fact is, whether he was a police officer or a regular citizen, what he did in this instance was to go way over the line. He broke the law, and that is why we are here.</u>
>
> And after you hear all the evidence, I'm confident that you will find that he did, in fact, break the law, that he did, in fact, commit all of the crimes with which he was charged and that you will find him guilty.

Notes of testimony, 3/22/12 at 56-57 (emphasis added).

Appellant may rightfully raise the second two instances in the record where the prosecution referred to the higher standard of behavior because objections were lodged at the time. As to eyewitness Flint, we find no error because Flint brought up the notion of a higher standard for police officers without prompting from the prosecution:

> Q. Did you have any discussion with him about whether he had acted -- whether he had done anything right or wrong --
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> [Defense Counsel]: Objection.
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> [The Prosecutor]: -- after the incident?
>
> THE COURT: Overruled. You can answer.

> THE WITNESS: Well, I thought that the way it was handled, I thought it could have been handled better. Because I even said that in my statement. I don't know if it was this one. But I said he is a police officer and all. The way it could have been handled -- she did strike him in the face. That's my opinion.
>
> BY [The Prosecutor]:
>
> Q. In fact, the next day you talked to him, you told him that he was held to a higher standard; isn't that correct?

Notes of testimony, 3/23/12 at 81-82.

Thus, Flint first intimated that the incident should have been handled better because appellant was a police officer before the prosecution directly asked him the question. Consequently, we find no impropriety on the part of the prosecutor.

Finally, we have the instance where the prosecution had Captain Lee read police Directive No. 22 to the jury. The prosecution was obviously aware at the time that Directive No. 22 contained the following language:

> Police officers are reminded that they are expected by the community to hold themselves to a higher standard of behavior, and they should conduct themselves accordingly. All actions are subject to departmental policies and procedures, including the Disciplinary Code.

Id. at 153.

Prior to Captain Lee reading Directive No. 22 to the jury, however, the trial court issued a cautionary instruction to the jury to forestall any prejudice to appellant:

> THE COURT: Let me just say, ladies and gentlemen, the defendant here is not charged with any violation of police directives. He's here for a crime that they say he committed.
>
> So you're not here to determine whether he's guilty of violating any police directives. You're here to decide, when the time comes, whether he's guilty of any of the crimes that I told you he's charged with.
>
> All right. Go ahead.

Id. at 151.

Furthermore, in light of the various mentions of a higher standard of behavior for police officers, the trial court also gave the following cautionary instruction during its final charge to the jury:

> Now, I'm going to start off a little differently than I generally do. First, let me talk to you about this so-called higher standard that you heard thrown around. I'm going to tell you about that.
>
> There is only one standard. And that's the standard that anybody that comes into the courtroom has to own up to. And that's the standard based on the law. And I'm going to give you all the law. Just because this gentleman had been a police officer at one time, at the time of the incident, that doesn't matter.
>
> As I told you before, all the people that come to this courtroom are treated the same no matter who they are, what their religion is. I told you that. They're all treated the same way. He's not treated

> any worse because he happened to be a police officer, or any better. He's treated like any defendant that comes in here and has to face a jury. So that's all I'm going to say about that.

Notes of testimony, 3/28/12 at 120.

A jury is presumed to follow the trial court's instructions. ***Commonwealth v. Roney***, 79 A.3d 595, 640 (Pa. 2013). We find that this instruction was sufficient to cure any prejudice occasioned by any remarks pertaining to a higher standard of behavior for police officers. Perhaps the best proof of that is the fact that the jury convicted appellant on only one of the several charges facing him, and not even the most serious charge. Plainly, the jury did not hold appellant to some heightened standard. We see no error here.

In his next issue, appellant complains that the trial court improperly permitted the prosecution to elicit prejudicial and irrelevant evidence from appellant to the effect that he had been dismissed from the police department, and that he would be reinstated if acquitted.[2] Appellant argues that this evidence was prejudicial on two bases. First, it suggests that the Philadelphia Police Department had already decided that appellant had

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[2] We note that this issue was not included in appellant's Statement of the Questions Involved. While we could find this issue waived as being in violation of Pa.R.A.P., Rule 2116, 42 Pa.C.S.A., we may overlook this omission where the issue is raised elsewhere in the brief and our ability to address the issue is not thereby impeded. ***Commonwealth v. Stradley***, 50 A.3d 769, 771 (Pa.Super. 2012).

violated the law. Second, it encouraged the jury to convict to prevent a "bad cop" from regaining his position. We disagree.

Our standard of review is well-established:

> The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion. In determining whether evidence should be admitted, the trial court must weigh the relevant and probative value of the evidence against the prejudicial impact of the evidence. Evidence is relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact. Although a court may find that evidence is relevant, the court may nevertheless conclude that such evidence is inadmissible on account of its prejudicial impact.

Commonwealth v. Antidormi, 84 A.3d 736, 749 (Pa.Super. 2014), quoting ***Commonwealth v. Weakley***, 972 A.2d 1182, 1188 (Pa.Super. 2009), ***appeal denied***, 986 A.2d 150 (Pa. 2009).

We find no abuse of discretion. As the Commonwealth argues, this evidence was probative as to appellant's bias to lie because not only was he at risk for criminal penalties, but his job was at stake also. Moreover, we see little prejudice. It is well within the knowledge of the jury that an employer will often suspend an employee facing criminal charges pending the outcome of the trial.

Finally, immediately after the testimony, the trial court gave a curative instruction and counsel indicated that the instruction was acceptable:

> All right. Ladies and gentlemen this stuff that you just heard about he was given desk duty and what you heard about his arrest and subsequent firing, disregard that as to any evidence of guilt as far as the defendant is concerned.
>
> Whether or not the defendant is guilty of this is up to you, no other entity involved. It's you're [sic] decision in this matter.
>
> Anything else on this?
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> [Defense counsel]: No. Thank you, your Honor.

Notes of testimony, 3/26/12 at 102-103. There is no error here.

Appellant next argues that the prosecution erred during closing when it argued that Janssen had suffered a concussion when the evidence at trial did not support that fact. We find no prejudice to appellant by any implication that Janssen may have suffered a concussion. The issue of a concussion was relevant only to the aggravated assault charge which has as an element the attempt to inflict serious bodily injury. As the jury acquitted appellant on the aggravated assault charge, there was manifestly no prejudice.

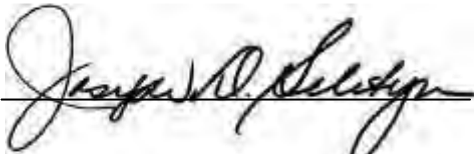
In his final two issues, appellant argues that the Commonwealth committed prosecutorial misconduct during the closing by referring to appellant with intemperate language such as "a wolf in sheep dog's clothing," and by telling the jury that appellant had packed the courtroom with supporters in order to intimidate the prosecution witnesses. Neither of

these issues was raised in the concise statement of errors complained of on appeal. Consequently, they are waived. ***See*** Pa.R.A.P., Rule 1925(b)(4)(vii), 42 Pa.C.S.A.; ***Commonwealth v. Castillo***, 888 A.2d 775 (Pa. 2005).

Accordingly, having found no merit in the issues on appeal, we will affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/2/2014