J-S26028-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
NOEL DEVON D. COWARD,	:	
	:	
Appellant	:	No. 2609 EDA 2013

Appeal from the Judgment of Sentence Entered April 1, 2013,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0010435-2009.

BEFORE: BENDER, P.J.E., SHOGAN and FITZGERALD*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 15, 2014**

Appellant, Noel Devon D. Coward, appeals from the judgment of sentence entered April 1, 2013. We affirm.

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

> **Procedural History**
>
> On February 12, 2009, the defendant, Noel Devon D. Coward, was arrested and charged with Robbery, Criminal Conspiracy, Possession Of Firearm Prohibited, Firearms not to be Carried without License, Carrying a Firearm in Public in Philadelphia, Theft By Unlawful Taking, Receiving Stolen Property, Possession of an Instrument Of Crime (PIC), Terroristic Threats, Simple Assault, and Recklessly Endangering Another Person (REAP).
>
> On November 2, 2011, Judge Hill granted the Commonwealth's Motions for consolidation and to present other bad acts evidence. On November 4, 2011, Judge Hill denied the defendant's Motion to Suppress physical evidence and out of

*Former Justice specially assigned to the Superior Court.

court identifications. On November 2, 2011, the defendant appeared before Judge Hill and elected to be tried by jury. On November 15, 2011, Judge Hill declared a mistrial after the jury could not return a verdict.[1]

> [1] On May 10, 2011, the defendant filed a Motion for Speedy Trial pursuant Pennsylvania Rule of Criminal Procedure 600(E) before the Honorable Glynnis Hill. From a review of the record, it appears to this Court that although Judge Hill did not rule on the defendant's Motion for Speedy Trial, defense counsel conceded that the Motion was not meritorious. N.T. 11.1.2013 Motion at 5. On April 4, 2012, the defendant attempted to file a *pro se* Motion to Dismiss pursuant Pennsylvania Rule of Criminal Procedure 600. The defendant was represented by counsel at the time; thus, this Court was not required to rule on such Motion. *Commonwealth v. Jette*, 23 A.3d 1032 (Pa. 2011). However, a review of the docket reveals that the defendant's Motion would not have merited relief even if properly submitted to this Court. The majority of the time between the November 15, 2011 mistrial and the February 5, 2013 retrial of this case was attributable to defense requests for continuances and the court's trial schedule.

On February 5, 2013, the defendant appeared before this Court and elected to be tried by jury. On February 8, 2013, the jury found the defendant guilty of Robbery and PIC. On April 1, 2013, this Court sentenced the defendant to consecutive terms of imprisonment of ten to twenty years for Robbery and two and a half to five years for PIC.

On April 9, 2013, the defendant filed Post-Sentence Motions. On April 10, 2013, this Court denied the defendant's Post-Sentence Motions.

On June 12, 2013, after failing to file a timely Notice of Appeal, the defendant filed a Post Conviction Relief Act Petition requesting *nunc pro tunc* reinstatement of his appellate rights. On August 29, 2013, this Court granted the Petition. On September 17, 2013, the defendant filed a Notice of Appeal. On

September 18, 2013, this Court ordered the defendant submit a Statement of Matters Complained of on Appeal pursuant Pa.R.A.P. 1925(b). On October 8, 2013, this Court granted the defendant's request for an extension of time to submit a Statement. On October 25, 2013, the defendant submitted a timely Statement.

Facts

On February 3, 2009, Eframe Worke was working as a cashier at Patriot Parking on 23rd and Arch Streets in Philadelphia. At about 2:30 p.m., the defendant and his unidentified co-conspirator asked Mr. Worke about the rates for the parking garage. N.T. 2.6.2013 at 15-16.

When Mr. Worke was looking up the rates, the defendant entered the booth and held a gun to his stomach. The co-conspirator told Mr. Worke not to move and the defendant demanded cash. The defendant opened the cash drawer and took $52 U.S. Currency. The defendant took Mr. Worke's cell phone, ordered him not to move, and then left, walking towards Market Street. N.T. 2.6.2013 at 17-18, 26, 31.

A few minutes later, Mr. Worke's manager arrived and called the police. Mr. Worke described the defendant to the police as in his late twenties or early thirties, skinny and about five foot six inches tall, with a lighter complexion and something funny about his front teeth. He described the co-conspirator as about six foot one inch tall, about 200 to 215 pounds with a darker complexion and wearing a white-hooded shirt. N.T. 2.6.2013 at 15-16, 34, 38-39.

Three days later, Paulos Negusse was robbed by the defendant. Mr. Negusse was working as a parking attendant at the 2030 Rittenhouse Square parking garage. On February 6th, 2009, at approximately 7:50 p.m., Mr. Negusse was parking cars in the garage when the defendant yelled at Nr. Negusse asking how much he would be charged to park for four hours. Believing he was a customer, Mr. Negusse approached the defendant, who then pushed Mr. Negusse. The defendant and his co-conspirator put Mr. Negusse on the hood of a car and demanded money. The defendant held Mr. Negusse's neck and pointed a gun at his face. The defendant told Mr. Negusse that he would shoot him if

he did not give the defendant money. They searched Mr. Negusse's pockets and took about $75 U.S. Currency from him. The defendant and his co-conspirator ran towards 21st and Market Streets. N.T. 2.6.2013 at 116-117, 123-128, 136-137.

Mr. Negusse described the defendant as a black male about five-foot-five to five-foot-six, 160 pounds, medium complexion wearing a gray knit hat and a black-hooded shirt. He described the co-conspirator as a black male about six-foot, 180 to 190 pounds, lighter complexion, and wearing a gray knit hat and dark gray jacket.[2] N.T. 2.6.2013 at 149.

> [2] Mr. Negusse was permitted to testify as other acts evidence for the purpose of identification per a ruling by Judge Hill.

On February 11, 2009, at approximately 6:20 p.m., at 524 North 15th street, Detective Paul Guerico stopped the vehicle the defendant was driving. Detective Guerico observed that the defendant and the passenger, Terrance Wongas, matched the descriptions in a flash information regarding two gunpoint robberies in the area.[3] Detective Guerico also noticed the defendant had a gap in his front teeth matching the description given by Mr. Worke. Detective Guerica detained both males for further investigation. A subsequent search of the vehicle pursuant [to] a search warrant produced a lighter that looked like a silver gun. The defendant was arrested that same day. N.T. 2.6.2013 at 190-195, 208; N.T. 2.7.2013 at 19-22.

> [3] The flash information actually contained information regarding multiple robberies; however, only the two admissible robberies were permitted to be referenced by Detective Guerico. N.T. 2.5.2013 at 75-76.

On February 13, 2009, Mr. Negusse identified the defendant from a photo array. On April 6, 2009, both Mr. Worke and Mr. Negusse identified the defendant at a line-up. On August 13, 2009, Mr. Worke identified the defendant as the person who robbed him[,] at the preliminary hearing. At the defendant's first trial, Mr. Worke and Mr. Negusse again identified the defendant as the person who robbed them. N.T. 2.6.2013 at 40-43, 68, 155-158.

Trial Court Opinion, 11/13/13, at 1-4.

Appellant presents the following issues for our review:

> DID THE LOWER COURT ERR BY GRANTING THE COMMONWEALTH'S MOTION TO INTRODUCE OTHER CRIMES EVIDENCE FOR PURPOSES OF PROVING IDENTIFICATION AND COMMON, PLAN, SCHEME, AND DESIGN?
>
> DID THE TRIAL COURT ERR BY DENYING APPELLANT'S MOTION FOR A MISTRIAL PROFFERED IN REACTION TO COMMENTS MADE BY THE PROSECUTOR DURING HER OPENING SPEECH?
>
> DID THE TRIAL COURT ERR BY DENYING APPELLANT'S MOTION FOR A MISTRIAL PROFFERED ON ACCOUNT OF NUMEROUS REFERENCES AT TRIAL TO OTHER ROBBERIES COMMITTED IN CENTER CITY?
>
> DID THE TRIAL COURT ERR BY OVERRULING CLOSING COMMENTS OF THE PROSECUTOR THAT REFERRED TO EVIDENCE DE HORS THE RECORD AND CONSTITUTED PURE SPECULATION?
>
> DID THE LOWER COURT ERR BY DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE BECAUSE IT WAS SEIZED WITHOUT PROBABLE CAUSE AND WAS THE FRUIT OF AN ILLEGAL ARREST?

Appellant's Brief at 4 (*verbatim*).

Appellant first argues that the trial court abused its discretion when it ruled that the Commonwealth could introduce other crimes evidence, specifically the crime involving Paulos Negusse, to prove identity and common plan, scheme and design.[1] Appellant's Brief at 11. Appellant maintains that in this case, the alleged similarities between the robberies

[1] For clarification purposes, we note that the charges at issue in this case stem from the crimes committed against Eframe Worke.

were simply characteristics common to a large number of robberies, and were not so unique such that one could definitively conclude that the same perpetrators committed both crimes. ***Id.*** at 19-20. It is Appellant's position that the trial court also erred by finding that the probative value of the evidence outweighed its prejudicial effect. ***Id.*** at 21.

With respect to the pretrial ruling by the trial court as to the admissibility of the other crimes evidence, the following standard of review applies:

> On appeals challenging an evidentiary ruling of the trial court, our standard of review is limited. A trial court's decision will not be reversed absent a clear abuse of discretion. "Abuse of discretion is not merely an error of judgment, but rather 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. Aikens, 990 A.2d 1181, 1184-1185 (Pa. Super. 2010) (internal citations omitted).

Our Supreme Court has discussed evidence of other bad acts and the related exceptions as follows:

> Generally, evidence of prior bad acts or unrelated criminal activity is inadmissible to show that a defendant acted in conformity with those past acts or to show criminal propensity. Pa.R.E. 404(b)(1). However, evidence of prior bad acts may be admissible when offered to prove some other relevant fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. Pa.R.E. 404(b)(2). In determining whether evidence of other prior bad acts is admissible, the trial court is obliged to balance the probative value of such evidence against its prejudicial impact.

Commonwealth v. Sherwood, 982 A.2d 483, 497 (Pa. 2009).

Evidence of other bad acts is admissible to prove a common plan or scheme "where the two crimes are so related that proof of one tends to prove the others." ***Commonwealth v. Ross***, 57 A.3d 85, 103 (Pa. Super. 2012).

> When ruling upon the admissibility of evidence under the common plan exception, the trial court must first examine the details and surrounding circumstances of each criminal incident to assure that the evidence reveals criminal conduct which is distinctive and so nearly identical as to become the signature of the same perpetrator. Relevant to such a finding will be the habits or patterns of action or conduct undertaken by the perpetrator to commit crime, as well as the time, place, and types of victims typically chosen by the perpetrator.

Commonwealth v. G.D.M., Sr., 926 A.2d 984, 987 (Pa. Super. 2007). Additionally:

> the trial court must assure that the probative value of the evidence is not outweighed by its potential prejudicial impact upon the trier of fact. To do so, the court must balance the potential prejudicial impact of the evidence with such factors as the degree of similarity established between the incidents of criminal conduct, the Commonwealth's need to present evidence under the common plan exception, and the ability of the trial court to caution the jury concerning the proper use of such evidence by them in their deliberations.

Id.

In the case at bar, the fact pattern involved in the two incidents was markedly similar. The trial court identified the following factors in determining that the two robberies were part of a common scheme or plan:

> 1. Both victims described one of his attackers as tall and the other as short.
>
> 2. Both victims were working as parking lot attendants.
>
> 3. Both robberies were committed in parking garages in the same geographical area.
>
> 4. Both robberies were committed with what appeared to be a silver gun.
>
> 5. Both robberies were committed by two black males.
>
> 6. The robbers took cash from both victims.
>
> 7. The robbery of Mr. Negusse was committed in the early evening and the robbery of Mr. Worke was committed in the late afternoon.
>
> 8. The robberies were within three days of each other.
>
> The level of commonality between the crimes convinces this Court that the occurrence of these crimes was not a mere coincidence, but that they are so similar that they share a perpetrator. Thus, the evidence was properly admitted to prove the identity of the defendant. This Court finds that the evidence's prejudicial value did not outweigh its probative value. The robbery of Mr. Negusse was a distinctive crime that was so similar to the robbery of Mr. Worke that the proof the defendant committed one tends to prove the defendant committed the other.

Trial Court Opinion, 11/13/13, at 15-16.

The trial court's findings of fact are supported by the record. We agree that the evidence reveals criminal conduct which is distinctive and so nearly identical as to become the signature of the same perpetrator. Thus,

we conclude that the trial court did not abuse its discretion in admitting evidence of other crimes.

Moreover, we cannot agree with Appellant's claim that the probative value of this evidence was outweighed by its prejudice. The other crimes evidence was relevant to bolster the Commonwealth's case that rested on the testimony of one witness, where the trial took place four years after the robbery, and where Appellant denied involvement and was not apprehended until more than a week after the crime. ***See Commonwealth v. O'Brien***, 836 A.2d 966, 970 (Pa. Super. 2003) (evidence of a common scheme, plan or design involving various similarly situated complainants is relevant to bolster the credibility of those complainants.)

Furthermore, the trial court issued an instruction directing the jury that it could not consider the evidence of the Negusse robbery for any purpose other than to establish a common scheme, plan, or design, and identity. N.T., 2/6/13, 173-174; N.T., 2/7/13, 132-133. "The law presumes that the jury will follow the instructions of the court." ***Commonwealth v. Brown***, 786 A.2d 961, 971 (Pa. 2001). The trial court's cautionary instruction minimized any undue prejudicial effect.

Appellant's next two issues consist of claims that the trial court erred in denying his motion for a mistrial. Appellant's Brief at 4.

> It is well-settled that the review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial

> court abused its discretion. "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will ... discretion is abused." A trial court may grant a mistrial only "where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.

Commonwealth v. Chamberlain, 30 A.3d 381, 422 (Pa. 2011) (internal citations omitted).

Appellant argues that the trial court erred in denying his motion for a mistrial based on the prosecutor's comments during her opening statement wherein she referenced other robberies for which Appellant was not on trial. Appellant's Brief at 22. Appellant further maintains that the trial court erred by overruling an objection to an opening comment where the prosecutor stated that Appellant had robbed Mr. Negusse. ***Id.*** at 23. Appellant asserts that the prosecutor's comments were so improper that the jury was "rendered incapable of rendering a fair verdict" and posits that a new trial is warranted. ***Id.*** at 30.

> While it is improper for a prosecutor to offer any personal opinion as to guilt of the defendant or credibility of the witnesses, it is entirely proper for the prosecutor to summarize the evidence presented, to offer reasonable deductions and inferences from the evidence, and to argue that the evidence establishes the defendant's guilt. In addition, the prosecutor must be allowed to respond to defense counsel's arguments, and any challenged statement must be viewed not in isolation, but in the context in which it was offered. "[The] prosecutor must be

> free to present his or her arguments with logical force and vigor."

Commonwealth v. Bryant, 67 A.3d 716, 727-728 (Pa. 2013)(internal citations omitted).

A review of the prosecutor's opening statement reflects that the prosecutor's comments consist of the Commonwealth's summation of the case and attempt to explain to the jury the evidence that would establish Appellant's guilt. Indeed, it is the prosecutor's job to convince the jury of Appellant's guilt. Additionally, the trial court had ruled that the other crimes evidence regarding the robbery of Negusse was admissible, and the prosecutor referenced that testimony in the attempt to establish that there was a common plan or scheme, that would help to confirm Appellant's guilt in the eyes of the jury.

Further, the court clarified for the jury that Appellant was on trial for one robbery. N.T., 2/5/13, at 36-37. Additionally, the trial court explained that Mr. Worke was the victim of the robbery which was the basis for the criminal charges at issue at the trial and that evidence of the other robbery was being introduced in order to establish a common plan or scheme. ***Id.*** at 37. The prosecutor also reminded the jury that Appellant was being charged with one count of robbery and one count of possession of an instrument of crime and that Mr. Negusse was not a victim of those crimes for which Appellant was being tried. ***Id.*** at 44. Thus, Appellant's claim fails.

Appellant also states in his brief that the prosecutor:

> intimated rather strongly that the trial was unnecessary and that the trial was a waste of time because appellant certainly was guilty not only of the crimes herein but also crimes for which he was not being tried and that the jury should convict appellant because he was guilty of the other crimes.

Appellant's Brief at 27. After reviewing the prosecutor's entire opening statement, we cannot agree with Appellant's characterization. The prosecutor did not, in any way, intimate that the trial was unnecessary or a waste of time because Appellant was guilty. Such claim has no factual basis in the transcript.

Appellant next argues that the trial court erred in denying Appellant's motion for a mistrial on the basis that Detective Louis Velazquez made numerous references at trial to other robberies committed in Center City. Appellant's Brief at 30. Appellant posits that he was not on trial for those crimes, and those references permitted the jury to convict Appellant based on an inference that he was involved in the commission of those crimes. ***Id.*** Appellant, in a footnote, also refers to Detective Paul Guerico's testimony that he had "a flash of several gunpoint robberies that occurred in that area." ***Id.***

Before we reach the merits of Appellant's argument, we must address whether this issue has been properly preserved. We note that Appellant did not make a motion for a mistrial based on Detectives Velazquez's or

Guerico's testimony. ***See*** Pa.R.A.P. 302; Pa.R.Crim.P. 605(B) (a motion for mistrial shall be made at the time the event prejudicial to the defendant occurs). Because Appellant failed to make a motion for a mistrial following the testimony of the two Detectives, we conclude that this issue is waived.

Furthermore, even if the issue had been properly preserved, we conclude that the Detectives' testimony referenced by Appellant would not warrant the grant of a mistrial. The trial court addressed this issue as follows:

> Detective Guerico's testimony about flash information and Detective Velazquez's description of his unit form part of the story of the case, and explained the case's natural development. "[A] trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events and offenses with which [a] defendant is charged." *Commonwealth v. Broaster*, 863 A.2d 588, 592 (Pa. Super. 2004)(citing *Commonwealth v. Serge*, 837 A.2d 1255, 1260-61 (Pa. Super. 2003)).
>
> Moreover, none of the challenged references specifically state that there were robberies other than those of Mr. Negusse and Mr. Worke. These references are vague and the words "several" and "patterns" just as accurately describe two robberies as three or more. Simply put, there was no evidence of robberies other than those of Mr. Worke and Mr. Negusse introduced directly nor indirectly referenced at trial. Additionally, any prejudice suffered by the oblique references to possible other robberies by the defendant was *de minimis*. This claim is meritless.

Trial Court Opinion, 11/13/13, at 19. We agree with the trial court's summation of the evidentiary references and had we not found the issue waived, we would affirm on this issue on this basis.

Appellant next argues that he was deprived of a fair trial when the prosecutor, in her closing argument, referred to evidence that had not been presented to the jury. Appellant's Brief at 35-36. Appellant identifies comments made by the prosecutor referring to Terrance Wongas and the gun-shaped lighter as the basis for this claim. ***Id.*** at 37-38. Appellant contends:

> The comments were improper because the record is devoid of any evidence who the person was who was in the car with appellant when the police stopped him or what, if any, role that person played in the crime for which appellant was being tried. In addition, the comments regarding the cigarette lighter were improper because the car within which the lighter was found did not belong to appellant as the prosecutor claimed.

Id. at 37-38. Appellant explains that it is not his vehicle; rather, it belonged to Appellant's wife. ***Id.*** at 40. It is Appellant's contention that a new trial must be granted because it is clear that the trial court erred in overruling counsel's objection to these comments insofar as the law provides that a prosecutor shall not make references to evidence not introduced during trial. ***Id.*** at 36.

Reviewing the references made by the prosecutor during closing with which Appellant takes issue, in the context of both defense and the

Commonwealth's closing, it is clear that the prosecutor's comments were made in response to statements made by defense counsel in his closing argument.

In his summation, defense counsel made the following statements:

> We're not talking about a car that's owned by this man. We're not talking about a car that is driven alone by him. There's another person in that car, isn't there? Again, there's another person in that car. Where is he? What happened to him? Where was the gun? Don't you folks think it makes a difference?
>
> And I mean this respectfully. Common sense. Doesn't it make a difference that this thing was found in [Appellant's] pocket? That this thing was found on [Appellant's] side of the truck? If it was found on the front passenger's side where this other mysterious gentleman was? If it was found in the glove compartment within arm's reach of the passenger of the truck but not within arm's reach of [Appellant]? In the map pocket of the passenger's side or the map pocket of the door on the driver's side?
>
> You could at least make an argument that if it was in the middle, they had equal access to it but we don't know.
>
> * * *
>
> From the start I told you you aren't getting the full story and you don't have it today.

N.T., 2/7/13, at 83-85.

In response, the prosecutor made the following statements in her closing:

> [Prosecutor]: [Defense counsel] wants to say, how come we don't hear from that guy? Well, think about that for a second. Think about what he's saying. How come we don't hear from the guy who is the codefendant in a robbery? How come that guy

doesn't want to come to the District Attorney's office and say, Hi. I committed a crime with this defendant. I also robbed two people in the parking lot. And I would like to testify in that case and admit to that under oath and testify against my codefendant?

Is that what he is saying is suppose[d to] happen here? Does that make any sense to you? Do you think that's ever going to happen? Terrance Wongas, the passenger in that car, if he is the codefendant, I don't know if he is. Neither do you. Maybe he is and he's not. But if he is and he didn't get identified and they let him go and they didn't let go of [Appellant] here because he was identified --

[Defense Counsel]: Judge, none of this is on the record, respectfully.

The Court: Counsel, it's a reasonable inference[] from the argument you made.

You may proceed.

[Prosecutor]: Thank you.

Terrance Wongas, if he is the other person, is never going to come back and admit to that, ever. Why would he? Why would he? He wants you to think that that's the witness that [the] Commonwealth is suppose[d] to present? That is ridiculous.

But again, what do we have … in addition to both Eframe and Paulos identifying this as the gun that was used in the robbery. Eframe said it looked similar. I say, how is it similar? He said, the same size and the same shape. Paulos, exactly the same gun, he said.

They both identified this and we found this. We recovered this. And you heard where this was recovered from. In his car. It was in his car. Eight identifications and the weapon in his car. . . .

> Just to be clear, it is a lighter. . . . People don't buy this to use as a lighter. People don't possess this to use as a lighter.

N.T., 2/7/13, at 114-117.

In addressing this issue, the trial court stated:

> The defendant challenges the prosecutor's comment wherein she references Terrance Wongas, the passenger in the vehicle when the defendant was stopped, and suggests the possibility that Wongas was the defendant's co-conspirator in the robberies. N.T. 2.7.2013 at 115-116. The prosecutor's comments were a fair response to the defense attorney's closing argument in which he raised questions about the mysterious passenger in the car with the defendant when he was arrested. N.T. 2.7.2013 at 83. The prosecutor's statements were also reasonable inferences based on the record. Evidence was introduced that Wongas was riding in the vehicle with the defendant when they were stopped by police. Further, Wongas generally fit the description of the defendant's co-conspirator. N.T. 2.6.2013 at 194.

Trial Court Opinion, 11/13/13, at 20.

"[W]hile a closing argument must be based upon evidence in the record or reasonable inferences therefrom, a prosecutor is permitted to respond to defense evidence and engage in oratorical flair." ***Commonwealth v. Culver***, 51 A.3d 866, 878 (Pa. Super. 2012) (internal citations omitted). In fact, this Court has stated:

> The Commonwealth is entitled to comment during closing arguments on matters that might otherwise be objectionable or even outright misconduct, where such comments constitute fair response to matters raised by the defense, or where they are merely responsive to actual evidence admitted during a trial.

Id., 51 A.3d at 876.

The prosecutor's comments were made in response to the reference made by defense counsel to the role that Terrance Wongas played in the crime and the discovery of the "gun" in the vehicle operated by Appellant.[2] As such, we conclude that the trial court did not err in overruling the objection made by defense counsel. Thus, Appellant's claim fails.

In his final claim, Appellant argues that the trial court erred by denying his motion to suppress physical evidence obtained pursuant to execution of the search warrant, specifically the gun-lighter, because the search was the product of an illegal arrest. Appellant's Brief at 41. Appellant further maintains that: "While the police had the right to conduct an investigative detention of appellant because he fit the description of a robbery suspect, they did not have the right to arrest him because they did not have probable cause to do so at the moment of arrest." ***Id.*** at 42. Appellant contends that while the search of the vehicle was conducted with a warrant, had police not illegally arrested Appellant and obtained photo identifications of him, police never would have obtained sufficient evidence to establish the probable cause necessary for the issuance of a warrant. ***Id.*** at 47-48.

[2] We find unpersuasive Appellant's argument that the prosecutor misstated the facts when she referred to the car as belonging to Appellant. Simply because the vehicle was registered in Appellant's wife's name does not preclude the conclusion that Appellant had access to it and was operating the vehicle at the time the crime was committed. It has no legal impact on the outcome of this case.

We review the trial court's decision according to the following standard:

> Our standard of review of a denial of suppression is whether the record supports the trial court's factual findings and whether the legal conclusions drawn therefrom are free from error. Our scope of review is limited; we may consider only the evidence of the prosecution 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 record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. McRae, 5 A.3d 425, 429 (Pa. Super. 2010).

In ***Commonwealth v. Jones***, 988 A.2d 649 (Pa. 2010), our Supreme Court addressed the requirements for a valid search warrant:

> Article I, Section 8 and the Fourth Amendment each require that search warrants be supported by probable cause. "The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause." ***Commonwealth v. Edmunds***, 526 Pa. 374, 586 A.2d 887, 899 (1991) (quoting ***Commonwealth v. Miller***, 513 Pa. 118, 518 A.2d 1187, 1191 (1986)). "Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." ***Commonwealth v. Thomas***, 448 Pa. 42, 292 A.2d 352, 357 (1972).
>
> In ***Illinois v. Gates***, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court established the "totality of the circumstances" test for determining whether a request for a search warrant under the Fourth Amendment is supported by probable cause. In ***Commonwealth v. Gray***, 509 Pa. 476, 503 A.2d 921 (1986), this Court adopted the totality of the circumstances test for

purposes of making and reviewing probable cause determinations under Article I, Section 8. In describing this test, we stated:

> Pursuant to the "totality of the circumstances" test set forth by the United States Supreme Court in ***Gates***, the task of an issuing authority is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.... It is the duty of a court reviewing an issuing authority's probable cause determination to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In so doing, the reviewing court must accord deference to the issuing authority's probable cause determination, and must view the information offered to establish probable cause in a common-sense, non-technical manner.
>
> * * *
>
> [Further,] a reviewing court [is] not to conduct a *de novo* review of the issuing authority's probable cause determination, but [is] simply to determine whether or not there is substantial evidence in the record supporting the decision to issue the warrant.

Commonwealth v. Torres, 564 Pa. 86, 764 A.2d 532, 537–38, 540 (2001).

Id., at 655. "In determining whether a search warrant is supported by probable cause, appellate review is confined to the four corners of the affidavit." ***Commonwealth v. Galvin***, 985 A.2d 783, 796 (Pa. 2009).

In the case before us, the affidavit of probable cause in support of the search warrant provides as follows:

> Between 12/6/08 and 2/6/09, 17 gunpoint robberies of parking lots and garages have occurred in the center city area committed by two black males, #1: approximately 6', 180 lbs, late 20's to early 30's, white hoody and #2: approximately 5'6, 150 lbls, late 20's early 30's, missing or gap in teeth, gray hoody. All of the robberies were committed at point of silver handgun. In addition, surveillance videos from the robberies showed two vehicles being used in the commission of these incidents; a silver/gray Dodge Durango and a white Chrysler sedan.
>
> On 2/11/09 at approximately 6:20pm, 9th District police spotted a silver Dodge Durango occupied by two black males operating south bound at 700 N. 15th St. Officers stopped the vehicle at 500 N. 15th St. and conducted a vehicle investigation. Officers observed inside the rear seat area was a white hoody, a gray hoody and bandanas. Upon further investigation, one of the males fit the description of the #2 male including the gap in the front teeth and the male passenger fit the description that was given for #1 male. The males' features are consistent with the males' in the video photos.
>
> A check of BMV shows the Dodge Durango, PA#GYF-3276 is registered to Khei TERRY 5316 Horrocks St. A check of bmv shows that a second vehicle, a Chrysler sedan, white in color, PA#GVK-0969 is also registered to Kheia Terry 5316 Horrocks St. The male #2 gave his address as 5316 Horrock St. Police went to the area of 5316 Horrocks St and spotted the white Chrysler.
>
> The affiant requests warrants to search the Dodge Durango, Chrysler sedan and the residence 5316 Horrocks St to locate proceeds of the crime, weapons, clothing and additional evidence from the 17 robberies.

Commonwealth's Exhibit 13, Probable Cause for Search and Seizure Warrant #140911, 2/11/09, at 1.[3]

Reviewing the affidavit on its four corners, we conclude that the issuing authority had probable cause to issue the search warrant. The affidavit included a description of the robberies and the suspects and outlined specific factors supporting a finding of probable cause that Appellant was involved in those robberies. Considering the totality of circumstances, the information provided in the affidavit would permit the issuing authority "to make a practical, common-sense decision" that there is a fair probability that contraband or evidence of a crime will be found in the places sought to be searched. ***Jones***, 988 A.2d at 655.

Going beyond the four corners of the affidavit, however, Appellant argues that had police not illegally arrested Appellant and obtained photo identifications of him, police never would have obtained sufficient evidence to establish the probable cause necessary for the issuance of a warrant. Appellant's Brief at 47. For the reasons outlined below, we conclude that Appellant's claim that an illegal arrest occurred, which required that evidence obtained pursuant to execution of the search warrant be suppressed, lacks merit.

[3] The affidavit reflects various inconsistencies in the spelling of relevant proper nouns.

The information used in the affidavit of probable cause was obtained as a result of the flash information issued by the police department and from the resulting investigatory stop of Appellant's vehicle. Officer Guerico testified at the suppression hearing that officers in his department were provided with an information bulletin consisting of approximately nine pages that outlined the robberies that had taken place, the location of the robberies, descriptions of the suspects, descriptions of the vehicles used, and photographs. N.T., 11/3/11, at 11-17. Officer Guerico testified that he received this information prior to observing Appellant's vehicle on February 11, 2009. ***Id.*** at 8, 11. Based on the flash, Officer Guerico testified that he stopped other silver or gray Dodge Durangos for purposes of an investigatory stop. ***Id.*** at 37. On the date in question, Officer Guerico and his partner stopped Appellant's vehicle, a silver Dodge Durango, on the basis of the flash information. ***Id.*** at 17-19.

"[A] police officer may stop a vehicle if he or she has reasonable suspicion to believe that the occupants were involved in criminal activity. ***Commonwealth v. Sands***, 887 A.2d 261, 269 (Pa. Super. 2005). Our Supreme Court described "reasonable suspicion" as follows:

> A police officer may detain an individual in order to conduct an investigation if that officer reasonably suspects that the individual is engaging in criminal conduct. This standard, less stringent than probable cause, is commonly known as reasonable suspicion. In order to determine whether the police officer had reasonable suspicion, the totality of the

> circumstances must be considered. In making this determination, we must give "due weight . . . to the specific reasonable inferences [the police officer] is entitled to draw from the facts in light of his experience." Also, the totality of the circumstances test does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

Commonwealth v. Rogers, 849 A.2d 1185, 1189 (Pa. 2004) (internal citations omitted).

Based on the flash information that Officer Guerico received, he had reasonable suspicion justifying the stop of Appellant's vehicle. Interestingly, Appellant concedes that the officers had justification for an investigative detention of Appellant because he met the description of the suspect in the flash. Appellant's Brief at 42. Thus, we conclude that the initial stop of Appellant was valid.

Officer Guerico further testified that upon approaching the vehicle, it became apparent that the passengers closely matched the description of the suspects in the bulletin. N.T., 11/3/11, at 20-21. Officer Guerico stated the fact that the driver had a gap in his front teeth caught his attention because that characteristic was specifically outlined in the description of one of the suspects in the bulletin. ***Id.*** at 21. Furthermore, Officer Guerico testified to observing various articles of clothing in the back seat of the vehicle that raised his level of suspicion. ***Id.*** at 49-52. Because the initial stop was

lawful, these factors were properly relied upon in developing the affidavit of probable cause for the search warrant.

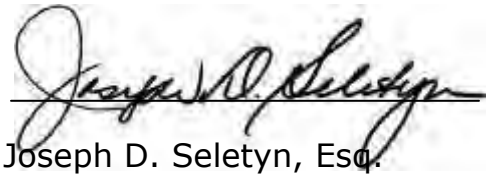
Appellant, however, maintains that his alleged unlawful subsequent custodial detention served as the basis of the affidavit and resulted in recovery of evidence that was fruit of the poisonous tree. It appears from testimony during the suppression hearing that after Officers approached the vehicle, the two passengers were placed in police vehicles and taken to the police station for further questioning. Appellant maintains such action was, in fact, an unlawful arrest and required suppression of any evidence obtained as a result of executing the search warrant.

Whether Appellant's subsequent custodial detention was unlawful is irrelevant to the determination of whether the search warrant was supported by probable cause. As noted, the information constituting probable cause and serving as the basis for the search warrant was obtained through the information bulletin and the lawful investigatory stop of Appellant. Thus, we need not, and indeed cannot, consider whether the subsequent custodial detention was lawful. Furthermore, contrary to Appellant's argument, the police did not use the photo identification of Appellant, allegedly obtained as a result of an illegal arrest, as the basis for the affidavit of probable cause. As noted, information obtained from the lawful investigative stop served as the basis for the affidavit of probable cause. As a result, we conclude that

Appellant's claim that the evidence obtained pursuant to the execution of the search warrant should be suppressed lacks merit.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014