

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LAMAR DOUGLAS CLARK	:	
	:	
Appellant	:	No. 1289 MDA 2016

Appeal from the Judgment of Sentence July 7, 2016
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0005760-2014

BEFORE: GANTMAN, P.J., SHOGAN, J., and STRASSBURGER, J.*

MEMORANDUM BY GANTMAN, P.J.: **FILED APRIL 25, 2017**

Appellant, Lamar Douglas Clark, appeals from the judgment of sentence entered in the Lancaster County Court of Common Pleas, following his jury trial convictions of one count each of third-degree murder and firearms not to be carried without a license, two counts of aggravated assault, and eleven counts of recklessly endangering another person.¹ We affirm.

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

Appellant raises the following issues for our review:

¹ 18 Pa.C.S.A. §§ 2502(c), 6106(a)(1), 2702(a)(1), and 2705, respectively.

*Retired Senior Judge assigned to the Superior Court.

DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT THE JURY VERDICT OF GUILTY TO COUNT 5, AGGRAVATED ASSAULT, WHEN THE COMMONWEALTH DID NOT ESTABLISH THAT [APPELLANT] HAD THE SPECIFIC INTENT TO ATTEMPT TO CAUSE SERIOUS BODILY INJURY TO CYNTHIA BOOTS AND CYNTHIA BOOTS DID NOT SUFFER SERIOUS BODILY INJURY[?]

DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION IN OVERRULING [APPELLANT'S] REQUESTED PENNSYLVANIA SUGGESTED STANDARD JURY INSTRUCTION 9.501 THAT INCLUDED THE LANGUAGE "OR SUBJECT TO THE FELONIOUS ACT OF ROBBERY" WHEN THIS WAS PART OF [APPELLANT'S] THEORY OF THE CASE AND WAS SUPPORTED BY EVIDENCE PRESENTED[?]

DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION IN REFUSING TO GRANT A MISTRIAL AND/OR CURATIVE INSTRUCTION DUE TO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT IN THE FORM OF PERSONAL OPINION, BOLSTERING THE CREDIBILITY OF COMMONWEALTH WITNESSES, MAKING ARGUMENT OF EVIDENCE NOT IN THE RECORD, AND SHIFTING THE BURDEN OF PROOF TO [APPELLANT?]

(Appellant's Brief at 7).

A challenge to the sufficiency of the evidence implicates the following legal principles:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder 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. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Jones, 874 A.2d 108, 120-21 (Pa.Super. 2005) (quoting **Commonwealth v. Bullick**, 830 A.2d 998, 1000 (Pa.Super. 2003)).

“[O]ur standard of review when considering the denial of jury instructions is one of deference—an appellate court will reverse a court’s decision only when it abused its discretion or committed an error of law.”

Commonwealth v. Baker, 24 A.3d 1006, 1022 (Pa.Super. 2011), *aff’d*, 621 Pa. 401, 78 A.3d 1044 (2013) (quoting **Commonwealth v. Galvin**, 603 Pa. 625, 651, 985 A.2d 783, 798-99 (2009), *cert. denied*, 559 U.S. 1051, 130 S.Ct. 2345, 176 L.Ed.2d 565 (2010)). “The trial court has broad discretion in formulating jury instructions, as long as the law is presented to the jury in a clear, adequate, and accurate manner.” **Commonwealth v. Lukowich**, 875 A.2d 1169, 1174 (Pa.Super. 2005), *appeal denied*, 584 Pa. 706, 885 A.2d 41 (2005).

[A] trial court is not obligated to instruct a jury upon legal principles which have no applicability to the presented facts. There must be some relationship between the law upon which an instruction is requested and the evidence

presented at trial. However, a defendant is entitled to an instruction on any recognized defense which has been requested, which has been made an issue in the case, and for which there exists evidence sufficient for a reasonable jury to find in his or her favor.

Commonwealth v. Bohonyi, 900 A.2d 877, 883 (Pa.Super. 2006), *appeal denied*, 591 Pa. 679, 917 A.2d 312 (2007) (citation omitted)

Similarly, “review of a trial court’s denial of a motion for mistrial is limited to determining whether the trial court abused its discretion.”

Commonwealth v. Brooker, 103 A.3d 325, 332 (Pa.Super. 2014), *appeal denied*, 632 Pa. 679, 118 A.3d 1107 (2015). “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.” ***Id.***

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable James P. Cullen, we conclude Appellant’s issues on appeal merit no relief. The trial court opinion comprehensively discusses and properly disposes of the questions presented. (**See** Trial Court Opinion, filed October 3, 2016, at 4-16) (finding: **(1)** both Commonwealth witness, Veldresha Lucas, and defense witness, Joshua Welsh, testified that Appellant pointed gun at Joshwin Gonzalez prior to firing several shots; this testimony was sufficient to establish Appellant’s intent to cause serious bodily injury to Mr. Gonzalez,

which transferred to Cynthia Boots when she was struck by bullet; even without consideration of doctrine of transferred intent, Appellant acted recklessly under circumstances manifesting extreme indifference to value of human life when he fired gun into crowded barroom; additionally, Ms. Boots suffered serious bodily injury because gunshot to her chest resulted in blood loss, possibility of infection, scarring, and ongoing pain; under these circumstances, jury properly convicted Appellant of aggravated assault of Ms. Boots; **(2)** Appellant asked court to include, in jury instruction on justification, reference to Appellant's reasonable belief he was subject to felonious act of robbery; nevertheless, defense reference to Dennis Ishman and Mr. Gonzalez "setting up" Appellant was too vague and speculative to warrant inclusion of requested robbery language; thus, court properly declined to include reference to robbery in jury instruction on justification; **(3)** with respect to prosecutor's reference to Commonwealth's duty to provide all evidence to defense and statement that defense worked backwards from Commonwealth's evidence, these comments did not constitute improper testimony by prosecutor or inappropriately shift burden of proof to defense; prosecutor stated multiple times during closing argument that Commonwealth had burden of proof at trial; additionally, prosecutor's remarks were responsive to comments made by defense counsel about the omission of certain evidence at trial; statement in question was merely part of longer argument on credibility of defense

witnesses and did not constitute prosecutorial misconduct; with respect to prosecutor's comments on Commonwealth's duty to disclose deals made with witnesses, prosecutor's remarks simply demonstrated that Commonwealth would have disclosed any promise made to Ms. Lucas in exchange for her testimony; comment was also directly responsive to defense counsel's comments about Ms. Lucas' pending charges and possible benefits she might gain as Commonwealth witness; further, aspects of prosecutor's statement were mere oratorical flourish and did not improperly bolster Ms. Lucas' credibility; under these circumstances, prosecutor's reference to lack of deal with Ms. Lucas' did not constitute prosecutorial misconduct; with respect to prosecutor's comments about defense counsel's ability to call witnesses and present evidence, Appellant waived any challenge to this statement for failure to raise issue in his objection to closing arguments at trial; finally, with respect to prosecutor's comments on testimony of defense witness, Mr. Welsh, prosecutor's statements were basic oratorical flair used during closing arguments; further, prosecutor's remarks were similar in style to comments made by defense counsel about credibility of Commonwealth witnesses; comments were within latitude given to prosecutor in closing arguments and were manifestation of prosecutor's right to respond to points raised by defense counsel; moreover, court instructed jury to disregard any opinions voiced on credibility of witnesses; under these circumstances, prosecutor's comments on testimony of Mr. Welsh did not

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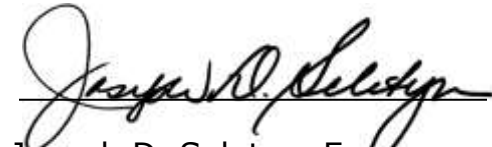
constitute prosecutorial misconduct; therefore, court properly denied Appellant's request for mistrial). Accordingly, we affirm on the basis of the trial court opinion.

Judgment of sentence affirmed.

Judge Shogan joins this memorandum.

Judge Strassburger files a concurring memorandum.

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: 4/25/2017