

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MARK KESSLER	:	
	:	
Appellant	:	No. 998 MDA 2018

Appeal from the Judgment of Sentence Entered May 17, 2018
In the Court of Common Pleas of Schuylkill County
Criminal Division at No(s): CP-54-CR-0001385-2017

BEFORE: GANTMAN, P.J.E., McLAUGHLIN, J., and FORD ELLIOTT, P.J.E.

MEMORANDUM BY GANTMAN, P.J.E.: **FILED OCTOBER 01, 2019**

Appellant, Mark Kessler, appeals from the judgment of sentence entered in the Schuylkill County Court of Common Pleas, following his jury trial convictions for the sale or transfer of firearms—materially false written statement during a firearm purchase, and unsworn falsification to authorities.¹ We affirm.

The relevant facts and procedural history of this appeal are as follows. On December 8, 2015, an officer from the Frackville Borough Police Department filed a criminal complaint against Appellant accusing him of, *inter alia*, terroristic threats. The court held a preliminary arraignment in January 2016, and a preliminary hearing in March 2016. The Commonwealth filed a

¹ 18 Pa.C.S.A. §§ 6111(g)(4)(ii) and 4904(b), respectively.

formal information charging Appellant with the offenses on March 10, 2016. Terroristic threats, a first-degree misdemeanor, carries a potential maximum penalty of five years' imprisonment.

While this charge was pending, Appellant visited Dunham's Sporting Goods in Frackville, Pennsylvania on May 5, 2016, to purchase a handgun. Appellant, a retired chief of police who had purchased between forty and fifty guns throughout his life in both his personal and professional capacities, found the firearm he wanted to purchase and filled out the required paperwork. In completing the "ATF-4473 Firearms Transaction Record" form, Appellant answered "no" to question 11.b, which asked, "Are you under indictment or information in any court for a felony or any other crime for which the judge could imprison you for more than one year?" (N.T. Trial, 4/4/18, at 94.) Appellant also completed a Pennsylvania State Police "Application/Record of Sale" form, and similarly answered "no" to question 32, which asked, "Are you now charged with or have you ever been convicted of a crime punishable by imprisonment for a term exceeding one year?" (*Id.* at 100.) Both forms contained clear warnings that anyone falsifying information on the forms is subject to criminal penalties. The Dunham's store clerk ran Appellant's information through the Pennsylvania Instant Check System ("PICS"), which performs an immediate search to see if a customer is eligible to purchase a firearm. The PICS report returned with a denial of Appellant's application, and the store clerk informed Appellant. Appellant made no inquiry into the reason

for the denial and left the store.

On July 31, 2017, the Commonwealth charged Appellant with knowingly and intentionally making materially false written statements when completing his application to purchase a firearm on May 5, 2016. A jury trial commenced on April 4, 2018. At trial, defense counsel questioned Appellant about his criminal history, and Appellant denied having any prior convictions. The following exchange took place on Appellant's direct-examination:

Defense Counsel: ...Did you have any convictions at all?

Appellant: No.

* * *

Defense Counsel: You've never been convicted of a crime in your entire life, have you?

Appellant: No, I have not.

Defense Counsel: Even to today?

Appellant: Correct.

(*Id.* at 184-85.) On cross-examination, however, the Deputy Attorney General ("Deputy AG")² questioned Appellant regarding a retail theft he had allegedly pled guilty to in 1989:

Deputy AG: Okay. Finally, you indicated on direct-examination that you've never been convicted of a crime, right?

Appellant: No criminal offenses.

² Due to the conflict of interest stemming from Appellant's former occupation as chief of police, the Attorney General's office prosecuted the instant case.

Deputy AG: You didn't plead guilty to a retail theft
back in 1989?

Appellant: I don't recall that. '89, I was 17 years
old.

Deputy AG: Yes, as a juvenile out of New Castle.

Appellant: I don't recall.

(*Id.* at 207.) Defense counsel objected to this line of questioning, and argued the Deputy AG was "attempting to bring back a juvenile record when [Appellant] was 17...." (*Id.*) The Deputy AG, however, responded that this line of questioning was appropriate because defense counsel had "opened up the door" by asking Appellant if he had any prior criminal convictions. (*Id.*)

The court held a brief sidebar, where defense counsel requested a mistrial based on the Deputy AG's cross-examination of Appellant. The court denied defense counsel's motion for a mistrial, but it granted defense counsel's request for a curative instruction. Following the sidebar, the court instructed the jury as follows:

All right. Members of the jury, we'll continue with [the Deputy AG's] right to cross-examine [Appellant] here. That last question about any prior arrests and question that was put to [Appellant] with regards to a juvenile matter, that is not relevant...nor should you consider that in any way. Ignore that and exclude it from your deliberations. That has nothing to do with this case at all....

(*Id.* at 215-16.) Ultimately, the jury convicted Appellant of the offenses related to his false statements on the application to purchase a firearm.

The court sentenced Appellant on May 17, 2018, to an aggregate

twenty-four (24) months' probation. Appellant timely filed a notice of appeal on June 14, 2018. On June 15, 2018, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b); Appellant complied on July 5, 2018.

Appellant raises the following issues for our review:

WHETHER THE TRIAL COURT ERRED AND/OR COMMITTED AN ABUSE OF DISCRETION AND/OR DEPRIVED [APPELLANT] OF HIS RIGHT TO DUE PROCESS AND/OR A FAIR TRIAL BY DENYING [APPELLANT'S] MOTION FOR A MISTRIAL AFTER THE DEPUTY ATTORNEY GENERAL INTENTIONALLY AND IMPROPERLY ASKED A HIGHLY PREJUDICIAL, IMPROPER AND INFLAMMATORY QUESTION REGARDING [APPELLANT'S] ALLEGED PRIOR JUVENILE SUMMARY [ADJUDICATION] IN FRONT OF THE JURY.

WHETHER [APPELLANT] WAS DENIED A FAIR TRIAL BY THE PROSECUTORIAL MISCONDUCT OF THE DEPUTY ATTORNEY GENERAL, WHO INTENTIONALLY AND IMPROPERLY ASKED A HIGHLY PREJUDICIAL, IMPROPER AND INFLAMMATORY QUESTION REGARDING [APPELLANT'S] PRIOR JUVENILE SUMMARY [ADJUDICATION] IN FRONT OF THE JURY, VIOLATING [APPELLANT'S] DUE PROCESS RIGHTS TO A FAIR TRIAL, THEREBY WARRANTING A NEW TRIAL AND/OR A COMPLETE BARRING OF ANY RETRIAL.

(Appellant's Brief at 8).

Appellant argues the Deputy AG's questions concerning Appellant's alleged juvenile record were unduly prejudicial because the questions implied he had lied to the jury about his lack of a prior criminal conviction. Appellant avers the trial court's curative instruction was insufficient to overcome this prejudice and, as a result, Appellant was denied his due process right to a fair trial. Appellant alleges the prejudicial nature of these questions was so

overwhelming that a new trial was warranted. Appellant maintains the trial court abused its discretion in denying Appellant's motion for a mistrial.

Appellant further asserts the Deputy AG committed prosecutorial misconduct by engaging in a line of questioning that had no other purpose than to prejudice Appellant improperly. Appellant emphasizes the Deputy AG intentionally violated Rule 609 of the Pennsylvania Rules of Evidence by failing to produce any credible evidence of Appellant's alleged juvenile record. Appellant claims the Deputy AG only provided an anonymous handwritten note, which Appellant could not verify as accurate or authentic. In contrast, Appellant maintains the official Pennsylvania State Police Criminal Record Check made no mention of a prior criminal conviction. Appellant further stresses the Deputy AG failed to provide sufficient advance written notice of his intent to utilize the juvenile record at trial. Appellant concludes this Court must vacate the judgment of sentence and remand for a new trial or, in the alternative, declare that the Deputy AG committed prosecutorial misconduct, dismiss the charges, and bar a retrial of Appellant. We cannot agree.

Appellate review of the denial of a motion for mistrial implicates the following:

A motion for mistrial is within the discretion of the trial court. A mistrial upon motion of one of the parties is required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial trial. It is within the trial court's discretion to determine whether a defendant was prejudiced by the incident that is the basis of a motion for mistrial. On appeal, our standard of review is whether the trial court abused that

discretion.

An abuse of discretion is more than an error in judgment. On appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised by the trial court was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

Commonwealth v. Tejada, 834 A.2d 619, 623 (Pa.Super. 2003) (internal citations and quotation marks omitted). ***See also Commonwealth v. Melendez-Rodriguez***, 856 A.2d 1278, 1288 (Pa.Super. 2004) (*en banc*).

Similarly, “[o]ur standard of review for a claim of prosecutorial misconduct is limited to whether the trial court abused its discretion.”

Commonwealth v. Bedford, 50 A.3d 707, 715 (Pa.Super. 2012), *appeal denied*, 618 Pa. 680, 57 A.3d 65 (2012).

The Pennsylvania Supreme Court has stated that “[t]he essence of a finding of prosecutorial misconduct is that the prosecutor, a person who holds a unique position of trust in our society, has abused that trust in order to prejudice and deliberately mislead [the factfinder].” ... Prosecutorial misconduct will justify a new trial where the unavoidable effect of the conduct or language was to prejudice the factfinder to the extent that the factfinder was rendered incapable of fairly weighing the evidence and entering an objective verdict. If the prosecutorial misconduct contributed to the verdict, it will be deemed prejudicial and a new trial will be required.

Commonwealth v. Melvin, 103 A.3d 1, 26 (Pa.Super. 2014) (internal citations omitted) (edits in original).

In addition, “[q]uestions concerning the admissibility of evidence lie within the sound discretion of the trial court, and a reviewing court will not reverse the court’s decision on such a question absent a clear abuse of

discretion.” ***Commonwealth v. Hyland***, 875 A.2d 1175, 1185-86 (Pa.Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005) (internal citations omitted). Generally, evidence of a defendant’s prior record is admissible if submitted to attack the defendant’s credibility **and** the past crime involves dishonesty or false statements (*crimen falsi*). Pa.R.E. 609(a). Under limited circumstances, however, a trial court may admit evidence of a defendant’s non-*crimen falsi* prior record to impeach the credibility of a defendant testifying on his own behalf. ***Commonwealth v. Hernandez***, 862 A.2d 647 (Pa.Super. 2004), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005). The relevant statute provides:

§ 5918. Examination of defendant as to other offenses

No person charged with any crime and called as a witness in his own behalf, shall be asked, or if asked, shall be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation **unless**:

(1) he shall have at such trial, personally or by counsel, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or

(2) he shall have testified at such trial against a codefendant, charged with the same offense.

42 Pa.C.S.A. § 5918 (emphasis added). Section 5918 “allows the prosecution to cross-examine a defendant concerning his past convictions to ‘repudiate

specific evidence of good character' offered by that defendant." **Hernandez, supra** (citing **Commonwealth v. Trignani**, 483 A.2d 862 (Pa.Super. 1984) (holding Commonwealth's question regarding defendant's prior conviction for aggravated robbery was permissible under 42 Pa.C.S.A. § 5918, where on cross-examination defendant voluntarily answered that he "never shot anybody in his life"))).

Likewise, "the Commonwealth may impeach a defendant's credibility with reference to prior crimes where the defense opens the door." **Commonwealth v. Hood**, 872 A.2d 175, 185 (Pa.Super. 2005), *appeal denied*, 585 Pa. 695, 889 A.2d 88 (2005) (citing **Commonwealth v. Days**, 784 A.2d 817, 821 (Pa.Super. 2001) (stating defendant is not insulated from being discredited about factual accuracy simply because proof involves other crimes)). **See also Commonwealth v. Pattakos**, 754 A.2d 679 (Pa.Super. 2000), *appeal denied*, 564 Pa. 695, 764 A.2d 49 (2000) (holding evidence of prior drug activity was admissible to explain relationship between parties); **Commonwealth v. Bey**, 439 A.2d 1175, 1178 (1982) (holding where defendant opens door to what otherwise might be objectionable testimony, Commonwealth may probe further to determine veracity of statement).

One who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of that opening. The phrase "opening the door"...by cross examination involves a waiver. If defendant delves into what would be objectionable testimony on the part of the Commonwealth, then the Commonwealth can probe further into the objectionable area.

Commonwealth v. Lewis, 885 A.2d 51, 54-55 (Pa.Super. 2005), *appeal denied*, 588 Pa. 777, 906 A.2d 540 (2006) (quoting **Commonwealth v. Stakley**, 365 A.2d 1298, 1299-1300 (Pa.Super. 1976)). With respect to the use of a juvenile record, the Commonwealth must produce clear proof that the prior record is authentic and accurate and that the present defendant is the same person referred to in the prior record. **Commonwealth v. Johnson**, 396 A.2d 726 (Pa.Super. 1978). **See also Commonwealth v. Boyd**, 463 Pa. 343, 344 A.2d 864 (1975); **Commonwealth v. King**, 455 Pa. 363, 316 A.2d 878 (1974).

Nevertheless, "A trial court may grant a mistrial only where the incident upon which the motion is based is of such 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." **Commonwealth v. Fletcher**, 41 A.3d 892, 894 (Pa.Super. 2012), *appeal denied*, 618 Pa. 683, 57 A.3d 67 (2012). "[A] mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice." **Id.** at 894-95. "'Unfair prejudice' means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." **Commonwealth v. Dillon**, 592 Pa. 351, 366, 925 A.2d 131, 141 (2007). "[W]hether the exposure of the jury to improper evidence can be cured by an instruction depends upon a consideration of all the circumstances." **Commonwealth v. Morris**, 513 Pa. 169, 177, 519 A.2d 374, 377 (1986).

Significantly, “juries are presumed to follow the instructions of a trial court to disregard inadmissible evidence.” ***Commonwealth v. Simpson***, 562 Pa. 255, 272, 754 A.2d 1264, 1272 (2000), *cert. denied*, 533 U.S. 932, 121 S.Ct. 2556, 150 L.Ed.2d 722 (2001); ***Commonwealth v. Lopez***, 57 A.3d 74, 84 (Pa.Super. 2012), *appeal denied*, 619 Pa. 678, 62 A.3d 379 (2013).

Instantly, the Commonwealth charged Appellant with several offenses, including terroristic threats, on March 10, 2016. Terroristic threats is a first-degree misdemeanor that carries a potential maximum penalty of five years’ imprisonment. While this charge was pending, Appellant tried to purchase a firearm at Dunham’s Sporting Goods on May 5, 2016. Appellant completed two forms to purchase the firearm and denied on the forms that he was under indictment or information in any court for a felony or any other crime for which the judge could imprison him for more than one year. Both forms contained clear warnings that falsifying information on the forms is a criminal offense. After the store clerk ran the information through PICS, Appellant’s application to purchase the firearm was denied.

On July 31, 2017, the Commonwealth charged Appellant with knowingly and intentionally making materially false written statements when completing an application to purchase a firearm on May 5, 2016. A jury trial commenced on April 4, 2018. Defense counsel questioned Appellant about his criminal history, and Appellant denied having any prior convictions. On cross-examination, however, the Deputy AG questioned Appellant about a retail

theft he allegedly pled guilty to as a juvenile in 1989. Appellant denied any memory of that offense. Defense counsel objected to this line of questioning, and argued the Deputy AG could not utilize a thirty-year-old juvenile record to impeach Appellant. During the subsequent sidebar, defense counsel further objected to the Deputy AG's reliance on a handwritten note from the District Attorney's office as the sole source of information regarding Appellant's alleged juvenile record.

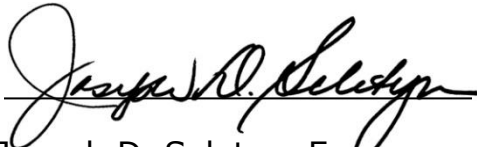
Here, defense counsel "opened the door" to questions concerning Appellant's criminal record by offering Appellant's testimony denying any prior convictions. **See** 42 Pa.C.S.A. § 5918; **Hood, supra**. The Deputy AG was then free to cross-examine Appellant about his juvenile record. **See Hernandez, supra; Trignani, supra**. Following defense counsel's timely objection to the use of the handwritten note, however, the Deputy AG failed to authenticate Appellant's prior record and show Appellant was the same person who was referenced in the juvenile record. **See Boyd, supra; King, supra; Johnson, supra**. The Deputy AG could not simply rely on the handwritten note to show the authenticity of Appellant's juvenile record. **See id.** Counsel timely objected on that ground, and the court issued a curative instruction, directing the jury to ignore completely any questions put to Appellant concerning prior arrests or juvenile matter. We can presume the jury followed the court's instruction to disregard those questions and exclude them from deliberations. **See Simpson, supra; Lopez, supra**. Thus, a

mistrial was unnecessary. **See Fletcher, supra.**

Further, the evidence at trial demonstrated Appellant had made materially false statements on the forms required to purchase a firearm while he knew he was under indictment or information for terroristic threats, a crime punishable by more than one year of imprisonment. **See** 18 Pa.C.S.A. §§ 6111(g)(4)(ii) and 4904(b). Nothing in the record suggests the jury reached its decision on an improper basis or failed to weigh the evidence impartially. **See Dillon, supra; Morris, supra.** Absent more, we are confident the jury verdict was sound. Therefore, the court properly denied Appellant's motion for a mistrial. **See Tejada, supra.** Accordingly, we affirm.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/01/2019