NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. LEVON TERRELL T. WARNER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 247 EDA 2011

Appeal from the Judgment of Sentence August 17, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0005973-2008;
CP-51-CR-0005975-2008

BEFORE: GANTMAN, J., DONOHUE, J., and PLATT, J.*

MEMORANDUM BY GANTMAN, J.: Filed: January 14, 2013

Appellant, Levon Terrell T. Warner, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial convictions for three (3) counts of robbery, two (2) counts of conspiracy, and one (1) count each of first degree murder, possessing an instrument of crime ("PIC"), and prohibited offensive weapons.[1] We affirm.

The relevant facts and procedural history of this appeal are as follows. In the spring of 2008, co-conspirator Howard Cain developed a plan to rob a Bank of America branch located inside a Philadelphia supermarket. Mr. Cain

[1] 18 Pa.C.S.A. §§ 3701, 903, 2502(a), 907, 908, respectively.

*Retired Senior Judge assigned to the Superior Court.

recruited several individuals to carry out the plan, which began with a series of separate robberies to obtain weapons and a getaway vehicle. Appellant, however, did not participate in these preliminary robberies. On the morning of May 3, 2008, Appellant and Mr. Cain met with co-defendant Eric Floyd to consummate the bank robbery. Prior to departing for the bank, Mr. Floyd and Mr. Cain disguised themselves in burqas. Appellant wore a wig, glasses, and a dust mask to obscure his face. Mr. Floyd drove the men to the supermarket in a stolen Jeep. Upon arriving at the supermarket parking lot, Mr. Floyd parked the vehicle, picked out a shopping cart, and placed a box inside the cart. The box contained a stolen SKS assault rifle. When the co-conspirators entered the supermarket, Mr. Floyd stood with the shopping cart near the door to the bank.

With Mr. Floyd serving as a lookout, Mr. Cain and Appellant entered the bank, stood in the back, and watched a bank manager unlock the gate to the teller area. Once the gate was unlocked, Mr. Cain rushed toward the manager, grabbed her, dragged her into the teller area, brandished a handgun, and demanded that the tellers place money into a bag Mr. Cain was carrying. Armed with a handgun, Appellant paced in front of the teller windows as the tellers complied with Mr. Cain's demands. The tellers placed approximately $50,000.00 into Mr. Cain's bag, along with a GPS tracking device. The tracking device activated at 11:27 a.m., when the thieves exited the bank.

After the robbery, Appellant, Mr. Cain, and Mr. Floyd returned to the Jeep. Mr. Floyd served as the getaway driver. Within minutes, calls went out over police radio relaying information about the robbery and the suspects. Philadelphia Police Sergeant Stephen Liczbinski received the call, spotted the getaway car, and commenced a pursuit. During the chase, someone in the Jeep said, "Bang him." At that point, Mr. Cain asked Appellant for the assault rifle, which Appellant handed to him. Mr. Floyd stopped the Jeep, and Mr. Cain exited with the assault rifle. Sergeant Liczbinski stopped his vehicle behind the Jeep, exited, and approached the Jeep. Before Sergeant Liczbinski could draw his service weapon, Mr. Cain opened fire with the assault rifle and killed the sergeant.

After the shooting, Mr. Cain reentered the Jeep; and Mr. Floyd drove to a second getaway vehicle, a minivan, parked nearby. Appellant drove the minivan a short distance before Mr. Cain ordered him to pull over. Appellant pulled over, and the suspects exited and split up. Later that day, Mr. Cain died during a shootout with police. Police subsequently arrested Appellant, and he provided a statement detailing his participation in the robbery. Police did not arrest Mr. Floyd until May 7, 2008, when a tipster led them to the abandoned house where Mr. Floyd was hiding. On May 8, 2008, Mr. Floyd provided an inculpatory statement regarding his own participation in the bank robbery.

At No. 5973 of 2008, the Commonwealth charged Appellant with offenses related to the bank robbery. At No. 5975 of 2008, the Commonwealth charged Appellant with offenses related to the homicide of Sergeant Liczbinski.[2] On September 16, 2008, Appellant filed a severance motion. In it, Appellant claimed the Commonwealth had charged Mr. Floyd with additional offenses, stemming from the May 2, 2008 theft of the Jeep used as the getaway car during the bank robbery. Appellant insisted any evidence that the Commonwealth intended to present against Mr. Floyd for additional offenses would prejudice Appellant. Appellant also argued that he and Mr. Floyd had both made post-arrest statements to the police, and the statements could not be redacted without creating undue prejudice and confusion. Ultimately, the court denied severance.

On April 12, 2010, Appellant filed a motion to suppress the post-arrest statement he provided to police. Appellant asserted that police questioned him without obtaining his consent, providing ***Miranda***[3] warnings, or receiving any type of waiver of Appellant's rights. Under these circumstances, Appellant concluded the court must suppress his involuntary post-arrest statements. The court conducted hearings on the matter on

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[2] The criminal information for No. 5975 of 2008 provided notice of aggravating circumstances in light of the possibility of a death sentence, pursuant to Pa.R.Crim.P. 802.

[3] ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

June 14, 2010 and June 25, 2010. Immediately after the June 25, 2010 hearing, the court denied relief.

Following trial, the jury found Appellant guilty of three (3) counts of robbery and one (1) count of conspiracy at No. 5973 of 2008. At No. 5975 of 2008, the jury found Appellant guilty of one (1) count each of first degree murder, conspiracy, PIC, and prohibited offensive weapons. On August 17, 2010, the jury announced that it could not reach a unanimous decision regarding the imposition of the death penalty. Consequently, the court sentenced Appellant to life imprisonment without parole for the first degree murder conviction. The court also imposed an aggregate sentence of sixty-seven and one-half (67½) to one hundred thirty-five (135) years' imprisonment for the remaining offenses, consecutive to the life term. Appellant timely filed post-sentence motions on August 26, 2010, which the court denied on December 21, 2010.

Appellant timely filed a notice of appeal on January 20, 2011. On January 24, 2011, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on February 10, 2011.

Appellant raises six issues for our review:

> DID THE TRIAL COURT ERR AND VIOLATE APPELLANT'S RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. AND PENNSYLVANIA CONSTITUTIONS WHEN IT FAILED TO GRANT APPELLANT'S MOTION TO SUPPRESS THE STATEMENT MADE TO POLICE BY APPELLANT?

> DID THE TRIAL COURT ERR AND VIOLATE APPELLANT'S RIGHTS UNDER BOTH THE U.S. AND PENNSYLVANIA CONSTITUTIONS WHEN IT DENIED APPELLANT'S REQUEST FOR A SEVERANCE?
>
> DID THE TRIAL COURT ERR AND VIOLATE APPELLANT'S RIGHTS UNDER BOTH THE U.S. AND PENNSYLVANIA CONSTITUTIONS WHEN IT DENIED APPELLANT'S REQUEST FOR A MISTRIAL DUE TO CO-DEFENDANT FLOYD'S MISBEHAVIOR IN THE COURTROOM?
>
> DID THE TRIAL COURT ERR AND VIOLATE APPELLANT'S RIGHTS UNDER BOTH THE U.S. AND PENNSYLVANIA CONSTITUTIONS WHEN IT DENIED APPELLANT'S REQUEST TO STRIKE CERTAIN JURORS FOR BIAS?
>
> DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THAT APPELLANT HAD THE SPECIFIC OR SHARED INTENT WITH CO-DEFENDANT, HOWARD CAIN[?]
>
> DID THE TRIAL COURT ERR IN FINDING THAT THE WEIGHT OF THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION FOR MURDER AND CONSPIRACY?

(Appellant's Brief at 4).

In his first issue, Appellant asserts he became the focus of police suspicion during his initial encounter with Officer Jason Smaron, which occurred shortly after the botched getaway. Appellant contends Officer Smaron should have provided ***Miranda*** warnings at the beginning of the encounter, but the officer did not. Appellant claims Officer Smaron subsequently transported him to the police station, where Appellant was emotionally distraught after his arrest. Appellant argues the officers left him in an interview room and forced him to wait for a lengthy period prior to conducting a formal interview. Appellant emphasizes that the officers paid

no attention to him inside the interview room, refusing to take him to a bathroom and forcing him to urinate on the interview room floor. Moreover, when officers finally returned to provide ***Miranda*** warnings and conduct the interview, Appellant maintains he asked them to videotape the proceedings. Appellant insists the officers refused to videotape the interview, because it enabled them to manipulate the wording of Appellant's written statement without any further evidence of what Appellant actually said. Appellant concludes the statements obtained by police were not voluntary or authentic, and the court should have granted his suppression motion. We disagree.

We review the denial of a suppression motion subject to the following principles:

> Our standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct.
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> > [W]e 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. Williams, 941 A.2d 14, 26-27 (Pa.Super. 2008) (*en banc*) (internal citations and quotation marks omitted). "Whether a confession is voluntary is a conclusion of law, and conclusions of law are

subject to plenary review." ***Commonwealth v. Nester***, 551 Pa. 157, 160-61, 709 A.2d 879, 881 (1998) (internal citations omitted).

"When deciding a motion to suppress a confession, the touchstone inquiry is whether the confession was voluntary." ***Id.*** at 162, 709 A.2d at 882.

> Voluntariness is determined from the totality of the circumstances surrounding the confession. The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess. The Commonwealth has the burden of proving by a preponderance of the evidence that the defendant confessed voluntarily.

Id. at 163, 709 A.2d at 882 (internal citations omitted). When assessing voluntariness under the totality of the circumstances, we examine the following factors:

> the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand coercion.

Commonwealth v. Roberts, 969 A.2d 594, 599 (Pa.Super. 2009) (quoting ***Nester, supra*** at 164, 709 A.2d at 882).

Instantly, Officer Smaron testified that he and his partner were on routine patrol when they heard a radio call regarding the bank robbery. The officers learned that the bank's GPS tracking device was sending out a signal from 500 Loudon Street, and they headed to that location. When the

officers reached the 300 block of Loudon Street, they heard the gunshots from Mr. Cain's shootout with police. By the time Officer Smaron arrived at 500 Loudon Street, his colleagues had shot and killed Mr. Cain.

Officer Smaron and his partner realized there was nothing more they could do at 500 Loudon Street, so they reentered their vehicle and departed. Approximately two blocks away, the officers stopped at a stop sign. Appellant approached the patrol car, signaled that he wanted to speak with the officers, and told them he had been carjacked. The officers treated Appellant as a complainant, questioning him about the allegedly stolen vehicle. Appellant began to describe a minivan, which Officer Smaron had seen parked near 500 Loudon Street. Officer Smaron described what happened next as follows:

> He kindly let us pat him down. He willingly got in the back of the [patrol] vehicle. We explained we will have to take you to detectives and you will have to give a statement. So upon him getting in the back of the car, we asked him where [the carjacking had occurred]. We asked him how it happened. He said they stuck a gun in his face and told him to drive….

(***See*** N.T. Hearing, 6/14/10, at 114-15).

Appellant claimed the carjacking occurred in the parking lot of the same supermarket where the robbery had just transpired. As the officers transported Appellant back to the parking lot, Appellant changed the details of his story. Initially, Appellant said he had walked from the parking lot to the location where he had encountered the officers. Later, Appellant

indicated he had driven to that location with the carjackers. Upon arriving at the scene, Officer Smaron's partner went to review surveillance footage of the parking lot. The surveillance footage did not reveal any evidence of a carjacking. When confronted with this fact, Appellant maintained, "[W]hen you have a gun in your face, you do as you're told…." (***Id.*** at 118). Thereafter, Appellant again changed his story, claiming that the carjacking happened "a couple blocks away" from the parking lot. (***Id.***) At that point, the officers ceased questioning Appellant, placed him in handcuffs, and drove him to the police station for a formal interview.

Detective Patrick Mangold interviewed Appellant at the police station. Detective Mangold testified that he first encountered Appellant inside an interview room at approximately 4:50 p.m. on May 3, 2008. Prior to formal questioning, Detective Mangold asked Appellant for a variety of biographical information, including height, weight, date of birth, and address. After taking the biographical information, Detective Mangold exited the interview room. He did not return for approximately an hour and a half. During that time, Appellant requested to use the bathroom. Detective Mangold explained that he could not honor Appellant's request:

> I came outside [the interview room] and we couldn't move [Appellant] because there were civilian witnesses all over the place and we didn't want a confrontation to take place, a one-on-one I.D. or anything like that. So he was kept in the room.
>
> When I came back in to do the statement with Detective Pitts, there was urine on the floor. So before beginning

> this, I went and got a mop and bucket and cleaned up the floor. I believe I got him a glass of water and we talked briefly about that. Then we sat down.

(***Id.*** at 151). At 7:00 p.m., Detective Mangold provided ***Miranda*** warnings and commenced the interrogation. Appellant appeared "completely lucid" and understood all of the questions posed to him. (***Id.*** at 154). Shortly thereafter, Appellant provided an inculpatory statement.

Regarding the possibility of videotaping Appellant's confession, Detective Mangold confirmed that Appellant actually wanted officers to videotape the statement. Appellant completed and signed a consent form, and Detective Mangold set up the recording equipment. Nevertheless, Detective Mangold did not record Appellant's statement. At the suppression hearing, the court questioned Detective Mangold about this circumstance:

> THE COURT: Did [Appellant] just say I don't want to do it? Did he say anything? If you remember, that's okay.
>
> THE WITNESS: Your Honor, to be honest with you, I don't know whether he didn't want to do it or there was a problem with the equipment.
>
> THE COURT: You just know it didn't happen?
>
> THE WITNESS: Yes.
>
> * * *

(***Id.*** at 170). Based upon the foregoing, the suppression court denied Appellant's motion. Regarding Appellant's interaction with Officer Smaron, the court concluded:

> The statements originally made to Officer Smaron and his partner are fully admissible because they were investigating what they thought to be a carjacking in which [Appellant] was the victim.
>
> Now when they get down to the [supermarket parking lot] and they are seeking to determine what happened to [Appellant's] car, actually I thought it was brilliant police work on their part to look at the videotape to see if they can get some insight into who might have stolen [Appellant's] car and discover there is no car there. At that point, they did not seek to interrogate [Appellant].

(***See*** N.T. Hearing, 6/25/10, at 251.) We accept the court's conclusion and emphasize there was no need for ***Miranda*** warnings during the initial encounter with Appellant, because the police did not subject him to a custodial interrogation. ***See Commonwealth v. Housman***, 604 Pa. 596, 986 A.2d 822 (2009), *cert. denied*, ___ U.S. ___, 131 S.Ct. 199, 178 L.Ed.2d 120 (2010) (reiterating ***Miranda*** warnings are required prior to custodial interrogation; to determine whether interview rises to level of a custodial interrogation, we view totality of circumstances to determine whether reasonable person in suspect's position would have believed he was in custody).

Regarding the events at the police station, the court determined that approximately six hours had passed from Appellant's arrival until Detective Mangold gave him ***Miranda*** warnings. The court concluded the police properly kept Appellant inside the interview room during that period:

> [W]hen I have to stack the issues in priority, I think it was far better to leave [Appellant] in a closed room outside the view of the public than to put him in front of thirty people

> and run the risk that they would point fingers at him, taint his constitutional rights. It would have been horrible.
>
> Do I think it was an embarrassment and [a shame] for [Appellant] to have to urinate in the [interview] room? Yes, I do but I give grave respect and appreciation for Detective Patrick Mangold who himself went to get a bucket and some cleaning fluid to clean up the situation and make things decent and presentable before he began to talk with [Appellant]. So were the conditions less than I would want them to be? Yes.
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> * * *
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> [B]ut I think given the conditions, Detective Patrick Mangold went out of his way to craft a situation that respected [Appellant's] dignity and, more importantly, his constitutional rights not to have people pointing at him, saying that's the guy, that's the guy, which would have been absolutely horrible. So I don't believe that…in any way was [there] any kind of oppression, abuse of his rights; in fact, it was done with great respect for his rights.
>
> The videotape, I do wish the equipment worked but that does not make the statement unconstitutional because the videotape equipment did not work, was not used, whatever.

(***Id.*** at 254-55).

Contrary to Appellant's assertions, the duration and means of the interview, as well as the conditions attendant to the interview, were not so unduly coercive as to give rise to an involuntary confession. Under the totality of the circumstances, the Commonwealth obtained Appellant's independent confession without the use of impermissible coercion. The record supports the court's conclusion that Appellant's statements were

voluntary. ***See Nester, supra***. Consequently, the court properly denied Appellant's suppression motion.

In his second issue, Appellant contends the majority of the Commonwealth's evidence was admissible against Mr. Floyd only, including testimony regarding Mr. Cain and Mr. Floyd planning the bank robbery and participation in a series of preliminary robberies to obtain the assault rifle and getaway vehicle. Further, Appellant complains the jury heard detailed evidence of Mr. Floyd's prior convictions for violent offenses. Appellant argues he was not involved in those prior criminal episodes with Mr. Floyd, and evidence of Mr. Floyd's criminal history caused Appellant to suffer undue prejudice. Appellant acknowledges the court specifically instructed the jury on multiple occasions that the evidence at issue was admissible only against Mr. Floyd. Appellant insists, however, the court's instructions failed to diminish the prejudice Appellant suffered. Under these circumstances, Appellant concludes the court should have granted his severance motion. We disagree.

"The decision to sever co-defendants' trials lies within the trial court's discretion, and will not be disturbed absent an abuse thereof." ***Commonwealth v. Birdsong***, 611 Pa. 203, ___, 24 A.3d 319, 336 (2011).

> Joint trials are favored when judicial economy will be served by avoiding the expensive and time-consuming duplication of evidence, and where the defendants are charged with conspiracy.

> [T]he mere fact that there is hostility between defendants, or that one may try to save himself at the expense of another, is in itself not sufficient grounds to require separate trials. In fact, it has been asserted that **the fact that defendants have conflicting versions of what took place, or the extents to which they participated in it, is a reason for rather than against a joint trial** because the truth may be more easily determined if all are tried together.

Id. (internal citations and quotation marks omitted) (emphasis in original).

"The central inquiry [in considering a motion to sever] is always whether undue prejudice has inured to the defendant." ***Commonwealth v. Gribble***, 580 Pa. 647, 660, 863 A.2d 455, 462 (2004). "A defendant requesting a separate trial 'must show real potential for prejudice rather than mere speculation.'" ***Commonwealth v. Colon***, 846 A.2d 747, 754 (Pa.Super. 2004), *appeal denied*, 582 Pa. 681, 870 A.2d 320 (2005) (quoting ***Commonwealth v. Rivera***, 565 Pa. 289, 298, 773 A.2d 131, 137 (2001), *cert. denied*, 535 U.S. 955, 122 S.Ct. 1360, 152 L.Ed.2d 355 (2002)).

Instantly, the Commonwealth charged Appellant and Mr. Floyd with conspiracy and other offenses related to their participation in the bank robbery and the homicide of Sergeant Liczbinski. Almost all of the evidence presented at trial pertained to the conduct of **both** Appellant and Mr. Floyd. Although the Commonwealth admitted some evidence of other crimes and bad acts by Mr. Floyd, the court properly instructed the jury not to consider that evidence against Appellant. (***See*** N.T. Trial, 6/29/10, at 205-06, 229;

N.T. Trial, 7/7/10, at 15; N.T. Trial, 7/22/10, at 20-21; N.T. Trial, 7/26/10, at 73.) Further, jury selection commenced on June 7, 2010, and the jury completed its penalty phase deliberations on August 17, 2010. The trial was quite lengthy and required tremendous judicial resources. Separate trials for Appellant and his co-defendant would have placed "a heavy burden upon the judicial system as well as the public." ***See Commonwealth v. Childress***, 680 A.2d 1184, 1187 (Pa.Super. 1996), *appeal denied*, 547 Pa. 723, 689 A.2d 231 (1997). Under these circumstances, the court properly denied Appellant's severance motion. ***See Birdsong, supra***. ***See also Childress, supra*** (holding "spillover effect" of evidence admitted against co-defendant was not sufficiently prejudicial to defendant to warrant severance of trials where crimes charged grew out of same episode, both defendant and co-defendant were charged with conspiracy, almost all evidence presented at trial pertained to both defendants, court instructed jury to consider each defendant separately as if he were alone on trial; "severance would not have insulated appellant from most of the evidence presented at trial").

In his third issue, Appellant asserts Mr. Floyd engaged in a pattern of misconduct throughout the proceedings, making outbursts during *voir dire*, assaulting his attorney, disavowing himself of the name "Eric Floyd," and arguing with the prosecutor from the witness stand. Mr. Floyd's behavior led Appellant's counsel to renew the motion for severance; in the alternative, counsel moved for a mistrial. Appellant argues the court should have

granted a mistrial, because Mr. Floyd's behavior caused prejudice that "spilled over" to the jury's determination of Appellant's guilt or innocence. Moreover, Appellant maintains Mr. Floyd's actions were significant, and the court's cautionary instructions were insufficient to cure the resulting prejudice. Appellant concludes the court erred in denying his motion for mistrial, and he is entitled to a new trial on this basis. We disagree.

We review the denial of a motion for a mistrial subject to the following principles:

> The trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. In making its determination, the court must discern whether misconduct or prejudicial error actually occurred, and if so, …assess the degree of any resulting prejudice. Our review of the resulting order is constrained to determining whether the court abused its discretion. Judicial discretion requires action in conformity with [the] law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.

Commonwealth v. Bozic, 997 A.2d 1211, 1225-26 (Pa.Super. 2010), *appeal denied*, 608 Pa. 659, 13 A.3d 474 (2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 2939, 180 L.Ed.2d 232 (2011) (quoting ***Commonwealth v. Judy***, 978 A.2d 1015, 1019 (Pa.Super. 2009)). "The remedy of a mistrial is an extreme remedy required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial

tribunal." ***Commonwealth v. Hogentogler***, 53 A.3d 866, 878 (Pa.Super. 2012) (quoting ***Judy, supra*** at 1019).

Instantly, Mr. Floyd expressed a desire for new court-appointed counsel on June 7, 2010, after the court commenced jury selection. The court refused Mr. Floyd's request. The next day, Mr. Floyd protested by making vocal outbursts during individual *voir dire*. Due to the frequency of the outbursts, the court ordered sheriff's deputies to remove Mr. Floyd. On June 9, 2010, the court conducted a colloquy to determine whether Mr. Floyd wanted to proceed *pro se*. Mr. Floyd did not provide direct answers to the court's inquiries, and the court terminated the colloquy. The court also ordered sheriff's deputies to remove Mr. Floyd due to his obstructionist behavior. Prior to his removal, Mr. Floyd violently attacked a member of his defense team. Significantly, Mr. Floyd's actions during the jury selection process occurred outside the presence of any individuals whom the parties eventually accepted as jurors. Absent more, Mr. Floyd's actions during *voir dire* did not warrant a mistrial. ***See Commonwealth v. Boxley***, 575 Pa. 611, 838 A.2d 608 (2003) (holding court's admonition of defense counsel did not warrant mistrial; admonition occurred during sidebar, outside jury's hearing range).

To the extent Appellant also complains about Mr. Floyd's belligerent exchanges with the prosecutor on cross-examination, Appellant moved for severance or mistrial immediately **before** Mr. Floyd took the stand.

Ultimately, the court terminated the Commonwealth's cross-examination of Mr. Floyd, because he refused to answer additional questions. Following Mr. Floyd's departure from the witness stand, Appellant did not renew the motion for severance or mistrial. In fact, Appellant's attorneys conceded that they did not have any objection to the court's handling of the matter:

> Your Honor, Mr. Floyd left the stand before Your Honor [gave] us the opportunity to cross-examine him. I would like to state for the record now that we didn't object to Mr. Floyd being taken off the stand because based upon what we heard from Mr. Floyd, we would have had no questions. There didn't appear to be anything that Mr. Floyd said with regard to [Appellant]. In fact, when Mr. Floyd was asked if he knew [Appellant], he said he didn't even know him. So given what we heard, there was really no reason for us to cross-examine Mr. Floyd and we didn't have any objection to your taking him off the stand before asking us whether we had any questions for him.

(***See*** N.T. Trial, 7/21/10, at 56.)[4] Given these circumstances, Appellant's current argument related to Mr. Floyd's behavior on the witness stand merits no relief. Thus, Appellant's third issue fails.

In his fourth issue, Appellant avers the trial court should have dismissed three jurors for cause. Appellant claims Juror 92 indicated that a defendant should be presumed guilty, and Appellant "must have done something" wrong by virtue of his arrest. Likewise, Appellant contends Juror

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[4] The following day, the Commonwealth offered evidence of Mr. Floyd's other crimes and bad acts to rebut Mr. Floyd's testimony. Appellant's counsel requested an instruction that the jury should not consider the evidence against Appellant. The court granted the request and provided the cautionary instruction.

52 presumed Appellant was guilty due to his presence in the courtroom. Appellant also asserts Juror 80 admitted that the father of her child was a police officer, and she lived in a high-crime area where other police officers had been killed. Appellant argues Juror 80 possessed strong opinions about violence against police officers, and the court should have struck the juror in light of her admitted bias. Although counsel ultimately struck all three prospective jurors, Appellant insists the court should not have forced counsel to use peremptory challenges to eliminate members of the venire when the court should have removed them for cause. Appellant concludes the court erred when it refused to strike Jurors 92, 52, and 80 for cause. We disagree.

"The decision whether to disqualify a juror is within the sound discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion." ***Commonwealth v. Stevens***, 559 Pa. 171, 197, 739 A.2d 507, 521 (1999). "A challenge for cause to service by a prospective juror should be sustained and that juror excused where that juror demonstrates through his conduct and answers a likelihood of prejudice." ***Commonwealth v. Ingber***, 516 Pa. 2, 7, 531 A.2d 1101, 1103 (1987). "The trial court makes that determination based on the prospective juror's answers to questions and demeanor." ***Stevens, supra*** at 197, 739 A.2d at 521. "Furthermore, a trial judge may properly refuse to excuse a juror for cause when the judge believes that the juror would be fair and

impartial." ***Commonwealth v. Chambers***, 546 Pa. 370, 392, 685 A.2d 96, 107 (1996), *cert. denied*, 522 U.S. 827, 118 S.Ct. 90, 139 L.Ed.2d 46 (1997).

Additionally: "[T]he purpose of the *voir dire* examination is to provide an opportunity to counsel to assess the qualifications of prospective jurors to serve." ***Ingber, supra*** at 6, 531 A.2d 1103 (quoting ***Commonwealth v. Drew***, 500 Pa. 585, 588, 459 A.2d 318, 320 (1983)).

> It is therefore appropriate to use such an examination to disclose fixed opinions or to expose other reasons for disqualification. Thus the inquiry must be directed at ascertaining whether the venireperson is competent and capable of rendering a fair, impartial and unbiased verdict. **The law also recognizes that prospective jurors were not cultivated in hermetically sealed environments free of all beliefs, conceptions and views.** The question relevant to a determination of qualification is whether any biases or prejudices can be put aside upon the proper instruction of the court.

Ingber, supra at 6-7, 531 A.2d 1103 (quoting ***Drew, supra*** at 588, 459 A.2d at 320) (internal citations omitted) (emphasis added).

Instantly, Appellant's counsel asked Juror 92 if she was predisposed to believe Appellant had committed a crime:

> [COUNSEL]: We necessarily had to give you a summary of what the Commonwealth will be trying to prove and also to let you know in advance of the trial that the Commonwealth will be asking the jury to convict [Appellant] of first degree murder and to impose the death penalty but you know we haven't started the trial. We haven't heard any evidence. Nobody testified. You haven't seen any photographs or seen the physical evidence. You haven't heard the lawyers make their arguments and you haven't heard the instructions and the

> law from Judge Hughes, but knowing what you know now, does that leave you with an impression that [Appellant] must be guilty of something?
>
> [JUROR 92]: No, I wouldn't say that.
>
> [COUNSEL]: What would you say?
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> [JUROR 92]: Based on the information that the DA will present, that is when I would say, right now he is now presumed of some crime but I have to hear the information that he presents and after I hear that, that is when I make my own decision if it actually happened the way—
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> [COUNSEL]: As you sit there now, do you presume that he has committed a crime?
>
> THE COURT: I think it is the words, Mr. Server. I do. I just think it is the words.
>
> Tell me if I'm misunderstanding you. What you just said to me is that he has been arrested for a crime but you don't know if he is guilty or not?
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> [JUROR 92]: Exactly, yes. He had to commit—do something to be arrested.
>
> THE COURT: But you don't know if that means he is guilty of a crime?
>
> [JUROR 92]: Exactly.
>
> THE COURT: So you are still ready to hold [the prosecutor] to his burden, hold his feet to the fire, make him prove to you that the police arrested the right person and that, in fact, a crime was even committed?
>
> [JUROR 92]: That's correct.

(***See*** N.T. Trial, 6/21/10, at 86-89.)

Following *voir dire*, Appellant's counsel asked the court to strike Juror

92 because the juror "indicated that there was a presumption that [Appellant] was guilty of something." (***Id.*** at 98). Given the full context of the comments, the court refused to strike Juror 92 on that basis. Mr. Floyd's counsel subsequently used a peremptory strike to exclude Juror 92 from service.

Here, Juror 92 expressly stated she did not know whether Appellant had committed any crime. In deciding on the motion to strike, the court accurately characterized the sentiments of Juror 92 as follows:

> She was real, real clear [that Appellant] being arrested didn't mean squat to her. She still wanted to know if the Commonwealth could meet its burden. It sounds to me she will hold [the prosecutor's] feet to the fire which is a good thing.
>
> * * *

(***Id.*** at 97). The record supports the court's decision to refuse to strike Juror 92 for cause. ***See Chambers, supra***.

Regarding Juror 52, Appellant's counsel questioned her about the presumption of innocence as follows:

> [COUNSEL]: Now, we have necessarily had to give you some factual basis for the case, what the Commonwealth is alleging.
>
> * * *
>
> Does having this information lead you to presume that [Appellant] must be guilty of something even though the Judge is going to instruct you that the mere fact that he is charged and arrested doesn't mean he is guilty of anything?

> [JUROR 52]: Right.
>
> [COUNSEL]: I'm sorry.
>
> [JUROR 52]: That's correct.
>
> [COUNSEL]: Do you presume that he must be guilty of something?
>
> [JUROR 52]: Well, yes.
>
> [COUNSEL]: Why is that, ma'am?
>
> [JUROR 52]: Because he's here.
>
> [COUNSEL]: Because he's here.
>
> So does that mean that you are not able to follow the Judge's instruction that the mere fact that he is here doesn't mean he is guilty of anything?
>
> [JUROR 52]: I can follow her instructions. You are innocent until proven guilty. That is a fact.

(***See*** N.T. Trial, 6/24/10, at 213-15.) The court subsequently revisited the topic with Juror 52 and confirmed that Juror 52 understood the presumption of Appellant's innocence.

Despite counsel's attempt to portray Juror 52 as someone who would ignore the presumption of innocence, Juror 52 repeatedly confirmed her understanding that Appellant was innocent until proven guilty. The court emphasized this point during the following exchange:

> THE COURT: The fact that a person gets arrested, all that means is that the DA thinks the person is guilty. Sometimes the DA is right. Sometimes the DA is wrong.
>
> [JUROR 52]: Right.

> THE COURT: That is why we have the presumption of innocence. If all that mattered was that a person be arrested, I wouldn't have a jury. They wouldn't even have me because they would make their arrests and it would be over with…. Okay?
>
> [JUROR 52]: Yes.
>
> THE COURT: This is America. People get arrested all of the time. You have seen in your life, I bet, stories in the news where people get arrested and the police were just flat out wrong.
>
> [JUROR 52]: Yes.
>
> THE COURT: So it is the same thing here. The police might be wrong. They might be right. I don't know and until we hear the evidence from the witnesses, we know he is innocent and we are going to treat him fairly; right?
>
> [JUROR 52]: Yes.

(***Id.*** at 216-17). Following *voir dire*, Appellant's counsel asked the court to strike Juror 52 because Juror 52 presumed Appellant's guilt "just because he is here." (***Id.*** at 222). Given the full context of the comment, the court refused to strike Juror 52. Counsel subsequently used a peremptory strike to exclude Juror 52 from service. The record supports the court's decision to refuse to strike Juror 52 for cause. ***See Chambers, supra***.

Regarding Juror 80, Appellant's counsel questioned her about her attitude toward the police:

> [COUNSEL]: Your daughter's father is a police officer.
>
> [JUROR 80]: Yes.
>
> [COUNSEL]: He obviously expressed some opinions about the dangers that police officers confront and some of

> the injuries and deaths that they sustain; is that fair to say?
>
> [JUROR 80]: Yes.
>
> [COUNSEL]: Now, you listen to those opinions obviously. Do you express opinions of your own?
>
> [JUROR 80]: Yes.
>
> [COUNSEL]: Well, is it fair to say that the opinions that you express are not in contradiction to the opinions that he might express?
>
> [JUROR 80]: That's a fair statement.
>
> [COUNSEL]: Don't you think that those kinds of predictions, which would seem to me, if I can characterize them, would be for, lack of a better word, pro-police, those kinds of opinions might get in the way of your being fair and impartial in this case?
>
> [JUROR 80]: I don't believe so. I live in a fairly high crime neighborhood and we have had about six police officers killed in our neighborhood. So, yes, I have strong opinions about it. Any death is bad and the death of a police officer is pretty bad.

(***See*** N.T. Trial, 6/23/10, at 168-69.)

Following *voir dire*, Appellant's counsel asked the court to strike Juror 80 because Juror 80 possessed "clear and unequivocal admitted bias." (***Id.*** at 185). The court refused to strike Juror 80 on that basis. Appellant's counsel subsequently used a peremptory strike to exclude Juror 80 from the service.

Here, Juror 80 unequivocally indicated her sentiments would not interfere with her duties as a juror. When asked if she could put aside her

personal opinions, Juror 80 frankly stated that she would not pass judgment on Appellant until "all of the facts" came out at trial. (***Id.*** at 170). Although Juror 80 held some opinions springing from her personal connection to a police officer, prospective jurors are not free of all beliefs, preconceptions, and views. ***See Ingber, supra***. Absent more, the record supports the court's decision to refuse to strike Juror 80 for cause, and Appellant is not entitled to relief on his fourth issue. ***See Chambers, supra***.

In his fifth and sixth issues, Appellant contends the only evidence that he shared Mr. Cain's specific intent to kill came from the portion of Appellant's post-arrest statement where he admitted handing the assault rifle to Mr. Cain. Nevertheless, Appellant maintains police illegally obtained the involuntary statement. Because the court should have suppressed the statement, Appellant claims the Commonwealth failed to prove each element of first degree murder. Moreover, Appellant asserts the jury placed undue weight on the statement, and it ignored the fact that he did not participate in much of the planning of the bank robbery. Appellant concludes the Commonwealth presented insufficient evidence to support the first degree murder conviction, and the murder and conspiracy convictions are against the weight of the evidence. We disagree.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

> 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 [trier] 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. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, ___ Pa. ___, 32 A.3d 1275 (2011) (quoting ***Commonwealth v. Jones***, 874 A.2d 108, 120-21 (Pa.Super. 2005)).

The following principles apply to our review of a weight of the evidence claim:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the…verdict if it is so contrary to the evidence as to shock one's sense of justice.
>
> ***Commonwealth v. Small***, 559 Pa. 423, [435,] 741 A.2d 666, 672-73 (1999). Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather,

> appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Champney, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003), *cert. denied*, 542 U.S. 939, 124 S.Ct. 2906, 159 L.Ed.2d 816 (2004) (most internal citations omitted).

The Pennsylvania Crimes Code defines first degree murder as follows:

> **§ 2502. Murder**
>
> **(a) Murder of the first degree.—**A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

18 Pa.C.S.A. § 2502(a). "To find a defendant guilty of first degree murder a jury must find that the Commonwealth has proven that he…unlawfully killed a human being and did so in an intentional, deliberate and premeditated manner." ***Commonwealth v. Sattazahn***, 563 Pa. 533, 540, 763 A.2d 359, 363 (2000), *judgment aff'd*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

> It is the element of a willful, premeditated and deliberate intent to kill that distinguishes first-degree murder from all other criminal homicide. Specific intent to kill may be inferred from the defendant's use of a deadly weapon upon a vital [part] of the victim's body.

Id. at 540-41, 763 A.2d at 363 (internal citations omitted). Significantly, "Each member of a conspiracy to commit homicide can be convicted of first-degree murder, regardless of who inflicted the fatal wound."

Commonwealth v. Smith, 604 Pa. 126, 142, 985 A.2d 886, 895 (2009), *cert. denied*, ___ U.S. ___, 131 S.Ct. 77, 178 L.Ed.2d 50 (2010).

The Crimes Code defines the offense of conspiracy as follows:

> **§ 903. Criminal conspiracy**
>
> **(a) Definition of conspiracy.—**A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
>
> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> * * *

18 Pa.C.S.A. § 903(a).

> To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy.

Commonwealth v. Hennigan, 753 A.2d 245, 253 (Pa.Super. 2000) (quoting ***Commonwealth v. Rios***, 546 Pa. 271, 283, 684 A.2d 1025, 1030 (1996), *cert. denied*, 520 U.S. 1231, 117 S.Ct. 1825, 137 L.Ed.2d 1032 (1997)).

> The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a

> conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.

Commonwealth v. McCall, 911 A.2d 992, 996 (Pa.Super. 2006) (quoting ***Commonwealth v. Johnson***, 719 A.2d 778, 784-85 (Pa.Super. 1998) (*en banc*), *appeal denied*, 559 Pa. 689, 739 A.2d 1056 (1999)).

> Circumstantial evidence may provide proof of the conspiracy. The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. Additionally:
>
> > An agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

Jones, supra at 121-22 (internal citations and quotation marks omitted).

Instantly, the assistant medical examiner testified that Sergeant Liczbinski suffered multiple gunshot wounds to several vital body parts. Two bullets struck the officer in the abdomen, penetrating his liver, intestines, pancreas, and lung. Two bullets struck the officer in the left buttock, penetrating his pelvis and further injuring the internal organs. Two bullets struck the officer's left arm, fracturing the limb and rendering it useless.

One of the bullets passed through the officer's left arm, entering his chest and injuring his heart. Thus, the evidence established that Sergeant Liczbinski was intentionally killed. ***See Sattazahn, supra***.

Additionally, Appellant carried a handgun into the bank and paced in front of the teller windows during the robbery. After the robbery, Appellant, Mr. Cain, and Mr. Floyd fled in the getaway car. As Sergeant Liczbinski pursued the suspects, someone in the car said, "Bang him." At that point, Mr. Cain asked Appellant for the assault rifle, which Appellant handed to him. Mr. Cain subsequently shot and killed the sergeant. After the shooting, Mr. Cain reentered the Jeep. Mr. Floyd drove to the second getaway vehicle, which was parked nearby. Appellant drove the second getaway vehicle a short distance before Mr. Cain ordered him to pull over. Appellant pulled over, and the suspects exited and split up. Here, the Commonwealth's evidence established all the elements necessary to support Appellant's first degree murder conviction as a co-conspirator. ***See Smith, supra***; 18 Pa.C.S.A. § 2502(a). Likewise, we deny relief on Appellant's weight of the evidence claim. ***See Champney, supra***. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.