NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KENNETH WILLIAMS, Appellant	:	No. 2486 EDA 2012

Appeal from the Judgment of Sentence June 1, 2011
In the Court of Common Pleas of Montgomery County
Criminal Division No(s).: CP-46-CR-0008760-2009

BEFORE: LAZARUS, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: April 26, 2013

Appellant, Kenneth Williams, appeals *nunc pro tunc* from the judgment of sentence entered in the Montgomery County Court of Common Pleas following his convictions for six counts of criminal conspiracy,[1] seven counts of robbery—fear of serious bodily injury,[2] seven counts of simple assault,[3] five counts of terroristic threats,[4] and seven counts of theft by unlawful

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 903(a)(1).

[2] 18 Pa.C.S. § 3701(a)(1)(ii).

[3] 18 Pa.C.S. § 2701(a)(3).

[4] 18 Pa.C.S. § 2706(a)(1).

taking.[5] Appellant claims certain incriminating statements should have been suppressed as the fruits of a poison tree, *viz.*, the illegal stop and/or arrest of his co-conspirator, Robert Maddrey.[6] Appellant also argues the trial court erred by denying his motion for a mistrial on the basis that the court erred in allowing evidence of other crimes. We affirm.

The trial court summarized the facts and procedural posture of this case as follows:

> In August of 2009, Detective Sergeant Anthony DiSandro of the Abington Township Police Department was involved in an investigation into a series of armed robberies, which were occurring in Abington Township. On August 28, 2009, Detective DiSando called Appellant on the telephone, asking him if he would come into the police station to discuss his involvement in the armed robberies. Appellant arrived at the police station . . . in an Explorer SUV. Appellant didn't park his vehicle in the police station parking lot, but rather, parked it on a side street. This was significant to the detective, because he knew that a dark colored SUV was implicated in the robberies. . . . The detective asked Appellant if he would consent to a vehicle search. Appellant signed a Consent to Search Form, agreeing to the vehicle search.
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> After the vehicle search, Detective DiSandro and Detective [Anthony] Ammaturo read Appellant his Constitutional rights, and asked him if he would give a voluntary statement. Detective DiSandro verified that Appellant could read and write the English language. Appellant also read the Constitutional rights form himself, after which he initialed and signed the form.

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[5] 18 Pa.C.S. § 3921(a).

[6] The trial court identifies Appellant's co-defendant as Dennis Maddrey. Trial Ct. Op., 10/19/12, at 5 n.6.

The interview began at 10:35 p.m., and was conducted in a question-and-answer format. Therein, Appellant admitted that Dennis Maddrey was a neighborhood friend, and that he was with him when he committed some robberies. Appellant also admitted that he drove Maddrey in his green Ford Explorer to certain areas outside of Philadelphia so that he could commit robberies. Appellant estimated that he drove Maddrey to about three or four robberies, of which Appellant actually witnessed one or two of the robberies occur. Appellant stated that he knew Maddrey used a BB gun during the course of the robberies, and that he personally saw the gun.

Detective DiSandro went through a list of the robberies with Appellant during the course of Appellant's statement. In response to the questioning, Appellant admitted that he drove Maddrey to a robbery which occurred on August 5, 2009 at approximately 8:45 p.m., wherein an Asian male was robbed at the Melrose Station Apartments located in Cheltenham Township.

On August 6, 2009, there were two robberies in Abington Township that Appellant acknowledged that he was involved in. The first August 6, 2009 robbery, occurred at about 10:00 p.m., at which time an Asian female was robbed at Mount Vernon Garden Apartments. This is one of the robberies that Appellant actually witnessed. The second August 6, 2009 robbery, happened at about 11:45 p.m., when an Asian male was robbed in the parking lot of the apartments at 101 Washington Lane.

Appellant also admitted that he might have been involved in an August 9, 2009 robbery, which occurred at approximately 12:12 a.m. In that robbery an Asian male was robbed in the 900 block of Valley Road, Elkins Park, Cheltenham Township.

Finally, Appellant admitted that he was involved in an August 15, 2009 robbery, when at approximately 10:30 p.m. an Asian male and female were robbed in the rear parking lot of the Colonnade Apartments in Abington Township. He actually witnessed this robbery. Appellant also stated that he could have possibly been involved in another August 15, 2009 robbery, in which an Asian male

was robbed in the parking lot of the Wyncote House Apartments, Cheltenham Township.

When the interview was concluded, Detective DiSandro printed out the statement and Appellant reviewed it. Appellant read through the entire statement and then signed at the bottom of every page. Appellant was free to leave after his statement.

On August 31, 2009, Detective DiSandro received a telephone call from Appellant. During the telephone conversation, Appellant told the detective sergeant that he wanted to clear things up from his first statement. Appellant voluntarily came back to the police station. Appellant was read his Constitutional rights and he signed the Constitutional Rights form. Thereafter, . . . Detective DiSandro conducted another interview. In the interview, Appellant explained how he and Maddrey chose victims for the robberies, that they used a gun to scare the victims and that he always used his vehicle for the robberies. When the interview was concluded, Appellant reviewed the entire statement and signed it.

A Suppression Hearing was held on December 12, 2010.[6] Oral argument on the suppression motion was heard on December 13, 2010. At the conclusion of argument, this Court placed its Findings of Fact and Conclusions of Law on the record and denied the Motion.

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[6] The December 12, 2010 Hearing on the Motion to Suppress addressed both the Motion to Suppress filed by Appellant and that of his co-conspirator, Dennis Maddrey.

On December 20, 2010, this matter proceeded to a two-day jury trial. The jury found Appellant guilty of the aforementioned charges. On June 1, 2011, Appellant was sentenced. No post-sentence motions were filed.

Appellant filed a direct appeal with the Pennsylvania Superior Court, which was ultimately dismissed on March 5, 2012, based on appellate counsel's failure to file a brief. Subsequently, Appellant filed a *pro se* petition for collateral relief under the Post-Conviction Relief Act, 42 Pa.C.S.A. §

> 9541 *et seq*. ("PCRA"). On June 6, 2012, this Court appointed counsel to represent Appellant in connection with his PCRA petition. On July 31, 2012, PCRA counsel submitted an amended PCRA petition, requesting that Appellant's direct appeal rights be reinstated due to appellate counsel's ineffectiveness in failing to file a brief with the Pennsylvania Superior Court, causing his initial direct appeal to be dismissed. With the Commonwealth in agreement, on August 2, 2012, this Court issued an Order reinstating Appellant's direct appeal rights and granting Appellant 30 days in which to file a notice of appeal.

Trial Ct. Op., 10/19/12, at 2-5 (citations to the record omitted). This timely appeal followed. Appellant filed a timely court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal and the trial court filed a responsive opinion.

Appellant raises the following issues for our review:

> First: Did the Trial Court err by denying [Appellant's] motion to suppress incriminating statements as those statements were the fruits of a poison tree, namely, an illegal stop and/or arrest of the co-Defendant?
>
> Second: Did the Trial Court err by denying [Appellant's] motion for mistrial on the basis that the Commonwealth, put on notice to refrain from doing so, introduced evidence of "other crimes"?

Appellant's Brief at 2.

First Appellant avers that Detective DiSandro "had been made aware of [Appellant's] possible involvement in the incidents by [his co-conspirator] who had been arrested on August 28, 2009 following one of the armed robberies." ***Id.*** at 8. On that date, the Detective "called Appellant and asked him to come to the Abington police station." ***Id.*** Appellant argues

that if the stop and arrest of his co-conspirator was illegal, *i.e.*, "in violation of the Fourth Amendment, then evidence flowing therefrom, either directly or indirectly, was tainted and could not, and should not, have been used against [Appellant]." ***Id.*** at 9. Appellant contends that the statements Appellant made were "the fruits of the poison tree." ***Id.***[7]

As a prefatory matter we consider the Commonwealth's claim that Appellant lacks standing to contest the stop and arrest of his co-conspirator.[8] Commonwealth's Brief at 8. The Pennsylvania Supreme Court "has repeatedly refused to recognize the vicarious assertion of constitutional rights." ***Commonwealth v. Hawkins***, 718 A.2d 265, 269 (Pa. 1998). The Supreme Court noted: "our rules of criminal procedure, following this logic, are crafted to address violations that are personal in nature rather than vicarious. ***See***, ***e.g.***, Pa.R.Crim.P. 323(a) (permitting a motion to suppress evidence 'alleged to have been obtained in violation of the defendant's rights')." ***Id.*** at 270 n.7.[9] Appellant bases his claim that his statements to Detective DiSandro should be suppressed on the illegality of the stop of his

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[7] Appellant and his co-conspirator were tried separately.

[8] We note that the trial court did not consider whether Appellant lacked standing. "We may affirm the trial court on any ground." ***Commonwealth v. Lynch***, 820 A.2d 728, 730 n.3 (Pa. Super. 2003).

[9] We note this Court affirmed the trial court's denial of Appellant's co-conspirator's suppression motion. ***Commonwealth v. Maddrey***, 1248 EDA 2011 (unpublished memorandum) (Pa. Super. June 29, 2012), *appeal denied*, 735 MAL 2012 (Pa. 2013).

co-conspirator. Our Supreme Court has "consistently declin[ed] to recognize derivative standing." ***Id.*** at 269. Appellant's argument is based upon vicarious or derivative standing. Therefore, his claim that the court erred in denying his motion to suppress fails for lack of standing. ***See id.***

Lastly, Appellant contends the trial court erred by denying his motion for a mistrial when the Commonwealth mentioned other robberies outside of Montgomery County. Appellant avers that "[t]he violent crimes with which [he] was charged were serious; the consequent penalties were severe. The circumstances in which the crimes occurred were nothing less than the 'citizen's nightmare': an unwary pedestrian, at night, being stalked, confronted, threatened, throttled and robbed at gunpoint by a menacing and violent predator." Appellant's Brief at 12. Therefore, Appellant argues that the mention of other robberies was prejudicial requiring a new trial. ***Id***. at 12-13.

> We review the trial court's decision to deny a mistrial for an abuse of discretion. ***Commonwealth v. Boone***, 862 A.2d 639, 646 (Pa. Super. 2004). A mistrial is necessary only when "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." ***Commonwealth v. Parker***, 957 A.2d 311, 319 (Pa. Super. 2008), *appeal denied*, 600 Pa. 755, 966 A.2d 571 (2009). A mistrial is inappropriate where cautionary instructions are sufficient to overcome any potential prejudice. ***Id.***

Commonwealth v. Bedford, 50 A.3d 707, 712-13 (Pa. Super. 2012), *appeal denied*, 57 A.3d 65 (Pa. 2012).

The Pennsylvania Rules of Evidence provide: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Pa.R.E. 404(b)(1).

> This rule is violated where evidence presented to the jury either expressly, or by reasonable implication, indicates that the defendant has engaged in other criminal activity. However, mere passing reference to prior criminal activity is insufficient to establish improper prejudice by itself. The inquiry into whether prejudice has accrued is necessarily a fact specific one.

Commonwealth v. Hudson, 955 A.2d 1031, 1034 (Pa. Super. 2008) (citations omitted).

> "The nature of the reference and whether the remark was intentionally elicited by the Commonwealth are considerations relevant to the determination of whether a mistrial is required."
>
> [This Court concluded], it appears from the record that the . . . testimony was not intentionally elicited by the Commonwealth. Further, both references to prior criminal activity were brief.

Commonwealth v. Guilford, 861 A.2d 365, 370 (Pa. Super. 2004).

> If evidence of prior criminal activity is inadvertently presented to the jury, the trial court may cure the improper prejudice with an appropriate cautionary instruction to the jury. However, the instruction must be clear and specific, and must instruct the jury to disregard the improper evidence.

Hudson, 955 A.2d at 1034 (citations omitted). Furthermore, "[t]he law presumes that the jury will follow the instructions of the court." ***Commonwealth v. Miller***, 819 A.2d 504, 513 (Pa. 2002).

In the case *sub judice*, the trial court opined:

> Prior to the start of the trial, defense counsel made several oral motions *in limine*, which were granted. In relevant part, defense counsel sought to exclude evidence of any Philadelphia robberies. The Commonwealth was in agreement that such evidence would not be elicited. . . .
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> * * *
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> [During the direct examination of Detective DiSandro,] the Commonwealth questioned the detective how Appellant's second statement[10] came about, as follows:
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> > Q: What did he say when you talked to him.
> >
> > A: He said he wanted to clear some things up form (sic) the first statement and **he wanted to give some more details on the other robberies that occurred outside of Montgomery County**.
> >
> > Q: Did he come in?
> >
> > A: Yes, ma'am, he did.
> >
> > Q: Did you go over his rights with him again?
> >
> > [Appellant's Counsel]: Your Honor, may we approach?
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> ***Id.*** at 117. [ ] This Court called for a brief recess, and when the jury was out of the courtroom, defense counsel made a motion for a mistrial. ***Id.*** at 118. This Court denied the motion for a mistrial, but upon the return of the jury, immediately instructed the jury that the statement was not to be considered by them for any reason. Specifically, this Court stated the following:
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> > All right, the members of the jury, I'll point out to you that [Appellant] is not charged with any robbery accept (sic) those from Abington and Cheltenham, so you must totally and completely disregard any

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[10] Appellant voluntarily returned to the police station and gave a second statement.

> remark the detective may have made concerning any other possible activity. Any passing reference to any other criminal activity not charged here simply does not refer to any activity that [Appellant] was actually involved in in any way, so you must not infer anything form (sic) it. As I said, you must totally and completely disregard those remarks.
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> ***Id.*** at 120-121. Additionally, after the defense rested, this Court asked defense counsel, whether she wanted this court to repeat the cautionary instruction, and defense counsel declined. [N.T., 12/21/10 at 44-45].

Trial Ct. Op. at 18-20. The trial court concluded that a mistrial was not necessary because the curative instruction was "adequate to overcome any possible prejudice." ***Id.*** at 20. We agree.

The mere passing reference by the detective was not intentionally elicited by the Commonwealth and was brief. Therefore, there was no showing of prejudice. ***See Hudson***, ***supra***; ***Guilford***, ***supra***. The court gave a clear and specific curative instruction, which the jury is presumed to have followed. ***See Hudson***.; ***Miller***, ***supra***. We discern no abuse of discretion. ***See Bedford***, ***supra***.

Judgment of sentence affirmed.