NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JONATHAN T. MOORE Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3336 EDA 2011

Appeal from the Judgment of Sentence November 4, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0014039-2010;
CP-51-CR-0014051-2010

BEFORE: GANTMAN, J., ALLEN, J., and OTT, J.

MEMORANDUM BY GANTMAN, J.: **FILED MAY 02, 2013**

Appellant, Jonathan T. Moore, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his jury trial convictions for two (2) counts each of possessing instruments of crime ("PIC") and carrying a firearm without a license and one (1) count each of conspiracy and robbery, and his bench trial conviction for persons not to possess firearms.[1] We affirm.

The relevant facts and procedural history of this appeal are as follows. On October 13, 2010, Angel Cruz and his wife, Isabel Castro, attended a family gathering on the 500 block of West Somerset Street in Philadelphia.

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[1] 18 Pa.C.S.A. §§ 907, 6106, 903, 3701, 6105, respectively.

At approximately 12:30 a.m. on October 14, 2010, Mr. Cruz and Ms. Castro prepared to depart the gathering. Mr. Cruz exited the residence and spotted an acquaintance named "Javier" walking down the street. Mr. Cruz approached Javier and engaged him in a conversation. Ms. Castro exited the residence to start her vehicle, which she had parked across the street. After starting the vehicle, Ms. Castro reentered the residence to retrieve something.

At that point, a burgundy Buick drove slowly down the block, at approximately two miles per hour, and contained three people. The Buick pulled up at a stop sign at the end of the block, and Appellant and his co-defendant, Todd Hall, exited. Co-defendant Marquis Moie, the driver, remained inside the Buick. Appellant and Mr. Hall brandished firearms, approached Mr. Cruz and Javier, and warned the victims not to run. Appellant pressed his firearm into Mr. Cruz's stomach and checked his pocket for valuables. Mr. Hall pointed his firearm at Javier and checked Javier's pockets. After approximately thirty (30) seconds, Appellant and Mr. Hall backed away, jumped into the Buick, and fled the scene.

Someone inside the residence informed Ms. Castro about the robbery, and she rushed to the front doorway. Ms. Castro saw her husband on the street and asked him who had committed the robbery. Mr. Cruz indicated that the robbers had fled in the Buick, which was still in sight. Ms. Castro immediately entered her vehicle and pursued the Buick. During the pursuit,

Ms. Castro used her cell phone to call a 911 dispatcher. Ms. Castro informed the dispatcher of her location and provided a description of the Buick, its occupants, and the license plate. As the vehicles approached the intersection of Sixth and Diamond Streets, Mr. Hall reached out and fired at Ms. Castro's vehicle. Ms. Castro ended the pursuit shortly thereafter, parked her vehicle, flagged down Police Officer Mark Cruz, and described the entire incident to him.

Within minutes, police discovered the Buick, which the perpetrators had abandoned on the 1700 block of North Fourth Street. Police Officer Thomas Anderosky received a call about the abandoned Buick over police radio and headed towards the scene. Approximately a half-block away from the Buick, Officer Anderosky encountered Appellant and his co-defendants, who matched the description of the robbery suspects. Officer Anderosky stopped the suspects. Police Officer Daniel Martinez arrived as backup and held the suspects while Officer Cruz transported Ms. Castro to the scene to make an identification. Ms. Castro, however, could only identify Mr. Hall and Mr. Moie. Thereafter, Officer Cruz and Ms. Castro picked up Mr. Cruz and transported him to the scene. Mr. Cruz subsequently identified Appellant and Mr. Hall as the gunmen from the robbery.

On November 17, 2010, the Commonwealth charged Appellant with multiple offenses at two separate docket numbers. Prior to trial, Appellant's counsel moved to suppress the witnesses' pretrial identifications. Counsel

argued as follows:

> [Appellant] was held by the police and the victim was brought and he was identified on the street by the victim, the circumstances being in police custody, not being free to leave, the presence of police were highly suggestive in that identification.

(N.T. Hearing, 9/12/11, at 3). Mr. Hall's and Mr. Moie's counsel joined the motion. On September 13, 2011, the court conducted a suppression hearing and denied relief.

Following a joint trial, a jury found Appellant guilty of two counts each of PIC and carrying a firearm without a license and one count each of conspiracy and robbery. The court found Appellant guilty of persons not to possess firearms. With the benefit of a pre-sentence investigation ("PSI") report, the court conducted Appellant's sentencing hearing on November 4, 2011. At the conclusion of the hearing, the court sentenced Appellant to consecutive terms of five (5) to ten (10) years' imprisonment for robbery, five (5) to ten (10) years' imprisonment for conspiracy, two (2) to four (4) years' imprisonment for persons not to possess firearms, and one (1) to two (2) years' imprisonment for carrying a firearm without a license. The court imposed concurrent terms of one (1) to two (2) years' imprisonment for PIC and one (1) to two (2) years' imprisonment for the remaining conviction for carrying a firearm without a license. The court imposed no further penalty for the remaining PIC conviction. Thus, the court imposed an aggregate term of thirteen (13) to twenty-six (26) years' imprisonment. Appellant filed

an untimely post-sentence motion on Wednesday, November 16, 2011, claiming the sentencing court "failed to give the appropriate weight to the circumstances of the events and [Appellant's] background." (Post-Sentence Motion, filed 11/16/11, at 2).

Appellant timely filed a notice of appeal on November 23, 2011. On February 2, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant subsequently complied.

Appellant raises three issues for our review:

> THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BASED ON THE SUGGESTIVENESS OF THE IDENTIFICATION PROCEDURE.
>
> THE TRIAL COURT ADVERSELY IMPACTED [APPELLANT'S] RIGHT TO A FAIR TRIAL BY PRECLUDING THE DEFENSE FROM IMPEACHING THE CREDIBILITY OF THE COMPLAINING WITNESS WITH INHERENT *CRIMEN FALSI*; SUSTAINING OBJECTIONS TO RELEVANT QUESTIONS THAT IMPACTED ON THE WITNESS' MEMORY, ABILITY TO OBSERVE AND THE ACCURACY OF HER TESTIMONY AND HER CREDIBILITY; NOT LETTING THE WITNESS ANSWER THE QUESTION AS TO HOW ANGEL CRUZ FOUND THAT HIS WIFE WAS SHOT AT; IN ALLOWING HEARSAY ABOUT ANGEL CRUZ BEING ROBBED; INTERRUPTING COUNSEL'S LINE OF QUESTIONING AS HE TRIED TO SET UP THE SCENARIO FOR THE JURY.
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> [APPELLANT] CHALLENGES THE DISCRETIONARY ASPECTS OF SENTENCING.

(Appellant's Brief at 12).

First, Appellant asserts the witnesses did not have an adequate chance

to view the perpetrators, because the robbery occurred on a dark street corner. Moreover, Appellant emphasizes that the witnesses likely misidentified the suspects due to the "highly traumatic set of circumstances" surrounding the robbery. (Appellant's Brief at 17). Appellant complains the witnesses spoke with each other before Mr. Cruz identified Appellant, thereby compromising the identification procedure. Appellant also insists the presence of police vehicles, and the possibility that the witnesses saw the suspects in handcuffs, created an unduly suggestive identification procedure. Appellant concludes that, under the totality of the circumstances, the witnesses' identifications were unreliable and should have been suppressed.[2] 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

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[2] Appellant relies on the New Jersey Supreme Court's decision in ***State v. Henderson***, 208 N.J. 208, 27 A.3d 872 (2011). We reiterate, however, that decisions from other states are not binding precedent on this Court. ***Commonwealth v. Arthur***, 2013 PA Super 28, *3 n.9 (filed February 20, 2012).

> 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).

"When analyzing the admission of identification evidence, a suppression court must determine whether the challenged identification has sufficient *indicia* of reliability." ***Commonwealth v. Sanders***, 42 A.3d 325, 330 (Pa.Super. 2012) (internal citation and quotation marks omitted). "This question is examined by focusing on the totality of the circumstances surrounding the identification." ***Id.***

"The purpose of a 'one-on-one' identification is to enhance reliability by reducing the time elapsed after the commission of the crime." ***Commonwealth v. Wade***, 33 A.3d 108, 114 (Pa.Super. 2011), *appeal denied*, ___ Pa. ___, 51 A.3d 839 (2012) (quoting ***Commonwealth v. Moye***, 836 A.2d 973, 976 (Pa.Super. 2003), *appeal denied*, 578 Pa. 694, 851 A.2d 142 (2004)).

> Suggestiveness in the identification process is but one factor to be considered in determining the admissibility of such evidence and will not warrant exclusion absent other factors. As this Court has explained, the following factors are to be considered in determining the propriety of admitting identification evidence: the opportunity of the witness to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the perpetrator, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation. The corrupting effect of the

> suggestive identification, if any, must be weighed against these factors. Absent some special element of unfairness, a prompt "one-on-one" identification is not so suggestive as to give rise to an irreparable likelihood of misidentification.

Wade, supra at 114 (quoting ***Moye, supra*** at 976) (internal citations and quotation marks omitted).

Instantly, the trial court described the circumstances surrounding the identifications as follows:

> At Appellant's pretrial suppression hearing, the evidence established that on October 14, 2010, at approximately 12:30 a.m., police radio broadcast flash information concerning [a] robbery. At approximately 12:45 a.m., police had apprehended Appellant and his cohorts on the 1700 block of North 3rd Street. Within two minutes, Officer Cruz transported Ms. Castro to that location, where she positively identified two out of the three males (*i.e.*, Co-Defendants Hall and Moie). None of the males were handcuffed at the time and no guns were drawn. Officer Cruz then transported Ms. Castro to the scene of the robbery to pick up her husband, Mr. Cruz. Officer Cruz instructed Ms. Castro and Mr. Cruz not to speak to each other. Both Ms. Castro and Mr. Cruz specifically testified that they complied with the officer's instructions and did not speak with one another about the crime or their identifications. Mr. Cruz was then transported to the scene, where he positively identified Appellant and Co-Defendant Hall. There were multiple police officers and vehicles at the location, which was well lit due to additional commercial lighting from an adjacent factory. Both sets of positive identifications occurred within twenty (20) minutes of the initial crime.
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> * * *
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> Based on the totality of the circumstances, [the suppression court] found that the identifications at issue were not unduly suggestive. Indeed, the evidence

> reflected a standard operating procedure for an on-the-scene identification.

(***See*** Trial Court Opinion, filed June 15, 2012, at 12, 14.) Because multiple police officers and vehicles were necessary to locate and stop the three suspects, this factor alone was not dispositive in determining suggestiveness. (***Id.*** at 13). The record supports the court's decision that, under the totality of these circumstances, the police did not employ a suggestive identification procedure, and the witnesses provided reliable identifications. ***See Wade, supra***. ***See also Moye, supra*** (rejecting defendant's arguments that identification process was unduly suggestive or created likelihood of misidentification just because (a) he was displayed to victims in handcuffs and alone in police cruiser, (b) victims identified defendant in each other's presence, and (c) defendant's identification was influenced by off-hand remarks). Thus, Appellant is not entitled to relief on his first claim.

In his second issue, Appellant raises multiple claims of error related to evidentiary rulings at trial, which we will address separately. Appellant initially contends Mr. Cruz was convicted of robbery in 1992. Appellant insists the court should have allowed him to impeach Mr. Cruz with evidence of the prior conviction. Appellant complains the court improperly focused on the amount of time that had elapsed since the conviction, and the court did not adequately consider the nature of the prior offense and its potential effect on the truth-determining process. Appellant concludes the court

should have permitted him to impeach Mr. Cruz with evidence of the prior conviction. We disagree.

"Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." ***Commonwealth v. Drumheller***, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003) (quoting ***Commonwealth v. Stallworth***, 566 Pa. 349, 363, 781 A.2d 110, 117 (2001)).

> Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.

Drumheller, supra at 135, 808 A.2d at 904 (quoting ***Stallworth, supra*** at 363, 781 A.2d at 117-18).

The relevant Pennsylvania Rule of Evidence in place at the time of Appellant's trial provided in pertinent part as follows:

> **Rule 609. Impeachment by evidence of conviction of crime**
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> **(a) General rule.** For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere*, shall be admitted if it involved dishonesty or false statement.
>
> **(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for

> that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect.
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> * * *

Pa.R.E. 609(a)-(b).[3] Robbery is considered a crime of dishonesty, and convictions for this offense can be admitted for impeachment purposes. ***Commonwealth v. Harris***, 884 A.2d 920 (Pa.Super. 2005), *appeal denied*, 593 Pa. 726, 928 A.2d 1289 (2007).

Instantly, Mr. Cruz was convicted of robbery in 1992. He was released from custody in 1999, more than ten years before Appellant's trial. Prior to Mr. Cruz's testimony, the court received argument on whether Appellant could impeach Mr. Cruz with the prior conviction. After weighing the probative value and prejudicial effect, the court ruled that defense counsel could not utilize the prior conviction:

> [C]ounsel has not convinced me that the probative value outweighs the prejudice. I mean, clearly the prejudice is quite enormous in this case. The probative value has to, in my mind, be also quite enormous.
>
> I understand [counsel's] argument that…robbery is a serious crime, it's not like forging a check or something of that sort. But I'm not hearing anything else about how, other than announcing to the jury that he was convicted of robbery, there would be any other probative effect. I don't

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[3] On January 17, 2013, after Appellant's trial, the legislature rescinded this version of Rule 609. The current version of Rule 609 went into effect on March 18, 2013.

> know that he's done anything from that time until now that would kind of corroborate that he's…not trustworthy…. It just seems like there's nothing in the interim that would suggest that this man could be less than trustworthy at this point in time. That [conviction] did happen 19 years ago, 12 years since he's been [released], I think the prejudice outweighs the probative value in this instance.

(***See*** N.T. Trial, 9/14/11, at 30-31.) ***See also*** Trial Court Opinion at 15. The record supports the court's ruling. In light of the applicable standard of review and Rule 609, we decline to disturb the court's decision. ***See Drumheller, supra***.

Next, Appellant claims he tried to question Ms. Castro and Officer Cruz regarding when Mr. Cruz found out about the shots fired at Ms. Castro's vehicle. Although Ms. Castro and Mr. Cruz denied discussing the shooting in Officer's Cruz's vehicle, Appellant insists Ms. Castro told Mr. Cruz about the shooting before they made the on-site identifications. Appellant contends counsel confronted Ms. Castro and Officer Cruz with this fact on cross-examination, but the court did not permit counsel to develop the record on this topic. Appellant maintains the court should have permitted counsel to continue questioning the witnesses about Ms. Castro's pre-identification discussions with Mr. Cruz, because the questioning would cast doubt on the witnesses' credibility. Appellant concludes the court erred in sustaining the Commonwealth's objections to this line of questioning. We disagree.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the

matter." Pa.R.E. 602.[4] "Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." ***Id.***

Instantly, Mr. Cruz testified that he saw Ms. Castro get into her car and pursue the perpetrators. Mr. Cruz stated he next heard from Ms. Castro approximately twenty minutes later. At that time, Ms. Castro called, asked for Mr. Cruz's whereabouts, and informed him that she would be arriving with a police officer to pick-up Mr. Cruz. When Ms. Castro and the officer arrived, Mr. Cruz entered the police vehicle. Mr. Cruz indicated that the officer told him not to speak with Ms. Castro about the criminal episode. Significantly, Mr. Cruz testified he did not speak with Ms. Castro about the criminal episode prior to his on-site identification of the perpetrators. On cross-examination, Mr. Moie's counsel confronted Mr. Cruz with the statement he had given to police on the night of the robbery. In the statement, Mr. Cruz indicated that he called Ms. Castro's cell phone before she returned to the scene of the robbery, and Ms. Castro informed him that the perpetrators had shot at her.

Appellant's counsel revisited this topic during his cross-examination of Ms. Castro. The relevant portion of the cross-examination is as follows:

[COUNSEL]: Did you tell your husband somebody

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[4] On January 17, 2013, after Appellant's trial, the legislature rescinded the applicable version of Rule 602. The current version of Rule 602 went into effect on March 18, 2013.

had shot at you?

[WITNESS]: Not in the vehicle.

[COUNSEL]: You told him later?

[WITNESS]: Later.

[COUNSEL]: Where?

[WITNESS]: When we [went] to the detective's office we started—I started to tell him that they shot at me, but I never specifically said who.

[COUNSEL]: And you told him that in person, in other words, human person next to human person, right?

[WITNESS]: Yes.

[COUNSEL]: So when he told the detectives that you called him and told him that, he was lying?

[COMMONWEALTH]: Objection, Your Honor.

THE COURT: Sustained.

[COUNSEL]: Well, when the detective wrote this, I guess the detective wrote it wrong, right?

[COMMONWEALTH]: Objection.

THE COURT: Sustained. You don't have to answer that, ma'am.

[WITNESS]: Oh, I'm sorry.

[COUNSEL]: And I guess when your husband signed the statement and adopted it, he was confused?

[COMMONWEALTH]: Objection.

THE COURT: Sustained. [Counsel], please.

(***See*** N.T. Trial, 9/14/11, at 185-86.)

Counsel conducted a similar line of questioning during his cross-examination of Officer Cruz, who picked up Mr. Cruz and transported him to make the on-site identification:

> [COUNSEL]: Is it fair to say that you recall [Ms. Castro] possibly making a phone call to Mr. Cruz?
>
> [WITNESS]: Can't recall her making a phone call.
>
> [COUNSEL]: Okay. Is it fair to say then that other than her telling him on the phone during the drive back there's no way he would have known that anybody had shot at her?
>
> [COMMONWEALTH]: Objection, that's the same question you just asked four questions ago.
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> [COUNSEL]: No, it's not.
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> THE COURT: Sustained.
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> [COUNSEL]: Is it fair to say, very delicate here, that on the ride with Mr. Cruz back to make an identification, now the two of them are in the back seat, you say they're not talking?
>
> [WITNESS]: I…said they weren't talking about the shooting.
>
> [COUNSEL]: They weren't talking about the shooting?
>
> [WITNESS]: Not to my knowledge.
>
> [COUNSEL]: Not to your knowledge. So the only spot where he would have known about the shooting would be her calling him before you picked him up, right?
>
> [COMMONWEALTH]: Objection, again, Your Honor, who knows how.

> THE COURT: If you can answer it, answer it and then move on.
>
> [WITNESS]: What was the question again?
>
> [COUNSEL]: The question is then, the only way since you stated to this jury they didn't talk in that car, not about the shooting, when you drove them back to the scene, right?
>
> [WITNESS]: Okay, yes.
>
> [COUNSEL]: The only way that Angel Cruz would have known that his wife had been shot at and that the police had gotten them was that she snuck a phone call to him when you were driving her back that you didn't hear?
>
> [COMMONWEALTH]: And objection to compound, argumentative.
>
> THE COURT: Sustained.

(***See*** N.T. Trial, 9/15/11, at 156-57.)

Here, the court sustained the Commonwealth's objections, concluding counsel's questions were based on speculation and called for speculation. (***See*** Trial Court Opinion at 16, 17.) Moreover, we agree with the court that counsel should have posed the questions to Mr. Cruz or to the detective who took Mr. Cruz's statement, because they were the parties with first-hand knowledge of the purported statement. In light of the applicable standard of review and Rule 602, we decline to disturb the court's decision to sustain the objections to this particular line of questioning. ***See Drumheller, supra***.

Next, Appellant asserts the Commonwealth introduced impermissible

hearsay during Ms. Castro's direct examination, when she said: "I hear this kid from the neighborhood and my cousin screaming, 'They're robbing your husband.' They came running towards the kitchen saying, 'They're robbing your husband.'" (N.T. Trial, 9/14/11, at 114). The court found the statement admissible under the "excited utterance" exception to the hearsay rule, but Appellant contends the court failed to determine whether the declarants were unavailable. Additionally, Appellant argues the excited utterance of an unidentified bystander is inadmissible unless the Commonwealth demonstrates the declarant actually viewed the event in question, which Appellant complains the Commonwealth did not show. Appellant concludes the court should have sustained his objection to this testimony. We disagree.

Pennsylvania Rule of Evidence 801 defines hearsay as follows:

> **Rule 801. Definitions**
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> The following definitions apply under this article:
>
> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> **(b) Declarant.** A "declarant" is a person who makes a statement.
>
> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
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> * * *

Pa.R.E. 801.[5] Generally, hearsay is inadmissible. Pa.R.E. 802. Nevertheless, "An out-of-court statement is not hearsay when it has a purpose other than to convince the fact finder of the truth of the statement." ***Commonwealth v. Busanet***, ___ Pa. ___, ___, 54 A.3d 35, 68 (2012).

Instantly, Ms. Castro testified about what transpired before she entered her car and pursued the perpetrators:

> [COMMONWEALTH]: When did Angel leave the house?
>
> [WITNESS]: We stepped out together at that present moment. The guy, Javier, came to talk to him and then they started to walk away from the house.
>
> [COMMONWEALTH]: And that is when you went and started your car?
>
> [WITNESS]: No, I started the car prior to [then]. But we were standing outside, I went to cross the street and turn on the car and he walked off with Javier.
>
> [COMMONWEALTH]: You indicated that you were going to get some leftovers, did you actually ever go back into the house?
>
> [WITNESS]: Yes, I did.
>
> [COMMONWEALTH]: Tell us about what happened when you went back in your cousin's house?
>
> [WITNESS]: I went inside, I put my purse down and my cousin came over and grabbed one of the Tupperware [containers] and took the lid off the rice cover and I started to scoop. I think about like the second or

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[5] On January 17, 2013, after Appellant's trial, the legislature rescinded the applicable version of Rule 801. The current version of Rule 801 went into effect on March 18, 2013.

> third scoop I hear this kid from the neighborhood and my cousin screaming, "They're robbing your husband." They came running towards the kitchen saying, "They're robbing your husband."

(***See*** N.T. Trial, 9/14/11, at 113-14.) Appellant immediately objected, and the court overruled the objection. Ms. Castro testified she ran outside, saw Mr. Cruz squatting in the street, and asked Mr. Cruz who had done this to him. Mr. Cruz pointed out the Buick at the end of the block, and Ms. Castro entered her vehicle and followed the Buick.

When viewed in context, the Commonwealth did not offer the hearsay to prove the truth of the matter asserted, *i.e.*, that someone had robbed Mr. Cruz. Instead, the statement explained why Ms. Castro abruptly left the residence, hurried outside, and pursued the perpetrators, which ultimately led to Mr. Hall firing shots at her vehicle. Thus, we decline to grant relief.[6] ***See Busanet, supra***.

The final claim of error in Appellant's second issue concerns the recross-examination of Mr. Cruz. Again, Appellant emphasizes Mr. Cruz's statement to police revealed that Ms. Castro and Mr. Cruz spoke before Mr. Cruz's on-site identification. Appellant maintains counsel questioned Mr. Cruz about his prior statement to police on recross-examination, which "was

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[6] While we are affirming the trial court's decision as to the admission of the hearsay statement, our rationale differs. Nevertheless, this Court may affirm a trial court's decision on any basis. ***See Commonwealth v. Moser***, 999 A.2d 602, 606 n.5 (Pa.Super. 2010), *appeal denied*, 610 Pa. 595, 20 A.3d 485 (2011) (stating same).

a solemn moment during the trial and deserved to be presented to the jury in a manner that was commensurate with its weight, gravity and profoundness." (Appellant's Brief at 38). Appellant complains, however, that the court marginalized the importance of the recross-examination, because it "very sternly ordered counsel to move on and just generally acted as though the point had no significance…." (***Id.***) Additionally, Appellant insists the court's rulings on the Commonwealth's objections embarrassed defense counsel in front of the jury and diverted the jury's attention from the favorable defense evidence. Appellant concludes he is entitled to a new trial on this basis. We disagree.

"The scope and manner of cross-examination is within the sound discretion of the trial judge whose decision will not be overturned absent an abuse of discretion." ***Commonwealth v. Conde***, 822 A.2d 45, 51 (Pa.Super. 2003). "A trial court may limit the scope of cross-examination to prevent repetitive inquiries and cumulative testimony." ***Id.***

Instantly, counsel conducted recross-examination after Mr. Moie's counsel had confronted Mr. Cruz with the statement he gave to police on the night of the robbery. Counsel asked Mr. Cruz additional questions about the statement as follows:

> [COUNSEL]: When you gave the statement you were given an opportunity to read it before you signed it, correct?
>
> [COMMONWEALTH]: Objection, Your Honor.

[WITNESS]: Correct.

[COMMONWEALTH]: This is a question that should have been asked on initial cross-examination.

THE COURT: [Counsel], are you going to move to something relevant?

[COUNSEL]: This is relevant, I'm asking him if he had a chance to read the statement before he signed it.

THE COURT: I'll allow it.

[WITNESS]: Correct.

[COUNSEL]: And the officer or detective gave you an opportunity to make corrections if you wanted to, correct?

[COMMONWEALTH]: Objection, Your Honor.

THE COURT: Overruled.

[WITNESS]: Correct.

[COUNSEL]: Look at that carefully, did you make any corrections, scratch anything out?

[WITNESS]: No, I did not.

[COUNSEL]: And fair to say the detective—

THE COURT: [Counsel], can you go back to your seat?

[COUNSEL]: Sorry. Would it be fair to say the detective was talking to you within two hours of the incident?

THE COURT: That's been asked and answered. If you have anything new, go ahead.

[COUNSEL]: Very well. On that statement, Page 2, Paragraph No. 3, the detective asked you an open-ended

question and said, "Then what happened," and was followed by a question mark.

[COMMONWEALTH]: Objection.

[COUNSEL]: Correct?

[WITNESS]: Correct.

[COUNSEL]: Now, you stated—

[COMMONWEALTH]: Your Honor, I have an objection.

THE COURT: Well, this has already been read into the record, am I correct?

[COMMONWEALTH]: Correct.

THE COURT: So it doesn't need to be read into the record again. If you have a question—

[COUNSEL]: I have a specific question.

THE COURT: —I might allow the question.

[COUNSEL]: Yes. On my cross you told this jury that you did not speak to anyone on the phone until your wife "chirped" you, yes or no?

[COMMONWEALTH]: Objection, Your Honor.

THE COURT: Overruled.

[COUNSEL]: Yes or no?

[WITNESS]: Correct.

[COUNSEL]: On this statement, you…have stated, "After I called 911 I was trying to call my wife, I think she was talking to 911 too."

THE COURT: As I said, don't read the whole statement in, just ask your questions.

> [COUNSEL]: Very well. Then you say, "I called her cell and she told me that they shot at her and that the cops got them."
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> [WITNESS]: Correct.
>
> [COUNSEL]: That's what you told the detective?
>
> [WITNESS]: Correct.

(***See*** N.T. Trial, 9/14/11, at 100-103.)

Here, the court noted, "Appellant does not point to any perceived erroneous evidentiary ruling, but rather faults [the trial court] for addressing objections raised by opposing counsel, which…[the trial court] **overruled, in Appellant's favor**." (Trial Court Opinion at 18) (emphasis in original). We agree. The court expeditiously dealt with a flurry of Commonwealth objections while attempting to limit cumulative testimony from the witness. ***See Conde, supra***. Thus, Appellant is not entitled to relief on his second issue.

In his third issue, Appellant claims "the sentence he received is two to three times the sentence called for by the guidelines and the mandatory minimum that applied to his case."[7] (Appellant's Brief at 43). Appellant

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[7] It is unclear whether the court actually imposed a mandatory minimum sentence. The certified record does not include several filings pertinent to the imposition of sentence, including the guideline forms and the PSI report. The trial court provided the following explanation for the omissions:

> The above captioned Common Pleas Court case is missing from the Clerk of Courts File Room. Accordingly, a

(Footnote Continued Next Page)

concludes the court imposed a manifestly excessive sentence. Appellant's claim challenges the discretionary aspects of his sentence. ***See Commonwealth v. Lutes***, 793 A.2d 949 (Pa.Super. 2002) (stating claim that sentence is manifestly excessive challenges discretionary aspects of sentencing).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

> [W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

(Footnote Continued) ———————————

> reconstructed record was prepared from photostats of available court documents and notes of testimony.

(Notice to Superior Court, dated 6/22/12, at 1). Although the certified record includes the sentencing hearing transcript, the transcript does not definitively reveal whether the court imposed a mandatory minimum sentence. At the beginning of the hearing, the Commonwealth mentioned that an unspecified mandatory minimum term applied to at least one of Appellant's convictions. (***See*** N.T. Sentencing, 11/4/11, at 4.) Then, the Commonwealth stated, "I'm sorry, there is no mandatory minimum. I do apologize, that is correct." (***Id.*** at 5). It is unclear, however, whether the Commonwealth's statement referred to Appellant or one of his co-defendants. When the court sentenced Appellant, it did not expressly state whether any of the sentences included a mandatory minimum term.

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases." ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*) (emphasis in original) (internal quotation marks omitted).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Sierra, supra*** at 912-13. A claim that a sentence is

manifestly excessive might raise a substantial question if the appellant's Rule 2119(f) statement sufficiently articulates the manner in which the sentence imposed violates a specific provision of the Sentencing Code or the norms underlying the sentencing process. ***Mouzon, supra*** at 435, 812 A.2d at 627. A bald assertion of excessiveness does not raise a substantial question. ***Commonwealth v. Trippett***, 932 A.2d 188 (Pa.Super. 2007). ***See also Commonwealth v. Kane***, 10 A.3d 327 (Pa.Super. 2010), *appeal denied*, 612 Pa. 689, 29 A.3d 796 (2011) (stating claim that sentencing court failed to consider factors set forth in Section 9721(b) does not raise substantial question).

Instantly, Appellant failed to preserve his sentencing issue at sentencing or in a timely post-sentence motion. Therefore, the issue is waived. ***See Evans, supra***. Further, the Rule 2119(f) statement in Appellant's brief on appeal does not identify a specific provision of the Sentencing Code or a fundamental norm underlying the sentencing process that the court violated in imposing the sentence. Absent more, Appellant's bald assertion of excessiveness fails to raise a substantial question. ***See Trippett, supra***. Additionally, the sentencing court imposed standard range sentences with the benefit of a PSI report; consequently, the sentences are presumptively sound. ***See Commonwealth v. Corley***, 31 A.3d 293 (Pa.Super. 2011) (explaining that reviewing court will not consider sentence excessive where sentencing court imposes standard range sentence with

benefit of a PSI report; reviewing court can assume sentencing court was aware of relevant information regarding defendant's character and weighed those considerations along with mitigating statutory factors). Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/2/2013