NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOSE R. HERNANDEZ, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 351 EDA 2011

Appeal from the Judgment of Sentence Entered February 1, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0001173-2009

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

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

Appellant, Jose R. Hernandez, appeals from the judgment of sentence of nine to twenty years' incarceration, imposed after he was convicted by a jury of various offenses including attempted murder and aggravated assault. Appellant challenges the sufficiency of the evidence to sustain his attempted murder conviction, as well as the trial court's denial of his motion for a mistrial. We affirm.

We have examined the certified record, Appellant's brief, and the applicable law.[1] Additionally, we have reviewed the thorough and well-reasoned opinion of the Honorable Ramy I. Djerassi of the Court of Common Pleas of Philadelphia County. We conclude that Judge Djerassi's analysis

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[1] The Commonwealth did not file a brief in this case.

accurately disposes of the issues presented by Appellant. Accordingly, we adopt Judge Djerassi's opinion as our own and affirm Appellant's judgment of sentence on that basis.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/2/2013

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
TRIAL DIVISION

Commonwealth of Pennsylvania		
v.	FILED	CP-51-CR-0001173-2009
Jose Hernandez	JUL 19 2012	
J. DJERASSI	Criminal Appeals Unit First Judicial District of PA	July 19, 2012

OPINION

Defendant Jose Hernandez ("Hernandez") brings this direct appeal following a judgment of sentence entered on February 1, 2011. Hernandez was convicted by a jury of attempted murder and related charges for a shooting in North Philadelphia.

Hernandez, through counsel, alleges, *inter alia*, the following: 1) the evidence was insufficient to support the conviction for attempted murder where the Commonwealth failed to prove that Defendant had the specific intent to kill; and 2) this Court erred when it denied a defense motion for mistrial following a prejudicial comment by the complaining witness.

These claims are without merit and the judgments of sentence should be affirmed.

PROCEDURAL HISTORY

Hernandez was arrested on August 27, 2009 in connection with a shooting in North Philadelphia.

On September 28, 2010, this Court began a jury trial, wherein the Commonwealth proceeded upon the following charges: 1) attempted murder (H1);[1] 2) aggravated assault (F1);[2]

[1] *18 Pa.C.S.A. § 901(a).*
[2] *18 Pa.C.S.A. § 2702(a).*

3) firearms not to be carried without a license (F3); [3] 4) possession of an instrument of crime ("PIC") (M1); [4] and 5) recklessly endangering another person ("REAP") (M2).[5]

On October 1, 2010, the jury returned a verdict of guilty on all charges. Sentencing was deferred pending a presentence investigation.

On February 1, 2011, this Court sentenced Defendant to an aggregate nine (9) to twenty (20) year prison term.[6]

Thereafter, on February 7, 2011, Defendant filed a timely notice of appeal.

SUMMARY OF FACTS

On September 21, 2008, at approximately 9:30 a.m., Complainant Paul Mulraney and his girlfriend were walking down the 3500 block of Kensington Avenue in search of crack-cocaine. The two were high and looking for more drugs when they got into an argument. (N.T. 9/28/10, pp. 76-79). Complainant was yelling after his girlfriend, who had begun to walk away, when he encountered Defendant. Defendant began to yell expletives at Complainant, saying Complaint did not know who he was messing with. *Id.* at 76-81. Complainant attempted to diffuse the situation and leave when Defendant swung and punched Complainant on the side of his head. *Id.* at 81. Complainant then turned to Defendant, who ran toward his home. Complainant grabbed some empty beer bottles from a nearby trashcan and threw them toward Defendant's home. *Id.* at 82. Seconds later, Defendant emerged from the alley by his home and pointed a gun at Complainant and fired. The shot missed. *Id.* Complainant took cover behind a nearby car as

[3] *18 Pa.C.S.A. § 6106(a)(1).*
[4] *18 Pa.C.S.A. § 907(a).*
[5] *18 Pa.C.S.A. § 2705.*
[6] Defendant was sentenced as follows: attempted murder- 9 to 20 years; aggravated assault- 9 to 20 years, concurrent; VUFA (6105)- 5 to 10 years, concurrent; VUFA (6106)- merged; PIC- no further penalty; and REAP- no further penalty.

Defendant continued to fire from across the street. *Id.* at 82-83. The vehicle sustained four to five bullet holes. (N.T. 9/29/10, p. 12). Seven 9 mm shell cases and one bullet fragment were recovered from the scene. *Id.* at 17. Fortunately, Complainant was unharmed.

Nearby officers heard the shots and arrived on scene almost immediately. Officers observed a chaotic scene with twenty to thirty people running and screaming. (N.T. 9/29/10, p. 8, 41). Officer Timothy Coleman, Badge No. 1264, arrived and received suspect information for a Hispanic male, tattooed, and bare-chested in the apartment of 3522 Kensington Avenue. *Id.* at 42. Officer Coleman was let into the rowhouse by a second floor tenant and directed to a rear apartment on the first floor. *Id.* Officer Coleman knocked on the door and announced his presence. Officer Coleman heard movement inside the apartment and knocked again. Unsuccessful, Officer Coleman kicked the door in and gained entry. *Id.* at 43. There, Officer Coleman found Defendant and another woman in bed, under the covers. *Id.* at 44. Defendant was sweaty and Officer Coleman could feel his heart pounding. *Id.* at 45. A gun was recovered from a blue motorcycle outside Defendant's apartment.[7] *Id.* at 93. Ballistics tests matched the gun to the shell cases recovered at the scene. *Id.* at 135. Defendant admitted the motorcycle was his. *Id.* at 93.

Complainant identified Defendant from two photo arrays. (N.T. 9/28/10, p. 89). Defendant was also identified by an eyewitness. (N.T. 9/30/10, p 55).

RULE 1925(b) STATEMENT

See attached 1925(b) Statement of Matters Complained of on Appeal.

LEGAL ANALYSIS

1. **The evidence presented at trial was sufficient as a matter of law to find the elements**

[7] An access door to a back yard is located within Defendant's apartment. (N.T. 9/29/11, p. 92-94).

of attempted murder.

Defendant argues the evidence was insufficient to convict him of attempted murder where the Commonwealth did not prove a specific intent to kill. The record clearly shows otherwise.

In evaluating the sufficiency of the evidence, a reviewing court must:

> evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." *Id.* Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty," *see Commonwealth v. Coon*, 695 A.2d 794, 797 (Pa. Super. 1997), and may sustain its burden by means of wholly circumstantial evidence, *see Commonwealth v. Aguado*, 760 A.2d 1181, 1185 (Pa. Super. 2000); *see also Commonwealth v. Murphy*, 795 A.2d 1025, 1038-39 (Pa. Super. 2002) ("The fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence."). Significantly, "[we] may not substitute [our] judgment for that of the factfinder; if the record contains support for the convictions they may not be disturbed." *Commonwealth v. Ostrosky*, 866 A.2d 423, 427 (Pa. Super. 2005).

Commonwealth v. Brewer, 876 A.2d 1029, 1032 (Pa. Super. 2005).

A defendant may be convicted of attempted murder "if he takes a substantial step toward the commission of a killing, with the specific intent in mind to commit such an act." *Commonwealth v. Hobson*, 604 A.2d 717, 719 (Pa. Super. 1992). The Commonwealth must, therefore, establish that the defendant possessed a specific intent to kill. *Commonwealth v. Anderson*, 650 A.2d 20, 24 (Pa. 1994). When there is no direct evidence of a defendant's intent to kill, the necessary intent can be inferred from the act itself and from all circumstances surrounding the incident. *Commonwealth v. Hawkins*, 701 A.2d 492, 500 (Pa. 1997). "A well-

recognized and generally accepted inference to establish state of mind is that an actor intends the natural and probable consequences of his acts." *Commonwealth v. Meredith*, 416 A.2d 481, 485 (Pa. 1980). Thus, where a defendant uses a deadly weapon upon a vital part of another's body, a specific intent to kill can be inferred. *Meredith*, 416 A.2d at 485.

The evidence presented in this case is more than sufficient to sustain Defendant's conviction for attempted murder. Far from being a spontaneous reaction, the evidence showed that Defendant deliberately left the street altercation with Complainant and retrieved a gun from his home. (N.T. 9/28/10, pp. 76-81). Defendant then raised, pointed, and fired the gun at Complainant, standing defenseless across the street. *Id.* at 82. Unsuccessful, Defendant continued to fire at Complainant, even after he took cover behind a car. In all, Defendant fired at least seven shots at Complainant, leaving five bullet holes in the car that ultimately saved Complainant's life. (N.T. 9/29/10, p.12, 17). From this evidence, the jury could reasonably conclude that, even if Defendant had not intended to kill Complainant when he went home to retrieve a gun, he formulated the intent to kill when he fired the first shot at Complainant and continued to empty his gun with at least six more shots. *See Commonwealth v. Chambers*, 980 A.2d 35, 46 (Pa. Super. 2009) (intent to kill can be proven by the defendant's course of conduct).

Accordingly, the evidence was sufficient to convict Defendant of attempted murder.

2. The Court did not err in denying defense counsel's motion for mistrial, where a passing reference to Defendant's incarceration was made and cured by an immediate cautionary instruction from this Court.

Defendant contends this Court erred in denying a motion for mistrial after Complainant stated that Defendant had been in jail for two years. Defendant argues that Complainant's statement was prejudicial, thereby requiring a mistrial. This claim is without merit.

A claim that the trial court erred in denying a motion for mistrial is a challenge to the discretionary power of the court.

> The decision to declare a mistrial is within the sound discretion of the court and will not be reversed absent a "flagrant abuse of discretion." *Commonwealth v. Cottam*, 616 A.2d 988, 997 (Pa. Super. 1992). A mistrial is an "extreme remedy . . . [that] . . . must be granted only when an incident is of such a nature that its unavoidable effect is to deprive defendant of a fair trial." *Commonwealth v. Vazquez*, 421 Pa. 617 A.2d 786, 787-88 (Pa. Super. 1992). A trial court may remove taint caused by improper testimony through curative instructions. Courts must consider all surrounding circumstances before finding that curative instructions were insufficient and the extreme remedy of a mistrial is required. The circumstances which the court must consider include whether the improper remark was intentionally elicited by the Commonwealth, whether the answer was responsive to the question posed, whether the Commonwealth exploited the reference, and whether the curative instruction was appropriate.

Commonwealth v. Bracey, 831 A.2d 678, 682-683 (Pa. Super. 2003), *appeal denied*, 577 Pa. 685, 844 A.2d 551 (Pa. 2004) (internal citations omitted).

The testimony at issue in this case consists of a single statement made by the complaining witness during direct examination. Specifically, Defendant objects to the following exchange:

> **Q.** Now, Mr. Mulraney, do you remember how the defendant looked on that day?
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> **A.** Do I remember how he looked?
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> **Q.** How the defendant looked that day.
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> **A.** Yeah.
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> **Q.** What was he wearing?
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> **A.** I think he had a tank top on. I can't recall. I can't recall really what he was wearing exactly.
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> **Q.** Does he look any different in appearance today?
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> **A.** He looks a lot heavier, he does. He looks a lot heavier today, a little. Not—seemed to me like he was a little lighter at the time. I mean, he's been in jail for two years--

(N.T. 9/28/10, pp. 93-94).

The record indicates that the complaining witness's answer was not responsive to the question asked by the prosecutor. The complaining witness was asked to describe how the

defendant's present appearance differed from his appearance at the time of the shooting. *See Commonwealth v. Whitman*, 380 A.2d 1284, 1289 (Pa. Super. 1977) (no prejudice where the witness's answer was not elicited by the prosecution in an attempt to establish a prior record). While there was no proper reason for Complainant to mention that Defendant had been incarcerated for the past two years, Complainant's reference did not convey an unavoidable inference of a *prior* criminal offense. *See Commonwealth v. Nichols*, 400 A.2d 1281 (Pa. 1979) (prejudice results where the testimony conveys to the jury either expressly or by reasonable implication the fact of a prior criminal offense); *Commonwealth v. Gaerttner*, 484 A.2d 92, 103 (Pa. Super. 1984) (courts place emphasis on whether the reference was by implication a reference to a prior conviction).

Instead, the more likely inference from Complainant's statement is that Defendant has been incarcerated while awaiting trial for the present offense. Complainant had already testified that he had never met Defendant prior to the shooting on September 21, 2008. Complainant's testimony was being given nearly two years later on September 28, 2010. Indeed, this implication is clear from the immediate cautionary instruction given by this Court, wherein this Court stated "[the Complainant] doesn't know where the defendant is or isn't." (N.T. 9/28/10, p. 94). This instruction was sufficient where there is no indication the prosecutor intentionally elicited the remark and no further references were made by the prosecutor or Complainant to Defendant's incarceration. *See Commonwealth v. Neary*, 512 A.2d 1226 (Pa. Super. 1986) ("[a] brief accidental sighting of a defendant in custodial trappings, without more, is not so inherently prejudicial as to significantly impair the presumption of innocence to which the defendant is entitled."); *see also Commonwealth v. Manley*, 985 A.2d 256, 268 (Pa. Super. 2009) (denial of

mistrial proper where trial court issued curative instruction after witness made passing reference to defendant's drug dealing in an attempted murder trial).

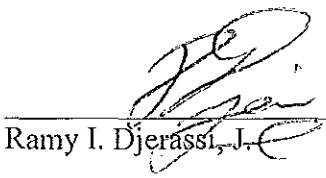
Finally, the testimony was not prejudicial in light of the overwhelming evidence of Defendant's guilt. The reference to Defendant's incarceration was a passing and corrected moment in a multi-day jury trial where the jury was presented with physical evidence from the scene of the crime, expert ballistics testimony matching the shell casings to a gun recovered from Defendant, testimony from police officers regarding Defendant's physical condition moments after the shooting---and eyewitness testimony from both the Complainant and a neighbor identifying Defendant as the shooter. In light of this overwhelming evidence, error, if any, was harmless. *See, e.g. Commonwealth v. Wharton*, 607 A.2d 710, 718 (Pa. 1992) (erroneous admission of codefendant's confession implicating defendant was harmless given overwhelming evidence of defendant's guilt).

In sum, Complainant's statement did not deprive the Defendant of a fair trial and his motion for mistrial was properly denied.

CONCLUSION

For the reasons stated above, judgments of sentence should be affirmed.

BY THE COURT:



Ramy I. Djerassi, J.

DAVID W. BARRISH, ESQUIRE
I.D. No. 62228
1333 Race Street
Philadelphia, PA 19107
(215) 557-6710

ATTORNEY FOR APPELLANT

COMMONWEALTH OF PENNSYLVANIA	PHILADELPHIA COUNTY
	COURT OF COMMON PLEAS
vs.	CRIMINAL TRIAL DIVISION
JOSE HERNANDEZ	C.P. # 51-CR-0001173-2009

CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

TO THE HONORABLE RAMY DJERASSI, JUDGE OF THE COURT OF COMMON PLEAS:

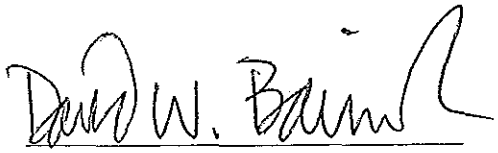
The above named appellant, by his attorney, DAVID W. BARRISH, ESQUIRE, respectfully notes the following matters to be raised on appeal:

1. The lower court erred when it found that there was sufficient evidence to prove, beyond a reasonable doubt, the criminal offense of Attempted Murder, as there was insufficient evidence offered by the Commonwealth to prove that Mr. Hernandez had the specific intent to kill complainant Paul Mulraney.

2. The lower court erred when it denied the defense Motion for a Mistrial. This motion was made in response to complaining witness Paul Mulraney stating the following in his testimony: "I mean, he's been in jail for two years." (N.T. 9/28/2010, 94-96). This

statement made by Mr. Mulraney prejudiced Mr. Hernandez to the extent that it deprived him of a fair trial by preventing the jury from weighing and rendering a true verdict.. (*See* Commonwealth vs. Spotz, 716 A.2d 580 (Pa. 1998) and Commonwealth vs. Robinson, 670 A.2d 616 (Pa. 1995)).

Respectfully submitted,



DAVID W. BARRISH, ESQUIRE
Attorney for Appellant

VERIFICATION

DAVID W. BARRISH, ESQUIRE verifies that the statements made in this CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL are true and correct to the best of his knowledge, information and belief, and understands that false statements herein are made subject to the penalties of 18 Pa.C.S. Section 4909 relating to unsworn falsification to authorities.

DAVID W. BARRISH, ESQUIRE
Attorney for Appellant
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IN THE COURT OF COMMON PLEAS
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Hernandez, through counsel, alleges, *inter alia*, the following: 1) the evidence was insufficient to support the conviction for attempted murder where the Commonwealth failed to prove that Defendant had the specific intent to kill; and 2) this Court erred when it denied a defense motion for mistrial following a prejudicial comment by the complaining witness.

These claims are without merit and the judgments of sentence should be affirmed.

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Accordingly, the evidence was sufficient to convict Defendant of attempted murder.

2. The Court did not err in denying defense counsel's motion for mistrial, where a passing reference to Defendant's incarceration was made and cured by an immediate cautionary instruction from this Court.

Defendant contends this Court erred in denying a motion for mistrial after Complainant stated that Defendant had been in jail for two years. Defendant argues that Complainant's statement was prejudicial, thereby requiring a mistrial. This claim is without merit.

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Instead, the more likely inference from Complainant's statement is that Defendant has been incarcerated while awaiting trial for the present offense. Complainant had already testified that he had never met Defendant prior to the shooting on September 21, 2008. Complainant's testimony was being given nearly two years later on September 28, 2010. Indeed, this implication is clear from the immediate cautionary instruction given by this Court, wherein this Court stated "[the Complainant] doesn't know where the defendant is or isn't." (N.T. 9/28/10, p. 94). This instruction was sufficient where there is no indication the prosecutor intentionally elicited the remark and no further references were made by the prosecutor or Complainant to Defendant's incarceration. *See Commonwealth v. Neary*, 512 A.2d 1226 (Pa. Super. 1986) ("[a] brief accidental sighting of a defendant in custodial trappings, without more, is not so inherently prejudicial as to significantly impair the presumption of innocence to which the defendant is entitled."); *see also Commonwealth v. Manley*, 985 A.2d 256, 268 (Pa. Super. 2009) (denial of

mistrial proper where trial court issued curative instruction after witness made passing reference to defendant's drug dealing in an attempted murder trial).

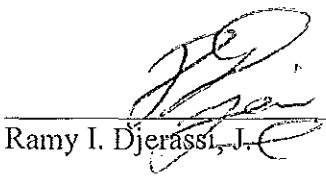
Finally, the testimony was not prejudicial in light of the overwhelming evidence of Defendant's guilt. The reference to Defendant's incarceration was a passing and corrected moment in a multi-day jury trial where the jury was presented with physical evidence from the scene of the crime, expert ballistics testimony matching the shell casings to a gun recovered from Defendant, testimony from police officers regarding Defendant's physical condition moments after the shooting---and eyewitness testimony from both the Complainant and a neighbor identifying Defendant as the shooter. In light of this overwhelming evidence, error, if any, was harmless. *See, e.g. Commonwealth v. Wharton*, 607 A.2d 710, 718 (Pa. 1992) (erroneous admission of codefendant's confession implicating defendant was harmless given overwhelming evidence of defendant's guilt).

In sum, Complainant's statement did not deprive the Defendant of a fair trial and his motion for mistrial was properly denied.

CONCLUSION

For the reasons stated above, judgments of sentence should be affirmed.

BY THE COURT:



Ramy I. Djerassi, J.

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ATTORNEY FOR APPELLANT

COMMONWEALTH OF PENNSYLVANIA	PHILADELPHIA COUNTY
	COURT OF COMMON PLEAS
vs.	CRIMINAL TRIAL DIVISION
JOSE HERNANDEZ	C.P. # 51-CR-0001173-2009

CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

TO THE HONORABLE RAMY DJERASSI, JUDGE OF THE COURT OF COMMON PLEAS:

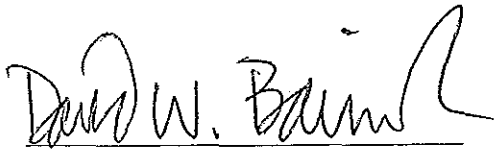
The above named appellant, by his attorney, DAVID W. BARRISH, ESQUIRE, respectfully notes the following matters to be raised on appeal:

1. The lower court erred when it found that there was sufficient evidence to prove, beyond a reasonable doubt, the criminal offense of Attempted Murder, as there was insufficient evidence offered by the Commonwealth to prove that Mr. Hernandez had the specific intent to kill complainant Paul Mulraney.

2. The lower court erred when it denied the defense Motion for a Mistrial. This motion was made in response to complaining witness Paul Mulraney stating the following in his testimony: "I mean, he's been in jail for two years." (N.T. 9/28/2010, 94-96). This

statement made by Mr. Mulraney prejudiced Mr. Hernandez to the extent that it deprived him of a fair trial by preventing the jury from weighing and rendering a true verdict.. (*See* Commonwealth vs. Spotz, 716 A.2d 580 (Pa. 1998) and Commonwealth vs. Robinson, 670 A.2d 616 (Pa. 1995)).

Respectfully submitted,



DAVID W. BARRISH, ESQUIRE
Attorney for Appellant

VERIFICATION

DAVID W. BARRISH, ESQUIRE verifies that the statements made in this CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL are true and correct to the best of his knowledge, information and belief, and understands that false statements herein are made subject to the penalties of 18 Pa.C.S. Section 4909 relating to unsworn falsification to authorities.

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