

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSHUA S. SILSBY,	:	
	:	
Appellant	:	No. 407 WDA 2012

Appeal from the Judgment of Sentence Entered February 29, 2012,
In the Court of Common Pleas of Potter County,
Criminal Division, at No. CP-53-CR-0000004-2011.

BEFORE: DONOHUE, SHOGAN and WECHT, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: March 11, 2013

Appellant, Joshua S. Silsby, appeals from the judgment of sentence entered on February 29, 2012. We affirm.

After breaking into a concession stand, Appellant was charged with burglary, conspiracy to commit burglary, theft by unlawful taking, and receiving stolen property. A jury trial was held on December 19, 2011. Appellant was convicted of all charges except conspiracy to commit burglary. On February 29, 2012, Appellant was sentenced to serve a term of 4½ months to 12 months of incarceration for burglary, 12 months of probation for theft by unlawful taking, consecutive to the burglary, and 12 months of probation for receiving stolen property, concurrent to the theft. This appeal followed.

Appellant raises a single issue for our consideration:

Did prosecutor's remarks during a jury trial constitute reversible misconduct?

Appellant's Brief at 5.

Appellant presents two allegations of prosecutorial misconduct. Initially, we note that our standard of review for a claim of prosecutorial misconduct is limited to whether the trial court abused its discretion:

In considering this claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one.

Generally, a prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict.

A prosecutor must have reasonable latitude in fairly presenting a case to the jury and must be free to present his or her arguments with logical force and vigor. The prosecutor is also permitted to respond to defense arguments. Finally, in order to evaluate whether the comments were improper, we do not look at the comments in a vacuum; rather we must look at them in the context in which they were made.

Commonwealth v. Rolan, 964 A.2d 398, 410 (Pa. Super. 2008) (citations omitted).

Appellant first claims that prosecutorial misconduct occurred during trial when the prosecutor referenced threats to the witness by Appellant's brother-in-law if the witness testified at trial. Counsel for the

Commonwealth specifically asked the witness: "Have you ever been threatened that if you gave testimony here today you would be sorry?" N.T., 12/19/11, at 46. After objections by defense counsel, the trial court sustained the objection and gave the following curative instruction to the jury:

I'll tell you again what I told you previously. When I sustain an objection, you are not to consider any evidence to the question presented or comment which may be blurted out before the Court is able to rule on that objection. So I expect that [the] jury will absolutely follow that instruction. When I sustain an objection, you're not to consider that evidence, it's as if it never came in or never existed and I expect that the jury will follow that.

N.T., 12/19/11, at 47-48.

"It is the duty of the trial judge to take affirmative steps to attempt to cure harm." *Poust v. Hylton*, 940 A.2d 380, 386 (Pa. Super. 2007), *appeal denied*, 598 Pa. 782, 959 A.2d 320 (2008) (citing *Siegal v. Stefanyszyn*, 718 A.2d 1274, 1277 (Pa. Super. 1998), *appeal denied*, 559 Pa. 693, 739 A.2d 1059 (1999)). A trial court may remove a purported taint through curative instructions. *Commonwealth v. Stilley*, 689 A.2d 242, 250 (Pa. Super. 1997) (citations omitted). In most instances, a curative instruction to the jury regarding the potentially prejudicial event is sufficient to overcome the potential prejudice to the defendant from the event. *See e.g. Commonwealth v. Johnson*, 846 A.2d 161, 167 (Pa. Super. 2004) (curative instruction to jury adequate to obviate prejudice from remark

made by witness). We are mindful that “[a]bsent evidence to the contrary, a presumption exists that a jury will follow the instructions of the trial court.” *Commonwealth v. O’Hannon*, 557 Pa. 256, 262, 732 A.2d 1193, 1196 (1999). *See also Commonwealth v. Brown*, 567 Pa. 272, 289, 786 A.2d 961, 971 (2001) (stating that “[t]he law presumes that the jury will follow the instructions of the court”); *Commonwealth v. Simpson*, 562 Pa. 255, 754 A.2d 1264 (2000) (stating that it is well established that juries are presumed to follow a trial court’s curative instructions).

As indicated above, review of the record reflects that the trial court promptly gave a curative instruction. N.T., 12/19/11, at 47-48. As the jury is presumed to follow the curative instruction, we discern no abuse of discretion by the trial court. *Brown; Simpson*. Appellant’s first claim fails.

Appellant next complains about comments made by the prosecutor during summation regarding Appellant’s credibility. Appellant specifically asserts the prosecutor’s comments that “Mr. Silsby is [the] least credible person here because he’s the one sitting here before you. He’s the one with something to lose. . . . I submit to you that he’s not credible[.]” constituted prosecutorial misconduct and were in contravention of the American Bar Association Standards.¹ N.T., 12/19/11, at 148, 150.

¹ Appellant states that expression of the prosecutor’s opinion as to the credibility of Appellant contravenes the standard that it is unprofessional to

The trial court addressed the issue as follows:

[I]n the present case, even though the prosecutor made potentially improper comments during his closing argument, the Court had instructed the jury prior to both opening arguments and closing arguments that the speeches counsel would make were not to be considered evidence by the jury. Furthermore the Court gave the following instruction to the jury after the Commonwealth delivered its closing argument:

Thank you ladies and gentlemen, you've just heard closing arguments of counsel. I would point out to you that personal opinions of the prosecutor or the defense as to the guilt or innocence of this Defendant is really for you to determine. References as to whether he's credible or incredible again is for the jury alone to make that determination. I would ask that you consider your hearing of all the evidence. You make the determination as to whether they're credible or not. If there is indications that Defendant is not credible, you should not accept that as truth because you have to determine that, that takes province away from you. So I am going to ask you again that jury having heard all of the testimony in this matter including testimony from the Defendant in this case you alone will decide credibility of this gentleman, not be swayed by comments from counsel, and I will note the continuing objection.

N.T., 12/19/11, at 162-163.

In light of the general instructions, the specific curative instruction and the substantial evidence of Appellant's guilt, we discern no abuse of discretion by the trial court. ***See Commonwealth v. Lewis***, 39 A.3d 341, 353 (Pa. Super. 2012), appeal denied, 51 A.3d 838 (Pa. 2012) (where a trial

express a personal belief or opinion as to the truth of any evidence. ***See American Bar Association Standard***, § 5.8(b).

court instructs a jury that statements of counsel are not evidence and cannot be the basis for a verdict, an appellant is not prejudiced to the extent that a new trial is warranted); ***Commonwealth v. Judy***, 978 A.2d 1015, 1020 (Pa. Super. 2009) (prosecutor's comment on the credibility of witnesses and argument addressing the witnesses' credibility did not warrant new trial). ***See also Commonwealth v. Hogentogler***, 53 A.3d 866, 878-879 (Pa. Super. Ct. 2012) (citing ***Judy***) (concluding that prosecutor's intemperate statement made at the close of the trial was not inflammatory to such a degree that it would fix bias and hostility against appellant in the minds of the jury and in light of the overwhelming evidence of appellant's guilt, a new trial was not warranted).

Judgment of sentence affirmed.