NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LEMUEL MARRERO-MONGE, JR.,	:	No. 625 MDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, February 29, 2012,
in the Court of Common Pleas of Dauphin County
Criminal Division at Nos. CP-22-CR-0004798-2010,
CP-22-CR-0004800-2010

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: February 22, 2013

Lemuel Marrero-Monge, Jr., appeals from the judgment of sentence of February 29, 2012, following his conviction of first-degree murder and other charges. We affirm.

The trial court has set forth the facts of this matter as follows:

> On the morning of June 24, 2009, the brother of Appellant, Michael Marrero, (Michael) drove to the house of Katherine Morales (Katherine), Michael's former girlfriend, in a maroon/burgundy colored car. (N.T., February 28, 2012, Vol. 1, 124-125). When Michael arrived at Katherine's house they sat together on the back porch and began to have a conversation. (N.T., 126, 129-130). Approximately an hour later, another man, Edgardo Sanchez (Edgardo), approached the side of the back porch to which Michael stood up and addressed him. (N.T., 130-131, 137). As Edgardo approached Michael, Edgardo pointed a gun at Michael and told him not to move. (N.T., 131). Edgardo was accompanied by two

other men, Juan Gaston[Footnote 5] (Juan) and Jonathan Martinez (Jonathan) who also proceeded to come onto Katherine's porch. (N.T., 131, 133). Juan approached Michael and told Michael to give him everything that he had on his person and subsequently patted him down for any weapons. (N.T., 132). Thereafter, Jonathan and Juan began to beat Michael with their fists. (N.T., 132). Edgardo remained at the corner of the porch with a gun. (N.T., 134). As Juan and Jonathan were beating Michael they threw Michael off the porch onto the grass area below the porch where Juan and Jonathan started to kick Michael. (N.T., 135). Katherine was also hit by Juan and Jonathan when she tried to put herself between Michael and his assailants. (N.T., 135-136). Juan then began hitting Michael's head with a stick. (N.T., 137). As Juan was hitting Michael in the head Jonathan went inside Katherine's home. (N.T., 137). Edgardo had moved from the porch down to where Michael and Juan were and Edgardo began kicking Michael. At some time during the beating, Michael was able to get off the ground and run away on Naudain Street towards 15th Street.[Footnote 6] (N.T., 139). After sustaining an intense beating, Michael was bleeding profusely from all over his body. (N.T., 145). Katherine then called Bianca Blanco[Footnote 7] (Bianca) to tell her what had just happened and to get Michael's father and brother to come over to get Edgardo, Juan, and Jonathan off her property. (N.T., 149). Edgardo, Juan and Jonathan remained at Katherine's house for about five-to-ten minutes before they left toward 16th Street to get into their car. (N.T., 140).

After Edgardo, Juan and Jonathan left Katherine's house, Appellant and Appellant's father, Lemuel Marrero Sr. (Lemuel Sr.)[1], arrived at Katherine's house. (N.T., 142). After convening at Katherine's house Lemuel Sr. and Appellant left

[1] Lemuel Marrero-Juarbe, appellant's father, was found guilty of third-degree murder and criminal conspiracy to commit aggravated assault. We affirmed the judgment of sentence on June 25, 2012. ***Commonwealth v. Marrero-Juarbe***, 53 A.3d 939 (Pa.Super. 2012) (unpublished memorandum).

Katherine's house in a burgundy/maroon colored car that Michael was driving earlier. Lemuel Sr. was in the driver's seat, Appellant sat in the front passenger seat and Michael sat in the back seat. (N.T., 144). During Katherine's testimony, she positively identified Appellant as the man that came to her house with Lemuel Sr. on June 24, 2009 but noted that Appellant's appearance had changed. [Footnote 8] (N.T., 146).

After Appellant and Lemuel Sr. left Katherine's house they went to Bianca's house. Bianca was standing outside near the back door of her apartment in Hall Manor with Jessica Martinez (Jessica) when she heard and saw Appellant and Lemuel Sr. approaching her. (N.T., 174, 175). Bianca heard Appellant and Lemuel Sr. say in Spanish and English as they approached her apartment, "[t]hat's where they live. That's where they're at." (N.T., 174). When Appellant and Lemuel Sr. approached Bianca they asked her if her cousins were home to which she responded that they were not. (N.T., 176). Appellant then said to Bianca while standing within two-to-three feet of her that he would "shoot the house down or shoot it up." (N.T., 176-177). Appellant showed Bianca a gun tucked in his pant waist band by lifting up his shirt and told her that if she let her cousins in her apartment that Appellant and Lemuel Sr. would drag her cousins out of Bianca's apartment by their hair and shoot them. (N.T., 181-182). He then pulled out the gun from his waist, pointed the gun at her,[Footnote 9] and said, "this is what I have for them if [you] let them in the house. " (N.T., 182). Out of fear, Bianca then told Appellant and Lemuel Sr. that they could find her cousins and Jonathan in her black Chevrolet Lumina. (N.T., 184).

After the encounter, Bianca called her mother, Maria Espada (Maria), and hysterically told her what had just happened. (N.T. February 28, 2012 Vol. II, 22-23). Maria then drove her car to her cousin Luis' house 15-minutes after her conversation with Bianca looking for Juan, Edgardo, and Jonathan. (N.T., 23).

When she entered Luis' house, she went upstairs and encountered her nephew Juan. (N.T., 24). Maria then started yelling at Juan and Jonathan, who had recently arrived, and told them that Appellant and his father were looking for them and were going to harm them. (N.T., 25). Maria then left Luis' house to go to Bianca's apartment and Jonathan left Luis' house and ran down Nectarine Street to Swatara toward 13th Street. (N.T., 26).

Jermaine Williams, an eye witness, was present at 13th Street and Paxton Street on June 24, 2009 at approximately 12:50 p.m. Jermaine was driving his car on the 13th Street Bridge in the right-most lane next to the side walk. (N.T. February 27, 2012, 70, 72). As Jermaine was driving in his car on the 13th Street bridge he observed two Hispanic men walking single file on the sidewalk arguing with each other.[Footnote 10] (N.T., 70). Jermaine's attention became affixed to these two men and he slowed down to observe what was happening between them. (N.T., 72). As he observed the two men in front of him on the sidewalk from the 13th Street Bridge, Jermaine saw one of the men fidgeting with something in his pant waist while the other man started to walk away. (N.T., 75). Jermaine described the man walking away as a Hispanic man in a white t-shirt with long hair and a slim figure. (N.T., 70). The other man following the man in the white t-shirt was described as a Hispanic man in a black-and-yellow t-shirt with short hair, thin beard, slight sunburn on his face, and had an eyebrow piercing above his left eye. (N.T., 73-74). As the man in the white t-shirt started to walk away, he turned around to look at the man in the black-and-yellow t-shirt, put his hands up and then started to run away from the man in the black-and-yellow t-shirt. (N.T., 76). Jermaine then saw the man in the black-and-yellow t-shirt pull a gun from his pant waist and fire four shots at the man in the white t-shirt.[Footnote 11] (N.T., 76). The man in the white t-shirt fell to the ground and tried to push himself up off the ground but then collapsed to the ground. (N.T., 76). Shortly after making this

observation, Jermaine saw a late model, burgundy colored car speeding from the Saturn dealership parking lot making its way across the median on 13th Street. (N.T., 76).

After Jermaine observed the shooting, he called Detective David A. Lau (Det. Lau) of the Harrisburg Police Department from his cell phone.[Footnote 12] (N.T., 76). Jermaine met with Det. Lau at 2:30 p.m. on June 24, 2009 to give a recorded statement. (N.T., 77, 92-93). The next day, on June 25, 2009, Det. Lau presented Jermaine with a photographic array and Det. Lau asked Jermaine if he recognized the shooter. [Footnote 13]. (N.T., 79). When Det. Lau showed Jermaine the photographic array Det. Lau instructed Jermaine that the person in question may or may not be in the group of photos that he was being shown. (N.T., 95-96). The other individuals in the photographic array were all light skinned Hispanic males with some facial hair and dark hair, similar to Jermaine's description of Appellant. (N.T., 96-97). Two of the eight individuals in the array had piercings: Appellant and another individual with ear piercings. (N.T., 98). Within approximately five seconds of viewing the photographic array, Jermaine pointed to Appellant's photo and indicated that he looked like the shooter.[Footnote 14] (N.T., 81). After he identified the man in the photographic array, Det. Lau circled the man's picture and Jermaine and Detective Lau signed their initials on the photographic array. (N.T., 80). Jermaine further identified the man in the photographic array as Appellant who was present at pretrial. (N.T., 83). As Jermaine testified as to Appellant's appearance, he noted that Appellant's appearance at pretrial was significantly different from when he observed Appellant on June 24, 2009 during the shooting.[Footnote 15] (N.T., 60-61). Jermaine noted that Appellant's hair was longer, that he no longer had any facial hair and that his body figure appeared to be much heavier than when he observed Appellant on June 24, 2009. (N.T., 84-85).

Officer Deborah Reigle of the Harrisburg City Police was on patrol in Allison Hill of Harrisburg around 12:50 p.m. on June 24, 2009. (N.T. February 28, 2012 Vol. I, 10-11). During this time, Officer Reigle heard Officer Jenny Jenkins call on the police radio that she had heard shots fired on the south side of Allison Hill in the area of 13th Street and Paxton Street. (N.T., 11). Officer Reigle then proceeded to drive her police vehicle to the area where there was a report of shots being fired. (N.T., 11). Once Officer Reigle arrived at 13th Street and Paxton Street, she observed the shooting victim, who was later identified as Jonathan, lying face down in a grassy area near the Sutliff Saturn car dealership on 13th Street and Paxton Street. (N.T., 12-13). Officer Reigle approached Jonathan and observed that he was unresponsive. (N.T., 13). Upon further inspection, Officer Reigle noticed that Jonathan had an entrance wound from a gunshot in his back and blood near that wound. (N.T., 18).

Officer Leroy Lucas, a detective in the forensics unit for the Harrisburg Police department, arrived at the crime scene and photographed four bullet casings on the highway and a cut-up black t-shirt lying in the grassy area of the Saturn dealership. (N.T., 23). After these items were photographed, Det. Lucas collected the bullet casing[s] and put them in an envelope and put the cut-up t-shirt in a paper bag. (N.T., 23). These items were then marked with a case number, sealed and placed in the police forensics van to be processed as evidence. (N.T., 23). After taking photos and collecting evidence at the crime scene, Det. Lucas went to Harrisburg Hospital, where Jonathan had been taken, to collect more evidence. At Harrisburg Hospital, Det. Lucas collected a white bloody t-shirt that belonged to Jonathan from one of the emergency hospital staff. (N.T., 26-27). Det. Lucas then departed Harrisburg Hospital and returned to the Harrisburg Police station where he took all of the collected evidence to the lab. (N.T., 27). Det. Lucas then began to process the evidence by checking the

bullet casings collected from the crime scene for finger prints but found none. (N.T., 27).

The next day, Det. Lucas attended Jonathan's autopsy where he collected Jonathan's clothing and a bullet that was removed from Jonathan's body which was processed as evidence. (N.T., 28). Jonathan's autopsy revealed four gunshot wounds: one to the back, one to the right armpit region, one to the left leg, and one to his right forearm. (N.T. February 29, 2012, 8). Dr. Wayne Ross M.D. concluded in his expert opinion within a reasonable degree of scientific certainty that Jonathan died of multiple gunshot wounds that another person had to have inflicted and that Appellant's death was a homicide. (N.T., 15).

Corporal Mark Garrett (Corp. Garrett) of the Pennsylvania State Police, an expert in firearms and tool mark examination, inspected the four cartridge cases recovered from the crime scene. (N.T., 47-48, 53). Corp. Garrett determined that the discharged casings were Winchester .40 caliber cartridges. (N.T., 53). The bullet casings were determined to have been discharged from the same gun which was determined to be a gun manufactured by Glock. (N.T., 55-56). While the gun involved in Appellant's case was not recovered as evidence, the gun that fired the bullet casings on June 24, 2009 was recovered as evidence in a completely separate matter. (N.T., 57).

Detective John O'Connor (Det. O'Connor) of the Harrisburg Police subsequently obtained a search warrant for Appellant's home at 1217 F Cumberland Road Harrisburg. (N.T., 80-81). Upon searching Appellant's home, Det. O'Connor retrieved a gun holster from the top shelf of a hall closet in which a .40 caliber hand gun could fit into. (N.T., 83, 86).

Detective Timothy Carter (Det. Carter) was the lead investigator and affiant in this matter. (N.T., 89-90). After canvassing the crime scene and conducting his initial investigation, Det. Carter had

> Appellant in mind as a suspect in this matter. (N.T., 96). On June 25, 2009, Det. Carter went to the Red Roof Inn on Progress Avenue around 1:30 a.m. because Det. Carter had received information from a confidential informant that Appellant was staying there and executed a search warrant there. (N.T., 95-96, 99). At the Red Roof Inn, Det. Carter learned that Lemuel Sr. and Michael had registered there in Room 148. (N.T., 96). Lemuel Sr. and Michael's registration card indicated that they had checked in on June 24, 2009 and checked out on June 25, 2009.[Footnote 16] (N.T., 97-98). Det. Carter later learned through a search warrant of Lemuel Sr.'s cell phone that Appellant had fled to New York City and thereafter fled to Puerto Rico. (N.T., 100-101).
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> In October of 2009, Det. Carter spoke with Special Agent Vladimir Gonzalez of the United States ATF in Puerto Rico regarding Appellant and how Appellant was wanted in Harrisburg for Jonathan's murder. (N.T., 31). Agent Gonzalez then began actively seeking Appellant in Puerto Rico. (N.T., 31).
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> On January 2, 2010, Appellant was arrested by the police in Puerto Rico for firearm possession. (N.T. February 27, 2012, 10). Task Force Agent Jose Fajardo (Officer Fajardo) was present when Appellant was arrested and witnessed Appellant being given his Miranda[2] warnings, to which Appellant admitted to carrying a firearm while being a fugitive. (N.T., 59). Appellant was subsequently housed in a jail facility until January 4, 2010. On January 4, 2010, Appellant was taken out of the jail facility and U.S. Marshals transported him to the ATF office in Puerto Rico to meet with Agent Gonzalez and discuss the firearms charges in Puerto Rico and the pending charges in Harrisburg. (N.T., 12). When Appellant arrived at the ATF office, he was escorted into the interview room with handcuffs and leg shackles where Officer Fajardo and Agent Gonzalez accompanied him and gave him his Miranda warnings. (N.T., 13-14; See also N.T., 15-16).

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

When Appellant was seated in the room, Agent Gonzalez had Appellant's handcuffs and leg shackles removed. (N.T., 14). Agent Gonzalez explained to Appellant that lying to a federal officer is a federal offense. (N.T., 13). In addition to reading Appellant his Miranda warnings, Agent Gonzalez also gave Appellant a written form of his Miranda warnings. (N.T., 13). After Appellant read them he signed it indicating that he understood his Miranda warnings.[Footnote 17] (N.T., 13). After giving Appellant his Miranda warnings, Agent Gonzalez explained to Appellant that the ATF was involved because he was a fugitive in possession of a firearm. (N.T., 17). Appellant indicated that he knew he was a fugitive when Appellant told Agent Gonzalez that he was going to turn himself in after his girlfriend gave birth to his daughter. (N.T., 17). Agent Gonzalez first questioned Appellant about the gun that he was carrying which was the initial cause for his arrest in Puerto Rico, but then began questioning Appellant about the June 24, 2009 incident in Harrisburg, Pennsylvania. (N.T., 19-20). He asked Appellant to "walk him through" the events that transpired in Harrisburg on June 24, 2009. (N.T., 32). At this point, Appellant gave a statement as to his version of the events that transpired on June 24, 2009 and also provided a signed written statement after Agent Gonzalez asked him to write his statement down.[Footnote 18] (N.T., 20, 22). During the interview, Agent Gonzalez indicated that he made no threats to Appellant and made no promises to him. (N.T., 23). Agent Gonzalez told Appellant that his family members could be charged with harboring a fugitive if they were helping him and that his children could be taken away by the Family Department in Puerto Rico if his girlfriend were implicated as well. (N.T., 34). He told Appellant that if Appellant helped him that he could help Appellant with the Assistant U.S. Attorney with respect to his gun charges in Puerto Rico and fugitive status. [Footnote 19] (N.T., 34-35). In total, the interview lasted approximately one-and-a-half hours. (N.T., 54).

During the interview, Appellant recounted the events of June 24, 2009 wherein he stated that he had received a call from his brother Michael that day indicating that he had been beaten. He further elaborated that he got in a car with an individual named J-Rock to look for the men that beat Michael. (N.T. February 28, 2012 Vol II, 38-39). Appellant stated that he was driving the car and that J-Rock was in the passenger seat. (N.T., 39-40). Appellant began driving around looking for Michael's assailants when he spotted Jonathan at a gas station. J-Rock, allegedly, exited the car, ran after Jonathan and shot him repeatedly. (N.T., 40). Appellant told Agent Gonzalez that J-Rock used a .40 caliber Glock pistol. (N.T., 40). Appellant further stated that he was in a lot of anger and also shot at Jonathan with a .380-caliber pistol but that the gun jammed after the third round. (N.T., 40). Thereafter, J-Rock got back into the car with Appellant where they drove to Carlisle, Pennsylvania. (N.T., 41). Appellant then gave his .380-caliber pistol to another individual, Jose Morales, and fled to New York where he resided for approximately one week. (N.T., 41). Appellant then flew from New York to Puerto Rico approximately one week after the murder. [Footnote 20] (N.T., 41).

Det. Carter subsequently traveled to Puerto Rico on June 16, 2010 to extradite Appellant to Harrisburg, Pennsylvania after he was arrested in Puerto Rico. (N.T. February 29, 2012, 102).

[Footnote 5] During this time Katherine was in an intimate relationship with Juan, a.k.a. Jose Gaston (N.T., 127-128, 132).

[Footnote 6] James Boulware, a journeyman electrician who was working across the street from Katherine's house when Michael was beaten, also testified to what Katherine witnessed the late morning of June 24, 2009. (N.T., 152-163).

[Footnote 7] Bianca was dating Jonathan during this time and her cousins are Juan and Edgardo Sanchez. (N.T., 165, 168).

[Footnote 8] Katherine noted that Appellant's body was skinnier on June 24, 2009 and that Appellant's hair was longer than it was on June 24, 2009. (N.T., 146).

[Footnote 9] Jessica was also present standing next to Bianca during the confrontation with Appellant and Lemuel Sr. (N.T. February 28, 2012 Vol. II, 6-7).

[Footnote 10] Jermaine could not hear the two men arguing, but he testified that he could tell they were arguing based upon their outward body expressions. (N.T. February 28, 2012 Vol. I, 41).

[Footnote 11] Marian Kowatch, a witness to the shooting on June 24, 2009, also testified to witnessing the same observations Jermaine made at 13th Street and Paxton Street. (N.T. February 28, 2012 Vol. I, 108-117).

[Footnote 12] After Jermaine incurred drug charges in October of 2009, he entered an agreement where he would only have to pay costs and fines if he worked as an informant for Det. Lau. (N.T. February 28, 2012 Vol. I, 36-37).

[Footnote 13] Det. Lau explained that when the Harrisburg Police form a photo array they try to make the photo array so that it is not suggestive in any way. (N.T., 98).

[Footnote 14] Det. Lau testified that Jermaine was "very confident" in picking Appellant's photo out of the array as the man he saw shoot Jonathan on June 24, 2009 and that he was "absolutely certain" this was the person. (N.T. February 27, 2012, 96).

[Footnote 15] Jermaine'[s] original statement to Det. Lau on June 24, 2009 about Appellant's appearance was limited to describing Appellant's yellow shirt,

> short haircut and lack of facial hair. (N.T., 78, 93-94). Det. Lau also testified that Jermaine never mentioned that he observed a left eyebrow piercing on the man he witnessed on June 24, 2009. (N.T., 94-95).
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> [Footnote 16] William Kimmick, a forensics investigator for the Harrisburg Police department, investigated Room 148 at the Red Roof Inn in Susquehanna Township on Progress Avenue and recovered a water bottle and Diet Pepsi bottle in the hotel room. (N.T., 18, 30). It was later determined that the finger print on the bottle was Michael's. (N.T., 34-35).
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> [Footnote 17] Agent Gonzalez gave Appellant one set of Miranda warnings at the beginning of the interview without providing a separate set for the charges underlying his fugitive status. (N.T., 32).
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> [Footnote 18] During the course of the interview Agent Gonzalez's demeanor and Appellant's demeanor were always cordial and calm. (N.T., 21). Officer Fajardo described Appellant as being so calm that they even uncuffed his leg shackles. (N.T., 51).
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> [Footnote 19] Agent Gonzalez never told Appellant that he could help him with his murder charges in Harrisburg. (N.T., 35).
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> [Footnote 20] Appellant also provided a written statement which was admitted at trial as Exhibit 31 and 32. (N.T., 41).

Trial court opinion, 6/1/12 at 2-12.

Following a jury trial held February 28-29, 2012, appellant was found guilty of first-degree murder, carrying a firearm without a license, simple assault by physical menace, and criminal conspiracy to commit simple assault. At the conclusion of trial, appellant was sentenced to life

imprisonment without the possibility of parole for first-degree murder, and concurrent sentences on the remaining charges. Appellant filed a timely notice of appeal on March 28, 2012. Appellant has complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion addressing the issues raised therein.

Appellant presents the following issues for this court's review:

> A. Whether the trial court erred by denying Appellant's pretrial Motion to Suppress Identification, specifically Jermaine Williams' identification of Appellant in a photographic array in which Appellant's was the only photo that had an eyebrow piercing when Williams previously indicated the shooter he witnessed had a distinctive eyebrow piercing?
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> B. Whether the trial court erred by denying Appellant's pretrial Motion to Suppress Statements, specifically the incriminating statements he made to ATF Special Agent Vladimir A. Gonzalez and Detective Rivera from the Harrisburg Police Department regarding the above captioned matter and the incriminating statement of co-defendant, Lemuel Marrero, Sr., which implicated Appellant?
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> C. Whether the trial court erred by granting the Commonwealth's Motion for Joinder in which the Commonwealth sought to join docket CP-22-CR-4800-2010 (charges of murder and carrying a firearm without a license) and docket CP-22-CR-4798-2010 (charges of simple assault by physical menace, criminal conspiracy, and carrying a firearm without a license) despite Appellant's objections?
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> D. Whether the trial court erred by denying Appellant's oral motion for a mistrial when it

> became evident that the Commonwealth failed to disclose the recovery of the murder weapon and evidence pertaining to the recovery of the firearm pursuant to the Rules of Criminal Procedure?

Appellant's brief at 7-8.

In his first issue on appeal, appellant claims that the trial court erred in denying his pre-trial motion to suppress identification. Appellant argues that the photo array was unduly suggestive because he was the only one with an eyebrow piercing.

> The role of this Court in reviewing the denial of a suppression motion is well-established:
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> > An appellate court's 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. Since the prosecution prevailed in the suppression court, we 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 factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.
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> ***Commonwealth v. Stevenson***, 894 A.2d 759, 769 (Pa.Super.2006) (citation omitted). Although we are bound by the factual and the credibility determinations of the trial court which have support in the record, we review any legal conclusions ***de novo***. ***Commonwealth v. George***, 878 A.2d

881, 883 (Pa.Super.2005), ***appeal denied***, 586 Pa. 735, 891 A.2d 730 (2005).

Commonwealth v. Wells, 916 A.2d 1192, 1194-1195 (Pa.Super. 2007).

> Our Supreme Court has instructed that a photographic identification is unduly suggestive if, under the totality of the circumstances, the identification procedure creates a substantial likelihood of misidentification. ***Commonwealth v. DeJesus***, 580 Pa. 303, 860 A.2d 102, 112 (2004) (citation omitted).
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> > Whether an out-of-court identification is to be suppressed as unreliable, and therefore violative of due process, is determined from the totality of the circumstances. We will not suppress such identification unless the facts demonstrate that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
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> ***Commonwealth v. Burton***, 770 A.2d 771, 782 (Pa.Super.2001) (citations and quotations omitted). The variance between the photos in an array does not necessarily establish grounds for suppression of a victim's identification. ***Id.*** "Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics." ***Commonwealth v. Fisher***, 564 Pa. 505, 769 A.2d 1116, 1126 (2001). "[E]ach person in the array does not have to be identical in appearance." ***Burton***, 770 A.2d at 782. The photographs in the array should all be the same size and should be shot against similar backgrounds. ***Commonwealth v. Thomas***, 394 Pa.Super. 316, 575 A.2d 921 (1990).

Commonwealth v. Kendricks, 30 A.3d 499, 504 (Pa.Super. 2011), ***appeal denied***, ___ Pa. ___, 46 A.3d 716 (2012).

Instantly, Williams never told Detective Lau that appellant had an eyebrow piercing. (Trial court opinion, 6/1/12 at 6, 14.) Williams' description of appellant was limited to his clothing, haircut and lack of facial hair. (***Id.*** at 6-7 n.15, 14.) The other individuals in the photo array were similar in appearance to Williams' description of appellant. (***Id.*** at 6, 14.) The Commonwealth can hardly be faulted for not including other individuals with piercings when Williams never mentioned appellant's piercing to the detective. In fact, Detective Lau was adamant that had Williams told him about the eyebrow piercing, they would have included other individuals in the array with piercings. (Notes of testimony, 2/28/12 at 106.)

At any rate, there was an independent basis for Williams' identification of appellant. Williams had an unimpeded view of appellant and picked him out of the line-up without hesitation.

> When an out-of-court identification is alleged to be tainted, an in-court identification may still stand if, considering the totality of the circumstances, the identification "had an origin sufficiently distinguishable to be purged of the primary taint." ***Commonwealth v. Abdul–Salaam***, 544 Pa. 514, 678 A.2d 342 (1996); ***see also Commonwealth v. James***, 506 Pa. 526, 486 A.2d 376 (1985). The factors a court should consider in determining whether there was an independent basis for the identification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the

> criminal; (4) the level of certainty demonstrated by the witness during the confrontation; and (5) the length of time between the crime and the confrontation. ***Id.*** at 380.

Kendricks, 30 A.3d at 506.

Williams witnessed the shooting on a clear, sunny day at approximately 12:50 p.m. (Trial court opinion, 6/1/12 at 13.) Williams indicated that there was nothing obstructing his view and that he got a "good look" at appellant during the crime. (***Id.*** at 13-14.) Williams' attention was focused on observing appellant and the victim. (***Id.***) Approximately two hours later, Williams provided a detailed description of the perpetrator to police. (***Id.*** at 13.) The following day, June 25, 2009, when the photo array was presented to Williams, he picked appellant out of the line-up in approximately five to ten seconds. (***Id.*** at 14.) Detective Lau testified that Williams was "100 percent confident"; "There was no question in his mind." (Notes of testimony, 2/28/12 at 101-103.) Therefore, there was an independent basis for Williams' identification of appellant as the shooter. The trial court did not err in denying appellant's motion to suppress identification.

Next, appellant argues that the trial court erred in denying his pre-trial motion to suppress statements made to police. Appellant contends that the incriminating statements were made involuntarily and under duress because Agent Gonzalez threatened to have his mother and girlfriend arrested and the children removed from the home. (Appellant's brief at 15.) According to

appellant, Agent Gonzalez also induced him to make a statement by promising to help him with the fugitive gun charges. (***Id.***) Furthermore, appellant states that at the time he agreed to waive his ***Miranda*** rights and talk to police, he was under the impression that the interview pertained only to the firearms charges in Puerto Rico. However, after he waived his ***Miranda*** rights, Agent Gonzalez began questioning him about the homicide charges in Pennsylvania. (***Id.***) According to appellant, this rendered his confession involuntary. (***Id.***)

> A confession obtained during a custodial interrogation is admissible where the accused's right to remain silent and right to counsel have been explained and the accused has knowingly and voluntarily waived those rights. The test for determining the voluntariness of a confession and whether an accused knowingly waived his or her rights looks to the totality of the circumstances surrounding the giving of the confession.
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> ***Commonwealth v. Jones***, 546 Pa. 161, 170, 683 A.2d 1181, 1189 (1996) (citations omitted). "The Commonwealth bears the burden of establishing whether a defendant knowingly and voluntarily waived his Miranda rights." ***Commonwealth v. Bronshtein***, 547 Pa. 460, 464, 691 A.2d 907, 913 (1997) (citation omitted).

Commonwealth v. Parker, 847 A.2d 745, 748 (Pa.Super. 2004).

Here, appellant was read his ***Miranda*** rights and also signed a written waiver. (Trial court opinion, 6/1/12 at 15.) Appellant proceeded to make an oral statement and also drafted a written statement indicating his

involvement in the victim's murder. (***Id.***) The interrogation lasted only one and one-half hours and appellant was not restrained. (***Id.*** at 16.) Appellant's handcuffs and leg shackles were removed during the interview. (***Id.***) Appellant's demeanor was described as cordial and calm. (***Id.*** at 11 n.18.)

As stated above, appellant complains that Agent Gonzalez threatened to have his family arrested and his children taken away. We disagree with appellant's characterization of Agent Gonzalez's statements. As the trial court explains, Agent Gonzalez was simply informing appellant of the possible consequences if his family was involved in aiding and abetting a known fugitive. (***Id.*** at 16.) There is no indication that Agent Gonzalez threatened to have appellant's family arrested and his children taken away if he refused to give a statement.

Similarly, appellant alleges that his incriminating statements were the result of Agent Gonzalez's promises to help him with the gun charges in Puerto Rico. Even if Agent Gonzalez did make some vague offer of assistance with respect to the gun charges in Puerto Rico and appellant's fugitive status, we reject appellant's argument that it rendered his ***Miranda*** waiver involuntary. As the trial court notes, Agent Gonzalez never promised to help appellant with the murder charges in Pennsylvania. (***Id.*** at 11 n.19.) Considering the totality of the circumstances, it appears that appellant's decision to waive his ***Miranda*** rights and make a statement implicating

himself in the victim's murder was the product of a free and unconstrained choice.

Finally, appellant complains that he only waived his ***Miranda*** rights with respect to the fugitive gun charges in Puerto Rico, and that he was under the impression the interview only pertained to the gun charges. Appellant seems to be arguing that his ***Miranda*** waiver was ineffective as to the homicide charges because those charges were not discussed until later in the interview. Appellant is incorrect. "Police, when giving someone ***Miranda*** warnings, are not required to inform him of all possible or hypothetical charges against him." ***Commonwealth v. Johnson***, ___ Pa. ___, 42 A.3d 1017, 1029 (2012), citing ***Colorado v. Spring***, 479 U.S. 564, 577 (1987) ("[A] suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege."). We also reject the implication that appellant had no idea police would question him about the pending murder charges in Pennsylvania. Indeed, appellant indicated to Agent Gonzalez that he knew he was a fugitive from justice. (Trial court opinion, 6/1/12 at 10.) Certainly, appellant could have invoked his Fifth Amendment right to counsel at any time and stopped questioning but he did not do so. The trial court did not err in denying appellant's motion to suppress his statements made to Agent Gonzalez.

Appellant also argues that the trial court erred in permitting the introduction into evidence of a statement by a non-testifying co-defendant, Lemuel Marrero, Sr. (Appellant's brief at 16.) Appellant claims that this statement directly implicated him and was admitted in violation of ***Bruton v. United States***, 391 U.S. 123 (1968). (***Id.***)

The record indicates that Lemuel Marrero, Sr. was tried separately in October 2010. Furthermore, Lemuel Marrero, Sr. was granted immunity but refused to testify, and was held in contempt of court. (Notes of testimony, 2/29/12 at 66-70.) No statement from Lemuel Marrero, Sr. was ever introduced at appellant's trial. (Trial court opinion, 6/1/12 at 14 n.21.) Therefore, appellant's argument is unfounded.

In his third issue on appeal, appellant contends that the trial court erred in granting the Commonwealth's motion for joinder of dockets 4800-CR-2010 and 4798-CR-2010. Docket No. 4798-CR-2010 was the simple assault by physical menace charge, where appellant went to Bianca Blanco's house and threatened her and Jessica Martinez with a gun. Docket No. 4800-CR-2010 was the criminal homicide charge.

> Whether to join or sever offenses for trial is within the trial court's discretion and will not be reversed on appeal absent a manifest abuse thereof, or prejudice and clear injustice to the defendant. ***Commonwealth v. Newman***, 528 Pa. 393, 598 A.2d 275, 277 (1991). The Rules of Criminal Procedure provide:
>
> Joinder-Trial of Separate Indictments of Informations

> (A) Standards
>
> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
>
> (b) the offenses charged are based on the same act or transaction.
>
> Pa.R.Crim.P. 582(A)(1)(a)-(b).

Commonwealth v. Wholaver, 605 Pa. 325, 351, 989 A.2d 883, 898 (2010), ***cert. denied***, ___ U.S. ___, 131 S.Ct. 332 (2010).

Clearly, there was no abuse of discretion in joining the offenses for trial. Detective Timothy Carter testified at the joinder hearing that Bianca Blanco was the victim, Jonathan Martinez's, girlfriend. (Notes of testimony, 2/15/12 at 7-8.) After the fight at Catherine Morales's house, appellant and his father showed up at Blanco's house looking for the three men who assaulted Michael Marrero. (***Id.*** at 9.) Blanco told them that the men had left earlier in a Chevy Lumina. (***Id.***) At that point, appellant produced a handgun from his waist area and told Blanco not to allow the men back into the house. (***Id.***) Appellant threatened that, "if they do come back to the

house that he was going to shoot up the house and drag him out by his hair." (***Id.*** at 10.)

We agree with the trial court that this was an ongoing criminal episode. (***Id.*** at 16-17.) Appellant appeared at Blanco's house with a firearm after Blanco's boyfriend, the eventual murder victim, Jonathan Martinez, allegedly beat up appellant's brother. Appellant displayed a firearm and demanded to know the whereabouts of Martinez, and threatened to drag him out of the house by his hair. Clearly, this was part of the history and natural development of the facts of the case and was therefore admissible. ***Wholaver***, 605 Pa. at 352, 989 A.2d at 899 ("Furthermore, because the charges all flowed from the same events and were part of the same story, joinder for trial was appropriate. ***See id.***, 582(A)(1)(b); ***Commonwealth v. Paddy***, 569 Pa. 47, 800 A.2d 294, 308 (2002) (evidence of other crime admissible where it is part of chain or sequence of events which became part of theory of case and formed part of natural development of facts)."). In addition, evidence that appellant showed up at Blanco's house brandishing a firearm and threatening Martinez for beating up his brother would be admissible at the homicide trial under Pa.R.E. 404(b)(2) as evidence of motive, intent and/or opportunity. The trial court did not err in joining these offenses for trial.

Finally, appellant argues that the trial court erred in denying his motion for mistrial based on a purported discovery violation. Corporal Mark

Garrett, a firearm and tool mark examiner, testified that he matched four discharged cartridge cases from the crime scene with a .40 caliber Glock firearm recovered in an unrelated case. (Notes of testimony, 2/29/12 at 56-58.) This evidence was never turned over to the defense. According to the Commonwealth, it was unaware that the state police had the firearm in their possession until Corporal Garrett testified. (***Id.*** at 72.) Defense counsel made a motion for mistrial which was denied. (***Id.*** at 73.)

Pennsylvania Rule of Criminal Procedure 573 provides, in relevant part, as follows:

> **(B) Disclosure by the Commonwealth.**
>
> *(1) Mandatory.* In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.
>
> (a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth;
>
> (f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence;

> **(D) Continuing Duty to Disclose.** If, prior to or during trial, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party shall promptly notify the opposing party or the court of the additional evidence, material, or witness.
>
> **(E) Remedy.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

Pa.R.Crim.P., Rule 573(B)(1)(a) & (f), (D), (E), 42 Pa.C.S.A.

"The Commonwealth does not violate Rule 573 when it fails to disclose to the defense evidence that it does not possess and of which it is unaware." ***Commonwealth v. Collins***, 598 Pa. 397, 424, 957 A.2d 237, 253 (2008) (citations omitted).

> As the text of Rule 573(B)(1) suggests, when the evidence is exclusively in the custody of police, possession is not attributed to the Commonwealth for purposes of Rule 573. ***Commonwealth v. Burke***, 566 Pa. 402, 781 A.2d 1136, 1142 (2001). Whether the Commonwealth's failure to disclose evidence that is exclusively in police custody constitutes a violation of ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), of course, is a different matter. If the undisclosed evidence implicates ***Brady*** (***i.e.***, if it is favorable to the accused and its non-disclosure resulted in prejudice to his case), then the Commonwealth is

> charged with its possession even while it is exclusively in the custody of police. ***Kyles v. Whitley***, 514 U.S. 419, 437–38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); ***Burke***, 781 A.2d at 1142 & n. 6 (making this distinction between ***Brady*** cases and Rule 573 cases).

Id.

Instantly, there does not appear to be any dispute that the evidence was exclusively in the possession of the state police and the Commonwealth was completely unaware of its existence prior to trial. Therefore, there was no Rule 573 violation. In addition, as the Commonwealth observes, appellant never invoked ***Brady***. (Commonwealth's brief at 23.) Appellant relied solely on Rule 573. However, even if appellant had alleged a ***Brady*** violation, he failed to demonstrate how the evidence was favorable or how he was prejudiced by its non-disclosure. As the trial court explains, appellant's theory of the case was that someone named "J-Rock" used a .40 caliber Glock handgun to shoot Martinez. (Trial court opinion, 6/1/12 at 18.) In appellant's statement to police, he asserted that he shot at the victim with a .380 caliber handgun but missed. (***Id.***) Other than the fact that appellant had a gun holster which could have fit a .40 caliber handgun (***id.*** at 9), the Glock was never tied to appellant and in fact it was recovered in a completely unrelated case, while appellant was in hiding in Puerto Rico. Appellant's theory of the case was not affected by Corporal Garrett's testimony.

Appellant argues on appeal that the firearm could potentially be exculpatory; however, he never explains how it could possibly have exonerated him when it was not recovered until months later and his defense was that someone else shot the victim. (Appellant's brief at 20-21.) Appellant's claim that the Glock firearm was material to his defense is purely speculative. For these reasons, the trial court did not err in denying appellant's motion for mistrial.

Judgment of sentence affirmed.