NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MAURICE BOWLER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 674 EDA 2012

Appeal from the Judgment of Sentence December 9, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0014779-2010,
CP-51-CR-0014781-2010, CP-51-CR-0015780-2010

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and MUSMANNO, J.

MEMORANDUM BY LAZARUS, J. **FILED MAY 15, 2013**

Maurice Bowler appeals from the judgment of sentence imposed in the Court of Common Pleas of Philadelphia after a jury convicted him of three counts of robbery,[1] two counts of terroristic threats[2] and one count each of possession of instruments of crime (PIC)[3] and persons not to possess a firearm.[4] Upon careful review, we affirm.

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

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[1] 18 Pa.C.S.A. § 3701(a)(1)(ii).

[2] 18 Pa.C.S.A. § 2706(a)(1).

[3] 18 Pa.C.S.A. § 907(a).

[4] 18 Pa.C.S.A. § 6105(a)(1).

> On November 10, 2010, at approximately 6:00 p.m., complainants Patrice Beckwith, Mendy Gee, and Wilson Beckwith were at Ms. Beckwith's home at 6019 Walton Avenue in West Philadelphia. Ms. Beckwith, who knew Defendant Maurice Bowler, had asked him to come over to fix her television. At some point that evening, [Bowler] became "very angry," and demanded Ms. Beckwith give him "everything [she] had." [Bowler] then brandished a black handgun and ordered the Beckwiths and Ms. Gee into a room. Bowler pointed the gun at all three victims and threatened to kill them. [Bowler] then took cell phones belonging to Patrice Beckwith and Mendy Gee and fled.
>
> At approximately 6:30 p.m., Philadelphia Police Officer Adam O'Donnell, Badge No. 6990, responded to a call at 6019 Walton Avenue. Officer O'Donnell found the front door of the apartment complex open and encountered the three victims "screaming, shouting, talking over each other." The three directed Officer O'Donnell upstairs to the rear bedroom. [Officer] O'Donnell searched the apartment and found no one on site.
>
> [Officer] O'Donnell relayed information to Philadelphia Police Officer Eugene Roher, Badge No. 7065[,] that [Bowler] was heading toward 59th [Street] and Cedar Avenue. In a marked police vehicle, Officer Roher saw [Bowler] on foot at 59th [Street] and Larchwood [Avenue]. [Bowler] was ordered to stop but instead took flight. Officer Roher exited his police car and caught Bowler at 58th and Rodman [Streets]. On [Bowler's] person, Officer Roher found an Apple iPhone, and a grey Samsung cell phone, both belonging to Patrice Beckwith and Mendy Gee. A gun was not recovered.
>
> Patrice Beckwith positively identified Maurice Bowler as the assailant within moments of the robbery.

Trial Court Opinion, 8/10/12, at 4-5 (internal citations omitted).

That same day, Bowler was arrested and charged with robbery and related offenses. He proceeded to a jury trial before the Honorable Ramy I. Djerassi on September 13, 2011 and was found guilty of the above offenses. On December 9, 2011, Judge Djerassi sentenced Bowler as follows: three concurrent sentences of 10 to 20 years' imprisonment on the robbery convictions; two sentences of 2½ to 5 years' imprisonment on the terroristic threats convictions, to run concurrently with each other and with the robbery sentences; and two two-year sentences of imprisonment on the possessory offenses, to run consecutively to the robbery sentences.

On January 6, 2012, Bowler filed a post-sentence motion requesting a new trial, which was denied by the trial court on January 17, 2012. Because Bowler's post-sentence motion was filed beyond the ten-day period provided for under Pa.R.Crim.P. 720, Bowler's time to file an appeal was not extended to thirty days after the disposition of that motion. As such, he was unable to file a timely appeal to this Court. Accordingly, on January 17, 2012, Bowler filed a counseled petition under the Post Conviction Relief Act ("PCRA"),[5] seeking reinstatement of his appellate rights, *nunc pro tunc*. The PCRA court granted relief on February 21, 2012.

This timely *nunc pro tunc* appeal follows, in which Bowler raises the following question: Whether the trial court erred by allowing into evidence

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[5] 42 Pa.C.S.A. §§ 9541-46.

the preliminary hearing testimony of Patrice Beckwith in violation of the Rules of Evidence and the Pennsylvania and United States constitutional rights to confrontation.

We begin by noting that the "admissibility of evidence is a matter of trial court discretion and a ruling thereon will only be reversed upon a showing that the trial court abused that discretion." ***Commonwealth v. Williams***, 58 A.3d 796, 800 (Pa. Super. 2012). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." ***Id.***

Here, Bowler asserts that the trial court erred in allowing the Commonwealth to introduce the preliminary hearing testimony of key witness Patrice Beckwith after authorities were unable to locate her prior to trial. In particular, Bowler argues that: (1) the Commonwealth's "belated" and "*pro forma*" efforts to locate Beckwith were insufficient to satisfy the Commonwealth's burden to prove her unavailability and (2) the Commonwealth's failure to provide discovery (in particular, witness statements to police) prior to the preliminary hearing deprived the defense of a full and meaningful opportunity to cross-examine Beckwith and the trial court employed the incorrect standard in addressing this claim.

We have reviewed the record, including the transcription of the preliminary hearing and the witnesses' police statements, as well as the

parties' briefs and the relevant law. We conclude that Judge Djerassi's well-written opinion thoroughly, comprehensively and correctly disposes of the issues Bowler raises on appeal.

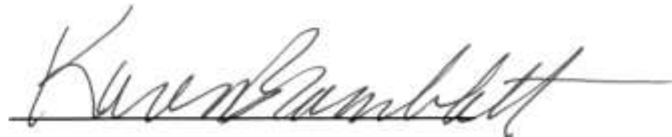
In particular, Judge Djerassi properly concluded that the Commonwealth sufficiently established that it made a good faith, reasonable attempt to locate Beckwith in the week leading up to trial by employing four Philadelphia Police detectives to engage in a multifaceted search that included interviewing neighbors, searching internet and police databases, and contacting hospitals and the morgue. ***See Commonwealth v. Campion***, 672 A.2d 1328, 1331 (Pa. Super. 1996) ("The test for unavailability is whether the prosecution has made a good faith effort to produce the live testimony of the witness. The length to which the prosecution must go to produce the testimony is a question of reasonableness.") Moreover, Judge Djerassi correctly determined that Bowler was given a full and fair opportunity to cross-examine Beckwith at his preliminary hearing and utilized the proper standard in evaluating Bowler's claim, *i.e.* that a defendant asserting a lack of a full and fair opportunity for cross examination must establish that he was deprived of "vital impeachment evidence." ***Commonwealth v. Leak***, 22 A.3d 1036 (Pa. Super. 2011). Bowler's claim that Beckwith's and Gee's police statements could have been used for impeachment purposes during the preliminary hearing is meritless; Judge Djerassi correctly notes that "omissions are not inconsistencies" and concludes that, viewed in context, the examples cited

by Bowler are not actually inconsistent and certainly do not rise to the level of "vital impeachment evidence." ***See Commonwealth v. Hanford***, 937 A.2d 1094, 1099 (Pa. Super. 2007) ("[D]issimilarities and omissions in prior statements must be substantial enough to cast doubt on a witness' testimony to be admissible as prior inconsistent statements.").

Accordingly, we affirm based on Judge Djerassi's opinion and direct counsel to attach a copy of that opinion in the event of further proceedings in this matter.

Judgment of sentence affirmed.

Judgment Entered.



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Date: 5/15/2013

FILED
AUG 10 2012
Criminal Appeals Unit
First Judicial District of PA

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
TRIAL DIVISION

Commonwealth of Pennsylvania : CP-51-CR-0014779-2010
v. : CP-51-CR-0014780-2010
: CP-51-CR-0014781-2010
Maurice Bowler :

J. DJERASSI August 10, 2012

OPINION

Defendant Maurice Bowler ("Bowler") brings this direct appeal following a judgment of sentence entered on December 9, 2011. Bowler was convicted by a Philadelphia jury of a gunpoint robbery and related charges.

Bowler, through counsel, alleges, *inter alia*, the following: 1) this Court erred by admitting the preliminary hearing testimony of an unavailable witness; 2) this Court erred by admitting the recording of a 911 call reporting the robbery; 3) this Court erred by allowing the defendant to enter an alleged conditional plea; 4) the evidence was insufficient to support his conviction for 18 Pa. C.S. § 907 (possession of an instrument of crime) absent evidence that the alleged gun met the definition of "weapon"; and 5) the evidence was insufficient to support his conviction for 18 Pa. C.S. § 6105 absent evidence that a gun was a "firearm".

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

PROCEDURAL HISTORY

Defendant was arrested on November 10, 2010 in connection with an armed robbery in West Philadelphia.

On November 29, 2010, a preliminary hearing was held, wherein a complaining witness,

Exhibit "B"

Patrice Beckwith, gave testimony implicating Defendant in an armed robbery. Defendant was held for court on all charges. Defense counsel was not provided with discovery prior to the preliminary hearing.[1]

On September 12, 2011, the Commonwealth filed a motion *in limine* pursuant to *Pa.R.E. 804*, seeking to introduce the preliminary hearing testimony of Patrice Beckwith. Defense counsel filed a reply and an evidentiary hearing was held on September 13, 2011. Upon consideration of the evidence presented and applicable law, this Court granted the Commonwealth's motion.

Upon conclusion of the evidentiary hearing, defense counsel called this Court's attention to a 911 radio tape. Defense counsel made an oral objection to the admissibility of the tape, arguing the tape was irrelevant and inadmissible hearsay. This Court denied the defense motion after listening to the tape and hearing argument.

Finally, a stipulation was entered between the Commonwealth and Defendant, whereby a verdict of guilt for any of the charges of Violation of the Uniform Firearms Act ("VUFA") § 6106, VUFA § 6108, and possession of instrument of crime, would trigger a fact finding by this Court that the essential elements have been proven for VUFA § 6105, if Defendant's prior criminal record made him eligible for liability under VUFA § 6105.

Defendant was then arraigned as follows:

CP-51-CR-0014779-2010:
1) robbery (F1);[2] 2) possession of firearm by persons prohibited (F2);[3] 3) firearms not to be carried without a license (F3);[4] 4) carrying firearms in the public streets

[1] Defense counsel was provided with discovery on December 20, 2010.
[2] *18 Pa.C.S.A. § 3701(a)(1)(ii).*
3 *18 Pa.C.S.A. § 6105(a)(1).*
[4] *18 Pa.C.S.A. § 6106(a)(1).*

of Philadelphia (M1);[5] 5) possession of an instrument of crime ("PIC"), a gun (M1); [6] and 6) terroristic threats (M1);[7]

CP-51-CR-0014780-2010:
1) robbery (F1);[8] 2) terroristic threats (M1);[9]

CP-51-CR-0014781-2010:
1) robbery (F1).[10]

On September 15, 2011, the jury returned a verdict of guilty on all charges involving three robbery victims during the course of one incident. On defense motion for acquittal, the VUFA § 6106 and VUFA § 6108 convictions were set aside because the Commonwealth had not proven non-licensure.

Sentencing was deferred pending a presentence investigation.

On December 9, 2011, this Court sentenced Defendant to an aggregate twelve (12) to twenty-four (24) year prison term.[11]

On January 6, 2012, Defendant filed a post-sentence motion for a new trial. The motion was denied by this Court on January 17, 2012.

On January 17, 2012, Defendant filed a Post-Conviction Relief Act Petition for re-instatement of his appellate rights, *nunc pro tunc*. The petition was granted on February 21, 2012.

Thereafter, on February 22, 2012, Defendant filed a timely notice of appeal.

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[5] *18 Pa.C.S.A. § 6108).*
[6] *18 Pa.C.S.A. § 907(a).*
[7] *18 Pa.C.S.A. § 2706(a)(1).*
[8] *18 Pa.C.S.A. § 3701(a)(1)(ii).*
[9] *18 Pa.C.S.A. § 2706(a)(1).*
[10] *18 Pa.C.S.A. § 3701(a)(1)(ii).*
[11] Defendant was sentenced as follows: ***CP-51-CR-0014779-2010***: robbery- 10 to 20 years; PIC- 2 to 4 years, consecutive; terroristic threats- 1 to 2 years, concurrent to PIC; VUFA (6105)- 2 to 4 years, concurrent to PIC; ***CP-51-CR-0014780-2010:*** robbery 10 to 20 years, concurrent to CP-51-CR-0014779-2010; terroristic threats- 1 to 2 years, concurrent to CP-51-CR-0014779-2010; ***CP-51-CR-0014781-2010***: robbery- 10 to 20 years, concurrent to CP-51-CR-0014779-2010.

SUMMARY OF FACTS

On November 10, 2010, at approximately 6:00 p.m., complainants Patrice Beckwith, Mendy Gee, and Wilson Beckwith were at Ms. Beckwith's home at 6019 Walton Avenue in West Philadelphia. Ms. Beckwith, who knew Defendant Maurice Bowler, had asked him to come over to fix her television. (P.H. 11/29/10, p. 6). At some point that evening, Defendant became "very angry," and demanded Ms. Beckwith give him "everything I had." *Id.* at 8. Defendant then brandished a black handgun and ordered the Beckwiths and Ms. Gee into a room. *Id* at 8-10. Bowler pointed the gun at all three victims and threatened to kill them. (Commonwealth's Exhibit C-4). Defendant then took cell phones belonging to Patrice Beckworth and Mendy Gee and fled. (P.H. 11/29/10, p.11)

At approximately 6:30 p.m., Philadelphia Police Officer Adam O'Donnell, Badge No. 6990, responded to a call at 6019 Walton Avenue. Officer O'Donnell found the front door of the apartment complex open and encountered the three victims "screaming, shouting, talking over each other." (N.T. 09/13/11, pp. 108-12). The three directed Officer O'Donnell upstairs to the rear bedroom. O'Donnell searched the apartment and found no one on site.

O'Donnell relayed information to Philadelphia Police Officer Eugene Roher, Badge No. 7065 that Defendant was heading toward 59th and Cedar Avenue. In a marked police vehicle, Officer Roher saw Defendant on foot at 59th and Larchwood. Defendant was ordered to stop but instead took flight. (N.T. 09/14/11, p. 18). Officer Roher exited his police car and caught Bowler at 58th and Rodman. On Defendant's person, Officer Roher found an Apple iPhone, and a grey Samsung cell phone, both belonging to Patrice Beckwith and Mendy Gee. (Commonwealth's Exhibit C-8). A gun was not recovered.

Patrice Beckwith positively identified Maurice Bowler as the assailant within moments of the robbery. (N.T. 09/13/11, pp. 125-126).

RULE 1925(b) STATEMENT

See attached 1925(b) Statement of Errors Complained of on Appeal ("Defendant's 1925(b) Statement").

LEGAL ANALYSIS

1. **The admission of the preliminary hearing testimony of Patrice Beckwith was proper when she was unavailable at trial and where the prior testimony had been subject to full and fair cross examination and Defendant did not lack vital impeachment evidence.**

It is well established that an unavailable witness's prior recorded testimony from a preliminary hearing is admissible where the defendant had counsel and a full opportunity to cross-examine that witness. *Commonwealth v. Paddy*, 800 A.2d 294, 312-13 (Pa. 2002); *Commonwealth v. Bazemore*, 614 A.2d 684, 687 (Pa. 1992).

Defendant argues prejudicial error occurred when preliminary hearing testimony of Patrice Beckwith was admitted at trial. Bowler claims this violated Pennsylvania Rules of Evidence and his right to cross-examination. Defendant's claims are incorrect based on the witness's legal unavailability at trial and the opportunity available to cross-examine the witness at the preliminary hearing.

a. **The witness was unavailable.**

With regard to the specific question of whether Patrice Beckwith was properly declared unavailable as a witness, the test for unavailability is whether the prosecution has made a good faith effort to produce the live testimony of the witness. *Commonwealth v. Blair*, 331 A.2d 213, 214 (Pa. 1975); Pa. R.E. 804(a)(5). The length to which the prosecution must go to produce the

testimony is a question of reasonableness. *Commonwealth v. Melson*, 637 A.2d 633, 638 (Pa. Super. 1994). "The question of the sufficiency of the preliminary proof as to the absence of a witness is largely within the discretion of the trial judge." *Commonwealth v. Jackson*, 344 A.2d 842, 844 (Pa. 1975); Pa. R.E. 104.

Defendant argues the Commonwealth's "belated efforts to locate the witness did not prove her 'unavailability.'" (Defendant's 1925(b) Statement, 1(b)). The record reflects the prosecuting attorney searched for Patrice Beckwith the week before Defendant's trial. In this search, Assistant District Attorney Colin Burke enlisted the help of Philadelphia police Detectives William Campbell, Daniel McGee, Deayoung Park, and Officer Eugene Roher. Detective Campbell's efforts to find Beckwith included going to her last known address three times, interviewing the witness's past neighbors; going to another possible address in Chester County; interviewing a relative of the witness; trying all known phone numbers for Beckwith; and searching Lexis/Nexis database records. (N.T. 9/13/11, pp. 21-29). Detective McGee checked local hospitals and searched several law enforcement databases to determine if Beckwith was in custody. *Id.* at 33. Finally, two different individuals told detectives that Beckwith had "skipped town" and did not want to be found. *Id.* at 25, 41.

Thus, although the defense argued the Commonwealth could have begun searching for Beckwith earlier, there were, nonetheless, extensive efforts to find the witness. Indeed, the Commonwealth need not establish that the witness "has disappeared from the face of the earth; it demands that the Commonwealth make a good-faith effort to locate the witness and fail." *Blair*, 331 A.2d at 215. Based on what took place, this Court was satisfied that the Commonwealth established a good-faith attempt to find Patrice Beckwith.

b. The Defendant had a full and fair opportunity to cross-examine Patrice Beckwith.

Defendant asserts that his preliminary hearing counsel lacked two important pieces of evidence: (1) Patrice Beckwith's police investigation interview record containing alleged inconsistent statements; and (2) the police investigation interview record of Mendy Gee, another witness to the crime.[12] Defendant contends these documents contained vital impeachment evidence, without which the cross-examination of Beckwith was insufficient to protect his constitutional right to confront the witnesses against him. (Defendant's 1925(b) Statement, 1(c)).

"To ensure a fair and reliable trial, the Sixth Amendment guarantees criminal defendants the right to confront and cross-examine adverse witnesses. Therefore, the prior testimony of a presently-unavailable witness may be used only where the party against whom the testimony is offered 'had an adequate opportunity and similar motive to develop the testimony through direct, cross, or redirect examination.'" *Commonwealth v. Laird*, 988 A.2d 618, 630 (Pa. 2010) (internal citations omitted). A defendant is denied a full and fair opportunity to cross examine a witness where the defendant is "denied access to vital impeachment evidence at or before the time of the prior proceeding at which that witness testified." *Bazemore*, 614 A.2d at 688.

In this case, Defendant Bowler was not denied access to vital impeachment evidence based on careful review of the documents that were not in possession of defense counsel at the time of the preliminary hearing.

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[12] Defendant's 1925(b) Statement does not specify what evidence deprived Defendant of a full and fair opportunity to cross-examine Patrice Beckwith. This Opinion, therefore, addresses the arguments raised in Defendant's post-sentence motion.

Patrice Beckwith's November 10, 2010 Statement to Philadelphia Police

Review of Patrice Beckwith's November 10, 2010 police investigation interview clearly shows the statement did not contain vital impeachment evidence because omissions are not inconsistencies.

Defendant cites five alleged prior inconsistent statements by Beckwith. Contrary to Defendant's claim, these statements are not inconsistent.[13] It is well settled that an omission is not the same as an inconsistency. *Commonwealth v. Hammond*, 454 A.2d 60, 64 (Pa. Super. 1982). "Mere dissimilarities or omissions in prior statements, even when the statements are the verbatim words of the victim, do not suffice as impeaching evidence; the dissimilarities or omissions must be substantial enough to cast doubt on a witness's testimony to be admissible as prior inconsistent statements." *Commonwealth v. Bailey*, 469 A.2d 604, 611 (Pa. Super. 1983). Mere omissions, therefore, are not proper subject matter for cross-examination at a preliminary hearing. *Johnson*, 758 A.2d at 171.

i. "410,.00" [sic] is clearly a typographical error

Defendant's first alleged inconsistency is clearly a typographical error. On the November 10, 2010 police investigation record, Beckwith gives a narrative account of the robbery and states, "I paid Reese $10.00 and a pack of cigarettes to put my TV together." The report continues in a question and answer form. The pertinent exchange is as follows:

Q: DID YOU PAY REESE FOR HIS SERVICES?
A: YES, I GAVE HIM 410,.00 AND A PACK OF CIGARAETTES.

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[13] Defendant argues this Court "employed an incorrect standard, requiring the inconsistencies be 'vital impeachment' depriving the jury of its right and duty to make the credibility determination and to decide what impeachment does and does not affect credibility."(Defendant's 1925(b) Statement, 1(a)). Defendant is mistaken. The record makes clear that this Court did not require that the inconsistencies be vital impeachment, but rather, evaluated whether the defense was deprived of vital impeachment evidence, including prior inconsistent statements, at the preliminary hearing.

(Defense Exhibit, D-1). It is obvious from the report that this figure is a typographical error, caused by the typist's failure to press the "shift" key on the keyboard. The figure contains an additional error, placing an extraneous comma prior to the decimal point. Tellingly, Defendant does not cite this extraneous comma as further evidence of Beckwith conjuring a fictitious amount. These typos did not yield "vital impeachment evidence".

ii. Phones

Defendant's next alleged inconsistency is an omission. Defendant argued that Beckwith gave inconsistent statements regarding what was taken during the robbery. Beckwith's November 10, 2010 interview to police states in relevant part:

> Q: WHAT WAS TAKEN DURING THIS INCIDENT?
> A: JUST MY PHONE

Id. Defendant alleges this statement is inconsistent with the following testimony given at the preliminary hearing:

> Q: Did you give up any of your belongings?
> A: My phone was taken.
> Q: What kind of phone?
> A: The Iphone. Apple.
> Q: Was anything taken off your friend Mendi [sic] Gee?
> A: Her phone.

(N.T. 11/29/10, pp. 11-12). As is plain from the record, these two statements are not inconsistent. "The fact that [the witness's] preliminary hearing testimony contained details not included in the police report did not make the earlier statements inconsistent with her later testimony." *Johnson,* 758 A.2d at 170. Here, Beckwith's preliminary hearing answers are shaped by the phrasing of the prosecutor's questions. In contrast, the single question asked by Detective Campbell on November 10, 2010 was not specific as to Mendy Gee and therefore the

two statements are not inconsistent.

iii. Details referring to Mendy Gee's role in the robbery

Defendant claims there is an inconsistency between Patrice Beckwith's preliminary hearing testimony regarding Mendy Gee and Beckwith's initial statement to police. Specifically, Bowler contends that Beckwith's initial account that he demanded Mendy Gee to "go into my bra and give [Defendant] my money," is inconsistent with her preliminary hearing testimony. (Defense Exhibit, D-1). Defendant correctly asserts that Beckwith's preliminary hearing testimony does not include this exchange between Mendy Gee and Defendant. But, clearly, her preliminary hearing testimony does not contradict this account either. Patrice Beckwith gave the following preliminary hearing testimony:

> Q: The person who came to fix your T.V. did he do something to you inside the house?
> A: (Pause) Yes.
> Q: What did he do to you?
> A: He got angry. Very angry.
> Q: When he got angry what did he do?
> A: He asked me for everything I had. He wanted everything I had.

(N.T. 11/29/10, p. 8). As is evident from this exchange, details of Defendant's demands are not inconsistent with the fact that Patrice Bowler testified Bowler wanted "everything I had."

iv. Threats toward Wilson Beckwith

Similarly, the alleged inconsistency of Patrice Beckwith's preliminary hearing testimony regarding Wilson Beckwith is not a vital point of impeachment.

In her November 10, 2010 narrative statement to police, Beckwith stated, "[Defendant] said if I didn't give him the money he was gonna go into my grandfather's room and kill him. My grandfather's [sic] asked him to leave the house and that's when he pushed all of us into my

room and then he pushed us into the bathroom." (Defense Exhibit, D-1). Defendant contended that "[n]o specific threat was mentioned" by Beckwith at the preliminary hearing. (Defendant's Motion and Supporting Memorandum to Bar Notes of Testimony, p. 9). However, at the preliminary hearing, Beckwith testified as follows:

> Q: At some point did the person do anything to your grandfather?
> A: Yes.
> Q: How did that happen?
> A: He knows I care a lot about my grandfather and he figured if he act like he was going to hurt him I would do what he said.
> Q: Okay. And by doing what he said was what? Do you mean give up your belongings?
> A: Yes.
> Q: Now, did the person who came to fix your T.V. *did he threaten your grandfather?*
> A: *Yes.*
> Q: Did he do that in front of you?
> A: Yes.
> Q: What did he do to your grandfather?
> A: He told us all to get in the room. Told us all to get in the room. He told me give to him everything I had. Everything I had. And he was angry.

(N.T. 11/29/10, p. 8) (emphasis added). It is plain from this testimony that defense counsel would have been unable to impeach Beckwith on the basis of an alleged inconsistency. *See Hammond*, 454 A.2d 64. Nothing in Beckwith's preliminary hearing testimony contradicts the statement she gave to police. *See Commonwealth v. Cruz-Centeno*, 668 A.2d 536, 544 (Pa. Super. 1995), *app. denied*, 544 Pa. 653 (1996); *Bailey*, 469 A.2d at 611.

v. Assault and injuries

Defendant incorrectly alleges another inconsistency between Patrice Beckwith's statement to police below and her preliminary hearing testimony. This time, the claim is based on the following question and answer between a police detective and Patrice Beckwith during the November 10, 2010 statement:

Q: DID HE HIT YOU DURING THIS INCIDENT?
A: YES, ABOUT 8 TIMES.

(Commonwealth's Exhibit, C-7).

Beckwith gave the following testimony at the preliminary hearing:

Q: Did [Defendant] hit you with the gun?
A: No. (N.T. 11/29/10, p.11).

It is plain these two statements are not inconsistent. Beckwith's answer at the preliminary hearing responds to a specific question whether Defendant hit her with a gun. In contrast, her prior police statement merely states she was hit by Defendant. It does not specify if Defendant hit her with a gun, his fists, or otherwise. There is no contradiction and no doubt on Beckwith's reliability based on this claim. *Bailey*, 469 A.2d at 611.

Finally, Defendant concludes this series of claims by alleging he was prejudiced during preliminary hearing by not knowing that Ms. Beckwith had told police earlier that her "face and left arm is sore." Compare Commonwealth Exhibit C-7 to N.T. 11/29/10, p. 13.

Where Defendant was not charged with assault, and because it is unlikely that competent defense counsel would have attempted to impeach Patrice Beckwith by inviting damaging testimony about injury, it is clear this was not vital impeachment. After all, the threat of serious bodily injury giving rise to F1 Robbery in this case was the brandishing of a gun in the course of committing a theft.

Finally, Defendant's reliance on *Commonwealth v. Bazemore*, 614 A.2d 684 (Pa. 1992), is misplaced. In *Bazemore*, the Commonwealth failed to disclose that the witness had given a statement to police that was inconsistent with his preliminary hearing testimony, specifically that he had a criminal record, and that the Commonwealth was considering filing charges against him

in connection with the same incident that had given rise to the charges against the appellant. The Superior Court held a "miscarriage of justice" would surely result if the Commonwealth were allowed to use the same testimony, "which it obviously disbelieved," as a basis for convicting the appellant. *Bazemore*, 614 A.2d at 688.

This case is very different from *Bazemore*. Patrice Beckwith has no criminal history subject to impeachment, she was not under investigation in this case, and there is no suggestion that Commonwealth prosecutors disbelieved Beckwith's statements.

In summary, there was nothing in Patrice Beckwith's prior statement that compels a conclusion that Defendant was denied the use of vital impeachment evidence at the preliminary hearing. *See Cruz-Centeno*, 668 A.2d at 544; *Commonwealth v. Elliot*, 700 A.2d 1243, 1251 (Pa. 1997) (minor discrepancies are not prejudicial).

Mendy Gee's November 10, 2010 Statement to Philadelphia Police

Defendant claims the victim Mendy Gee's November 10, 2010 statement to police was also vital impeachment evidence to which he was denied before preliminary hearing. Defendant contends the statement contained evidence of Beckwith's intoxication which could have been used to impeach her credibility.

Alcohol and or drug use by the witness is relevant if the witness was under the influence at the time of the alleged occurrence. *Commonwealth v. Small*, 741 A.2d 666 (Pa. 1999). In most cases, mere consumption of alcohol is inadmissible *unless* it reasonably establishes intoxication. *Commonwealth v. McGuire*, 448 A.2d 609 (Pa. Super. 1982) (holding that "it is not merely the consumption of alcohol that is relevant to attack the credibility of a witness"); *In Re Wright*, 401 A.2d 1209 (Pa. Super. 1979) (deciding that the mere fact that a person drinks does

not impeach his credibility; evidence of drinking is admissible only if it lays a foundation for an opinion of the intoxication of the witness).

In her statement, Gee admits that she had been drinking "a lot of beer since like 12:30 in the afternoon."[14] (Commonwealth's Exhibit, C-10). Gee goes on to state, however, that she arrived at Beckwith's house in the "early evening." The timing of Gee's arriving is critical, depriving Defendant of any implication that Beckwith and Gee were drinking together all afternoon. Gee again mentions alcohol in her narrative account of the robbery. She states, "They were watching a movie, I left and went to get some more beer and came back." *Id.* Each reference to alcohol by Gee is made in the singular, possessory tense. Based on these statements, preliminary hearing counsel would not have been able to lay the necessary foundation to establish that Beckwith had been intoxicated as opposed to merely drinking. In the absence of intoxication evidence as to Patrice Beckwith, impeachment on the basis of Gee's own conduct would have been improper. *See In the Interest of M.M.,* 653 A.2d 1271, 1276 (Pa. Super. 1995) (there must be evidence of intoxication before mere consumption of alcohol is admissible for impeachment). The reason alchohol consumption alone is excluded is that unless intoxication is also shown, there is nothing wrongful about simply drinking alchohol.

Finally, Beckwith's statement to responding officers and her preliminary hearing testimony both state that Defendant was invited to Beckwith's home and stayed as a guest while he fixed Beckwith's television. Defendant is not in a position now to suggest that the earlier statements would have helped him challenge Patrice Beckwith's preliminary hearing identification or her recall of the details of the robbery. Corroborating statements of the other two victims confirm Defendant was not missing vital impeachment evidence at preliminary

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[14] The statement is time-stamped 8:10 p.m.

hearing.

Accordingly, as the admission of Patrice Beckwith's preliminary hearing testimony was not error, there is no ground for reversal.

2. This Court did not err by admitting 911 radio tapes for substantive evidence where the out-of-court statements were made while the declarant perceived the event.

Defendant next argues there was error when the jury heard a 911 call which reported the robbery.

To be admissible, evidence must be competent and relevant. *Commonwealth v. Freidl*, 834 A.2d 638, 641 (Pa. Super. 2003). Hearsay is defined as "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." Pa. R.E. 801(c). *See Commonwealth v. Smith*, 586 A.2d 957, 963 (Pa. Super. 1991).

The present sense impression exception to the hearsay rule is addressed in the Pennsylvania Rules of Evidence 803(1), which provides:

> The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Pa. R.E. 803(1). A present sense impression permits testimony of out-of-court statements about conditions or non-exciting events observed by the declarant as they are happening. *Commonwealth v. Harper*, 614 A.2d 1180, 1183 (Pa. Super. 1992), *appeal denied*, 624 A.2d 109 (Pa. 1993). The observation must be made at the time of the event or so shortly thereafter that it is unlikely that the declarant had the opportunity to form the purpose of misstating his

observation. *Commonwealth v. Blackwell*, 494 A.2d 426, 431 (Pa. Super. 1985). The present sense impression exception allows these comments to be made over the telephone. *Commonwealth v. Harris*, 658, A.2d 392, 395 (Pa. Super. 1995).

Here, the Commonwealth introduced a 911 tape recording of a phone call made to police on November 10, 2010 at 6:32 p.m. A stipulation was entered, wherein the parties agreed that if Dispatcher Soriano was called to testify, she would authenticate the tape is a true and accurate audio recording of the original call. (N.T. 9/13/11, p. 106). Thereafter, the brief 911 call was played. In it, a female caller is heard reporting an emergency. The caller states that she lives at 6021 Walton Avenue. The caller states that her next door neighbor at 6019 Walton Avenue is a senior citizen, and she can hear someone yelling trying to rob him. The caller also states that she heard a lot of noises and banging around. (Commonwealth's Exhibit, C-1). It is clear from the 911 call that the neighbor was making the statements contemporaneously to hearing the events next door. Therefore, this Court was satisfied that the statements fit the present sense exception and were relevant.

Accordingly, admission of the 911 call was not grounds for reversal.

3. Defendant did not enter a conditional guilty plea and his claim is also waived.

Defendant asserts that this Court "erred by allowing the defendant to essentially enter a conditional plea to 18 Pa. C.S. § 6105 should he be convicted of PIC without a full colloquy." (Defendant's 1925(b) Statement, 3). Defendant misstates the record. Defendant stipulated to Commonwealth proof of the elements of an 18 Pa. C.S. § 6105 conviction if the jury returned a guilty verdict for possession of an instrument of crime, provided the jury be instructed the

instrument was a gun.[15] (N.T. 9/13/11, pp. 86-88). Counsel entered this stipulation to prevent prejudice so the jury would not know of Defendant's substantial criminal record.

At formal arraignment, Defendant pled not guilty to all charges. There was no conditional guilty plea.

This claim is also waived. Ordinarily, issues not raised in the trial court are waived and cannot be raised for the first time on appeal. Pa. R.A.P. 302(a). "A party cannot rectify the failure to preserve an issue by proffering it in response to a Rule 1925(b) order." *Commonwealth v. Kohan*, 825 A.2d 702, 706 (Pa. Super. 2003) (internal citations omitted). The Rule 1925(b) statement is merely a tool to advise the trial court of previously preserved issues to be pursued on appeal. *Glenbrook Leasing Co. v. Beau sang*, 2003 PA Super 489, 839 A.2d 437, 444 (Pa. Super. 2003). *affirmed*, 881 A.2d 1266 (Pa. 2005).

Defendant now asserts for the first time in his 1925(b) Statement that there was something improper about the stipulation entered to keep his prejudicial criminal record from the jury as substantive evidence.

Defendant, however, failed to object to the stipulation at trial, at his December 9, 2011 sentencing hearing, or in his post-sentence motion filed January 6, 2011. Defendant cannot now raise the issue for the first time on appeal. Pa. R.A.P. 302(a); *Commonwealth v. Fowler*, 893 A.2d 758 (Pa. Super. Ct. 2006) (defendant's argument that his guilty plea was involuntary because the trial court did not ensure that he understood the elements of third degree murder

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[15] The decision as to "what agreements to enter about admission of evidence are rights that a lawyer may relinquish on behalf of a defendant without the defendant's express consent." *Commonwealth v. Brown*, 18 A.3d 1147, 1163 (Pa. Super. 2011). While this Court is aware that under *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966), a defendant's constitutional right to plead not guilty cannot be waived by counsel absent a defendant's express consent, the Defendant here did not enter what amounted to a guilty plea. At no time did Defendant admit guilt to 18 Pa. C.S. § 6105, whether explicitly or conditionally. *Brookhart* is therefore inapplicable and a full colloquy was not required. Nevertheless, in an abundance of caution, this Court did engage Defendant in a colloquy for the 18 Pa. C.S. § 6105 stipulation. (N.T. 9/14/11, pp. 106-108).

during the oral colloquy was waived where it was not presented to the trial court at any point when the trial court retained jurisdiction).

Accordingly, Defendant's claim is both meritless and waived.

4. The evidence was sufficient to convict Defendant of possession of an instrument of crime where circumstantial evidence established beyond a reasonable doubt that Defendant wielded a black handgun during the course of a robbery.

Defendant argues the trial evidence was "insufficient to prove 18 Pa. C.S. § 907 absent evidence that the alleged weapon met the definition of 'weapon'- to wit that it was capable of lethal use." (Defendant's 1925(b) Statement, 5).

As an initial matter, it is noted that Defendant was charged and sentenced under 18 Pa. C.S.A. §907(a).[16] Defendant's alleged error is inapplicable to 18 Pa. C.S.A. § 907(a), and instead refers to language contained in 18 Pa. C.S.A. § 907(b).[17] Section 907(b) differs substantially from subsection (a), applying to *concealed weapons* capable of lethal use. In contrast, 18 Pa. C.S.A. § 907(a) refers to criminal instruments generally, which may include handguns. *See Commonwealth v. Stanley*, 446 A.2d 583 (Pa. 1982). Contrary to Defendant's complaint, the mere fact that the instrument was a handgun does not also require the Commonwealth to prove concealment of a lethal weapon.[18]

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[16] 18 Pa. C.S.A.§ 907(a) provides in relevant part:

> (a) Criminal instruments generally. --A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.

[17] 18 Pa. C.S.A.§ 907(b) provides:

> Possession of weapon. --A person commits a misdemeanor of the first degree if he possesses a firearm or other weapon concealed upon his person with intent to employ it criminally.

Subsection (d) defines "weapon" as follows:

> Anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have. The term includes a firearm which is not loaded or lacks a clip or other component to render it immediately operable, and components which can readily be assembled into a weapon.

[18] Defendant's error is underscored by the final jury charge, in which this Court instructed:

> Then we have what is called possession of an instrument of crime. In this charge, that's the second to last one for the complaining witness, Patrice Beckwith, and on this one, in order to

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. Wider*, 744 A.2d 745, 751 (Pa. 2000). Evidence is sufficient when each element is proven beyond a reasonable doubt and will not be disturbed if the record contains support for the convictions. *Commonwealth v. Brewer*, 876 A.2d 1029, 1032 (Pa. Super. 2005).

A person commits PIC when he possesses an instrument of crime and intends to employ it criminally. 18 Pa. C.S.A. § 907(a); *Commonwealth v. Brown*, 23 A.3d 544, 561 (Pa. Super. 2011).

Viewed in the light most favorable to the Commonwealth, the trial testimony contains direct evidence from multiple witnesses that Defendant possessed a handgun. The Commonwealth presented testimony from Patrice Beckwith that Defendant pointed a black handgun at her while demanding all of her money. Testimony from Mendi Gee and Wilson Beckwith were in accord: Defendant pointed a black handgun at the victims and threatened to shoot them. (Commonwealth's Exhibit, C-4, C-5). The jury could have disbelieved their testimony but did not. *See also Brown*, 23 A.3d at 561 (toy gun pointed at a convenience store

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> prove possession of an instrument of crime, there are three elements to that; first, that the defendant possessed a gun. For a person to possess a gun, he most have the power to control and the intent to control the gun. And, second, that's [sic] gun was an instrument of crime, and that is anything that is used for criminal purposes and possessed by the defendant at the time of the alleged offense under circumstances not manifestly appropriate for lawful uses it may have.
>
> That a thing can somehow facilitate a crime is not enough. To be an instrument of crime, the thing must be something the defendant would need to use in carrying out the underlying offense; in this case, robbery.
>
> And, finally, on possession of instrument of crime, there is a third element and that is that the defendant possessed the element with intent to employ it criminally; by that I mean the gun; that is, he has to attempt or intent [sic] to commit a crime with it.
>
> The Commonwealth charge here that the crime the defendant intended to commit with the gun was a robbery. So that's possession of instrument of crime.

(N.T. 9/14/11, pp. 171-172). No objection was made by Defendant to this instruction. (N.T. 9/14/11, p. 176).

cashier while attempting to rob the store was an "instrument of crime" pursuant to 907(d)).

Accordingly, evidence was sufficient to convict Defendant for possession of an instrument of crime, 18 Pa. C.S.A. § 907(a).

5. **The evidence was sufficient to convict Defendant of possession of a firearm by persons prohibited.**

Lastly, Defendant argues the evidence was insufficient to prove 18 Pa. C.S.A § 6105, possession of a firearm by persons prohibited, "absent evidence that the alleged gun met the definition of a firearm." (Defendant's 1925(b) Statement of Matters Complained on Appeal, 4). This claim is without merit.

In order to sustain a conviction under 18 Pa. C.S.A § 6105, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a firearm and that he was convicted of an enumerated offense that prohibits him from possessing, using, controlling, or transferring a firearm. The term "firearm" is defined in that section as any weapon that is designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon. 18 Pa. C.S.A § 6105(i).

Here, the parties entered a stipulation, wherein a guilty verdict on possession of an instrument of crime, would "trigger a fact finding by this Court of possession of a firearm as to 6105..." (N.T. 9/13/11, p. 88). "A stipulation is a statement that the fact agreed upon has been proven." *Commonwealth v. Leman ski*, 529 A.2d 1085, 1097 (Pa. Super. 1987) (citing *Commonwealth v. McMurray*, 47 A. 952, 953 (Pa. 1901)). "The parties are bound to accept the facts to which they have stipulated..." *Id.* (citing *Commonwealth v. Mathis*, 463 A.2d 1167, 1171 (Pa. Super. 1983)). Indeed, this Court cautioned Defendant that a "firearm" may be "described in different ways," such that it does not necessarily refer to an actual gun. (N.T. 9/14/11, p. 106).

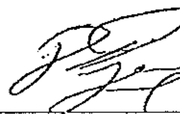
Thereafter, Defendant signaled his assent to the stipulation. *Id.* at 106-108. Based on this stipulation, there was no surprise and no error relating to Defendant's conviction on 18 Pa. C.S.A. § 6105 as he had a prior conviction that made him eligible for the offense once possession was proven beyond a reasonable doubt, as the jury announced through its guilty verdict on PIC.

In any event, this Court imposed a 2 to 4 year sentence on 6105. This is concurrent to the 2 to 4 year sentence on the PIC charge.

CONCLUSION

For the reasons stated above the judgment of sentence should be affirmed.

BY THE COURT:



Ramy I. Djerassi, J.