NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
HASAAN HATCHER,	:	No. 729 EDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, September 9, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0006134-2010

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 05, 2013**

Hasaan Hatcher appeals from the judgment of sentence of September 9, 2011[1], following his conviction of aggravated assault and criminal conspiracy. We affirm.[2]

---

[1] Appellant purports to appeal from the order dated September 30, 2011, denying post-sentence motions. However, appeal is properly taken from the judgment of sentence, not the order denying post-sentence motions. The order denying post-sentence motions acts merely to finalize the judgment of sentence for purposes of appeal. ***Commonwealth v. Stewart***, 867 A.2d 589, 590 n.1 (Pa.Super. 2005); ***Commonwealth v. Chamberlain***, 658 A.2d 395, 397 (Pa.Super. 1995). We have amended the caption accordingly.

[2] Appellant was tried together with his co-defendant and brother, Jamal Hatcher, who filed an appeal at 2932 EDA 2011. Jamal Hatcher's appeal has been assigned to this same panel.

The trial court has aptly summarized the facts of this case as follows:

> In March 2010, complainant Wayne Tynes began receiving phone calls from a collection agency regarding a delinquent Sprint cell phone account that was opened sometime in 2005 or 2006. (N.T. 05/04/11, pp. 38-39; N.T. 05/05/11, pp. 66-67). The account listed complainant's nineteen-year-old son, Lamar Span, as the account holder and carried his social security number.[Footnote 1] (N.T. 05/04/11, pp. 38-40; N.T. 05/05/11, pp. 63, 66). The collection agency also provided complainant with the address attached to the account as 7504 Fayette Street. (N.T. 05/04/11, pp. 38-40; N.T. 05/05/11, pp. 63, 66). Complainant did not believe that his son had opened this account because he has a cognitive disability. (N.T. 05/04/11, pp. 38-40; N.T. 05/05/11, p. 63). Lamar Span did have a prepaid cell phone in 2007, but he did not have a Sprint cell phone account. (N.T. 05/05/11, pp. 66-67).
>
> After learning about this fraudulent account, complainant conducted an internet search of the address and phone number provided by the collection agency and discovered that Martha Hatcher lived at 7504 Fayette Street. (N.T. 05/04/11, pp. 38-40). Complainant's wife, Tanika Scott, knew Martha Hatcher as defendant's mother. (N.T. 05/05/11, p. 68). Ms. Scott has known defendant for approximately ten years and previously spent a lot of time with defendant and his brother, Jamal Hatcher. (N.T. 05/05111, pp. 64-66, 113-114). In 2006, when complainant and his wife were separated, Ms. Scott started an intimate relationship with defendant, which continued off and on through 2008. (N.T. 05/05/11, pp. 64, 114-116).
>
> In addition to filing a formal complaint with the collection agency, complainant tried contacting defendant at least five times. (N.T. 05/04/11, pp. 41-42; N.T. 05/05/11, p. 70). Although complainant left voicemail messages requesting a call back from defendant, complainant never talked to defendant over the telephone. (N.T. 05/04/11, pp. 41-42).

Ms. Scott also tried contacting defendant. (N.T. 05/05/11, pp. 69-70). When she reached defendant, she asked him why he opened a cell phone account using her son's information, and he denied doing so. (N.T. 05/05/11, pp. 69-70). Thereafter, complainant continued trying to contact defendant over the telephone, but to no avail. (N.T. 05/05/11, pp. 69-70).

On April 1, 2010, complainant drove to 7504 Fayette Street with Ms. Scott because he wanted to talk to defendant about the delinquent cell phone account. (N.T. 05/04/11, pp. 41-43; N.T. 05/05/11, pp. 70-71). Ms. Scott remained in the car. (N.T. 05/04/11, p. 42; N.T. 05/05/11, pp. 70-72). When complainant reached the porch, he approached Ms. Hatcher and asked for defendant. (N.T. 05/04/11, pp. 41-43, 92). Defendant was not at the residence. (N.T. 05/04/11, pp. 41-43, 92). An argument between complainant and Ms. Hatcher then ensued. (N.T. 05/04/11, p. 42; N.T. 05/05/11, pp. 71-72). Before complainant left, he told Ms. Hatcher that he wanted defendant to contact him about this cell phone account. (N.T. 05/04/11, pp. 42-43; N.T. 05/05/11, p. 72).

On April 2, 2010, between 9:00 and 9:45 a.m. complainant drove Ms. Scott to her place of employment at the Wine and Spirits store, 3215 North Broad Street, near Broad and Allegheny Streets. (N.T. 05/04/11, pp. 43-44; N.T. 05/05/11, pp. 10-11). At approximately 10:30 a.m., defendant called the store and asked for Ms. Scott. (N.T. 05/05/11, pp. 19, 74-75). When Ms. Scott picked up the phone, defendant said, "You brought that pussy to my house? . . . . You told that pussy my address." (N.T. 05/05/11, pp. 75-76). He then told her: "You getting fucked up. The store you in getting fucked up. You going to lose everything. Your house getting fucked up. You done." (N.T. 05/04/11, p. 44; N.T. 05/05/11, pp. 75-76). When the phone call ended, Ms. Scott was frantic, upset, and scared. (N.T. 05/04/11, p. 44; N.T. 05/05/11, pp. 44-45). She called complainant and told him

what happened. (N.T. 05/05/11, p. 78). Shortly thereafter, complainant returned to Ms. Scott's place of employment and parked directly in front of the Wine and Spirits store. (N.T. 05/04/11, pp. 44-45; N.T. 05/05/11, pp. 78-79). When he went inside the store, complainant tried to console his wife after she told him about the content of the phone call. (N.T. 05/04/11, p. 44; N.T. 05/05/11, p. 78). Complainant then left the store, sat inside his vehicle, and waited for Ms. Scott to finish her shift. (N.T. 05/04/11, pp. 44-45; N.T. 05/05/11, pp. 78-79).

As complainant sat on the passenger side of his vehicle, he saw a person's shadow circle toward him. (N.T. 05/04/11, p. 45). He then heard defendant say: "I think that's him. I think that's him." (N.T. 05/04/11, pp. 45-46). Complainant got out of his car and approached defendant. (N.T. 05/04/11, pp. 45-46). As complainant approached defendant, defendant lifted up his shirt and showed his gun. (N.T. 05/04/11, pp. 45-46). As complainant tried to turn around, Jamal Hatcher got out of the car and said: "Watch out. I got him. I got him." (N.T. 05/04/11, p. 46). Jamal Hatcher then fired his revolver approximately six times. (N.T. 05/04/11, pp. 46-47; N.T. 05/05/11, pp. 194-196). The first bullet passed complainant's head. (N.T. 05/04/11, p. 47). The second bullet hit complainant in the right leg. (N.T. 05/04/11, p. 47). As complainant tried to run away, he fell to the ground and was lying on his stomach. (N.T. 05/04/11, pp. 47-48). While complainant was lying on the ground, Jamal Hatcher stood over complainant and shot him approximately four times in the back. (N.T. 05/04/11, p. 47). The two men then rode away in a gray Dodge Magnum with dents and scratches on the side. (N.T. 05/04/11, p. 46). The vehicle had been parked about two to three cars behind complainant's car. (N.T. 05/04/11, pp. 46-47).

Police Officer Eric Hidalgo was patrolling near 15th and Allegheny Streets when he heard four to five gunshots. (N.T. 05/05/11, p. 10). When he

approached Broad and Allegheny Streets, he saw people running away from the area. (N.T. 05/05/11, pp. 10-11). Ms. Zenola Davis, the store manager, flagged him down and told him that complainant had been shot. (N.T. 05/05/11, p. 11). Officer Hidalgo found complainant bleeding profusely as he stood near the checkout counter inside the store. (N.T. 05/05/11, p. 11). There was blood on complainant's shirt and a pool of blood on the floor. (N.T. 05/05/11, p. 11). When Ms. Scott stopped crying and screaming, Officer Hidalgo interviewed her. (N.T. 05/05/11, pp. 11-13). Based on Ms. Scott's interview, Officer Hidalgo prepared two police reports. (N.T. 05/05/11, pp. 13-20). The first police report detailed the shooting and identified Jamal Hatcher as the shooter. (N.T. 05/05/11, pp. 16-17, 20). The report also indicated that complainant suffered injuries to his chest, arm and hip. (N.T. 05/05/11, p. 16). The second police report detailed the alleged terroristic threats that were made against Ms. Scott and identified defendant as the perpetrator. (N.T. 05/05/11, pp. 13-20). Ms. Scott described defendant as a "black male, mid 30s, 5,11." (N.T. 05/05/11, pp. 19-20).

Officer Hidalgo placed an alert over police radio that a man had been shot. (N.T. 05/05/11, p. 12). Two minutes later, responding police officers arrived and transported complainant to Temple University Hospital. (N.T. 05/04/11, pp. 49-50; N.T. 05/05/11, p. 12). At approximately 10:55 a.m., complainant was taken into emergency surgery, where he was treated for five gunshot wounds; two to his upper left extremity, one to his upper right flank, one to his upper right back, and one to his right leg. (N.T. 05/04/11, pp. 49-50; N.T. 05/05/11, pp. 12, 18; N.T. 05/06/11, p. 76). In addition to repairing the brachial artery in complainant's left arm, doctors retrieved two bullets from his back. (N.T. 05/06/11, pp. 50-51, 76-77). Bullet fragments remain lodged in complainant's right shoulder, lung base region, and lower back. (N.T. 05/06/11, pp. 50-51, 77). On April 6, 2010, complainant was discharged from the hospital. (N.T. 05/06/11, p. 77). Complainant's left

arm is partially paralyzed, and he continues to suffer chronic back pain. (N.T. 05/04/11, p. 51). Due to his medical condition, he has been unable to return to work and undergoes physical therapy once a week. (N.T. 05/05/11, p. 51; N.T. 05/06/11, p. 77).

Detectives [Steven] Grace and [Don] Suchinsky were assigned to investigate this shooting. (N.T. 05/05/11, pp. 224, 233). Detective Grace interviewed Ms. Scott and Ms. Davis inside the Wine and Spirits store. (N.T. 05/04/11, pp. 185-187; N.T. 05/05/11, pp. 233-235). Ms. Scott told Detective Grace that she saw Jamal Hatcher shoot her husband. (N.T. 05/04/11, p. 188). She also told Detective Grace that she knew him personally because of her past relationship with defendant. (N.T. 05/04/11, p. 188). Sometime after this interview, Detective Grace showed Ms. Scott a photographic array that included a photograph of Jamal Hatcher. (N.T. 05/04/11, pp. 189-190, 204). Ms. Scott identified Jamal Hatcher as the shooter and circled his photograph. (N.T. 05/04/11, pp. 189-190, 204). Ms. Scott also provided police with the address of 7504 Fayette Street. (N.T. 05/04/11, p. 207).

Detective Suchinsky interviewed three eyewitnesses to the shooting and subsequent getaway: Brian Collins, Ismael Rodriguez, and Macy Suarez. (N.T. 05/04/11, pp. 166-172; N.T. 05/05/11, pp. 34, 233-235). Mr. Collins saw the shooting and heard about six gunshots while he sat inside his co-worker's vehicle parked directly across from the Wine and Spirits store. (N.T. 05/04/11, pp. 164-172). He was waiting for his co-worker to return from inside Temple University Hospital. (N.T. 05/04/11, pp. 164-172; N.T. 05/05/11, p. 235). At approximately 11:15 a.m., Detective Suchinsky interviewed Mr. Collins, who gave a signed statement, wherein he provided a description of the shooter. (N.T. 05/04/11, pp. 175-177; N.T. 05/05/11, p. 235). The only distinct feature that Mr. Collins remembered was that the shooter had a beard. (N.T. 05/04/11, p. 177). Mr. Collins was

shown a photographic array, but he was unable to identify anyone. (N.T. 05/04/11, p. 177).

Detective Suchinsky next interviewed Mr. Rodriguez. (N.T. 05/05/11, p. 234). Mr. Rodriguez heard about six gunshots and observed the shooting from his rearview mirror as he was driving southbound toward Center City. (N.T. 05/05/11, pp. 30-34). Mr. Rodriguez also saw the shooter jump inside the Dodge Magnum and flee the scene. (N.T. 05/05/11, pp. 31-32). Mr. Rodriguez described the shooter as being over 6 feet tall, 250 to 260 pounds, dark complexion with a big beard, wearing a white T-shirt, light blue jeans, and a baseball cap. (N.T. 05/05/11, pp. 35-38). After the shooting, Mr. Rodriguez parked his car at the corner and waited for police to arrive. (N.T. 05/05/11, p. 34). When police arrived, Mr. Rodriguez provided a signed statement of his observations. (N.T. 05/05/11, pp. 34-37).

Ms. Suarez parked on the 3200 block of North Broad Street and sat inside her car waiting for her mother to exit the PNC Bank located next to the Wine and Spirits store. (N.T. 05/05/11, pp. 145, 237-238). As Ms. Suarez waited for her mother, she observed a car park behind her. (N.T. 05/05/11, pp. 145-146). The driver got out of the car, approached a black male and began to argue with him. (N.T. 05/05/11, pp. 146, 151). She then saw a man exit from the passenger side of the car. (N.T. 05/05/11, pp. 146, 151). She saw the victim pull out a knife. (N.T. 05/05/11, p. 152). The driver then said, "I got something for you" and went back to his car. (N.T. 05/05/11, p. 152). The passenger also went back to the car. (N.T. 05/05/11, p. 152). Ms. Suarez then took her seat belt off and moved to the passenger side of the vehicle. (N.T. 05/05/11, pp. 152, 170). When she noticed that the driver had a gun in his hand, she ducked her head down. (N.T. 05/05/11, pp. 152-154). While she was hiding, she heard about three to four gunshots. (N.T. 05/05/11, pp. 152-154). When Ms. Suarez looked up, she saw complainant collapse next to her car. (N.T.

05/05/11, p. 153). The two men drove away in a Dodge Magnum. (N.T. 05/05/11, pp. 154-155). When the men left, she ran inside the PNC Bank to get her mother. (N.T. 05/05/11, p. 185). When Ms. Suarez came out of the bank, she noticed that police had secured the scene. (N.T. 05/05/11, p. 185).

At approximately 12:15 p.m., Detective Suchinsky interviewed Ms. Suarez. (N.T. 05/05/11, p. 165). In her signed statement, she described the passenger as a black male with a beard, wearing a white T-shirt, blue jeans, and having a thin build. (N.T. 05/05/11, pp. 164-166, 170-171). She described the driver as heavy set with a beard, wearing a white T-shirt and blue jeans. (N.T. 05/05/11, p. 170). At approximately 12:20 p.m., Detective Suchinsky showed Suarez a photographic array. (N.T. 05/05/11, p. 160). After identifying Jamal Hatcher as the shooter, Ms. Suarez circled his photograph and signed her name. (N.T. 05/05/11, pp. 159-160, 172). At trial, Ms. Suarez identified Jamal Hatcher as the shooter and defendant as the driver of the Dodge Magnum. (N.T. 05/05/11, pp. 146-147, 152-153, 186-187).

When Detective Timothy Hartman processed the crime scene, he observed a blood trail from the street to the front entrance of the Wine and Spirits store. (N.T. 05/05/11, pp. 190-191, 200-201, 205). Detective Hartman recovered a knife and a silver bullet fragment from the middle of the street. (N.T. 05/04/11, pp. 198, 203-204; N.T. 05/05/11, pp. 190-194, 197, 200, 202). Detective Hartman also discovered that a black Nissan Altima that was parked directly across the street had been struck by a bullet. (N.T. 05/04/11, pp. 198-200; N.T. 05/05/11, pp. 194, 198). The bullet went through the rear passenger window and into the rear side air bag of the vehicle. (N.T. 05/05/11, pp. 194, 198-199). Because no fired cartridge casings were found at the scene, police concluded that the shooter used a revolver instead of a semiautomatic weapon. (N.T. 05/05/11, pp. 194-196). In addition to recovering a

knife and ballistics evidence from the crime scene, police recovered live streaming video from inside the Wine and Spirits store. (N.T. 05/04/11, pp. 204-205). They also retrieved still photographs that were taken from a camera inside an automatic teller machine operated by the nearby PNC Bank. (N.T. 05/04/11, pp. 200, 204-205; N.T. 05/05/11, pp. 237-238).

After conducting his investigation, Detective Grace prepared a search warrant to 7504 Fayette Street and an arrest warrant for Jamal Hatcher. (N.T. 05/04/11, pp. 204, 206-207). On April 2, 2010, police executed the search warrant. (N.T. 05/04/11, pp. 207-208). Although no one was present at this residence, police recovered paperwork and a photograph proving it to be a residence of Jamal Hatcher. (N.T. 05/04/11, p. 208). When Ms. Hatcher returned to her residence, Detective Grace informed her that Jamal Hatcher was a suspect in a shooting and provided her with his contact information. (N.T. 05/04/11, pp. 208-209).

On April 3, 2010, Detective Grace interviewed complainant at the hospital. (N.T. 05/04/11, p. 210). Complainant was unable to identify anyone in the photographic array that Detective Grace showed him. (N.T. 05/04/11, p. 210). Complainant informed Detective Grace that defendant was the first to approach him outside the Wine and Spirits store. (N.T. 05/04/11, p. 211). Based upon complainant's interview, defendant was identified as a participant in the shooting. (N.T. 05/04/11, pp. 211-212).

On April 6, 2010, police arrested defendant at 309 West Roosevelt Boulevard. (N.T. 05/04/11, p. 212). Police Officer Daniel Gilmore recovered a 2006 gray Dodge Magnum with Pennsylvania license GTN-3055 around the corner, in front of 4818 North 4th Street. (N.T. 05/05/11, pp. 210, 213-214). The vehicle was towed to the police impound lot. (N.T. 05/04/11, pp. 213-215; N.T. 05/05/11, pp. 210-

> 212). The front passenger side and rear passenger side of the vehicle were damaged. (N.T. 05/05/11, pp. 217-219). Inside the vehicle, police found paperwork, a 3XL sweatshirt, boots, and a pair of work glasses. (N.T. 05/05/11, pp. 220-224). The paperwork included a letter from First Premier Bank listing defendant's name and address as 309 West Roosevelt Boulevard, Philadelphia, PA 19120; a receipt from T-Mobile; the vehicle title listing defendant and Martha Hatcher as co-purchasers, the vehicle identification number and an address of 7504 Fayette Street, Philadelphia, PA 19150. (N.T. 05/04/11, p. 215; N.T. 05/05/11, pp. 222-223). Approximately a week later, at or around April 13, 2010, Jamal Hatcher was arrested. (N.T. 05/04/11, pp. 213-215).
>
> ---
>
> [Footnote 1] Lamar's last name is not the same as complainant's last name because complainant changed his last name "Span" to "Tynes" when he obtained his identification card and social security card. (N.T. 05/04/11, p. 37).

Trial court opinion, 3/21/12 at 1-7.

Following a jury trial, on May 10, 2011, appellant was found guilty of aggravated assault and criminal conspiracy. He was found not guilty of the remaining charges including attempted murder, recklessly endangering another person, possession of an instrument of crime, and firearms charges. In related cases tried at the same time before the same jury, appellant was found not guilty of additional charges including witness intimidation and retaliation involving the victim and his wife. On September 9, 2011, appellant was sentenced to an aggregate term of 10 to 20 years' imprisonment. Post-sentence motions were denied, and this timely appeal

followed. Appellant 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.[3]

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

> [1.] Was [appellant]'s motion for a mistrial improperly denied after an eyewitness made an in-court identification of [appellant], where the Commonwealth stated at a motion in limine that this particular witness would not be identifying [appellant]?
>
> [2.] Should [appellant]'s motion for a mistrial have been granted after a former Assistant District Attorney testified that he handled this case while assigned to the Repeat Offenders Unit, insinuating that [appellant] was a violent felon?
>
> [3.] Were sufficient reasons present for substantially deviating from the sentencing guidelines, and imposing a sentence of ten (10) to twenty (20) years incarceration?
>
> (a) Did the court unfairly rely on the same factors which were taken into consideration in developing the guidelines, such as the nature of the offense and the injuries sustained by the victim?
>
> (b) Did the court at sentencing wrongfully rely on alleged thefts against the victim's son which were never even charged?
>
> (c) Did the court fail to give sufficient consideration to certain mitigating factors presented at sentencing; specifically that this case was

[3] Several issues raised in appellant's Rule 1925(b) statement have been abandoned on appeal. (Trial court opinion, 3/21/12 at 8.)

> [appellant]'s first arrest, [appellant] did not possess a firearm; when the victim pulled a knife on [appellant], he began to retreat; [appellant] was employed with a few credits remaining for his Bachelor's Degree, was engaged and has a young child; [appellant]'s character letters which were completely ignored by the court?

Appellant's brief at 1.

In his first issue on appeal, appellant claims the trial court erred in allowing Macy Suarez ("Suarez") to testify at trial that appellant was the passenger and his co-defendant was the driver. (Appellant's brief at 7.) Appellant complains that before trial, the Commonwealth represented that no eyewitnesses other than the complainant and his wife would identify appellant as one of the perpetrators at trial. Appellant claims that Suarez's in-court identification was a "surprise" to appellant and prejudicial, and caused appellant to alter his strategy in the middle of trial. (***Id.*** at 7-8.) Appellant argues that the trial court should have granted his request for a mistrial on this basis.

> The following standards govern our review of the denial of a motion for mistrial:
>
> > In criminal trials, declaration of a mistrial serves to eliminate the negative effect wrought upon a defendant when prejudicial elements are injected into the case or otherwise discovered at trial. By nullifying the tainted process of the former trial and allowing a new trial to

> convene, declaration of a mistrial serves not only the defendant's interest but, equally important, the public's interest in fair trials designed to end in just judgments. Accordingly, the trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. In making its determination, the court must discern whether misconduct or prejudicial error actually occurred, and if so, . . . assess the degree of any resulting prejudice. Our review of the resulting order is constrained to determining whether the court abused its discretion. Judicial discretion requires action in conformity with [the] law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.
>
> ***Commonwealth v. Lettau***, 955 A.2d 360, 363 (Pa.Super.2008) (internal citations and quotations omitted). The remedy of a mistrial is an extreme remedy required "only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial tribunal." ***Commonwealth v. Johnson***, 719 A.2d 778, 787 (Pa.Super.1998) (***en banc***), quoting ***Commonwealth v. Montgomery***, 533 Pa. 491, 626 A.2d 109, 112–113 (1993).

Commonwealth v. Judy, 978 A.2d 1015, 1019 (Pa.Super. 2009).

> With regard to evidentiary challenges, it is well established that "[t]he admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error. An abuse of discretion is

> not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record. Furthermore, if in reaching a conclusion the trial court overrides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error." ***Commonwealth v. Glass***, 50 A.3d 720, 724–725 (Pa.Super.2012) (internal quotations omitted).

Commonwealth v. Serrano, 61 A.3d 279, 290 (Pa.Super. 2013).

First, we disagree with appellant's assertion that the Commonwealth represented that Suarez would be unable to identify appellant at trial. Rather, it is clear from the transcript that Suarez was not shown a photo array containing appellant's photograph and appellant did not participate in a pre-trial line-up. (Appellant's brief, Exhibit C at 1, 4-5.) Unlike the victim and his wife, Suarez was not familiar with appellant prior to the incident, so she was unable to make an on-scene identification; however, she did describe appellant's physical characteristics. (***Id.*** at 1.) Apparently, the first opportunity Suarez had to make an identification was in court, at trial. While the Commonwealth may have surmised, for whatever reason, that Suarez would be unable to positively identify appellant at trial, it was by no means a certainty.

Furthermore, there would be no grounds to bar Suarez's in-court identification, and appellant cites no case law to the contrary. Appellant seems to be making some sort of estoppel argument, but can cite no

supporting authority. Simply because Suarez had not identified appellant before trial, does not mean that she is precluded from doing so at trial, nor would her identification be foreclosed by the Commonwealth's representations as to her ability to make such identification.

In ***Commonwealth v. Rush***, 522 Pa. 379, 562 A.2d 285 (1989), the defendant's line-up request was denied and the prosecutor informed the defense that it was believed the victim would be unable to identify the person who shot her. ***Id.*** at 387, 562 A.2d at 288-289. Later, at trial, the victim was allowed to testify as to the identity of the person who shot her, and identified the defendant. ***Id.*** Our supreme court found no error in allowing this testimony:

> It was not an abuse of discretion for the trial court to deny the requested lineup and to allow [the victim] to testify as to who shot her. This testimony was merely cumulative in light of the overwhelming evidence of the shooter's identity supplied by the testimony of the other victim and two eyewitnesses. Furthermore, the absence of a pretrial identification may go to the weight of the identification testimony, but it certainly does not render the testimony inadmissible as appellant would have us conclude.

Id. at 387-388, 562 A.2d at 289, citing ***Commonwealth v. Cornish***, 471 Pa. 256, 261, 370 A.2d 291, 293 (1977). ***See also Commonwealth v. Davis***, 439 A.2d 195, 200 (Pa.Super. 1981) ("an accused does not have a constitutional right to a line-up and the suggestiveness of a courtroom identification is only one factor to be considered in determining the reliability of the identification evidence"); ***Commonwealth v. Sexton***, 485 Pa. 17,

25, 400 A.2d 1289, 1293 (1979) ("we have declined to accept a per se rule that all in-court confrontations are inadmissible").

There is no indication here that appellant requested and was denied a pre-trial line-up. The fact that Suarez first identified appellant in court went to the weight to be given her identification testimony, not its admissibility. Indeed, as the Commonwealth points out, appellant aggressively cross-examined Suarez on this issue, emphasizing that she had not previously identified appellant at the scene, in a photo array, or at a pre-trial line-up. (Commonwealth's brief at 11.)

Appellant argues that he was unfairly prejudiced by Suarez's testimony because his trial strategy was to argue that no "independent witness," ***i.e.***, a witness other than the victim and his wife, could identify appellant, and his face could not be clearly seen on the surveillance tape. (Appellant's brief at 7.) However, the fact that appellant's trial strategy was derailed by Suarez's in-court identification is not a basis for mistrial. It is prejudicial only in the sense that it implicates appellant. Appellant could have requested a pre-trial line-up and did not. In addition, it is important to note that appellant does not argue that Suarez's identification was unreliable or that she did not have an independent basis for the identification. However, even if such an argument were advanced, it would fail for the reasons set forth in the trial court's comprehensive opinion addressing the identification issue. (Trial court opinion, 3/21/12 at 13.) As the trial court states, Suarez was the

closest eyewitness to the crime; she had ample opportunity to observe appellant and his co-defendant; and she was certain in her identification. (***Id.***) The trial court did not err in admitting this testimony and denying appellant's request for a mistrial.

In his second issue on appeal, appellant argues that the trial court erred in denying his motion for mistrial after former ADA Matthew Glazer testified that he was formerly assigned to the Repeat Felony Offenders Unit of the district attorney's office, thereby implying that appellant was a repeat felony offender. (Appellant's brief at 9.) The trial court gave a curative instruction to the jury which appellant maintains was insufficient. (***Id.***)

ADA Glazer testified that he was an assistant district attorney for the City of Philadelphia for approximately five years. (Notes of testimony, 5/6/11 at 26.) The prosecuting attorney asked ADA Glazer about his progression through the district attorney's office, and he responded by testifying regarding various units in which he had served:

> . . . After that I proceeded to the Major Trials Unit to handle a variety of cases, you know, larger drug cases, violent cases, robberies, assaults, and such. After that I progressed to the Repeat Offender Unit, which is, basically, our version of the career criminal unit where [sic] handling defendants who've been identified as particularly dangerous.

Id. At that point, defense counsel objected and moved to strike, and a sidebar was held outside the presence of the jury. (***Id.*** at 27.) Counsel

moved for mistrial which was denied. (***Id.*** at 28-29.) However, the trial court granted the request for a cautionary instruction, which was as follows:

> Ladies and gentlemen, you may not consider the fact that Mr. Glazer was at one time in the Repeat Offender Unit as evidence of anything other than his progression through the District Attorney's Office. You may not consider the fact that Mr. Glazer was in the Repeat Offender Unit as evidence against these defendants in any way.

Id. at 35.

> When the statement at issue relates to a reference to past criminal behavior, "[t]he nature of the reference and whether the remark was intentionally elicited by the Commonwealth are considerations relevant to the determination of whether a mistrial is required." ***Commonwealth v. Kerrigan***, 920 A.2d 190, 199 (Pa.Super.2007), ***appeal denied***, 594 Pa. 676, 932 A.2d 1286 (2007). A singular, passing reference to prior criminal activity is usually not sufficient to show that the trial court abused its discretion in denying the defendant's motion for a mistrial. ***Id.***; ***Commonwealth v. Allen***, 448 Pa. 177, 181, 292 A.2d 373, 375 (1972). When the trial court provides cautionary instructions to the jury in the event the defense raises a motion for mistrial, "[t]he law presumes that the jury will follow the instructions of the court." ***Commonwealth v. Brown***, 567 Pa. 272, 289, 786 A.2d 961, 971 (2001) (citation omitted), ***cert. denied***, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003).

Commonwealth v. Parker, 957 A.2d 311, 319 (Pa.Super. 2008), ***appeal denied***, 600 Pa. 755, 966 A.2d 571 (2009).

Instantly, ADA Glazer did not specifically reference past criminal behavior, he merely testified that, in addition to various other units within the district attorney's office, he had served in the Repeat Offenders Unit.

Indeed, as the trial court observed, it was unclear from his testimony whether the case even originated while he was assigned to the Repeat Offenders Unit. (Notes of testimony, 5/6/11 at 28.) When testimony resumed, ADA Glazer clarified that when he was assigned to handle this particular case, he was working in Northwest Division. (***Id.*** at 35.) In addition, the allegedly prejudicial remark was not intentionally elicited by the Commonwealth; the prosecuting attorney was merely questioning the witness about his progression through the district attorney's office.

Moreover, in an abundance of caution, the trial court granted the request for a cautionary instruction which we find was sufficient to cure any taint caused by ADA Glazer's remarks. Furthermore, as the Commonwealth notes, ADA Glazer was called to testify in relation to the charges of retaliation and witness intimidation, of which appellant was acquitted. (Commonwealth's brief at 13.) Therefore, it is difficult to see how appellant was actually prejudiced. The trial court did not err in denying appellant's motion for mistrial.

Finally, appellant challenges the discretionary aspects of sentencing. Appellant argues that his sentence of 10 to 20 years' incarceration was manifestly excessive and that the trial court did not put sufficient reasons on the record for going outside the guidelines, which called for a sentence of 36 to 54 months, plus or minus 14 months. (Appellant's brief at 10-11.)

> A challenge to the discretionary aspects of sentencing is not automatically reviewable as a

> matter of right. ***Commonwealth v. Hunter***, 768 A.2d 1136 (Pa.Super.2001)[,] ***appeal denied***, 568 Pa. 695, 796 A.2d 979 (2001). When challenging the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 522 A.2d 17 (1987); 42 Pa.C.S.A. § 9781(b); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal 'furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases.'" ***Commonwealth v. Williams***, 386 Pa.Super. 322, 562 A.2d 1385, 1387 (1989) (***en banc***) (emphasis in original).

Commonwealth v. McNear, 852 A.2d 401, 407-408 (Pa.Super. 2004).

> To demonstrate that a substantial question exists, "a party must articulate reasons why a particular sentence raises doubts that the trial court did not properly consider [the] general guidelines provided by the legislature." ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617, 622 (2002), quoting, ***Commonwealth v. Koehler***, 558 Pa. 334, 737 A.2d 225, 244 (1999). In ***Mouzon***, our Supreme Court held that allegations of an excessive sentence raise a substantial question where the defendant alleges that the sentence "violates the requirements and goals of the Code and of the application of the guidelines . . . ." ***Id.*** at 627. A bald allegation of excessiveness will not suffice. ***Id.***

Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa.Super. 2005), ***appeal denied***, 587 Pa. 684, 897 A.2d 451 (2006).

Instantly, appellant has complied with Rule 2119(f) by including in his brief the requisite statement of reasons relied upon for allowance of appeal with respect to the discretionary aspects of his sentence. (Appellant's brief at 2.) Therein, appellant argues that the trial court failed to place sufficient reasons on the record for deviating from the guideline ranges; the trial court relied on factors already subsumed within the guidelines, such as the nature of the offense and the injuries sustained by the victim; the trial court improperly relied on uncharged misconduct, ***i.e.***, alleged thefts committed against the victim's son; and the trial court ignored various mitigating factors, including that this was appellant's first arrest and he was employed with only a few credits remaining for his bachelor's degree. (***Id.***)

"Where the appellant asserts that the trial court failed to state sufficiently its reasons for imposing sentence outside the sentencing guidelines, we will conclude that the appellant has stated a substantial question for our review." ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa.Super. 1999) (***en banc***), citing ***Commonwealth v. Wagner***, 702 A.2d 1084, 1086 (Pa.Super. 1997). ***See also Commonwealth v. Reynolds***, 835 A.2d 720, 733-734 (Pa.Super. 2003) (allegation that sentencing court failed to offer specific reasons for the sentence raises a substantial question) (citation omitted); ***Commonwealth v. Long***, 831 A.2d 737, 750 (Pa.Super. 2003) (a claim that the sentence is excessive because the trial court relied on impermissible factors raises a substantial question) (citations omitted);

Commonwealth v. Hyland, 875 A.2d 1175, 1183 (Pa.Super. 2005), ***appeal denied***, 586 Pa. 723, 890 A.2d 1057 (2005) ("A substantial question is raised where an appellant alleges the sentencing court erred by imposing an aggravated range sentence without consideration of mitigating circumstances.") (citation omitted). Therefore, appellant has presented at least a colorable claim that a substantial question exists, and we may conduct a substantive review of appellant's arguments concerning the discretionary aspects of his sentence to ascertain whether relief is warranted.

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.
>
> ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa.Super.1999) (***en banc***) (quotations marks and citations omitted). ***See also Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 957, 961 (2007) (citation omitted) ("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 a lack of support as to be clearly erroneous.").

> The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is "in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." ***Commonwealth v. Ward***, 524 Pa. 48, 568 A.2d 1242, 1243 (1990); ***see also Commonwealth v. Jones***, 418 Pa.Super. 93, 613 A.2d 587, 591 (1992) (***en banc***) (offering that the sentencing court is in a superior position to "view the defendant's character, displays of remorse, defiance or indifference and the overall effect and nature of the crime."). Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review.
>
> ***Id.*** Nevertheless, the trial court's discretion is not unfettered. "When imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S. § 9721(b), that is, the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant . . . . [A]nd, of course, the court must consider the sentencing guidelines." [***Commonwealth v.***] ***Fullin***, 892 A.2d [843,] 847-48 [Pa.Super. 2006].

Commonwealth v. Coulverson, 34 A.3d 135, 143-144 (Pa.Super. 2011).

"An appellate court shall vacate a sentence and remand if the sentence is outside the guidelines and is 'unreasonable.' If the sentence is 'not unreasonable,' the appellate court must affirm." ***Commonwealth v. Griffin***, 804 A.2d 1, 7 (Pa.Super. 2002), ***appeal denied***, 582 Pa. 671, 868 A.2d 1198 (2005), ***cert. denied***, 545 U.S. 1148 (2005) (citations omitted).

> The Sentencing Code requires a trial judge who intends to sentence outside the guidelines to demonstrate, on the record, his awareness of the guideline ranges. Having done so, the sentencing court may, in an appropriate case, deviate from the guidelines by fashioning a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community. In doing so, the sentencing judge must state of record the factual basis and specific reasons which compelled him or her to deviate from the guideline ranges. When evaluating a claim of this type, it is necessary to remember that the sentencing guidelines are advisory only.

Id. at 7-8, citing ***Commonwealth v. Eby***, 784 A.2d 204, 206-207 (Pa.Super. 2001).

Instantly, the trial court put sufficient reasons on the record to justify an above-guidelines sentence. As the trial court observed, appellant's actions set the entire sequence of events in motion, by opening a cell phone account in the victim's son's name, threatening to kill Ms. Scott, and approaching the victim outside the liquor store.

> I am equally aware, Mr. Hasaan Hatcher, that you've never been convicted of a crime. In fact, the reports suggest you have never been arrested as an adult or juvenile for a crime. Nevertheless, it was your machinations that set this entire ugly event in motion. But for you, we would not be here.

Notes of testimony, 9/9/11 at 25.

Appellant and his co-defendant also put numerous bystanders in physical peril. The shooting occurred during daylight hours on a crowded

street. The first bullet flew past the victim's head and could have struck anyone in the area. (***Id.*** at 12-13.) As the trial court observed,

> This was a most egregious event. As someone pointed out, this was a shooting on Broad Street in daylight under circumstances [in] which literally dozens and dozens of innocent bystanders were put in harm's way. This is the kind of thing, unfortunately, that happens on a daily basis in this city. This kind of insanity has got to stop.

Id. at 23-24. In addition, this was not a "typical" aggravated assault case; the victim was shot multiple times in the back at close range as he lay on the street and was lucky to have survived. Indeed, the facts of the case would have supported an attempted murder conviction as a co-conspirator.

Appellant complains that the nature of the offense was already accounted for in the guidelines. (Appellant's brief at 11.) We disagree. This incident clearly exceeded the bare elements of aggravated assault, which requires only a serious bodily injury. The victim was shot five times, suffering numerous injuries including to his left arm which remains partially paralyzed. Bullet fragments remain lodged in the victim's shoulder, lung, and lower back. He is unable to return to work due to his ongoing medical problems. In addition, after the victim had been shot and was lying on the ground, defenseless, appellant's co-conspirator shot him four more times in the back. (Trial court opinion, 3/21/12 at 3.) ***See also*** notes of testimony, 9/9/11 at 25 ("A number of shots were fired after the victim was thrown on the ground. Jamal Hatcher, the man was shot in the back as he lay on the

ground. It is an ugly, ugly, ugly crime.") This was indeed a heinous crime and warranted a sentence outside the guidelines.

Appellant also protests that the Commonwealth used uncharged criminal conduct to argue for a greater sentence, specifically the alleged thefts committed against the victim's son which were never prosecuted. (Appellant's brief at 11.) The Commonwealth argued at sentencing,

> The records of the Sprint cell phone account opened in the name of the son of Wayne Times and Tamika Scott were tracked and came back to [appellant] when Tamika Scott's son was a juvenile. He was 15 years old when that account was opened. That account ran up a deficit of nearly $1,000 when Tamika Scott's son is mentally retarded with serious learning disabilities. And this incident started because [appellant] and no one else opened that account. He denied doing it. He refused to pay it. And that is why this fire storm of events transpired.

Notes of testimony, 9/9/11 at 19-20.

The basis of appellant's argument, that uncharged criminal conduct cannot be considered by the sentencing court, is simply incorrect. ***See Commonwealth v. Shugars***, 895 A.2d 1270, 1278 (Pa.Super. 2006) ("Not only does the caselaw authorize a sentencing court to consider unprosecuted criminal conduct, the sentencing guidelines essentially mandate such consideration when a prior record score inadequately reflects a defendant's criminal background."), quoting ***Commonwealth v. P.L.S.***, 894 A.2d 120, 131 (Pa.Super. 2006). The trial court was free to consider the fact that appellant stole from the victim's mentally disabled son by opening fraudulent

accounts in his name in fashioning appellant's sentence, whether such conduct resulted in additional charges or not.

Finally, appellant argues that the trial court completely ignored mitigating evidence, including appellant's employment status and the fact that he has a young child. (Appellant's brief at 11.) According to appellant, the trial court disregarded his personal history and situation and sentenced him based solely on the circumstances of the offense. (***Id.***) To the contrary, the record indicates that the trial court considered all relevant factors including appellant's employment history, educational background, and parental status. (Trial court opinion, 3/21/12 at 16-17.) Appellant's attorney advocated zealously on his behalf. (Notes of testimony, 9/9/11 at 17-18.) Appellant testified at the sentencing hearing, describing his employment history and characterizing himself as "one of the safest human beings you ever met." (***Id.*** at 22.) Furthermore, the trial court had the benefit of a pre-sentence investigation report as well as a mental health evaluation. (***Id.*** at 24; trial court opinion, 3/21/12 at 16.) "Our Supreme Court has ruled that where pre-sentence reports exist, the presumption will stand that the sentencing judge was both aware of and appropriately weighed all relevant information contained therein." ***Griffin***, 804 A.2d at 8, citing ***Commonwealth v. Devers***, 519 Pa. 88, 101-102, 546 A.2d 12, 18 (1988); ***see also Commonwealth v. Fullin***, 892 A.2d 843, 849-50 (Pa.Super. 2006) (stating "[w]here the sentencing judge had the benefit of a

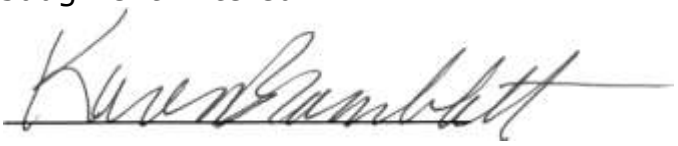
pre-sentence report, it will be presumed that he was aware of relevant information regarding appellant's character and weighed those considerations along with the mitigating statutory factors."). To the extent that appellant argues the trial court did not give enough weight to various mitigating factors, such argument does not raise a substantial question for this court's review, and we need not address it. ***Griffin***, 804 A.2d at 9, citing ***Commonwealth v. Williams***, 562 A.2d 1385 (Pa.Super. 1989) (***en banc***) (an allegation that the sentencing court did not adequately consider various factors is, in effect, a request that this court substitute its judgment for that of the lower court in fashioning a defendant's sentence).

We also note that, as the trial court remarks, it would have been within the court's discretion to impose consecutive rather than concurrent sentences. (Trial court opinion, 3/21/12 at 16.) ***See Commonwealth v. Perry***, 883 A.2d 599, 603 (Pa.Super. 2005) ("In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed.") (citations omitted). Appellant was sentenced to 10 to 20 years' imprisonment on each count of criminal conspiracy and aggravated assault, run concurrently for an aggregate sentence of 10 to 20 years. Had the trial court chosen to run them consecutively, appellant could have been sentenced to serve 20 to 40 years, which would have been within the court's statutory authority. (Trial court opinion, 3/21/12 at 16.)

We find the trial court carefully reviewed the applicable guidelines, the facts of the case, appellant's individual circumstances and background, and his rehabilitative needs. The sentence was not unreasonable and the trial court did not abuse its discretion in sentencing appellant. Having found no merit to appellant's issues on appeal, we will affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Prothonotary

Date: 6/5/2013