NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ARLIN FORD Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 729 WDA 2012

Appeal from the Judgment of Sentence April 24, 2012
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0000504-2011

BEFORE: STEVENS, P.J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.: Filed: January 30, 2013

Appellant, Arlin Ford, appeals from the April 24, 2012 aggregate judgment of sentence of 10 to 20 years' incarceration following his conviction by a jury of persons not to possess firearm, possession with intent to deliver a controlled substance (cocaine), and possession of a controlled substance (cocaine).[1] After careful review, we affirm.

The trial court aptly summarized the procedural history of this case as follows.

> This was a second trial on the charges of Possession and Possession with Intent to Deliver Cocaine and Persons Not to Possess Firearms. [Appellant's] first trial held on September 8, 2011

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 6105(a), 35 P.S §§ 780-113(30) and (16), respectively.

> resulted in guilty verdicts for charges of Possession of Marijuana (Count 4) and Possession of Paraphernalia (Count 5). The jury was unable to reach a unanimous verdict on the charges of Persons Not to Possess Firearms (Count 1), Possession of a Controlled Substance, Cocaine, With Intent to Deliver (Count 2) and Possession of a Controlled Substance, Cocaine, (Count 3). Since the jury was hopelessly deadlocked on Counts 1, 2 and 3, [Appellant's motion for] mistrial was granted on September 9, 2011 by the Honorable Judge John F. Wagner. On September 16, 2011, [Appellant] was sentenced on the convictions for Counts 4 and 5. On September 19, 2011, [Appellant] filed a motion to modify sentence which was denied by Judge Wagner on September 26, 2011. Thereafter, on October 4, 2011, [Appellant] filed his notice of appeal with the Superior Court at No. 1554 WDA 2011 from the sentence imposed on Counts 4 and 5. ….[2]
>
> On December 28, 2011, [Appellant] filed a Motion to Dismiss Counts 1, 2 and 3, contending that a retrial on these counts would constitute double jeopardy. A hearing was subsequently held on January 30, 2012 before the Honorable President Judge Gerald R. Solomon and on the same date an Order was entered denying [Appellant's] Motion to Dismiss.
>
> The second trial of [Appellant] on Counts 1, 2 and 3, commenced before [the trial court] on April 2, 2012.

Trial Court Opinion, 6/18/12, at 2-3 (citations omitted).

> Following his second trial [Appellant] was found guilty by a jury of [Counts 1, 2 and 3].

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[2] This Court affirmed the September 16, 2011 judgment of sentence on June 12, 2012. ***Commonwealth v. Ford***, 53 A.3d 930 (Pa. Super. 2012) (unpublished memorandum).

> Prior to the imposition of sentence the Commonwealth filed its notice of intent to seek a mandatory minimum sentence in accordance with the sentencing provisions of 18 Pa.C.S.A. § 7508(a)(3)(ii) which calls for a minimum mandatory sentence of no less than five years and a fine of no less than $30,000.00. The conviction was for a quantity of cocaine exceeding ten grams and [Appellant] had prior convictions for drug trafficking offenses.
>
> The Commonwealth also filed a notice of intention to seek a mandatory minimum sentence in accordance with 42 Pa.C.S.A. § 9712.1(a) which calls for a minimum mandatory sentence of five years total confinement where a firearm is found in close proximity to the controlled substance.
>
> [Appellant] was sentenced on the conviction for Possession With Intent to Deliver to a mandatory term of incarceration of not less than five years nor more than 10 years. [Appellant] was sentenced on the conviction for Persons Not to Possess Firearms to a consecutive mandatory term of not less than five years nor more than 10 years.

Id. at 1-2 (citations omitted).

The trial court further summarized the facts underlying the charges in this case as follows.

FACTS

> On February 4, 2011, Officer Jamie Holland of the Fayette County Drug Task Force using a confidential informant (C.I.) travelled to [Appellant's] residence, 138 Searight Avenue, Uniontown, Pennsylvania, where the C.I was searched and provided with $40.00 in official funds as buy money. The C.I. met [Appellant] on the porch of the residence. The C.I. entered the residence with [Appellant], following which the C.I. reappeared within two to three minutes. The C.I. again met with

Holland and turned over to the officer a small quantity of crack cocaine. The C.I. was again searched and found to be free of any contraband and the U.S. currency that had been provided by the officer.

On February 7, 2011, Officer Holland again met with and searched the C.I. and provided him with $40.00 in official funds. The Officer watched as the C.I. approached the back French doors of [Appellant's] residence. [Appellant] exited the back door and met with the C.I. The C.I. then rejoined Officer Holland and turned over to the officer a small quantity of crack cocaine. The C.I. was again searched and found to be free of contraband and currency.

With regard to both of the undercover buys, the official funds were photocopied by the police before being provided to the C.I.

On February 7, 2011, following the second undercover purchase of drugs, Officer Holland prepared the necessary documents and affidavit to apply for a search warrant. A search warrant for [Appellant's] residence was issued by the district judge. The search warrant was executed during the early hours of February 8, 2011, at [Appellant's] residence by Officer Holland, Captain David Rutter and other members of the Fayette County Drug Task Force.

During the search of the residence the Police recovered from a cubby hole above the master bedroom doorway, behind a section of unfinished drywall, $1,030.00 in U.S. currency ($60.00 of which was part of the official funds which had been supplied by Officer Holland to the C.I.), a baggie of hard white chunky substance about the size of a baseball suspected to be crack cocaine, a digital scale designed to resemble a CD case, and a .38 caliber Smith and Wesson revolver loaded with three live rounds of ammunition.

After locating the cubby hole above the door, Rutter proceeded downstairs to the first floor of the home and explained to Officer Holland what he had found. [Appellant] who was in the immediate vicinity, put his head down and said "that was my ultimate hiding spot." This comment was overheard by Captain Rutter and Constable Mike Pasquale.

The Police also recovered from a computer desk in [Appellant's] bedroom plastic baggies including baggies with the corners ripped off commonly referred to in the drug trade as diapers, a cell phone, a second digital scale and additional currency.

A box of Winchester .38 caliber ammunition was recovered from the kitchen. The box had contained 97 bullets, three bullets were missing from the box.

During the trial, the parties stipulate that the white baseball-sized substance contained in the plastic baggie recovered from the cubby hole was analyzed at the Pennsylvania State Crime Laboratory in Greensburg, Pennsylvania by Douglas Stambar, a chemist, and was found to weigh 62.7 grams and contained cocaine, a Schedule 2 controlled substance.

The Parties further stipulated that the weapon recovered was examined by firearms examiner Robert M Haggins, at the Greensburg Laboratory. The weapon was identified as being a Smith and Wesson double action revolver model .38. The examination revealed that the firearm was functional and capable of discharging the types of ammunition for which it was designed and manufactured. The weapon had a trigger pull of approximately four pounds in single action and 13 to 15 pounds in double action.

It was also stipulated that [Appellant] was a person prohibited from possessing, using, controlling, transferring or manufacturing a firearm

> pursuant to 18 Pa.C.S.A. § 6105 and that he had been so for a period of time in excess of 60 days prior to February 8, 2011.
>
> Corporal Dennis Ulery of the Pennsylvania State Police was duly qualified as an expert in the field of drug investigations. In the opinion of the expert based upon the quantity of the cocaine possessed , the sandwich baggies used as packaging material, some of which have the corners removed, the digital scales which weigh quantities as small as one-tenth of a gram, the large quantity of currency and the handgun that the cocaine was not possessed for personal use but was possessed with the intent to deliver to others.

Id. at 3-7 (citations omitted).

Appellant did not file any post-sentence motions. On May 1, 2012, Appellant filed a timely notice of appeal from the April 24, 2012 judgment of sentence. Appellant and the trial court have complied with Pa.R.A.P. 1925.

On appeal, Appellant raises the following questions for our review.

> []1: Whether the [trial] court committed reversible error in permitting the Commonwealth to introduce evidence of prior uncharged crimes[?]
>
> []2: Whether the court committed reversible error in pemitting [sic] the Commonwealth to introduce evidence from prior trial where [Appellant] was convicted. Specifically the introduction of paraphanalia [sic] from prior trial in violation of double jeopardy?
>
> []3: Did the court err in denying the Appellant's double jeopardy motion?
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> []4: Whether the court erred in denying the [Appellant's] omnibus pre-trial motion in that the basis for the search warrant lacked

> sufficeint [sic] specificity as to what areas were to be searched within the house and did not grant police the authority to search inside the walls of the home and therefore, the court should have suppressed all of the evidence recovered from inside the walls of Appellant's house.
>
> []5: Whether the Commonwealth failed to prove beyond a reasonable doubt that Appellant possessed the drugs or firearms in the instant case?

Appellant's Brief at 7.

Appellant's first two issues concern the trial court's evidentiary rulings. We acknowledge our well-settled standard of review of a trial court's ruling on the admissibility of evidence.

> The admissibility of evidence is within the sound discretion of the trial court, wherein lies the duty to balance the evidentiary value of each piece of evidence against the dangers of unfair prejudice, inflaming the passions of the jury, or confusing the jury. We will not reverse a trial court's decision concerning admissibility of evidence absent an abuse of the trial court's discretion.

Commonwealth v. Estepp, 17 A.3d 939, 945 (Pa. Super. 2011) *appeal dismissed as improvidently granted*, 54 A.3d 22 (Pa. 2012), *quoting* ***Commonwealth v. Ruffin****,* 10 A.3d 336, 341 (Pa. Super. 2010) (citations omitted).

> Not merely an error in judgment, an abuse of discretion occurs when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence on record.

Commonwealth v. Montalvo, 986 A.2d 84, 94 (Pa. 2009) (internal quotation marks and citation omitted), *cert. denied*, ***Montalvo v. Pennsylvania***, 131 S.Ct. 127 (2010).

> [When] the trial court indicate[s] the reason for its decision[,] our scope of review is limited to an examination of the stated reason. We must also be mindful that a discretionary ruling cannot be overturned simply because a reviewing court disagrees with the trial court's conclusion.

Commonwealth v. Lomax, 8 A.3d 1264, 1266 (Pa. Super. 2010) (internal quotation marks and citation omitted).

Instantly, we conclude Appellant's first two issues are waived for failure to sufficiently argue his position in his appellate brief. Appellant provides no argument at all relative to his second issue. Relative to his first issue, Appellant cites to no authority in support of his bald assertions, fails to address the authority relied on by the trial court and Commonwealth, and provides no cogent analysis or development of his claim. ***See*** Appellant's Brief at 10-12.

We have held such briefing deficiencies will result in waiver of an issue on appeal. ***See Commonwealth v. Johnson***, 985 A.2d 915, 924 (Pa. 2009) (stating, "where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived"), *cert. denied*, ***Johnson v. Pennsylvania***, 131 S.Ct. 250 (2010).

Even absent waiver, we agree with the trial court's discussion of the merits of Appellant's claims as expressed in its June 18, 2012 opinion, which thoroughly discusses the facts and the law, refuting Appellant's claims. Specifically, we agree the challenged evidence was admissible to prove Appellant's intent to deliver the cocaine. We further agree with the trial court that its instruction to the jury cast the evidence in its proper context. We also agree that Appellant's double jeopardy assertion as raised in his second issue is without merit as he was not in jeopardy for the paraphernalia charge in his second trial. Accordingly, as an alternative disposition, we adopt the trial court's June 18, 2012 opinion as our own for purposes of this appeal.

Appellant's third issue challenges the trial court's refusal to grant its motion to dismiss the charges on double jeopardy grounds. Appellant's Brief at 12. "An appeal grounded in double jeopardy raises a question of constitutional law. This court's scope of review in making a determination on a question of law is, as always, plenary. As with all questions of law, the appellate standard of review is *de novo*." ***Commonwealth v. Vargas***, 947 A.2d 777, 780 (Pa. Super. 2008) (internal quotation marks and citations omitted). "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects an individual against successive punishments and successive prosecutions for the same criminal offense." ***Id.*** (internal quotation marks and citations omitted).

> The prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. Generally, mistrial because of the inability of the jury to reach a verdict does not fall within these protections and, therefore, is not a bar to reprosecution.

Commonwealth v. McCane, 539 A.2d 340, 345-346 (Pa. 1988) (citation omitted).

Again, we conclude Appellant has waived this issue for failure to adequately brief it. **See *Johnson***, ***supra***. Appellant cites to no authority and provides no meaningful development of the issue. ***See*** Appellant's Brief at 12-13. Even absent waiver, we agree with the trial court that Appellant's issue is totally without merit. Accordingly, as an alternative resolution relative to this issue, we again adopt the trial court's June 18, 2012 opinion as our own for purposes of this appeal.

Appellant's fourth issue faults the trial court's denial of his suppression motion, filed prior to his initial trial. Appellant's Brief at 14. Appellant specifically asserts, "the warrant should not have been issued because the Commonwealth did not establish probable cause, nor did the warrant give specific permission to open the walls of [the] property to be searched." ***Id.*** We note Appellant raised this precise issue in his earlier appeal from his September 16, 2011 judgment of sentence. "[Appellant] claims there was insufficient probable cause to support the search warrant and the warrant did not permit the police to search behind drywall paneling where some of

the incriminating evidence was found." ***Ford***, ***supra*** at 1. We also note Appellant made no additional arguments or objections to admission of the physical evidence seized pursuant to the warrant during the proceedings in the retrial of counts 1, 2 and 3. This Court addressed and disposed of this issue, holding the trial court did not err in denying Appellant's suppression motion. ***Id.*** at 3-5. Accordingly, this issue is subject to collateral estoppel on the legal issue presented, and we are bound by that determination. ***See Commonwealth v. Holder***, 805 A.2d 499, 503-505 (Pa. 2002) (plurality) (applying collateral estoppel against a defendant to preclude relitigation of issue determined in prior proceeding); ***see also Commonwealth v. States***, 938 A.2d 1016, 1019-1020 (Pa. 2007) (discussing application of collateral estoppel to criminal cases in certain aspects).

In his fifth issue, Appellant claims the weight of the evidence was unable to support his convictions.[3] Appellant's Brief at 16. "[A]ppellant believes that the Commonwealth has failed to meet its burden of proof and suggests the jury's verdict shocks the conscience." ***Id.*** "A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court." ***Commonwealth v. Diggs***,

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[3] The trial court interpreted Appellant's ambiguously phrased issue in his Rule 1925(b) concise statement as a challenge to the sufficiency of the evidence. Trial Court Opinion, 6/18/12, at 17. To the extent Appellant has raised a challenge to the sufficiency of the evidence, we adopt the trial court's June 18, 2012 opinion, relative to this issue, as our own for purposes of this appeal.

949 A.2d 873, 879 (Pa. 2008), *cert. denied*, ***Diggs v. Pennsylvania***, 129 S.Ct. 1520 (2009).

> Moreover, where the trial Court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Gibbs, 981 A.2d 274, 282 (Pa. Super. 2009) (quotations and citations omitted), *appeal denied*, 3 A.3d 670 (Pa. 2010).

Because our review of a challenge to the weight of evidence is limited to whether the trial court abused its discretion, it is critical that Appellant present the issue to the trial court in the first instance in a motion for new trial.[4] Failure to raise the issue before the trial court waives the issue for appeal.

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[4] Rule 607, addressing challenges to the weight of the evidence, provides as follows.

> (A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:
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> (1) orally, on the record, at any time before sentencing;
>
> (2) by written motion at any time before sentencing; or
>
> (3) in a post-sentence motion.

(Footnote Continued Next Page)

> Appellant's failure to challenge the weight of the evidence before the trial court deprived that court of an opportunity to exercise discretion on the question of whether to grant a new trial. Because "appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence," ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 753 (2000), this Court has nothing to review on appeal. We thus hold that Appellant waived his weight of the evidence claim because it was not raised before the trial court as required by Pa.R.Crim.P. 607.

Commonwealth v. Sherwood, 982 A.2d 483, 494 (Pa. 2009) (footnote omitted), *cert. denied*, ***Sherwood v. Pennsylvania***, 130 S.Ct. 2415 (2010).

Instantly, Appellant did not file a post-sentence motion. Additionally, the record reflects that Appellant did not advance any oral or written motion for new trial, based on the weight of the evidence, prior to sentencing. Accordingly, we conclude Appellant has waived this issue.

In conclusion, we find Appellant's first, second and third issues waived for failure to adequately develop an argument in his brief. As an alternative resolution, we adopt the trial court's June 18, 2012 opinion as our own for disposition of these issues on the merits. Additionally, we conclude Appellant's fourth issue, having been finally decided in his earlier appeal is now collaterally estopped, and we are bound by that decision. We also

(Footnote Continued) ————————————————

Pa.R.Crim.P. 607(A).

conclude that Appellant has waived his challenge to the weight of the evidence by failing to raise the issue before the trial court prior to his appeal. Accordingly, we affirm the April 24, 2012 judgment of sentence.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

CRIMINAL ACTION

COMMONWEALTH OF PENNSYLVANIA :

Vs. :

ARLIN FORD, :

Defendant. : NO. 504 of 2011

OPINION

WARMAN, J.

Following his second trial defendant, Arlin Ford, was found guilty by a jury of a violation of the Controlled Substance, Drug, Device and Cosmetic Act involving Possession of a Controlled Substance, Cocaine, With Intent to Deliver[1], (Count 2), Possession of a Controlled Substance, Cocaine[2], (Count 3), and Persons not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms[3], (Count 1).

Prior to the imposition of sentence the Commonwealth filed its notice of intent to seek a mandatory minimum sentence in accordance with the sentencing provisions of 18 Pa.C.S.A. §7508(a)(3)(ii) which calls for a minimum mandatory sentence of no less than five years and a fine of no less than $30,000.00. The conviction was for a quantity of cocaine

[1] 35 P.S. §780-113(a)(30).
[2] Id. §780-113(a)(16).
[3] 18 Pa.C.S.A. §6105(a).

exceeding 10 grams and defendant had prior convictions for drug trafficking offenses.

The Commonwealth also filed a notice of intention to seek a mandatory minimum sentence in accordance with 42 Pa.C.S.A. §9712.1(a) which calls for a minimum mandatory sentence of five years total confinement where a firearm is found in close proximity to the controlled substance.

Defendant was sentenced on the conviction for Possession With Intent to Deliver to a mandatory term of incarceration of not less than five years nor more than 10 years. The defendant was sentenced on the conviction for Persons Not to Possess Firearms to a consecutive mandatory term of not less than five years nor more than 10 years.

This was a second trial on the charges of Possession and Possession With Intent to Deliver Cocaine and Persons Not to Possess Firearms. The defendant's first trial held on September 8, 2011 resulted in guilty verdicts for charges of Possession of Marijuana (Count 4) and Possession of Paraphernalia (Count 5). The jury was unable to reach a unanimous verdict on the charges of Persons Not to Possess Firearms (Count 1), Possession of a Controlled Substance, Cocaine, With Intent to Deliver (Count 2) and Possession of a Controlled Substance, Cocaine, (Count 3). Since the jury was hopelessly deadlocked on Counts 1, 2 and 3, a mistrial was granted on September 9, 2011 by the Honorable Judge John F.

Wagner. On September 16, 2011, Defendant was sentenced on the convictions for Counts 4 and 5. On September 19, 2011, defendant filed a Motion to Modify Sentence which was denied by Judge Wagner on September 26, 2011. Thereafter, on October 4, 2011, defendant filed his notice of appeal with the Superior Court at No. 1554 WDA 2011 from the sentence imposed on Counts 4 and 5. The Appeal is still pending.

On December 28, 2011, defendant filed a Motion to Dismiss Counts 1, 2 and 3, contending that a retrial on these counts would constitute double jeopardy. A hearing was subsequently held on January 30, 2012 before the Honorable President Judge Gerald R. Solomon and on the same date an Order was entered denying defendant's Motion to Dismiss.

The second trial of the defendant on Counts 1, 2 and 3, commenced before this Court on April 2, 2012.

Following his sentence on Counts 1, 2 and 3, defendant filed the current appeal from judgment of sentence directly to the Superior Court. This Opinion is in support of the judgment of sentence imposed by the Court.

FACTS

On February 4, 2011, Officer Jamie Holland of the Fayette County Drug Task Force using a confidential informant (C.I.) travelled to the defendant's residence, 138 Searight Avenue, Uniontown, Pennsylvania,

where the C.I. was searched and provided with $40.00 in official funds as buy money. IN.T. 70, 72, 78-79) The C.I. met with the defendant on the porch of the residence. (N.T. 76) The C.I. entered the residence with defendant, following which the C.I. reappeared within two to three minutes. (N.T. 77) The C.I. again met with Holland and turned over to the officer a small quantity of crack cocaine. The C.I. was again searched and found to be free of any contraband and the U.S. currency that had been provided by the officer. (N.T. 78)

On February 7, 2011, Officer Holland again met with and searched the C.I. and provided him with $40.00 in official funds. (N.T. 79, 80) The officer watched as the C.I. approached the back French doors of defendant's residence. (N.T. 82) The defendant exited the back door and met with the C.I. (N.T. 82) The C.I. then rejoined Officer Holland and turned over to the officer a small quantity of crack cocaine. The C.I. was again searched and found to be free of contraband and currency. (N.T. 83)

With regard to both of the undercover buys, the official funds were photocopied by the police before being provided to the C.I. (N.T. 73, 83, 104)

On February 7, 2011, following the second undercover purchase of drugs, Officer Holland prepared the necessary documents and affidavit to apply for a search warrant. A search warrant for defendant's residence was issued by the district judge. (N.T. 84) The search warrant was

executed during the early morning hours of February 8, 2011, at the defendant's residence by Officer Holland, Captain David Rutter and other members of the Fayette County Drug Task Force. (N.T. 84)

During the search of the residence the police recovered from a cubby hole above the master bedroom doorway, behind a section of unfinished drywall, $1,030.00 in U.S. currency ($60.00 of which was part of the official funds which had been supplied by Officer Holland to the C.I.), a baggie of hard white chunky substance about the size of a baseball suspected to be crack cocaine, a digital scale designed to resemble a CD case, and a .38 caliber Smith and Wesson revolver loaded with three live rounds of ammunition. (N.T. 30, 32, 94)

After locating the cubby hole above the door, Rutter proceeded downstairs to the first floor of the home and explained to Officer Holland what he had found. (N.T. 93) Defendant, who was in the immediate vicinity, put his head down and said "that was my ultimate hiding spot." This comment was overheard by Captain Rutter and Constable Mike Pasquale. (N.T. 33, 52)

The police also recovered from a computer desk in the defendant's bedroom plastic baggies including baggies with the corners ripped off commonly referred to in the drug trade as diapers, a cell phone, a second digital scale and additional currency. (N.T. 104, 105, 108, 110, 113)

A box of Winchester .38 caliber ammunition was recovered from the kitchen. The box had contained 97 bullets, three bullets were missing from the box. (N.T. 107)

During the trial, the parties stipulated that the white baseball-sized substance contained in the plastic baggie recovered from the cubby hole was analyzed at the Pennsylvania State Crime Laboratory in Greensburg, Pennsylvania by Douglas Stambor, a chemist, and was found to weigh 62.7 grams and contained cocaine, a Schedule 2 controlled substance. (N.T. 60)

The parties further stipulated that the weapon recovered was examined by firearms examiner Robert M. Haggins, at the Greensburg Laboratory. The weapon was identified as being a Smith and Wesson double action revolver model 38. The examination revealed that the firearm was functional and capable of discharging the types of ammunition for which it was designed and manufactured. The weapon had a trigger pull of approximately four pounds in single action and 13 to 15 pounds in double action. (N.T. 61)

It was also stipulated that the defendant, Arlin Ford, was a person prohibited from possessing, using, controlling, transferring or manufacturing a firearm pursuant to 18 Pa.C.S.A. §6105 and that he had been so for a period of time in excess of 60 days prior to February 8, 2011. (N.T. 59)

Corporal Dennis Ulery of the Pennsylvania State Police was duly qualified as an expert in the field of drug investigations. (N.T. 151-155) In the opinion of the expert based upon the quantity of cocaine possessed, the sandwich baggies used as packaging material, some of which have the corners removed, the digital scales which weigh quantities as small as one-tenth of a gram, the large quantity of currency and the handgun that the cocaine was not possessed for personal use but was possessed with the intent to deliver to others. (N.T. 166-167)

DISCUSSION

In his Concise Statement of Issues Complained of on Appeal, the defendant raised the following:

1. Whether the Court committed reversible error in permitting the Commonwealth to introduce evidence of prior uncharged crimes?
2. Whether the Court committed reversible error in permitting the Commonwealth to introduce evidence from prior trial where the defendant was convicted, specifically the introduction of paraphernalia from prior trial in violation of double jeopardy?
3. Did the Court err in denying the appellant's double jeopardy motion?

4. Whether the Court erred in denying defendant's omnibus pretrial motion in that the basis for the search warrant lacked sufficient specificity as to what areas were to be searched within the house and did not grant the police the authority to search inside the walls of the home and therefore, the Court should have suppressed all of the evidence recovered from inside the walls of appellant's house?

5. Whether the Commonwealth failed to prove beyond a reasonable doubt that appellant possessed the drugs or firearms in the instant case?

Defendant first contends that the Court committed error in permitting the Commonwealth to introduce evidence of prior uncharged crimes.

Initially we note that the admissibility of evidence is a matter directed to the sound discretion of the trial court. Commonwealth v. Robinson, 554 Pa. 293, 304, 721 A.2d 344, 350 (1998).

In this case Officer Holland, through the use of a C.I., made controlled purchases of cocaine from the defendant on February 4, 2011,

and again on February 7, 2011. The C.I. was strip-searched by the officer to assure that he had no contraband or currency on his person before being provided with official funds in the amount of $40.00 prior to each transaction. The C.I. was also searched following each transaction after turning the controlled substance over to the officer to assure that he had no contraband or currency on his person.

On each occasion, surveillance was maintained by Officer Holland in the vicinity of the defendant's residence. On both occasions the C.I. made direct contact with the defendant. On February 4, 2011 contact with the defendant was made on the front porch of the residence and on February 7, 2011 contact with defendant was made on the back porch of the residence.

For the first controlled buy, the C.I. was taken into the residence by the defendant following which the C.I. emerged with the cocaine within two to three minutes. On the occasion of the second controlled buy, defendant met with the C.I. on the back porch following which the C.I. returned with the cocaine.

The sales are directly relevant to the charge of Possession With Intent to Deliver. The Supreme Court of Pennsylvania has held that evidence of prior crimes and/or acts of violence are inadmissible merely to show the defendant's propensity for violence or bad character. However, the Supreme Court has also carved out certain exceptions to this general

rule. Specifically, the Supreme Court stated that:

> [The] general rule prohibiting the admission of evidence of prior crimes nevertheless allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.

Commonwealth v. Banks, 513 Pa. 318, 349, 521 A.2d 1, 17 (1987).

Evidence of controlled buys of narcotics at defendant's residence should be admissible to establish defendant's "intent to deliver" with respect to drugs seized during a subsequent search of defendant's premises. Commonwealth v. Matthews, 415 Pa. Super. 306, 609 A.2d 204 (1992). Commonwealth v. Pattakos, 754 A.2d 679, 681 (2000).

In the present case evidence of the controlled buys was tendered by the Commonwealth to prove that the cocaine recovered from the defendant's residence on February 8, 2011, was possessed with the intent to deliver the substance to other persons and was not being held by the defendant for personal use.

In its charge the Court instructed the jury on how to consider the controlled buys. The jury was told to consider the buys only as they

reflect upon the issue of defendant's intent to deliver. The Court provided the following instruction:

> Now, in this case the defendant has not been charged with the alleged controlled sales to the informant which are alleged to have taken place on February 4 and February 7 of 2011, but you have heard testimony relative to those dates, February 4 and February 7 of 2011. This testimony was introduced by the Commonwealth for the purpose of asking you to draw an inference that the defendant was involved in the distribution of cocaine, and therefore asks you to consider that in determining whether he was on February 8, 2011, in possession with intent to deliver. That is the charge you must decide. This evidence must not be considered by you in any other way than for the purpose I just stated. In particular, I caution you that you must not regard this evidence as showing that the defendant is a person of bad character or criminal tendencies from which you might be inclined to infer guilt. If you find the defendant guilty, it must be because you are convinced by the evidence that he committed the crime charged, and not because you believe that he has committed other improper conduct. (N.T. 239)

This Court finds that any possible prejudicial effect of the testimony was cured by the Court's instruction to the jury. *See* Commonwealth v. Echevarria, 394 Pa. Super. 261, 575 A.2d 620, 623-24 (1990).

Defendant next contends that the Court committed reversible error in permitting the Commonwealth to introduce evidence from prior trial where defendant was convicted, specifically the introduction of paraphernalia from prior trial in violation of double jeopardy.

Defendant apparently contends that since he was found guilty in his first trial of Possession of Drug Paraphernalia for which conviction he has been sentenced by Judge Wagner that the Commonwealth by introducing evidence of the possession of drug paraphernalia in the second trial has violated his right and protection from double jeopardy.

The Fifth Amendment of the Constitution provides that no person shall "be subject for the same offense, to be twice put in jeopardy of life or limb ...".

The protections afforded by the double jeopardy clause have been articulated in a number of ways by Pennsylvania's courts. Most often, the courts characterize the double jeopardy clause as providing three protections once jeopardy has attached: (1) against a second prosecution for the same offense after an acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. Commonwealth v. Smalis, 527 Pa. 375, 592 A.2d 669 (1991); Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

The Blockburger "same offense" test is not a "same evidence" test but rather a "same elements" test. The Commonwealth's introduction of evidence with regard to items of paraphernalia in a retrial on the charge of Possession With Intent to Deliver does not trigger the double jeopardy clause where defendant was found guilty of the crime of possessing drug

paraphernalia and where the jury was unable to reach a unanimous verdict on the charge of Possession With Intent to Deliver. In United States v. Felix, 503 U.S. 378, 386, 112 S.Ct. 1377, 1382, 118 L.Ed. 2d 25, 34 (1992), the United States Supreme Court explicitly stated that an overlap in proof offered in two prosecutions does not constitute a double jeopardy violation. The presentation of specific evidence in one trial does not forever prevent the government from introducing the same evidence in a subsequent proceeding. Commonwealth v. Hockenbury, 549 Pa. 527, 701 A.2d 1334 (1997).

In Grady v. Corbin, 495 U.S.. 508, 110 S.Ct. 2084, 109 L.Ed. 2d 548 (1990), the Supreme Court held that in addition to passing the Blockburger test, a subsequent prosecution must also satisfy the "same conduct" test. The "same conduct" test dictated that a subsequent prosecution will be barred if, in order to prove an essential element of that subsequent prosecution, the Commonwealth will prove conduct that constitutes an offense for which the defendant has already been convicted. Id. 495 U.S. at 521. The Grady holding, however, was abandoned by the Supreme Court as being "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." *See* United States v. Dixon, 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed. 2d 556 (1993).

The evidence that defendant possessed paraphernalia to

facilitate the delivery of the controlled substance is certainly relevant to the charge of Possession With Intent to Deliver. The possession of paraphernalia is not an element of or lesser included offense of Possession With Intent to Deliver but it merely constitutes an item of circumstantial evidence from which the finder of fact may reasonably infer that the drugs were possessed with intent to deliver. All facts and circumstances surrounding the possession of the drugs are relevant in making a determination of whether the contraband was possessed with intent to deliver. Commonwealth v. Fisher, 316 Pa. Super. 311, 462 A.2d 1366 (1983). In addition to the quantity of drugs possessed, in determining whether there was an intent to deliver, the courts have also considered the presence of paraphernalia used in the narcotic trade as well as the presence of inordinately large sums of cash. Id. Commonwealth v. Davis, 331 Pa. Super. 285, 480 A.2d 1035 (1984).

In the present case evidence of the possession of paraphernalia including two digital scales, commonly used for weighing controlled substances, baggies for packaging controlled substances, some of which had corners removed indicating previous packaging of drugs, and a cell phone for arranging transactions, are all items of evidence which tend to establish that the contraband was Possessed With Intent to Deliver. The introduction of these items of paraphernalia does not constitute a double jeopardy violation in this case.

The defendant next contends that the Court erred in denying his double jeopardy motion.

On December 28, 2011, defendant filed his motion to dismiss for double jeopardy. Defendant alleges in the motion that on September 8, 2011, he went to trial and that on September 9th of 2011 he was found guilty of Possession and Drug Paraphernalia, and that the jury was hung on Counts 1, 2 and 3 of the indictment.

At Count 4 defendant was charged with Possession of a Controlled Substance, namely 54.1 grams of marijuana, and at Count 5 defendant was charged with Possession of Drug Paraphernalia. Following deliberation the jury returned a verdict of guilty to the charge Possession of Marijuana and guilty to the charge of Possession of Paraphernalia. The jury reported to the trial judge that it was unable to arrive at a unanimous verdict on the remaining three charges, Possession and Possession With Intent to Deliver Cocaine and Persons Not to Possess Firearms. The jury foreman was questioned by the trial judge as to whether further deliberations might result in a verdict and was informed that the jury was hopelessly deadlocked. None of the remaining jurors were in disagreement with the foreman. All members of the jury agreed that they were hopelessly deadlocked with regard to Counts 1, 2 and 3.

Defendant's counsel made a motion for mistrial with regard to Counts 1, 2 and 3, and the motion was granted by the trial judge.

When a defendant moves for a mistrial the request ordinarily is assumed to remove any barrier to re-prosecution, even when the defendant's motion results from prosecutorial or judicial error. Commonwealth v. Bolden, 472 Pa. 602, 638, 373 A.2d 90, 107 (1977); Commonwealth v. Hunter, 381 Pa. Super. 499, 554 A.2d 112 (1989); Commonwealth v. Balog, 395 Pa. Super. 158, 576 A.2d 1092, 1097 (1990). If the Commonwealth has engaged in conduct which gave rise to a successful motion for a mistrial and that conduct was intended to provoke the defendant into moving for a mistrial, then retrial is barred. Commonwealth v. Simons, 514 Pa. 10, 522 A.2d 537 (1987).

In the present case where the jury has indicated that it is hopelessly deadlocked and could not arrive at a verdict, no error is committed by the Court when it grants a motion for mistrial at the request of defendant. The grant of the mistrial does not prohibit the retrial of the defendant.

Defendant next contends that the Court erred in denying the defendant's omnibus pretrial motion in that the search warrant lacked sufficient specificity as to what areas were to be searched within the house and did not grant police the authority to search inside the walls of the home and, therefore, the Court should have suppressed all of the evidence recovered from inside the walls of appellant's house.

This issue has been previously addressed by the Honorable

Judge Steve Leskinen who ruled upon the defendant's omnibus pretrial motion.

Defendant next contends that the Commonwealth failed to prove beyond a reasonable doubt that appellant possessed the drugs or firearms in the instant case.

This issue concerns the sufficiency of the Commonwealth's evidence to support the verdict entered by the jury. In considering whether the Commonwealth presented sufficient evidence to prove that the defendant possessed the drugs and firearm, we are guided by the standards provided by our appellate courts. In Commonwealth v. Zingarelli, 839 A.2d 1064 (Pa. Super. 2003), *appeal denied* 579 Pa. 692, 856 A.2d 834 (2004), the Superior Court indicated:

> The standard we apply in reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly

> circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of the witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Zingarelli, 839 A.2d 1069.

Where the contraband is not found on the defendant's person, the Commonwealth must prove that the defendant had constructive possession of the contraband, which has been defined as the "ability and intent to exercise control or dominion over the substance." Commonwealth v. Hutchinson, 947 A.2d 800, 806 (Pa. Super. 2008). The Commonwealth may establish constructive possession through the totality of the circumstances. Commonwealth v. Muniz, 5 A.3d 345, 349 (Pa. Super. 2010). Every element of the crime may be proven beyond a reasonable doubt by means of wholly circumstantial evidence. Commonwealth v. Conaway, 791 A.2d 359 (Pa. Super. 2002); Commonwealth v. Aguado, 760 A.2d 1181, 1185 (Pa. Super. 2000); Commonwealth v. Torres, 421 Pa. Super. 233, 617 A.2d 812, 814 (1992).

Here, the home located at 138 Searight Avenue, Uniontown, Pennsylvania, is owned by the defendant as shown in the deed of conveyance dated February 23, 2006 and entered as Commonwealth Exhibit #27.

Upon entry into the residence at the time of the execution of

the search warrant, Officer Holland immediately went to the upstairs of the residence where he encountered the defendant standing in the doorway of the master bedroom dressed in a pair of boxer shorts. (N.T. 86) There were numerous places in the residence where unfinished drywall had been applied to the walls and secured with drywall screws. Upon entering the bedroom where the defendant was found, Officer Rutter observed a cordless hand-held power drill in the room by the doorway. (N.T. 24) The cordless drill was equipped with a Phillips screwdriver head. (N.T. 29) Rutter also noted that drywall screws in the panels of drywall were generally evenly spaced two to three inches apart on the edges of the drywall. (N.T. 30) However, above the bedroom doorway, Rutter noticed one panel that was about three feet by two feet in size which was only held in place by three screws. He also observed that the screw holes in this panel were rounded out and worn giving the appearance that the screws had been removed and replaced repeatedly. (N.T. 30, 31) Captain Rutter immediately suspected that this small panel was being used to conceal a secret hiding place. He, therefore, directed other officers to remove the panel.

Removal of the panel revealed a small space containing drugs, money, paraphernalia and the weapon. Three of the four $20.00 bills which Officer Holland had provided to the C.I. on February 4, 2011 and February 7, 2011 were recovered from the compartment above the

doorway.

From a computer stand in the same bedroom the police recovered a box of baggies and other loose baggies, some of which had the corners missing, additional U.S. currency and a second digital scale.

Additionally, when Captain Rutter returned to the first floor of the residence and announced to Officer Holland that he had located a hiding place above the bedroom door, defendant lowered his head and made a statement which was overheard by Captain Rutter and Constable Pasquale to the effect "that was my ultimate hiding spot."

As noted by the Court in Commonwealth v. Rippy, 732 A.2d 1216 (Pa. Super. 1999), possession of a controlled substance can be proven by showing that the defendant actually possessed the drugs through direct evidence, such as finding the controlled substance on the defendant's person, or it can be proven by showing that the defendant constructively possessed a controlled substance. The doctrine of constructive possession has been explained as follows:

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion." We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." To aid application, we have held that constructive possession may be established by the

totality of the circumstances. (citations omitted)

Commonwealth v. Thompson, 779 A.2d 1195 (Pa. Super. 2001)

The evidence introduced by the Commonwealth was sufficient to prove that the defendant not only had the power to control the cocaine but also had the intent to exercise that control. Accordingly, we conclude that the evidence was sufficient to prove beyond a reasonable doubt that the defendant constructively possessed the drugs found in the hidden panel above the upstairs bedroom doorway.

It is the function of the jury to pass upon the credibility of the witnesses and to determine the weight to be accorded the evidence produced. The jury is free to believe all, part or none of the evidence introduced at trial. Commonwealth v. Guest, 500 Pa. 393, 456 A.2d 1345 (1983); Commonwealth v. Griscavage, 512 Pa. 540, 517 A.2d 1256 (1986).

The finder of fact has the prerogative to determine credibility, to resolve conflicts in the evidence, to make reasonable inferences from the evidence, to believe all, part or none of the evidence presented and to determine the weight to be assigned to the evidence. Commonwealth v. Willis, 380 Pa. Super. 555, 552 A.2d 682 (1988).

The facts and circumstances established by the Commonwealth "need not be absolutely incompatible with the defendant's innocence, but the question of any doubt is for the jury unless the evidence be so weak and inconclusive that as a matter of law no

probability of fact can be drawn from the combined circumstances." Commonwealth v. Sullivan, 472 Pa. 129, 150, 371 A.2d 468, 478 (1977); Commonwealth v. Feathers, 442 Pa. Super. 490, 660 A.2d 90 (1995).

From the evidence introduced by the Commonwealth, the finder of fact could reasonably have found that the cocaine and firearm were within the possession of defendant.

BY THE COURT:

ATTEST:

_____, J.
RALPH C. WARMAN, JUDGE

_____
CLERK OF COURTS

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