**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>THEODORE WOODALL<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 549 EDA 2013 |

Appeal from the Judgment of Sentence of November 22, 2004
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-1208311-2003

BEFORE: BENDER, P.J.E., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.: **FILED JULY 02, 2014**

Theodore Woodall appeals his November 22, 2004 judgment of sentence. We affirm.

On September 23, 2004, Woodall was convicted by a jury of two counts of aggravated assault, one count of carrying a firearm in a public street or place, and one count of possessing an instrument of crime.[1] The trial court summarized the evidence underlying Woodall's convictions as follows:

> On October 23, 2003, Philadelphia Police Officers Keenan and Wenger were on duty, in plainclothes, and driving an unmarked

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* Retired Senior Judge assigned to the Superior Court.

[1] ***See*** 18 Pa.C.S. §§ 2702, 6108, and 907(a), respectively. The jury found Woodall not guilty of criminal attempt—homicide, 18 Pa.C.S. §§ 901, 2501, and receiving stolen property, 18 Pa.C.S. § 3925.

minivan when they went to investigate a complaint of drug dealing on the corner of 12th and Reno Streets in Philadelphia.

The officers arrived at the scene at approximately 11:00 [p.m.] and observed a group of people gathered on the corner, including [Woodall,] who was standing outside of a deli with his acquaintance Mr. Kalonji Jones. Officers Keenan and Wenger got out of the minivan and ordered the group to disperse. The group complied and left the corner, but shortly thereafter, Kalonji Jones and [Woodall] returned to the location after getting a few drinks at a bar down the street. The officers pulled up in their minivan again and Officer Keenan got out and approached [Woodall]. Officer Keenan saw that [Woodall's] left hand was in his pocket and he ordered [Woodall] to place his hands on the window of the [] corner deli. Instead of complying with Officer Keenan's order, [Woodall] shoved Officer Keenan. As Officer Keenan attempted to get control of [Woodall], [Woodall] drew a gun and shot Officer Keenan in the neck. Officer Keenan heard the gunfire and immediately felt the heat of the gunshot in his chin and lower jaw.

Immediately after the shot was fired, Officer Wenger saw Officer Keenan jerk his head back and then slump against [Woodall]. [Woodall] took off running with the gun [in] his hand and Officer Wenger chased him. During this brief pursuit, [Woodall] turned back towards Officer Wenger and fired his gun at Officer Wenger. Officer Wenger was not hit. Having drawn his own weapon, Officer Wenger returned fire and shot [Woodall], who stumbled and fell. As [Woodall] collapsed, Officer Wenger saw [Woodall] throw his gun across the street into a nearby field. Officer Wenger then stood over [Woodall] with his gun drawn and called for backup.

Officer Scollon immediately responded to Officer Wenger's call for assistance and arrived on the scene to see Officer Wenger standing over [Woodall] in the middle of the street with his gun drawn. Officer Scollon and his partner then handcuffed [Woodall].

As soon as Officer Scollon secured [Woodall], Officer Wenger went to the location where he saw [Woodall] thrown the gun and recovered it. Officer Wenger identified the recovered gun as the same one that [Woodall] used to shoot at both police officers. Philadelphia Police Sgt. James Gilrain arrived on the scene within minutes of the shooting and observed Officer Wenger, with blood

on him, holding a gun in his hand. Sgt. Gilrain asked, "Whose weapon is that?" and Officer Wenger responded, "The guy that's in the middle of the street. He shot my partner with it." Sgt. Gilrain took the gun from Officer Wenger and secured it in a paper bag in the trunk of a marked police vehicle.

Officer John Taggart of the PPD Crime Scene Unit testified that he recovered the gun from Sgt. Gilrain and identified it as a 9-millimeter Kel-Tec semi-automatic handgun with serial number 103531. Its legally registered owner Jamie Henley had reported this gun stolen in January 2003. Officer Taggart also testified that he recovered both 9-millimeter Luger F.C. and 9-millimeter Luger R.P. fired cartridge casings at the scene. According to Officer Taggart, Philadelphia police officers only used R.P. bullets, evidence that a non-police gun was fired at the scene. Officer Taggart clarified that the only difference between Luger F.C. and Luger R.P. bullets is the brand name. Officer Taggart also found blood evidence in the alley next to the deli, where Officer Keenan testified he ran after being shot.

During the trial, the Commonwealth called Officer Leonard Johnson from the PPD Firearms Identification Unit to testify as an expert in the fields of firearms identification, firearms operation, and microscopic matching of ballistic evidence. Officer Johnson examined the KelTech nine millimeter that was identified as [Woodall's], as well as numerous fired cartridge casings that had been recovered from the scene of the shooting. Officer Johnson provided an expert opinion that some of the recovered fired cartridge casings were fired from [Woodall's] weapon.

On the night of the shooting, Kolanji Jones gave a signed statement in the homicide unit of the PPD wherein he admitted that he knew that the gun belonged to [Woodall] because [Woodall] had shown it to him earlier and told him it was a 9-millimeter. Mr. Jones affirmed this statement at trial. Mr. Jones also stated that both he and [Woodall] knew Officers Wenger and Keenan from the neighborhood and that these [officers] had been nicknamed "Beavis and Butthead" by some people in the community.

Officer Keenan was taken to Jefferson Hospital and underwent surgery on his chin and lower jaw. Officer Keenan was released from the hospital the following day. While it took over a month

for the injuries to heal, the only permanent bodily injury he sustained was a more limited range of motion turning his neck.

Officer Evelyn Rodriguez and her partner drove [Woodall] to Hahnemann Hospital. [Woodall] was admitted and treated for a single gunshot wound to his left arm and back of his neck. [Woodall] did not sustain life-threatening injuries and was able to leave the hospital the following day to give a statement to Philadelphia Police Detective Kenneth Rossiter at 2:45 [p.m.] Det. Rossiter read [Woodall's] statement to the jury that is reproduced in full below:

Q: Theodore, do you read, write, and understand the English language?

A: Yes.

Q: Are you presently under the influence of any alcohol or drug?

A: No.

Q: Do you understand that you are under arrest and are being charged with Attempted Murder, Aggravated Assault, and Weapons Offenses for the shooting of Police Officer Keenan on October 22, 2003 at about 11:05 p.m. at 12th and Parrish Streets?

A: Yes.

Q: Tell me what you know about the shooting of Police Officer Keenan.

A: A big mistake.

Q: What happened?

A: We walked up 12th and Green. I went into the alley to take a pee. I found a gun up under the air conditioner that comes out the side of the building. I asked Kalonji whose gun was it. He said he didn't know so I said I'm going to sell it cause I need money. I was out of the alley when the cops pulled up. He said come here. I knew I just picked up the gun and decided I was going to

push off and run. That is when all the shots started going off.

Q: When you came out of the alley where did you have the gun?

A: In my pants pocket (right front).

Q: When you started pushing the police officer to try and get away were you pushing with your hands?

A: Yes, both hands.

Q: Where was the gun?

A: In my right hand.

Q: Are you right or left handed?

A: Left.

Q: Were the police officers in uniform or plainclothes?

A: Plainclothes.

Q: At what point did you drop the gun?

A: On 12th street between Parrish and Reno.

Q: What was Kalonji saying while this was happening?

A: He was saying to run when the police pulled up.

Q: While you were running with the gun in your hand, did the gun go off?

A: Yea.

Q: What kind of vehicle were the police officers driving?

A: A minivan.

Q: What color was it?

A: Blue

Q: How many officers got out of [the] van?

A: Two (2).

Q: Is there anything you want to add to your statement at this time?

A: No.

As [Woodall's] first version of events reveals, he knew Keenan and Wenger were police officers and he ran to avoid getting caught possessing an illegal gun. During the trial, the parties stipulated that [Woodall] was not licensed to carry a firearm. During trial, [Woodall] testified that his statement was coerced and taken under duress. [Woodall] also testified that Det. Rossiter refused to write down many of the things he said. Det. Rossiter refuted these assertions, testifying that the statement was given knowingly, intentionally, and voluntarily. [Woodall] also [alleged] that Det. Rossiter forced him to sign this statement against his will and that the prosecutor responded by stating "Yeah, yeah, you're lying." **Both the trial prosecutor and defense counsel** deny that this occurred.

[Woodall] offered a second version of events in his handwritten letter dated 8/21/04 that he sent to Lieutenant Nolan of the PPD Internal Affairs Bureau. Lt. Nolan read the contents of the letter to the jury, which is presented in full below:

> "Sir, I did not shoot that officer. He pretty much shot himself with the gun. He never did I.D.ed himself as a[n] officer. He got out a mini-van and said 'you know what it is, take your hands out of your pockets.' The first thing I thought about was when I was robbed earlier in the year. When I did not move fast enough for him, he pulled out a gun. I froze. He patted my back pockets with the point at me. Then he looked back at the van. That is when I saw my chance. I grabbed his gun. We wrestled for the gun. It went off, he let it go. I ran with it and threw the pistol under a car and that [was] when I was shot in the back of the neck."

In this second version of events, [Woodall] indicates that he did not know that Officers Keenan and Wenger were police. This claim is contradicted by evidence from Kalonji Jones, Officer Evelyn Rodriguez, and Officer Wenger establishing that [] Officers Wenger and Keenen were known in the neighborhood by the nicknames "Beavis and Butthead" and that, in fact, [Woodall] knew who they were. Furthermore, on the recorded police radio

call for back up which was offered as evidence at trial, [Woodall] himself can be heard on tape pleading, "Don't do me Beavis." And finally, Officer Rodriguez testified that [Woodall] kept saying, at the hospital, "that he knew the two officers. [Woodall] was calling them Beavis and Butthead. He just kept saying it over and over." This evidence completely contradicts [Woodall's] second assertion that he did not know the officers were police but rather is proof that [Woodall] knew exactly who Officers Kennan and Wenger were and that any action taken by him was not for fear of being robbed.

In [Woodall's] second version of the events in his handwritten letter, he denies possessing his own gun, but rather asserts that he grabbed and accidentally fired Officer Keenan's weapon. However, testimony by Officer Scollon, who took possession of Officer Keenan's gun on the way to the hospital, revealed that Officer Keenan's gun was never fired that night. Officer Wenger recovered [Woodall's] gun and Officer Taggart recovered both fired casings and live rounds matching [Woodall's] gun. There is no evidence to support the claim that Officer Keenan's gun was fired.

In his third and final version of events, [Woodall] testified at trial that he thought he was being robbed by people he did not know were police. As stated earlier, the evidence presented by the Commonwealth, particularly the recorded call by Officer Wenger requesting back up, directly contradicted [Woodall's] version of events.

On rebuttal, the Commonwealth introduced two stipulations: First, that [Woodall] had a *crimen falsi* conviction for robbery as a felony of the second degree; and second, that [Woodall] was on probation for a conviction that did not allow him to have a firearm. [Woodall] claims that the prosecutor said "oh, you're involved in tax evasion, you know that's a crime?" in response to [Woodall's] statement that he worked [but] was not paying taxes at his place of employment. The trial prosecutor stated that the context was that [Woodall] testified that he was coming from work. The prosecutor was trying to determine where [Woodall] was coming from and if it could be verified, and then brought out [the] fact that it is tax evasion.

Trial Court Opinion ("T.C.O."), 9/3/2013, 4-9 (references to notes of testimony omitted; emphasis in original).

On November 22, 2004, Woodall was sentenced to an aggregate term of twenty-one to forty-two years' incarceration. On December 29, 2004, Woodall filed an untimely *pro se* notice of appeal. On July 18, 2005, this Court quashed that appeal. The trial court summarized the procedural events that occurred after Woodall's direct appeal was quashed as follows:

> On October 24, 2005, [Woodall] filed his first Post Conviction Relief Act (hereinafter "PCRA") petition, claiming ineffectiveness of trial counsel for not filing a timely notice of appeal and seeking reinstatement of his direct appeal rights *nunc pro tunc*. [Woodall] filed this PCRA petition *pro se*, because [Court of Common Pleas Judge John Chiovero] did not appoint him counsel. Judge Chiovero denied [Woodall's] first PCRA petition as untimely on September 22, 2006. [Woodall] timely filed a *pro se* notice of appeal of Judge Chiovero's denial on October 23, 2006. [Woodall] was not required to file a concise statement of [errors] complained of on appeal pursuant to Pa.R.A.P. 1925(b). The court ultimately appointed Mr. John Belli[, Esquire,] to represent [Woodall] in his PCRA appeal. On April 1, 2010, Mr. Belli filed an amended PCRA petition on [Woodall's] behalf.
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> On November 16, 2010, [this Court] vacated the order dismissing [Woodall's] PCRA petition and remanded the case to the trial court having determined that [Woodall's] PCRA petition was timely and that [Woodall] had been improperly denied counsel. [This Court] did not consider the merits of [Woodall's] claims, but rather, remanded the matter for counsel to consult with [Woodall] and file either an amended petition or a "no merit" letter.
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> [Woodall's] case was reassigned to [Court of Common Pleas Judge Ellen Ceisler] on November 10, 2011 because trial Judge Chiovero had retired. On April 19, 2012, appointed counsel, Mr. Belli, filed an amended PCRA petition requesting that [Woodall] be granted a new trial or, in the alternative, that [Woodall's] direct appeal rights be reinstated *nunc pro tunc*. Mr. Belli

withdrew from the case and present PCRA counsel, Mr. Stephen O'Hanlon[, Esquire,] was appointed. On July 9, 2012, Mr. O'Hanlon fully adopted the petition filed by Mr. Belli.

In the years since [Woodall's] trial, the notes of testimony for two days of the four-day trial were lost. The full jury [trial] took place from 9/20/2004 through 9/23/2004. The two missing dates of notes include 9/22/2004 & 9/23/2001. These two dates of the missing trial transcripts included the firearms expert testimony, [Woodall's] testimony, closing arguments, and jury instructions. [Woodall] requested a new trial arguing that the unavailability of the full record of the jury trial was insufficient to satisfy his constitutional right to "meaningful appellate review."

Vigorous attempts were made by [the trial court], and PCRA counsel for both the Commonwealth and [Woodall] to locate the missing notes of testimony. These attempts proved unsuccessful. Thus, pursuant to Pa.R.A.P. 1923, [the trial court] instructed both parties to attempt to reconstruct the case record for the missing days.

On February 12, 2013, [Woodall] and the Commonwealth filed a joint proposed reconstruction of the record. On February 20, 2013, after a hearing, [the trial court] found the reconstructed record to be sufficient under the law, denied [Woodall] the request for a new trial, but reinstated [Woodall's] direct appeal rights *nunc pro tunc*.[1] Appointed counsel filed a notice of appeal on February 21, 2013.

[1] In preparing [its opinion, the trial court] realized that the Commonwealth referred several times to ballistics evidence and testimony of the Philadelphia Police Department's Firearms Investigation Unit that were not evident in the trial transcripts or the reconstructed record. In August 2013, [the trial court] requested that the Commonwealth provide a supplemental reconstructed record to address this oversight, if testimony/evidence was omitted from the original record. [The trial court] instructed the Commonwealth to submit any additional reconstructed record to [Woodall's] counsel prior to submission. The Commonwealth submitted and filed a "Supplement to Reconstructed Record" shortly thereafter. There has been no objection raised by the defense.

T.C.O. at 1-3 (minor grammatical and capitalization modifications made for clarity and consistency).

On March 28, 2013, Woodall filed with the trial court a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On September 3, 2013, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

Woodall raises the following issues for our review:

1. Did the [trial] court err in certifying a joint proposed reconstruction of the record because large parts of the trial transcript were not reproduced , the certifying judge differed from the trial judge and, as such, could not certify the record pursuant to Pa.R.A.P. 1923, crucial components of the joint proposed reconstruction of the record were subject of assumption, presumption, and unresolved dispute between parties, and [Woodall], an untrained legal layman, was incapable of recreating issues associated with the jury charge?

2. Did the prosecutor deprive [Woodall] of a fair trial and commit prosecutorial misconduct when he yelled at [Woodall] that [Woodall] was lying when he testified that Detective Kenneth Rossiter grabbed his injured arm and made him sign a statement?

3. Did the prosecutor engage in improper impeachment of [Woodall] when he stated that [Woodall] was "involved in tax evasion" and "crime" because [Woodall] admitted that he worked in a job in which he did not pay taxes?

4. Did the prosecutor commit prosecutorial misconduct by stating to the jury during his closing speech that this "black man believes that the white men came to rob him and if you don't find him guilty you are not doing your job as a citizen of Philadelphia and you have no respect for the panel of jury," as he pointed his finger inches from [Woodall's] face?

Brief for Woodall at 4.

In his first issue, Woodall contends that the trial court erred by certifying the joint proposed reconstructed record submitted by the Commonwealth, Woodall, and Woodall's present counsel. ***See*** Joint Proposed Reconstructed Record ("JPRR"), 2/12/2013. As noted by the trial court, two days of the notes of testimony from Woodall's jury trial were missing from the certified record when Woodall's case was remanded by this Court for consideration of his PCRA petition. At that time, the trial judge had retired, and, for whatever reason, the notes of testimony could not be reproduced by the court reporter's office. Consequently, the trial court instructed the parties to collaborate with each other and attempt to recreate the record with regard to the events that occurred on the two days that no longer were represented in the notes of testimony pursuant to Pa.R.A.P. 1923. Rule 1923, entitled "Statement in Absence of Transcript," provides as follows:

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within ten days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the lower court for settlement and approval and as settled and approved shall be included by the clerk of the lower court in the record on appeal.

Pa.R.A.P. 1923. Pursuant to this rule and the court's mandate, Woodall, his present counsel, and an attorney for the Commonwealth met with the trial prosecutor and the trial defense attorney and created the JPRR. The JPRR

was submitted to the trial court for approval. However, Woodall noted his objection to the JPRR in a footnote and at a subsequent hearing. ***See*** JPRR at 1 n.1; Notes of Testimony ("N.T."), 1/20/2013, at 4-12.

Presently, Woodall echoes the objections that he raised before the trial court, arguing that the JPRR should not have been certified because: (1) the trial judge had retired and was unavailable for consultation; (2) trial counsel had an incomplete memory of the proceedings; (3) Woodall is a layperson who was unable to meaningfully contribute to the attempted reconstruction, particularly with regard to the trial court's closing instructions to the jury; and (3) the trial took place over eight years before the JPRR was created. Due to these purported defects, Woodall maintains that the JPRR does not depict an equivalent representation of what occurred on the two days in question, and should not have been certified pursuant to Rule 1923. We review Woodall's claim for an abuse of the trial court's discretion. ***Commonwealth v. Harvey***, 32 A.3d 717, 723 (Pa. Super. 2011). For the reasons that follow, we disagree with Woodall, and conclude that the trial court did not abuse its discretion by certifying the JPRR.

Generally, the burden of obtaining the necessary transcripts for an appeal lies with the appellant. ***See*** Pa.R.A.P. 1911(a). Although unusual, circumstances sometimes arise that prevent an appellant from executing this obligation, when such circumstances are beyond the control of the appellant. In such circumstances, "[w]here meaningful review is impossible and [the] appellant is free from fault, a new trial may be granted." ***Harvey***, 32 A.3d

at 721 (citing ***Commonwealth v. Burrows***, 550 A.2d 787 (Pa. Super. 1988)). "Meaningful review does not require, *per se*, a complete trial transcript." ***Burrows***, 550 A.2d at 789; ***see also Commonwealth v. Lesko***, 15 A.3d 345, 410-11 (Pa. 2011) ("[T]he absence of notes does not generate some instantaneous, meritorious claim for relief."). Rather, the appellant is afforded the opportunity to complete the record with a Rule 1923 statement. ***See*** Pa.R.A.P. 1923, *supra*. Rule 1923 permits an appellant to satisfy his obligation of presenting a complete record to an appellate court with a statement that depicts, to the best of his ability, an equivalent depiction of the missing transcripts.

In ***Harvey***, we elaborated on the purposes behind Rule 1923, and the extent to which appellants must go to recreate the missing portions of the transcripts as follows:

> "Rule 1923 does not contemplate that appellate counsel must single-handedly reconstruct the record." ***Burrows***, 550 A.2d at 789. The theory that underlies Rule 1923 is that a verbatim transcript of proceedings is not necessarily a condition precedent to meaningful appellate review, so long as the appellate court has an "equivalent picture" of what happened at trial. ***Commonwealth v. Anderson***, 272 A.2d 877 (Pa. 1971). Further, no relief is due because counsel on appeal was not counsel at trial. ***Burrows***, *supra* (the rules of appellate procedure do not require appellate counsel to have first-hand direct knowledge of what transpired at trial to prepare a statement of evidence). Rather, appellate counsel is required to prepare a statement of the missing evidence from the best available means. ***See id.*** . . . However, the information necessary to prepare a statement in absence of transcript can come from any of the parties who were present, including the trial judge, witnesses, the trial prosecutor, defendant's trial attorney, and defendant. ***Burrows***, *supra*.

***Harvey***, 32 A.3d at 721-22 (citations modified).

Instantly, Woodall and his present counsel met with Woodall's trial counsel and the trial prosecutor. What transpired from these consultations was the JPRR. The JPRR described Officer Evelyn Rodriguez' testimony regarding her transportation of Woodall to the hospital, including her recitation of Woodall's repeated references to Officers Keenan and Wenger as "Beavis and Butthead." ***See*** JPRR at 2. The JPRR also detailed Detective Kenneth Rossiter's testimony regarding the statement that he obtained from Woodall. The parties that contributed to the JPPR were able to recall that Detective Rossiter testified that Woodall, being in good mental and physical condition, voluntarily provided a statement to him. Detective Rossiter read that statement to the jury, a copy of which was attached to the JPRR. ***Id.*** The JPRR next described defense counsel's cross-examination of Detective Rossiter, including counsel's questioning that was pointed towards establishing that Woodall's statement was involuntary because he was taken directly from the hospital to an interrogation room, which defense counsel elicited was more like a prison cell than an office. ***Id.*** at 3.

The JPRR next summarized Lieutenant Nolan's testimony, during which Lieutenant Nolan read a letter to the jury that Woodall had authored and sent to Sergeant John Prendergast. In that letter, Woodall alleged that Officer Keenan "pretty much shot himself with the gun." ***Id.*** Woodall also claimed in the letter that Officer Keenan did not identify himself as a police officer and that caused Woodall to believe that he was being robbed. The

parties agreed that defense counsel did not elicit any meaningful information on cross-examination. ***Id.***

Next, the JPRR noted that the parties had entered into, and offered to the jury, two stipulations. The first was that Woodall was not licensed to carry a firearm. The second was that Officer Keenan was admitted to the hospital for injuries that required surgery to repair. At that point, the Commonwealth rested, and defense counsel moved the trial court for a judgment of acquittal. ***Id.***

The JPRR then summarized Woodall's testimony, in which he testified consistently with the letter that Lieutenant Nolan read to the jury. That is, Woodall testified that Officer Keenan did not identify himself as a police officer, causing Woodall to believe that he was being robbed. He also claimed that Detective Rossiter did not write down everything that Woodall told him during his interview. ***Id.*** at 4. The JPRR summarized the Commonwealth's cross-examination of Woodall regarding the inconsistencies in each of the statements that Woodall made to the police and at trial. During cross-examination, the Commonwealth played a 911 recording, during which Woodall could be heard stating, "Don't do me, Beavis." The purpose of the statement was to contradict Woodall's claim that he did not know that Officer Keenan and Officer Wenger were police officers by demonstrating that Woodall's use of the officer's street nickname proved that he knew who the officers were. ***Id.***

The JPRR also reports Woodall's claim that, during his cross-examination, the Commonwealth asked him "oh, you're involved in tax evasion, you know that's a crime?" The Commonwealth's attorney claimed that this question was posed as a response to Woodall's testimony that he was coming home from a job, and that he got paid under the table for that job. ***Id.***

Next, the JPRR summarized the parties' respective closing arguments. The JPRR reports that, during the meeting to reconstruct the closing arguments, Woodall claimed that the prosecutor, during his closing argument, stated to the jury that "this black man believes that the white men came to rob him and if you don't find him guilty you are not doing your job as a citizen of Philadelphia and you have no respect for the panel of the jury." ***Id.*** at 5. The JPRR notes that both the trial prosecutor and Woodall's trial attorney deny that this statement was made to the jury.

Finally, the JPRR summarized the instructions that were requested by Woodall and the prosecutor. Although the parties had no specific recollection, the JPRR reports that they assumed the trial judge gave all of the requested instructions in addition to the standard trial instructions. ***Id.*** at 6-7. The JPRR notes that the jury asked one question (pertaining to the pictures of the crime scene) before rendering its verdict. ***Id.*** at 7-8.

There is no doubt that, as time passes, memories fade. Over eight years elapsed between Woodall's jury trial and the creation of the JPRR. Nonetheless, the parties worked together and created a detailed, and from

what we can discern, substantially accurate depiction of the events that occurred on the two days for which no notes of testimony currently exist. Despite Woodall's arguments to the contrary, the parties were not required to enlist the aid of the trial judge, who had since retired. Rather, the parties were required to elicit aid from whatever sources available. ***See Harvey***, *supra*. When recreating a record after so many years have passed, there are bound to be disputes and objections to the final product. However, such objections do not render a Rule 1923 statement automatically invalid nor do they automatically require a new trial. ***See Burrows***; ***Lesko***, *supra*. All that is required is that the parties set forth an "equivalent picture" of what happened on the missing days of transcripts. Having reviewed the procedural history in this case, the hearing notes of testimony on the adequacy of the statement, Woodall's arguments, and the detail provided in the JPRR, we conclude that the parties have done just that. We discern no abuse of discretion by the trial court in certifying the JPRR for the purposes of this appeal.

Having so determined, we proceed directly to Woodall's fourth stated issue. Therein, Woodall argues that the trial prosecutor committed prosecutorial misconduct for allegedly stating to the jury during his closing argument that "this black man believes that the white men came to rob him and if you don't find him guilty you are not doing your job as a citizen of Philadelphia and you have no respect for the panel of jury." Brief for Woodall at 26. As noted earlier, both the trial prosecutor and defense

counsel denied during the creation of the JPRR that this statement was made. Because we have concluded that the trial court did not err in certifying the JPRR, the JPRR now constitutes the certified record for what occurred on the day that closing arguments were made at Woodall's trial. Therefore, Woodall's claim finds no support in the record before us. As such, his claim necessarily fails.

We next consider Woodall's issues two and three together, because they implicate alleged prosecutorial misconduct during Woodall's testimony. In his second issue, Woodall contends that the prosecutor committed misconduct when he allegedly stated "yeah, yeah, you're lying" when Woodall testified that Detective Rossiter grabbed Woodall's arm and made him sign a written statement.[2] ***See*** Brief for Woodall at 18; JPRR at 2. In his third issue, Woodall argues that the prosecutor committed misconduct by engaging in improper impeachment of Woodall by accusing him of committing tax evasion by working an "under the table" job during cross-

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[2] As in issue four, it is not entirely clear that the prosecutor actually uttered the contested statement during trial. Indeed, during the recreation of the record, the prosecutor denied making the statement. However, unlike the statement made in issue four, there is no indication in the JPRR that defense counsel agreed that the statement was not made. Hence, we are not as confident that the record does not support Woodall's allegation as we were in disposing of issue four. Thus, for purposes of this argument, we will assume, *arguendo*, that the record supports Woodall's claim that the statement was made. Nonetheless, for the reasons set forth herein, Woodall is not entitled to relief.

examination. ***See*** Brief for Woodall at 22.[3] Based upon these allegations, Woodall maintains that he was entitled to a mistrial, and that the proper remedy is a new trial. We disagree.

The grant of a mistrial is an extreme remedy that is 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***, 626 A.2d 109, 112-13 (Pa. 1993)). "In reviewing prosecutorial remarks to determine their prejudicial quality, comments cannot be viewed in isolation but, rather, must be considered in the context in which they are made." ***Commonwealth v. Sampson***, 900 A.2d 887, 890 (Pa. Super. 2006) (citation omitted). "Our review of prosecutorial remarks and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial." ***Commonwealth v. Judy***, 978 A.2d 1015, 1019 (Pa Super. 2009) (citing

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[3] Because of the unique circumstances in this case, and more specifically the circumstances in which the certified record was created in this case, we are unable to ascertain whether Woodall timely objected to these contested statements. The failure to do so normally would result in waiver. However, under these exceptional circumstances, and knowing that the parties put forth a commendable effort to recreate the record, it would be inequitable to find waiver solely because the JPRR lacks such information. Hence, we proceed under the assumption that Woodall timely objected to the statements that he argues constitutes misconduct.

***Commonwealth v. Rios***, 721 A.2d 1049, 1054 (Pa. 1998)). Moreover, we are mindful of the following precepts:

> [P]rosecutorial misconduct does not take place unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict. Prosecutorial misconduct is evaluated under a harmless error standard.

***Commonwealth v. Holley***, 945 A.2d 241, 250 (Pa. Super. 2008) (internal citations and quotations omitted).

We need not delve into the more complicated inquiries of whether the contested statements constituted misconduct pursuant to the preceding principles. Indeed, assuming, *arguendo*, that the comments amounted to misconduct, we nonetheless must subject the misconduct to the harmless error standard. ***Id.*** "[W]here the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict, then the error is harmless beyond a reasonable doubt." ***Commonwealth v. Miles***, 681 A.2d 1295, 1302 (Pa. 1996) (internal citation omitted) (discussing prosecutorial misconduct in closing argument). Instantly, a fair review of the evidence convincingly demonstrates that the alleged misconduct was harmless.

On the date in question, Officers Keenan and Wenger went to the corner of 12th and Reno streets to investigate a complaint that drug dealing was occurring on the corner. While there, they noticed Woodall standing

with Kalonji Jones and a few others. The officers ordered the group to disperse, but Woodall and Jones returned to the corner shortly thereafter. After Woodall and Jones returned, so too did Officers Keenan and Wenger. Officer Keenan ordered Woodall to place his hands on the window of the corner deli. However, instead of doing so, Woodall shoved Officer Keenan, drew a weapon, and shot the officer in the neck. Woodall then took off running.

Officer Wenger followed Woodall on foot. During the pursuit, Woodall fired his weapon at Officer Wenger, but did not hit him. Officer Wenger returned fire and hit Woodall. As Woodall fell to the ground, he threw his weapon into a nearby field. Woodall was detained in the middle of the street until back-up police officers arrived and arrested him. Woodall's discarded weapon later was recovered by Officer Wenger, who identified the weapon as the weapon that Woodall used to shoot Officer Keenan and to shoot at Officer Wenger. A firearms expert testified at trial that some of the shell casings found at the scene were fired from the weapon that was identified as the weapon used by Woodall.

Kolanji Jones, who was with Woodall on the night in question, testified that he knew that the gun wielded by Woodall indeed belonged to Woodall, because Woodall had shown it to him earlier in the day. Jones also testified that both he and Woodall knew Officers Keenan and Wenger from the neighborhood. Jones confirmed that those officers were nicknamed "Beavis and Butthead."

Woodall admitted his involvement in the shooting in his initial statement that he gave to Detective Rossiter. In that statement, Woodall claimed that he found the gun under an air conditioner. Nonetheless, Woodall admitted that he knew that Officers Keenan and Wenger were police officers. Woodall further admitted that, because he had just picked up a gun, his intention was to push off of one of the officers and flee from the scene. However, he claimed that, during his attempt to flee, the gun went off.

At trial, Woodall claimed that this statement was coerced by Detective Rossiter, and untruthful. The truth, according to a letter written by Woodall and his trial testimony, was that he believed that he was being robbed by someone that he did not know. However, this defense entirely was refuted by the remainder of the trial evidence. The trial court explained how the claim was definitively contradicted as follows:

> This claim is contradicted by evidence from Kalonji Jones, Officer Evelyn Rodriguez, and Officer Wenger establishing that [] Officers Wenger and Keenen were known in the neighborhood by the nicknames "Beavis and Butthead" and that, in fact, [Woodall] knew who they were. Furthermore, on the recorded police radio call for back up which was offered as evidence at trial, [Woodall] himself can be heard on tape pleading, "Don't do me Beavis." And finally, Officer Rodriguez testified that [Woodall] kept saying, at the hospital, "that he knew the two officers. [Woodall] was calling them Beavis and Butthead. He just kept saying it over and over." This evidence completely contradicts [Woodall's] second assertion that he did not know the officers were police but rather is proof that [Woodall] knew exactly who Officers Kennan and Wenger were and that any action taken by him was not for fear of being robbed.

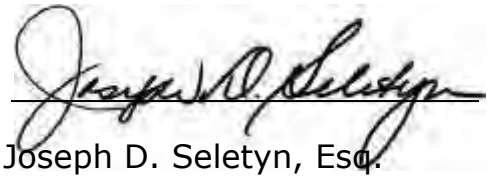
T.C.O. at 8.

Thus, the evidence overwhelmingly established that Woodall, when asked to place his hands on a window, pushed Officer Keenan, drew a weapon, and shot Officer Keenan in the neck. These events were corroborated by the physical evidence, as well as the testimony of Woodall's cohort, Kolanji Jones, and police officers. Furthermore, Woodall's defense was defeated not only by the testimony of Jones, but also by his own words on the 911 recording, on which Woodall calls one of the officers "Beavis," contradicting his claim that he did not know that they were police officers.

This evidence constitutes overwhelming evidence of guilt, such that any prejudice that resulted from the purported prosecutorial misconduct could not have had an impact upon the jury's verdict. ***See Miles***, *supra*. As such, to the extent that the prosecutor's statements constituted misconduct, the misconduct was harmless.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/2/2014