NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TYLER STEVEN MARLATT, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2145 MDA 2012

Appeal from the Judgment of Sentence Entered November 7, 2012,
In the Court of Common Pleas of Centre County,
Criminal Division, at No. CP-14-CR-0000326-2012.

BEFORE: SHOGAN, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED NOVEMBER 21, 2013**

Appellant, Tyler Steven Marlatt, appeals from the judgment of sentence entered on November 7, 2012, in the Centre County Court of Common Pleas. We affirm.

In its May 9, 2013 opinion, the trial court set forth the background of this case as follows:

> On January 17, 2012, [Appellant] was charged with murder of the first degree, murder of the second degree, murder of the third degree, robbery, and aggravated assault, as a result of an incident involving the death of Tyler Struble on January 16, 2012. On that date, Tyler Struble took marijuana from [Appellant's] girlfriend without paying her the approximately twenty-five-dollar value. [Appellant] then drove to Tyler Struble's residence, armed with weapons, and the death occurred during an altercation between the two men. At the preliminary hearing held on February 1, 2012, the Commonwealth moved to amend and add two additional counts

> of robbery and two counts of criminal conspiracy to commit robbery, which was subsequently granted.
>
> At the conclusion of the jury trial on November 7, 2012, the jury found [Appellant] guilty of murder of the second degree, murder of the third degree, aggravated assault, two counts of robbery (felonies of the first degree), three counts of criminal conspiracy, one count of robbery (felony of the second degree), and not guilty of murder in the first degree and voluntary manslaughter. [Appellant] was then sentenced to life imprisonment in a state correctional institution that same day.

Trial Court Opinion, 5/9/13, at 1-2.

In his appeal, Appellant raises the following issues for this Court's consideration:

> I. Was there sufficient evidence to support the conviction for murder of the second degree, more specifically, was there sufficient evidence that the murder was committed in the course of a felony?
>
> II. Was there sufficient evidence to support a robbery conviction, specifically was there evidence to establish that a theft was being committed?
>
> III. Did the trial court err in allowing Dr. Gordon Handte to testify in the Commonwealth's case in chief, as an expert, due to the fact that a report was only provided to counsel for [Appellant] during the middle of trial?
>
> IV. Did the trial court err in denying a motion for mistrial given the Commonwealth's statements made during the opening which violated a pretrial court order?
>
> V. Did the trial court err in granting the Commonwealth's motion in limine as it precluded the admission of alleged self-serving statements made by [Appellant] during his police interview?
>
> VI. Did the trial court improperly admit text messages purportedly made by either [Appellant] or co-defendant Fatima Ghoul due to the lack of authentication of said text messages?

> VII. Did the trial court err in prohibiting [Appellant] from admitting [] written and oral statements made by David Williams who at the time of trial was deceased?
>
> VIII. Did the trial court err in giving to the jury [the] Commonwealth's requested jury instruction number eight (8) dealing with the principal [sic] that [Appellant] did not have a right to access monies allegedly wrongfully retained by another?
>
> IX. Did the trial court err in sustaining the Commonwealth's objection to [Appellant's] attempts to establish his trustee status while in jail?

Appellant's Brief at 6 (full capitalization omitted).[1] We will address these issues in the order presented.

Appellant's first two issues challenge the sufficiency of the evidence. Our standard of review in this regard is well settled.

> 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 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 witnesses and

[1] In his brief, Appellant concedes that issues six and eight are without merit. Appellant's Brief at 34, 41. Accordingly, we will not address them in our disposition.

> the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Baker, 72 A.3d 652, 657-658 (Pa. Super. 2013) (citation omitted).

In his first issue, Appellant claims that the evidence was insufficient to prove the murder was committed in the course of a felony. We disagree.

As noted, Appellant was convicted of second-degree murder. "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." ***Commonwealth v. Montalvo***, 956 A.2d 926, 934 (Pa. 2008) (quoting ***Commonwealth v. Small***, 741 A.2d 666, 681 n.19 (Pa. 1999); 18 Pa.C.S.A. § 2502(b)). The phrase "perpetration of a felony" is defined as "engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery . . . ." 18 Pa.C.S.A § 2502(d).

Here, the trial court addressed this issue as follows:

> The Commonwealth presented substantial, probative evidence by way of testimony of several eyewitnesses, police officers, a forensic pathologist, and physical evidence including photographs of the crime scene and injuries to the victim and [Appellant], as well as letters written by [Appellant] and recordings of taped conversations of [Appellant] while in jail. All of this, when taken together, provided sufficient evidence for the jury to find [Appellant] guilty of murder in the second degree and robbery.

* * *

> In the case *sub judice*, the felony was robbery. Alex Exarchos and Shawn Holton were with [Appellant] and his girlfriend, Fatima Ghoul, the day of the incident, and they both testified at the jury trial. [N.T., 11/5/12,] at 182-271, Commonwealth v. Marlatt, No. 2012-0326 (November 5, 2012). Exarchos and Holton testified that [Appellant] and Ghoul orchestrated a drug deal with Melinda Burns, a friend of the victim, Tyler Struble. *Id*. Melinda Burns testified that she orchestrated the deal with Ghoul, at the request of Struble. *Id*. at 122-123. When Struble (accompanied by Melinda Burns, John Caldwell, Nikki Doedderlein, and Susan Spicer), drove to [Appellant's] home to pick up the drugs, he did not pay. *Id*. at 130-132. When Struble got in the car to drive off with the drugs, Ghoul injured her knee after she tried to hold on to the car. *Id*. at 173. After finding out what happened to his girlfriend, [Appellant] became angry and decided to go to Struble's home to get "drugs or money back or someone is going to get fucked up." *Id*. at 193 (testimony by Alex Exarchos). Shawn Holton also testified that [Appellant's] girlfriend, Ghoul, continued to text threats to Melinda Burns. *Id*. at 236. [Appellant] and Ghoul armed themselves with knives, a wooden stick, and a wooden bat. *Id*.
>
> [Appellant] went to the home where Struble was staying—and it was evident by the testimony and the copies of the text messages between Ghoul and Burns—that [Appellant] went to the home to confront Struble for the purpose of taking the drugs and/or money he was owed. [Appellant] went to the home extremely angry that Ghoul had been injured by Struble, and that he had been "ripped off" by Struble. The testimony also illustrated that . . . shortly after [Appellant's] arrival to the residence . . . a fight between Struble and [Appellant] broke out. By all accounts, [Appellant] was acting in a menacing and aggressive way, and his statements could lead to the inference that he was confronting Struble because of the money he felt he was owed for the marijuana taken by Struble.

Trial Court Opinion, 5/9/13, at 2-4. The trial court concluded that Appellant's act of arming himself, announcing his intent to retrieve the drugs or the money, engaging in a physical confrontation with the victim while

using the weapons he possessed, and ultimately killing the victim during the altercation, was sufficient evidence to sustain the conviction of second-degree murder. Under the applicable standard of review, we agree. Appellant is entitled to no relief on this claim.

In his second issue, Appellant argues that the evidence was insufficient to establish robbery because there was no evidence of a theft. We disagree. The crime of robbery, as defined in the Pennsylvania Crimes Code, is set forth in relevant part as follows:

> **Robbery**
>
> **(a) Offense defined.--**
>
> > (1) A person is guilty of robbery if, in the course of committing a theft, he:
> >
> > > (i) inflicts serious bodily injury upon another;
> >
> > * * *
> >
> > (2) An act shall be deemed "in the course of committing a theft" if it occurs **in an attempt to commit theft or in flight after the attempt or commission**.
>
> * * *
>
> **(b) Grading.--**Robbery under subsection (a)(1)(iv) and (vi) is a felony of the second degree; robbery under subsection (a)(1)(v) is a felony of the third degree; otherwise, it is a felony of the first degree.

18 Pa.C.S.A. § 3701 (emphasis added).

As noted above, Appellant announced his intention to retrieve either drugs or money from the victim, and then acted on this statement with physical force resulting in the injury, and ultimately the death of the victim. Robbery does not require a completed theft; it only requires an **attempt** to commit theft. 18 Pa.C.S.A. § 3701(a)(2). We conclude that there was ample evidence from which the jury could find that the elements of robbery were established and, therefore, Appellant is entitled to no relief.

In his third issue, Appellant argues that the trial court erred in allowing Dr. Gordon Handte to testify as an expert in the Commonwealth's case-in-chief. Appellant claims that, because Dr. Handte's report was not provided until the middle of the trial, the trial court should not have allowed Dr. Handte to testify as an expert. Appellant's Brief at 26-28.

The admissibility of evidence is left to the sound discretion of the trial court. ***Commonwealth v. Bryant***, 57 A.3d 191, 194 (Pa. Super. 2012). The trial court's rulings on the admissibility of evidence may be reversed only upon a showing that the trial court abused its discretion. ***Id***.

Here, Appellant argues that because he did not receive Dr. Handte's report until the middle of trial, he was unable to have the report independently reviewed, or prepare any argument to cast doubt on the report. Appellant's Brief at 28. The trial court disagreed and stated:

> Dr. Handte was initially produced by the Commonwealth as an expert in forensic pathology in their case in chief for the

purpose of testifying as to the victim's autopsy and the clinical results Dr. Handte procured therefrom. It was only after some new information came out in Shawn Holton's testimony regarding [Appellant's] injuries from the altercation with the victim that the Commonwealth asked Dr. Handte to review photographs of [Appellant's] injuries after the incident and write a report as to his findings. Dr. Handte wrote the report and it was produced to [Appellant's] trial counsel as soon as it was available (i.e., the middle of trial). The Court will assume [Appellant] takes issue, specifically, with the testimony and expert report by Dr. Handte as to [Appellant's] injuries.

At trial, [Appellant's] objection to Dr. Handte's testimony and report regarding his injuries was initially granted by the Court. [N.T., 11/5/12,] at 404. At the beginning of the second day of trial, during a sidebar, [Appellant's] counsel again objected to the Commonwealth bringing Dr. Handte back to testify as to [Appellant's] wounds. The Commonwealth contended the lack of notice to [Appellant's] counsel was reasonable because timeliness of said notice depends on when the Commonwealth knows of the facts that would require the report. In this case, the fact that prompted the report was the testimony of Shawn Holton on the first day of trial. The Commonwealth argued that the testimony by Holton suggesting that [Appellant] may have been hit by a bat was a surprising new fact, and because the Commonwealth has the burden to disprove self defense, they needed the testimony and expert report by Dr. Handte. It was not possible for the Commonwealth to have their expert produce a report sooner on a fact that wasn't a part of the case until the defense attorney elicited that fact. [Appellant's] counsel argued the report was untimely, but failed to show that [Appellant] would have suffered any actual prejudice as a result of the untimeliness of the report. The Commonwealth cited to *Com. v. Rosa* and *Com. v. Collins*, for the proposition that the Court should only prevent the Commonwealth from calling the witness if the defense can show actual prejudice. *Commonwealth v. Rosa*, 609 A.2d 200 (Pa. Super. Ct. 1992), *Commonwealth v. Collins*, 957 A.2d 237 (Pa. 2008). After a review of the cases, the Court determined Dr. Handte could testify, as the court was persuaded by the fact that the statement made by the witness would have been unknown to the Commonwealth and that the Commonwealth made an obvious effort to get the expert report to the defense

> as quickly as possible. [Appellant] was not left without options, as [Appellant] would still have the possibility to refute Dr. Handte's testimony through cross-examination and through the possible testimony of the physician subpoenaed by the defense, who treated [Appellant's] injuries the night of the incident. For these reasons, the Court stands by its decision at trial to allow the additional testimony and supplemental report by Dr. Handte.

Trial Court Opinion, 5/9/13, at 5-7.

We agree with the trial court's decision. While the Commonwealth was required to provide Appellant with discovery pursuant to Pa.R.Crim.P. 573, Dr. Handte's report was not prepared prior to trial, and the Commonwealth was made aware of its necessity at the same time as Appellant. Moreover, and as noted in the trial court's opinion, Appellant has failed to demonstrate that he was prejudiced by the report as required by ***Rosa*** and ***Collins***. ***See also Commonwealth v. Jones***, 668 A.2d 491, 512 (Pa. 1995) (stating that a defendant seeking relief from a discovery violation must demonstrate prejudice in order to be entitled to relief). Finally, we are constrained to point out that Appellant never sought a continuance to remedy this perceived prejudice once the report was disclosed. For the reasons set forth above, we conclude that Appellant is entitled to no relief on this claim.

Next, Appellant claims the trial court erred in denying his motion for a mistrial wherein he alleged the Commonwealth violated a pretrial court order. Specifically, Appellant argues that, in its opening, the Commonwealth made statements regarding drug dealing in contravention of an order that

precluded the prosecution from mentioning Appellant's involvement in selling drugs. Appellant's Brief at 29.

When reviewing a trial court's denial of a motion for mistrial, our standard of review is as follows:

> It is well-settled that the review of a trial court's denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will ... discretion is abused. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.

Commonwealth v. Fortenbaugh, 69 A.3d 191, 193 (Pa. 2013) (citation omitted).

Here, on October 22, 2012, the Commonwealth filed a motion *in limine* seeking to introduce evidence of Appellant's history of drug dealing as evidence of motive. Motion, 10/22/12, at 7. Specifically, the Commonwealth stated: "Critical to the Commonwealth's case is the ability to independently prove that [Appellant] and his live-in girlfriend, Fatima Ghoul, were indeed drug dealers in the business of selling marijuana and were protective of this failing business and insistent on getting paid on the night of the homicide." ***Id***. at 8, ¶18. In an opinion and order filed on November 1, 2012, the trial court denied the Commonwealth's motion but

stated that "[t]he Commonwealth will be permitted to introduce all evidence of drug activity and sales that took place on the date in question." Opinion and Order, 11/1/12, at 3. On November 2, 2012, the Commonwealth filed a motion for reconsideration and clarification regarding the trial court's order. In an order filed that same day, the trial court clarified that: "the Commonwealth may introduce evidence of statements made by [Appellant] about money he was owed by Melinda Burns for drugs, the Commonwealth may introduce evidence of prior drug dealing if the defense opens the door by denying this fact, and if [Appellant] takes the stand, the parties and the Court will address the scope of cross-examination at that time." Order, 11/2/12. During the Commonwealth's opening statement, the prosecutor referenced Appellant's involvement in the "drug trade," stated Appellant was the "protector of his drug operation," and told the jury that they will hear that Melinda Burns texted the phone that Fatima Ghoul and Appellant shared to do their drug deals. N.T., 11/5/12, at 48-50. Appellant objected and requested a mistrial claiming the Commonwealth violated the pretrial order by pointing out that Appellant sold drugs. The trial court denied the motion stating:

> It was not the intention of this court that the Commonwealth would be precluded from arguing that there was commerce going on relative to a drug trade. It was my intention that we would not get into a trial within a trial as to whether they were or were not in possession of buy sheets and owe sheets and scales and things of that nature. My order was intended to

> preclude the introduction of things from the search warrant, not from the inference that Fatima Ghoul and [Appellant] were doing this for profit, so your motion for a mistrial is denied at this point.

N.T., 11/5/12, at 84 (full capitalization omitted).

Upon review of the November 1, 2012 opinion and order, the November 2, 2012 order that clarified the ruling, and the trial court's statement at trial, we conclude it was never the court's intent to preclude mention of Appellant's involvement in the sale of drugs as that was the genesis of this case. Here, the Commonwealth informed the jury that it intended to prove the victim and Melinda Burns obtained drugs from Appellant and Fatima Ghoul, fled without paying, and Appellant sought to regain his drugs or their cash value through force. N.T., 11/5/12, at 48-50. There would have been no means by which the Commonwealth could have tried this case without reference to drugs and Appellant's involvement in selling drugs. In its opinion, the trial court reiterated its statement to Appellant following the motion for a mistrial wherein the court said that it was not its intention to preclude reference to commerce relative to a drug trade for profit. Trial Court Opinion, 5/9/13, at 7. For these reasons, we conclude that Appellant is entitled to no relief.

In his fifth issue, Appellant claims that the trial court erred in granting the Commonwealth's motion *in limine* precluding the admission of certain

statements made by Appellant during his police interview. We conclude that Appellant is entitled to no relief.

The record reveals that on October 22, 2012, the Commonwealth filed a motion *in limine* to preclude the defense from introducing self-serving statements made by Appellant to the police. These statements, wherein Appellant allegedly asserted that he feared for his life during the fight with the victim were deemed hearsay and ruled inadmissible by the trial court in the order granting the motion. Opinion and Order, 11/1/12, at 7-9.

At the outset, we note that in his brief, Appellant never identifies what specific statements were barred by the trial court's order. There is only the general allegation that these statements revealed Appellant's fear during the fight, his state of mind, and they were wrongly deemed inadmissible. Appellant's Brief at 31-34. We are constrained to consider this argument undeveloped and unsupported. Issues that are not developed in the argument portion of an appellant's brief are waived on appeal. ***Commonwealth v. Thoeun Tha***, 64 A.3d 704, 713 (Pa. Super. 2013) (citation omitted); Pa.R.A.P. 2119(a), (b). Accordingly, Appellant has not illustrated and supported with argument any basis upon which we can conclude that the trial court abused its discretion. Thus, Appellant is entitled to no relief on this claim.

Next, Appellant asserts that the trial court erred in prohibiting the admission of written and oral statements made by David Williams ("Williams"), who at the time of trial, was deceased. We conclude that no relief is due.

Williams was at the victim's residence at the time of the murder. N.T., 11/5/12, at 122, 281; N.T., 11/6/12, at 605. Appellant sought to introduce Williams' statements to police made after the murder. Appellant was unable to call Williams to the witness stand because Williams died prior to trial. N.T., 11/5/12, at 281. The trial court ruled that Williams' statements were inadmissible under Pa.R.E. 804. N.T., 11/6/12, at 609-610.

Now on appeal, Appellant claims that the trial court erred because these statements made by Williams were admissible under either the present sense impression or the excited utterance exceptions set forth in Pa.R.E. 803. However, as the Commonwealth points out, the court's ruling was based on Pa.R.E. 804, and Appellant never presented these statements as an exception to the hearsay bar under Pa.R.E. 803 at trial. Commonwealth's Brief at 19. It is well settled that an appellant cannot raise issues on appeal that were not raised and properly preserved in the trial court. ***Commonwealth v. Stevenson***, 894 A.2d 759, 767 (Pa. Super. 2006); Pa.R.A.P. 302(a). Because there was no mention of the admissibility of these statements pursuant to Pa.R.E. 803, this issue is waived.

Finally, Appellant argues that the trial court erred in sustaining the Commonwealth's objection to Appellant's attempt to establish his status as a trustee while incarcerated awaiting trial. We reiterate that the admissibility of evidence is left to the sound discretion of the trial court, and this Court will reverse only upon an abuse of that discretion. ***Bryant***, 57 A.3d at 194.

At trial, Appellant took the witness stand. N.T., 11/6/12, at 663-762; 11/7/12, at 807-855. Following direct examination by defense counsel, the Commonwealth cross-examined Appellant regarding his short temper and letters he wrote while incarcerated illustrating his anger at his cellmate for talking about Fatima Ghoul and his anger toward the guards. N.T., 11/7/12, at 810-835. On re-direct examination, counsel asked Appellant if he had received any status while incarcerated, and Appellant responded that he was a trustee. N.T., 11/7/12, at 841. The Commonwealth immediately objected on the grounds that Appellant's status as a trustee was irrelevant. ***Id***. The trial court sustained this objection. ***Id***. at 843.

The trial court explained:

> The Commonwealth presented, during cross-examination of [Appellant], that he had issues with one of his cellmates while in jail awaiting trial. The Commonwealth also presented letters [Appellant] wrote about anger towards the guards. [N.T., 11/7/12,] at 810. After this cross-examination, [Appellant's] attorney attempted to bring out information regarding [Appellant] obtaining trustee status while in jail, in an effort to show the jury [Appellant] had, through medication, resolved his anger issues while incarcerated. The Commonwealth objected as to the relevance of the information. If [Appellant's] obtaining

> medication resulted in his trustee status in jail, it was not relevant to [Appellant's] behavior and state of mind at the time of the murder. Further, while the Commonwealth did put into evidence [Appellant's] anger issues while in jail, this was brought out in an effort to show [Appellant's] state of mind and his intentions when he killed the victim. *Id*. at 841-843. The Court maintains it did not err in sustaining the Commonwealth's objection to the relevance of [Appellant's] trustee status in jail and believes it was not relevant information for the jury to consider at trial.

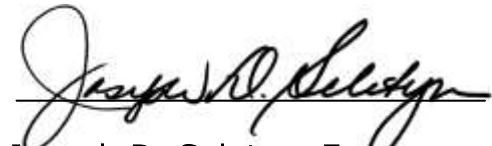
Trial Court Opinion, 5/9/13, at 9-10.

We discern no abuse of discretion. Appellant's status as a trustee at the time of his trial was irrelevant to the events that occurred and the acts in which Appellant engaged on the night of the murder.

For the reasons set forth above, we conclude that Appellant is entitled to no relief. Accordingly, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/21/2013