NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HEATHER AISHA HARRIS,	:	
	:	
Appellant	:	No. 1359 MDA 2013

Appeal from the Judgment of Sentence May 1, 2013,
Court of Common Pleas, York County,
Criminal Division at No. CP-67-CR-0003436-2012

BEFORE: BENDER, P.J.E., DONOHUE and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED APRIL 21, 2014**

Appellant, Heather Aisha Harris ("Harris"), appeals from the judgment of sentence on May 1, 2013 imposed by the Court of Common Pleas of York County, Criminal Division, following her conviction for retail theft, 18 Pa.C.S.A. § 3929(a)(1). We affirm.

The facts and procedural history of this case are as follows. On November 18, 2011, Harris and her sister-in-law, Nancy Ferrer ("Ferrer"), entered a T.J. Maxx store in York, Pennsylvania. N.T., 3/7/13, at 109. On that day, Chris Deppen ("Deppen"), a District Loss Prevention Manager with T.J. Maxx observed the two women on the store's video surveillance system making their way through the store with a shopping cart and one large, empty purse. ***Id.*** at 108-09, 115, 117. Deppen observed the two women bringing items to the shopping cart. ***Id.*** at 115, 117. Specifically, Deppen

*Retired Senior Judge assigned to the Superior Court.

observed Harris bringing boxes of Tommy Hilfiger underwear and infant socks to the shopping cart. ***Id.*** at 117, 131. Subsequently, Harris and Ferrer left the store without paying for any items. ***Id.*** at 129. As Harris and Ferrer left the store, Deppen was able to confront Ferrer and get her to return to the store. ***Id.*** at 129. However, Harris left the premises quickly in her car and another store employee wrote down her license plate number, which the store forwarded to police. ***Id.*** at 129-30. After speaking to Ferrer, Deppen recovered $174.87 worth of merchandise from the large purse in which Ferrer had concealed all of the stolen merchandise, including the Tommy Hilfiger underwear and infant socks. ***Id.*** at 132, 148.

On November 28, 2011, police filed a criminal complaint against Harris, charging her with retail theft. On March 7, 2013, a jury trial commenced in which the jury found Harris guilty of the aforementioned crime. On May 1, 2013, the trial court sentenced Harris to one to two years of incarceration based on her prior convictions. On May 10, 2013, Harris filed a post-sentence motion that the trial court denied on June 24, 2013. This timely appeal followed.

On appeal, Harris raises the following two issues for review:

> I. Did the trial court commit reversible legal error when it allowed a Commonwealth witness to testify to hearsay statements, specifically, another store employee's observations?
>
> II. Was the Commonwealth's evidence insufficient as a matter of law to support the jury's finding that

> Defendant committed the criminal act of Retail Theft?

Appellant's Brief at 4.[1]

For her first issue on appeal, Harris argues that the trial court erred when it allowed Deppen to testify regarding several of Harris's actions in the store and regarding the observations made by Randy Hunter ("Hunter"), another employee at the store. Appellant's Brief at 10-11. Harris asserts that the trial court committed reversible legal error when it permitted Deppen to narrate the video surveillance footage that the Commonwealth showed to the jury. ***Id.*** Specifically, Harris takes issue with Deppen's narration of the video between the timestamps of 15:36 and 15:39, where it is unclear what Harris and Ferrer are doing because only the tops of their heads are visible. ***See id.*** At this point in the video, Deppen recounted the following:

> This is them in the men's department. They are about to conceal all the merchandise -- most of the merchandise that they had intended on taking, including the Tommy Hilfiger underwear, which were six boxes of those, the infant socks, the tops that Miss Ferrer had selected.

[1] Harris also raised a weight of the evidence claim in her 1925(b) statement, but failed to include argument on the issue in her appellate brief. 1925(b) Statement at 1. "The failure to develop an adequate argument in an appellate brief may [] result in waiver of the claim under Pa.R.A.P. 2119." ***Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa. Super. 2007) (quotations and citation omitted). Accordingly, Harris has waived her weight of the evidence claim.

> She's going to get in front of the car here shortly, and she is going to begin helping Miss Ferrer by hiding merchandise, rolling it up, removing hangers, so she can get it concealed into her purse, and Mr. Randy Hunter is watching from the tower.
>
> So, this is where you notice the biggest difference when she comes out here where she has come from a flat purse to no purse -- her purse getting really big, excuse me.

N.T., 3/7/13, at 118-19; ***see also*** Appellant's Brief at 10. Counsel for Harris objected to Deppen's narration at the outset of the presentation of the video to the jury, and the trial court overruled this objection. N.T., 3/7/13, at 111-14.

Harris also argues that the trial court committed reversible error because the above-referenced narration was not the product of Deppen's direct observations, but rather was the result of information that Hunter relayed to Deppen. Appellant's Brief at 10-11. During trial, Deppen stated the following:

> Q. You also mentioned about the activities that were going on currently behind this men's clearance display head.
>
> Is that based upon your own observation of the video as it was happening in real time, or is that something that was related to you by Mr. Hunter, which I believe you mention before, or another individual?
>
> A. It was -- I was asking Mr. Hunter questions because the observation booth is right there in the office, so I was asking him in real time, what, can you see them?

> He's like, yes, I got them. I can see clearly.
>
> Attorney Neiderhiser: Objection to the hearsay testimony.

N.T., 3/7/13, at 121-22. Following this objection, a sidebar conservation took place and thereafter the trial court provided the following cautionary instruction to the jury:

> The Court: All right, ladies and gentlemen. Let me give you an instruction at this point regarding evidence. I have allowed Mr. Deppen—pardon me—to narrate the video up to this point because it's one of the typical security videos. It's like choppy. There's one frame after another, and without somebody narrating some of the actions due to the choppiness might be unclear.
>
> So, I think it helps the jury to have him narrate; however, under our rules of evidence, the witness can narrate to what is seen in the video.
>
> Mr. Deppen was just relating beginning at roughly at the time hack of 15:36 through 15:39 of this video, he was relating some information that may have been told to him by someone else who is not present here in the courtroom. That's hearsay, and that's inadmissible. That's stricken, and you should disregard that.
>
> You can see in the video between 15:36 and 15:39, we have a couple of ladies standing behind some racks of clothing and some signs where the tops of their heads and maybe a shoulder is visible. That's what you have as far as evidence.
>
> Your viewing of this video controls under that theory that we described earlier. You are the fact finder. Mr. Deppen's testimony can be helpful in assisting you as far as the things that are actually visible on

> the video, and as far as the things that are not visible on the video that he did not see himself; he cannot testify to.

Id. at 127-28.

We conclude that Harris has waived this issue on appeal. In order to preserve an issue for appellate review, a party must make a timely and specific objection at trial. ***Commonwealth v. Schoff***, 911 A.2d 147, 158 (Pa. Super. 2006). Failure to do so results in waiver of that issue on appeal. ***Id.*** Additionally, the Supreme Court of Pennsylvania has held that when the trial court provides a curative instruction, and the defendant fails to object to that curative instruction, it indicates that the defendant is satisfied with the curative instruction and that any prejudice has been cured because the jury is presumed to follow the court's instructions. ***Commonwealth v. Jones***, 542 Pa. 464, 492, 668 A.2d 491, 504 (1995).

In this case, our review of the certified record indicates that Harris did not raise any objection following the trial court's above-referenced curative instruction. ***See*** N.T., 3/7/12, at 127-28. In fact, the trial court gave Harris's counsel the instruction at a sidebar conversation prior to giving it to the jury to make sure that he approved of the instruction. ***Id.*** at 125-26. This curative instruction, without objection, is presumed to have cured any potential prejudice caused by Deppen's hearsay testimony. ***See Jones***, 542 Pa. at 492, 668 A.2d at 504. Therefore, we find that Harris has waived her

first issue on appeal because she did not raise any objection following the trial court's curative instruction. ***See*** N.T., 3/7/12, at 127-28.

For her second issue on appeal, Harris argues that the evidence presented by the Commonwealth was insufficient to support a conviction for retail theft. ***Id.*** at 11-12. Additionally, Harris asserts that there was insufficient evidence to support a conviction for retail theft based on an accomplice liability theory. ***Id.*** at 12. Harris contends that the only evidence against her was her presence in the T.J. Maxx store with Ferrer. ***Id.*** Harris further asserts that the video surveillance did not show Harris concealing any merchandise, but rather only showed two women shopping together in the store. ***Id.*** As a result, the Commonwealth has not proven any element of the retail theft statute. ***Id.***

Our standard of review for challenges to the sufficiency of the evidence is well settled:

> In reviewing the sufficiency of the evidence, we examine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, viewed in a light most favorable to the Commonwealth as verdict winner, support the jury's finding of all the elements of the offense beyond a reasonable doubt. In applying this standard, we bear in mind that the Commonwealth may sustain its burden by means of wholly circumstantial evidence.

Commonwealth v. Montalvo, 598 Pa. 263, 273, 956 A.2d 926, 932 (2008) (citations omitted). We find that the evidence was sufficient to sustain Harris's retail theft conviction under an accomplice liability theory.

A person has committed the crime of retail theft if he or she:

> (1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof . . .

18 Pa.C.S.A. § 3129(a)(1). The Supreme Court of Pennsylvania has stated the following regarding accomplice liability:

> A person is deemed an accomplice of a principal if with the intent of promoting or facilitating the commission of the offense, he: (i) solicited the principal to commit it; or (ii) aided or agreed or attempted to aid such other person in planning or committing it. Accordingly, two prongs must be satisfied for a defendant to be found guilty as an accomplice. First, there must be evidence that the defendant intended to aid or promote the underlying offense. Second, there must be evidence that the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene. There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so. With regard to the amount of aid, it need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime.

Commonwealth v. Murphy, 577 Pa. 275, 285-86, 844 A.2d 1228, 1234 (2004) (internal citations and quotations omitted).

We find that the Commonwealth presented sufficient evidence to sustain Harris's conviction for retail theft under an accomplice liability theory. The evidence demonstrates that Harris intended to facilitate the commission of retail theft and aided Ferrer in committing the offense. In this case, Deppen observed Harris and Ferrer on the T.J. Maxx store's video surveillance system with a shopping cart and a large purse. N.T., 3/7/13, at 108-09, 117. Deppen also observed Harris and Ferrer traversing the store together and placing merchandise into the shopping cart. ***Id.*** 115, 117. Specifically, Deppen observed Harris bringing boxes of Tommy Hilfiger underwear and infant socks back to the shopping cart. ***Id.*** at 117, 131. When Harris and Ferrer left the store, they did so without paying for any merchandise. ***Id.*** at 129-30. When store employees attempted to confront Harris and Ferrer outside of the store to see if they were attempting to shoplift, Harris quickly drove away in her vehicle, while store employees recovered $174.87 worth of merchandise, including the Tommy Hilfiger underwear and infant socks, in the large purse Ferrer was carrying. ***Id.*** at 132.

This Court has previously held that "flight does indicate consciousness of guilt, and a trial court may consider this as evidence, along with other proof, from which guilt may be inferred." ***Commonwealth v. Dent***, 837 A.2d 571, 576 (Pa. Super. 2003) (quotations and citations omitted). In ***Dent***, this Court determined that the appellant fleeing the scene of her retail

theft when she learned that the store manager was going to call the police constituted evidence of her guilt. ***Id.*** at 576-77. Thus, the jury in this case was permitted to infer guilt from the fact that Harris fled the scene of the crime. ***See id.***

The evidence established that Harris and Ferrer entered the T.J. Maxx store together with a large purse. The evidence further showed that Harris placed Tommy Hilfiger underwear and infant socks in a shopping cart and store employees later recovered that same merchandise from the large purse after Harris and Ferrer, who was carrying the purse, attempted to leave the store without paying for anything. Finally, Harris fled the scene of the crime. Viewing the evidence in the light most favorable to the Commonwealth as the verdict winner and accepting as true all of its evidence, together with all reasonable inferences from that evidence, we conclude that the trier of fact could have found that Harris intended to facilitate the commission of retail theft and aided Ferrer in committing the offense.

Judgment of sentence of affirmed.[2]

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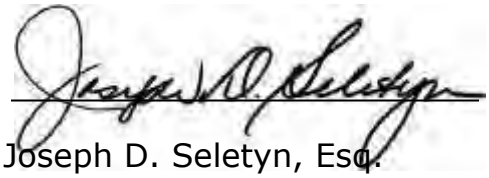
[2] We note our concern with the trial court's failure to provide a satisfactory Pa.R.A.P. 1925(a) opinion. Pa.R.A.P. 1925(a)(1) provides, in part:

> Except as otherwise prescribed by this rule, upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/21/2014

> opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

In this case, the trial court provided a Pa.R.A.P. 1925(a) opinion that merely restated Harris's concise statement of errors and then urged that a review of the trial transcript "fully supports the Trial Court's decisions made therein." Trial Court's 1925(a) Statement at 1-2. It is not this Court's role to review the transcript to search for reasons to support a trial court's decision. Rule 1925(a) is a mandate to the trial court, not an optional step in the appeals process.