

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JOSEPH FREELY,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 968 EDA 2013

Appeal from the Judgment of Sentence entered March 20, 2013,  
in the Court of Common Pleas of Philadelphia County,  
Criminal Division, at No(s): CP-51-CR-0013748-2010

BEFORE: SHOGAN, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.:

**FILED APRIL 14, 2014**

Joseph Freely (“Appellant”) appeals from the judgment of sentence imposed after a jury convicted him of robbery, conspiracy, prohibited possession of a firearm, carrying a firearm without a license, carrying a firearm in Philadelphia, and possessing an instrument of crime.<sup>1</sup>

The trial court summarized the factual background as follows:

At about 4:10 a.m. on October 19 2010, [the victim] was walking to his friend’s house as part of his commute to work, which was to begin at 5:30 a.m. While walking down Ditman Street, he noticed two men approaching him head on. One man, later identified as Appellant, was wearing a gray hooded sweatshirt; the other was wearing a black hooded sweatshirt. Appellant pulled out a gun and ordered [the victim] to empty out his pockets. [The victim] handed Appellant his wallet while the other assailant reached into his pocket and took his phone.

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<sup>1</sup> 18 Pa.C.S.A. §§ 3701(a)(1)(ii), 903, 6105(a)(1), 6106(a)(1), 6108, and 907(a).

During the one to two minutes that this robbery took place, [the victim] had a clear and unobstructed view of Appellant's face. As per their instructions, he continued down the block as the two assailants retreated in the opposite direction.

[The victim] immediately phoned the police when he reached his friend's house, which was located one half block from where the robbery occurred. He told the 911 operator that two males, one in a gray hoodie and one in a black hoodie, had robbed him. Five to ten minutes later, Officer Gorman picked up the [victim], who sat in the back of a police car and described Appellant as wearing a gray sweatshirt and having facial hair. Officer Gorman and [the victim] then saw two men walking down a nearby street. Because the two men were both wearing hooded sweatshirts, one gray and one black, [the victim] identified the two men as matching the description of the men who robbed him. Officer Gorman used his police radio and said "it's definitely them." He then got out of his patrol car, stopped Appellant and placed him in handcuffs, and escorted him back to the vehicle. [The victim] identified Appellant as the man who robbed him, stating that he was 100 percent certain it was the same man. He similarly identified Appellant at trial.

Trial Court Opinion, 7/22/13, at 1-2 (citations to notes of testimony omitted).

Appellant was charged with the aforementioned crimes. On November 21, 2012, Appellant filed a motion to suppress, contending that the victim's out-of-court identification was made under "unduly suggestive" circumstances. Following a hearing on November 26, 2012, the trial court denied Appellant's motion. A jury trial commenced, and on November 29, 2012, the jury returned its guilty verdicts. Following a hearing on March 20, 2013, the trial court sentenced Appellant to 8 - 17 years of incarceration followed by 6 years of probation. No post-sentence motions were filed. This

appeal followed. Both appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues:

1. Did not the [trial] court err in denying [A]ppellant's motion to suppress the [victim's] out-of-court and in-court identifications where an officer, who escorted [Appellant] in a patrol car looking for the perpetrators who robbed [the victim], said over police radio in front of the [victim], "It's definitely them" referring to [A]ppellant and an unknown male, directly before the [victim] identified [A]ppellant as one of the robbers?
2. Did not the [trial] court err in denying [A]ppellant's motion for a mistrial after an overzealous sheriff hovered over [A]ppellant as he was testifying before the jury, and acted in such an alarming manner toward [A]ppellant in front of the jury that her actions violated [A]ppellant's right to a fair trial and his right to the presumption of innocence?

Appellant's Brief at 3.

In his first issue, Appellant challenges the trial court's denial of his suppression motion. Appellant's Brief at 12-15. Our scope and standard of review of such claims is well-settled:

An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. [Because] the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

***Commonwealth v. Reese***, 31 A.3d 708, 721 (Pa. Super. 2011) (citations omitted).

Appellant argues that the victim's out-of-court identification was tainted by the conduct of Officer Gorman and therefore unreliable. Appellant's Brief at 11-15. Specifically, Appellant contends that while in the police car with the victim, Officer Gorman, upon seeing Appellant walk down the street, stated through his police radio that Appellant was "definitely" one of the perpetrators, before the victim was given the opportunity to view Appellant and identify him. *Id.* at 14. Appellant argues that the circumstances surrounding the victim's subsequent identification were unduly suggestive, and the victim's out-of-court identification as well as the ensuing in-court identification were therefore unreliable and should have been suppressed. *Id.* at 11-15.

In reviewing the propriety of identification evidence, the central inquiry is whether, under the totality of the circumstances, the identification was reliable. The purpose of a "one on one" identification is to enhance reliability by reducing the time elapsed after the commission of the crime. Suggestiveness in the identification process is but one factor to be considered in determining the admissibility of such evidence and will not warrant exclusion absent other factors. As this Court has explained, the following factors are to be considered in determining the propriety of admitting identification evidence: the opportunity of the witness to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the perpetrator, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation. The corrupting effect of the suggestive identification, if any, must be weighed against these factors. Absent some special element of unfairness, a prompt "one on

one" identification is not so suggestive as to give rise to an irreparable likelihood of misidentification.

***Commonwealth v. Moye***, 836 A.2d 973, 976 (Pa. Super. 2003), *appeal denied*, 851 A.2d 142 (Pa. 2004) (citations omitted). **See also** ***Commonwealth v. Bruce***, 717 A.2d 1033, 1036 (Pa. Super. 1998) (citations omitted) ("The question for the suppression court is whether the challenged identification has sufficient indicia of reliability to warrant admission, even though the confrontation procedure may have been suggestive.").

In ***Moye***, the victims' out-of-court identification was found to be reliable despite possible suggestiveness of the police officer's pre-identification remarks, where the victims had the opportunity to view the defendant during the perpetration of the crime, identified the defendant within minutes of the crime, and upon viewing the defendant, were very certain that he was the perpetrator. Similarly, in the present case, the trial court reasoned:

The [victim] testified that during the robbery he was able to see Appellant's face clearly, viewing it as the perpetrators were walking up to him and while they were robbing him. Moreover, based upon their clothes, he identified Appellant and the other assailant as they were walking down the street, before Officer Gorman made the stop. The [victim] made the identification shortly – around thirty minutes – after the robbery took place, so the perpetrator's face was still fresh in his mind. He testified to identifying Appellant based on his clothes and his facial features. Further, he was able to identify Appellant as being the same man that robbed him with 100 percent certainty.

Thus, the identification was neither unduly suggestive nor unreliable.

Trial Court Opinion, 7/22/13, at 5 (citations to notes of testimony omitted).

Upon review, we agree with the trial court that the circumstances surrounding the victim's identification were not unduly suggestive. The victim testified that during the robbery, Appellant was "directly in front of me, so I got a good look at him," and that in identifying Appellant as one of the perpetrators, he was not influenced by any statements Officer Gorman made over the police radio. N.T., 11/26/12, at 16, 64. Moreover, [the victim] had already indicated that Appellant's clothing matched the description of his assailant's before Officer Gorman stated over the police radio that Appellant was "definitely" one of the perpetrators. *Id.* at 57. In addition, only a short interval of time elapsed between the robbery and the victim's identification of Appellant. The record indicates that the robbery occurred at approximately 4:10 a.m., and at approximately 4:28 a.m., Officer Gorman took Appellant into custody. N.T., 11/26/12 at 14; Commonwealth's Exhibit 16. Under the totality of these circumstances, in particular the promptness of the identification and the victim's opportunity to view closely his assailant, we conclude that the trial court did not err in denying Appellant's suppression motion.

Appellant next argues that the trial court erred in refusing to grant a mistrial when, while Appellant was testifying, the sheriff behaved in a manner that infringed upon Appellant's right to a fair trial and his presumption of innocence. Appellant's Brief at 16-17. Appellant argues that

at trial, the sheriff engaged in conduct which “conveyed to the jury that [Appellant] was a dangerous person.” N.T., 11/28/12, at 105. Specially, Appellant made the following objection:

[W]hen [Appellant] was on the stand, the sheriff jumped visibly and made ... a visible face within the jury’s sight when [Appellant was given] a ruler [for] pointing to the map. The sheriff I believe on one or two occasions grabbed that from him and sort of made a face and kind of shrugged and acted like that was a horrible thing for him to be in possession of a ruler.

...I thought that was unduly prejudicial and gave the impression that [Appellant] is a dangerous man.

*Id.*

The trial court denied Appellant’s motion for mistrial, explaining that while the sheriff’s conduct was “a little bit sudden and a little alarming ... [i]t was nothing outrageous” and did not “cross[] that line where a mistrial is warranted.” *Id.* at 107. Following the trial court’s denial of Appellant’s motion for a mistrial, Appellant’s counsel opted against a cautionary instruction to avoid drawing the jury’s attention further to the challenged conduct, and argues on appeal that the trial court erred in its denial of his motion for a mistrial.

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) (internal quotation marks and citations omitted).

“It is universally accepted that the trial judge has the responsibility and authority to maintain in the courtroom the appropriate atmosphere for the fair and orderly disposition of the issues presented. Proper security measures fall within the trial court's exercise of discretion. When necessary to prevent a defendant from disrupting a trial and possibly injuring others, reasonable security measures will not prejudice the defendant's fair trial rights.” ***Commonwealth v. Gross***, 453 A.2d 620, 622 (Pa. Super. 1982). ***See also In re F.C. III***, 2 A.3d 1201, 1222 (Pa. 2010) *quoting Commonwealth v. Patterson*, 308 A.2d 90 (Pa. 1973) (“Proper security measures are within the sound discretion of the trial court, and, thus, will not be disturbed absent an abuse of that discretion”). “[W]henver a courtroom arrangement is challenged as inherently prejudicial ... the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play.” ***Commonwealth v. Philistin***, 53 A.3d 1, 32 (Pa. 2012) (internal quotations omitted) *quoting Holbrook v. Flynn*, 475 U.S. 560, 570–71, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

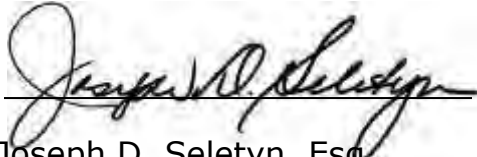


Here, we find no abuse of discretion in the trial court's determination that even though the sheriff's movements were "a little bit sudden," the sheriff's conduct did not create an unacceptable risk. N.T., 11/28/12, at 107. Rather, the trial court, which had the opportunity to view the challenged conduct, concluded that the sheriff's conduct was "nothing outrageous," was "not anywhere close to the point where [even] a cautionary instruction would be warranted," and that in taking the ruler from Appellant, the sheriff performed "standard courtroom protocol." *Id.* at 107-108. We decline to substitute our judgment for that of the trial court, based on the cold record before us, and find no error in the trial court's determination that the sheriff's conduct was not so egregious as to deprive Appellant of his right to a fair trial. ***See Commonwealth v. Rega***, 70 A.3d 777, 786, n.8. (Pa. 2013) ("courts have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for alleged criminal conduct") *quoting Holbrook* 475 U.S. at 567, 106 S.Ct. at 1345. We therefore affirm the judgment of sentence.

Judgment of sentence affirmed.

J-S21018-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/14/2014