NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MARK E. LAZO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1575 MDA 2014

Appeal from the Judgment of Sentence of February 6, 2014
In the Court of Common Pleas of Luzerne County
Criminal Division at No.: CP-40-CR-0001027-2012

BEFORE: BENDER, P.J.E., ALLEN, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED JULY 31, 2015**

Appellant Mark Lazo appeals the judgment of sentence entered against him on February 6, 2014, upon his conviction of twenty six counts of theft by failure to make required disposition of funds received, 18 Pa.C.S. § 3927(a). The offenses arose due to non-payment of sales and other taxes collected by Ferdinand's Family Restaurant and Catering, in which Lazo held an ownership interest. He contends, *inter alia*, that the trial court erred in declining to order a mistrial because the Commonwealth adduced testimony before the jury that was precluded by the trial court's pre-trial order granting Lazo's motion *in limine*. We affirm.

The trial court has provided the following factual and procedural history of this case:

> [Lazo] was, during the time frame at issue, the owner, operator, and president of Lazo Brothers, Inc., d/b/a Ferdinand's Family

Restaurant and Catering. [Lazo] and his brother initially started doing business as Ferdinand's in February 2004 when they acquired ownership. In April 2007, the brothers ended their business relationship and [Lazo] became the sole party responsible for the business operations located in Hazleton, Luzerne County. The Commonwealth witnesses established the largely unchallenged facts set forth herein based upon various[] required filings with the Commonwealth. Additionally, the record established both sales tax and employer withholding tax liability based upon documents filed with the Commonwealth by or on behalf of the business entity for the period of July 2007 through August 2010.[1]

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[1] [Lazo's] errors complained of are limited and accordingly a detailed factual synopsis is unnecessary to this opinion.

On October 24th, 2011, a criminal complaint was filed charging [Lazo] with 43 counts of violating [18 Pa.C.S. 3927(a),][2] and on March 9th, 2012 the Office of [the] Attorney General filed the criminal information.

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[2] "A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition." 18 Pa.C.S. § 3927.

According to the criminal information, [Lazo] either collected, or was required to collect, and failed to remit sales tax based upon filed returns as alleged in [c]ounts 1 [through] 36, and withheld and failed to remit employer withholding tax as alleged in [c]ounts 37 [through] 43.

The jury trial giving rise to this appeal was convened on December 9th and concluded on December 10th, 2013.[3] [Lazo]

> was acquitted of counts 1 [through] 17 but was found guilty of counts 18 [through] 43. Thereafter, on February 6th, 2014, [Lazo] was sentenced.
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> [3] We note that the case initially went to trial in April of 2013[,] resulting in a mistrial by hung jury.
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> On February 18th, 2014, [Lazo] filed a post-sentence motion seeking a new trial. On June 18th, 2014, in accord with Pa.R.Crim.P. 720(b)(3), said motion was deemed denied by operation of law.[4] Pa.R.Crim.P. 720.
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> [4] Unfortunately, and for unknown reasons, the Clerk of Courts belatedly issued the order on [August] 18, 2014.
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> On September 16th, 2014, [Lazo] filed a Notice of Appeal and in response thereto on September 17th, 2014, [the trial court] directed [Lazo] to file of record and serve a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). In accordance therewith, [Lazo] filed his statement of errors on October 7th . . . .

Trial Court Opinion ("T.C.O."), 11/25/2014, at 1-2 (citations modified).

Lazo presents the following questions for our review:

> 1. Was [Lazo] entitled to a new trial on Counts 18 through 43 because the trial court erred in denying his motion for a mistrial following testimony offered by the Commonwealth that violated the trial court's ruling or order regarding [Lazo's] pre-trial motion *in limine*?
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> 2. Was [Lazo] entitled to a new trial on Counts 18 through 43 because the trial court erred in denying [Lazo's] request at the conclusion of trial for a cautionary instruction in response to the admission of testimony in violation of the trial court's ruling on [Lazo's] pre-trial motion *in limine*?

Brief for Lazo at 4.

We address these issues in turn. However, because Lazo seeks a mistrial in connection with both issues, we begin by reviewing our well-settled standard for reviewing a trial court's refusal to grant a mistrial:

> "The denial of a motion for a mistrial is assessed on appellate review according to an abuse of discretion standard." ***Commonwealth v. Sanchez***, 907 A.2d 477, 491 (Pa. 2006). It is primarily within the trial court's discretion to determine whether the defendant was prejudiced by the challenged conduct. On appeal, therefore, this Court determines whether the trial court abused that discretion. ***Commonwealth v. Savage***, 602 A.2d 309, 311 (Pa. 1992) (citation omitted). "An abuse of discretion is not merely an error of judgment; rather, discretion is abused when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record." ***Commonwealth v. Kriner***, 915 A.2d 653 (Pa. Super. 2007) (internal quotation marks and citations omitted).

Commonwealth v. Padilla, 923 A.2d 1189, 1192 (Pa. Super. 2007) (citations modified). A mistrial may be granted "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." ***Commonwealth v. L. Bryant***, 67 A.3d 716, 728 (Pa. 2013) (quoting ***Commonwealth v. Chamberlain***, 30 A.3d 381, 408 (Pa. 2011)).

Our review of Lazo's first issue, concerning the Commonwealth's alleged violation of the trial court's pre-trial order, is informed and governed by the following principles:

> A motion *in limine* is a pre-trial application before a trial court made outside the presence of a jury, requesting a ruling or order from the trial court prohibiting the opposing counsel from referring to or offering into evidence matters so highly prejudicial to the moving party that curative instructions cannot alleviate an adverse effect on the jury. The purpose of a motion *in limine* is two[-]fold: 1) to provide the trial court with a pre-trial opportunity to weigh carefully and consider potentially prejudicial and harmful evidence; and 2) to preclude evidence from ever reaching a jury that may prove to be so prejudicial that no instruction could cure the harm to the defendant, thus reducing the possibility that prejudicial error could occur at trial which would force the trial court to either declare a mistrial in the middle of the case or grant a new trial at its conclusion. Further, a ruling on a pre-trial motion *in limine* provides counsel with a basis upon which to structure trial strategy. The motion *in limine* is an effective procedural device with no material downside risk. Once the court has pronounced its decision, the matter before it will proceed unless the Commonwealth elects to appeal an adverse ruling.

Commonwealth v. Noll, 662 A.2d 1123, 1125 (Pa. Super. 1995) (quoting ***Commonwealth v. Metzer,*** 634 A.2d 228, 232-33 (Pa. Super. 1993) (internal quotation marks and citations omitted)). For purposes of an appeal, the court's ruling on a motion *in limine* is the same as a pre-trial suppression order. ***Noll,*** 662 A.2d at 1125. "[A] pretrial suppression order is, in its practical effect, a final order . . . ." ***Commonwealth v. Bosurgi,*** 190 A.2d 304, 308 (Pa. 1963). "[T]he grant of a motion *in limine* . . . is identical in effect, to a suppression order and characterized by identical indicia of finality." ***Bosurgi,*** 190 A.2d at 308. Because "a motion *in limine* is effectively the same as a motion to suppress, any ruling thereon is also 'final, conclusive, and binding at trial' . . . ." ***Metzer***, 634 A.2d at 234 (citing current Pa.R.Crim.P. 580(j)). Thus, both a suppression motion and a motion *in limine* "settle, before trial, issues regarding the exclusion or admission of evidence." ***Metzer,*** 634 A.2d at 233.

Implicit in the Supreme Court's discussion in ***Bosurgi*** and its progeny about the finality of a pre-trial ruling for purposes of appeal is the importance of finality for purposes of trial strategy. ***Metzer,*** 634 A.2d at 233 (citing ***Bosurgi,*** 190 A.2d at 308); ***see***

> ***also Commonwealth v. Cohen****,* 605 A.2d 1212, 1215 (Pa. 1992). Accordingly, "[a]bsent the introduction of new evidence that was unavailable before the [suppression/*in limine*] . . . hearing, a pre-trial ruling may not be reversed at trial." ***Metzer****,* 634 A.2d at 234.

Commonwealth v. Padilla, 923 A.2d 1189, 1193-94 (Pa. Super. 2007) (footnote omitted; citations modified)

The trial court aptly summarized the events underlying Lazo's first issue:

> Prior to the first trial in this matter, a hearing was convened on April 8th, 2013, with respect to [Lazo's] motion *in limine* to preclude testimony relating to discussions between [Lazo] and the Department of Revenue Agent[s] regarding any offers to compromise the outstanding tax monies and/or with respect to the restaurant's liquor license. Subsequent to hearing testimony, we granted the motion with respect to "*any payments made, offers to compromise or settle, [and] testimony regarding deferred payment plans*[,]*" as well as testimony regarding the liquor license*. In all other respects, the motion was deemed denied. . . .
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> [A]t trial the instant issue arose when [Revenue Agent John Hadesty] was questioned on direct examination as to whether he made [Lazo] aware of unpaid sales tax. The agent answered affirmatively. The next question posed sought [Lazo's] response, if any, to that notification. To this question, the agent responded that [Lazo] stated, "[w]e were going to *work* on paying them."

T.C.O. at 3 (trial court's emphasis).

The trial court rejected Lazo's contention that the statement violated the court's evidentiary order in the first instance: "The answer at issue [was] not a proposed offer to compromise or settle; nor can the statement be construed as an invitation or request to allow for a deferred payment

plan. Additionally, the response elicited did not concern any alleged payments made." ***Id.*** at 4.

> [The court did not view] the question or answer as an attempt on the part of the [Commonwealth] to intentionally solicit a response which would violate [the court's] order as it relate[d] to the motion *in limine*. In [the court's] judgment, the question was proper in that [Lazo's] state of mind regarding knowledge of the taxes was relevant. This evidence was wholly unrelated to the precluded evidence concerning specific offers to compromise, payment plans, or the effect of the non-payment on the liquor license.

Id.

Lazo argues that the statement in question plainly violated the trial court's order:

> The statement that [Lazo] was going to work on paying the taxes, as either an "offer to pay" or an "offer to compromise or settle[,"] (or perhaps possibly testimony regarding a "deferred payment plan"), was indisputably covered by, and directly related to, the trial court's ruling on [Lazo's] motion *in limine*.
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> [Lazo's] statement that "we were going to work on paying [the taxes]" is clearly an "offer to pay"[[1]] or "offer to compromise or settle" given the surrounding circumstances. Agent [John] Hadesty . . . confronted [Lazo] at various times by either showing up at the restaurant or by a prescheduled appointment with [Lazo], and also had perhaps a dozen telephone conversations with [Lazo]. Agent Hadesty reviewed tax delinquencies with [Lazo], informed him that his sales tax license was revoked, and explained that further enforcement would take place if an agreement on repayment was not reached. [Lazo]

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[1] As quoted by the trial court, *supra*, the order in question did not expressly exclude testimony going merely to an "offer to pay," as such, although, as noted *infra*, that does not mean the order was not ambiguous on that point.

> then, in response, indicated that "we were going to work on paying" [the taxes].

Brief for Lazo at 18 (footnote and citations omitted).

Lazo further asserts that the Commonwealth's testimony was sufficiently prejudicial that it could not be cured by a cautionary jury instruction,[2] and therefore required a mistrial. Lazo notes that the Commonwealth's testimony indicated that the relevant meeting(s) with the revenue agent occurred in late 2008. He notes further that the jury acquitted Lazo of only the offenses that occurred in December 2008 and thereafter:

> [T]he only distinction between the facts supporting the counts [Lazo] was convicted of and the counts he was acquitted of is the offending testimony. It is a logical conclusion that the jury relied on the offending testimony[,] *i.e.*[,] the offer to pay, in finding [Lazo] guilty of all offenses beginning only in December 2008, a time period contemporaneous to the offending statement.

Id. at 20 (citations omitted).

> [T]he very fact that the testimony contradicted an 'explicit order' that no reference whatsoever be made to the underlying subject matter . . . made that evidence particularly prejudicial. The very definition of a motion *in limine* likewise makes it clear that any subject matter of a motion *in limine* is, by definition, prejudicial."

Id. at 22 (citing ***Padilla***, *supra*). Citing ***Padilla***'s observations that adherence to orders *in limine* is critical to enable the defendant to formulate

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[2] As noted, *infra*, Lazo did not request a jury instruction contemporaneously with the offending testimony.

trial strategy, Lazo notes that Lazo's "entire defense during trial was grounded on the assumption that any statements made by [Lazo] during settlement negotiations or compromise negotiations would never be heard by a jury." ***Id.*** at 23.[3] Finally, Lazo argues that the Commonwealth's alleged violation of the order *in limine* was not harmless error.

We are not persuaded that the statement in question clearly ran afoul of the trial court's order precluding certain testimony. We view the testimony as ambiguous at best (relative to Lazo's interests) as it only **suggests** something resembling a "compromise" or an "offer to settle." Notably, Lazo concedes that "[o]ne of many possible permitted responses would have been for the witness to have indicated that [Lazo] merely acknowledged that the tax debt was owed, which would have been permissible according to the trial court's ruling, since that statement would not be an offer to pay or settle." Brief for Lazo at 26-27. However, the same statement could be read as a mere offer to rectify the arrear directly and in full, which would not be unlike a mere acknowledgment of the debt, which Lazo admits would not violate the order. The proposition that offering

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[3] Lazo does not explain how this is the case by, for example, explaining his trial strategy. Furthermore, at the sidebar following the statement in question, Lazo did not allude to how the statement undermined that strategy. Elsewhere in his brief, though, Lazo notes that the defense evidence showed that, "although he may have been a corporate officer on paper, he had limited knowledge of the financial affairs of the business, did not handle the bills of the business and did not take part in its day-to-day financial affairs." Brief for Lazo at 28.

to pay would materially differ in the jury's eyes from merely acknowledging the debt is dubious at best.

Even granting *arguendo* Lazo's assertion that the statement ran afoul of the trial court's order, he is not entitled to relief, because Lazo fails to establish sufficient prejudice arising from any such error. In order to establish prejudice requiring a mistrial, Lazo must establish that the "unavoidable effect" of the admission of the evidence was "to deprive the defendant of a fair trial by preventing the jury from weighing the evidence and rendering a true verdict." ***L. Bryant***, 67 A.3d at 728.

In this connection, Lazo contends that we should infer prejudice from the jury's acquittal of Lazo on all courts approximately preceding the discussion(s) described in the offending testimony. He speculates that the jury's verdict suggested an inflection point in their assessment that coincided with the timing of that discussion. However, the Commonwealth's alternative interpretation of the jury's verdict seems to us more logical:

> Lazo's statement to Agent Hadesty that he was going to work on paying the unpaid taxes was an acknowledgment of the debt for the unpaid taxes which gave rise to counts 1-17. (Counts 1-17 alleged thefts committed between June 2007 and October 2008). Therefore, that testimony, if crucial to the verdict, would have supported conviction on [c]ounts 1-17 and not acquittal.

Brief for the Commonwealth at 11.

In conceding that evidence establishing Lazo's awareness of the debt was admissible, and given that the testimony in question arguably went no farther than that in its substance, Lazo does not establish a basis upon

which to find that the admission of that testimony was materially prejudicial. Furthermore, given that his own defense was to the effect that his distance from the business' financial affairs effectively left him unaware of the arrear, then it is not clear how the challenged testimony contradicted that: Whatever he knew at the relevant time regarding the payment of taxes, to the extent the testimony only indicated a willingness to pay generally, it suggested nothing more than that, when confronted with the debt, Lazo, as an officer of the corporation, recognized the business' obligation to make the Commonwealth whole. Obviously, the jury rejected Lazo's claims in this regard, but nothing about the testimony clearly suggested that Lazo's state of mind at the time of the subject meetings was inconsistent with his exculpatory evidence.

Viewing the trial evidence as a whole, we cannot conclude that, even if improperly admitted, the challenged testimony had the unavoidable effect of depriving the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. ***See L. Bryant***, *supra*. Accordingly, we conclude that the trial court did not err or abuse its discretion in declining to grant Lazo's motion for a mistrial.[4]

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[4] As noted, *supra*, Lazo also argues that the Commonwealth's alleged violation of the order *in limine* was not harmless error. Pennsylvania courts have held that the harmless error doctrine applies to the improper admission of evidence in various contexts. ***See, e.g., Commonwealth v. Strong***, 836 A.2d 884, 887 (Pa. 2003) (applying harmless error analysis when trial court improperly allowed an exhibit to go to the jury); ***Commonwealth v.***

(Footnote Continued Next Page)

In his second issue, Lazo contends that the trial court erred in refusing at the end of trial to give a corrective instruction regarding what he contends was the prejudicial and precluded testimony adduced by the Commonwealth. "[O]ur standard of review when considering the denial of jury instructions is one of deference—an appellate court will reverse a court's decision only when it abused its discretion or committed an error of law." ***Commonwealth v. Baker***, 24 A.3d 1006, 1022 (Pa. Super. 2011), *affirmed,* 78 A.3d 1044 (Pa. 2013).

We may only consider such a challenge when it has been duly preserved.

> Failure to request a cautionary instruction upon the introduction of evidence constitutes a waiver of a claim of trial court error in failing to issue a cautionary instruction. ***See Commonwealth v. Wallace****,* 561 A.2d 719 (Pa. 1989) (trial counsel's failure to object when trial court did not issue cautionary instruction following introduction of evidence of defendant's prior incarceration resulted in waiver of any claim of error based upon trial court's failure to give cautionary instruction);

(Footnote Continued) ———————————

Rivers, 644 A.2d 710, 716 (Pa. 1994) (applying harmless error analysis to improper introduction of prejudicial photographs). In ***Commonwealth v. Washington***, 700 A.2d 400 (Pa. 1997), our Supreme Court held that "an error is harmless if it could not have contributed to the verdict because the erroneously admitted evidence is merely cumulative of substantially similar, properly admitted evidence." ***Id.*** at 407. The trial court may overlook the erroneous admission of evidence only when it finds "that the evidence of guilt was so overwhelming, and the error . . . so insignificant by comparison, that the error was harmless beyond a reasonable doubt." ***Rivers***, 644 A.2d at 716. Because we have found that Lazo was not sufficiently prejudiced, if prejudiced at all, by the complained-of testimony to warrant a mistrial, we need not address this argument.

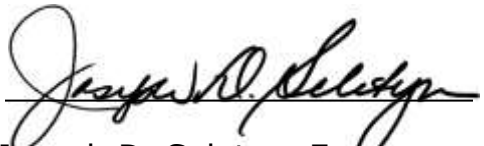
> ***Commonwealth v. Jones***, 460 A.2d 739 (Pa. 1983) (issue waived where defense counsel immediately objected to prosecutor's conduct but failed to request mistrial or curative instructions).

Commonwealth v. R. Bryant, 855 A.2d 726, 739 (Pa. 2004).

In this case, it is undisputed that, although Lazo requested a sidebar and moved for a mistrial immediately upon the challenged testimony, thus preserving his challenge to the trial court's refusal to grant a mistrial, he did not at that time ask that the court issue a cautionary instruction to the jury. Because it was then, upon the introduction of the evidence in question, that it would have been proper to seek such an instruction, Lazo's belated attempt to seek such an instruction at the close of trial as part of the trial court's jury charge came too late. Furthermore, when he requested the charge, Lazo was unable to remind the court of the relevant details of the testimony in question. ***See*** Notes of Testimony, 12/9-10/2013, at 216-17. In any event, because Lazo failed to seek the instruction contemporaneously with the complained-of testimony, this issue is waived.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015