NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ROBERT SCHMIDT Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2175 EDA 2012

Appeal from the Judgment of Sentence July 12, 2012
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0003127-2011

BEFORE: GANTMAN, J., MUNDY, J., and COLVILLE, J.*

MEMORANDUM BY MUNDY, J.: **FILED JUNE 27, 2013**

Appellant, Robert Schmidt, appeals from the July 12, 2012 judgment of sentence of life imprisonment without the possibility of parole, imposed following his conviction by a jury of first-degree murder for the intentional slaying of Robert J. Sarko.[1] After careful review, we affirm.

The factual and procedural history of this case, as revealed by the certified record, follows. Upon presentment by a county grand jury, Appellant was charged, on July 11, 2011, with criminal homicide in connection with the death of Robert J. Sarko. Following a preliminary hearing on September 26, 2011, Appellant's charge was bound over to the

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 2502(a).

Court of Common Pleas of Northampton County. A four-day jury trial commenced on July 9, 2012.

At trial, the Commonwealth called 26 witnesses, whose evidence, when viewed in the light most favorable to the Commonwealth, establish the following. On or about June 7, 2002, human remains were discovered during excavation taking place at 829 South Mink Road, Danielsville, Moore Township, Northampton County. Forensic testing subsequently identified the remains as those of Robert J. Sarko, and determined that the remains had been buried for over a year. There was evidence of a gunshot wound to the back of the head and evidence of a slicing wound to the neck, either of which could have been the cause of death.

Sarko's family made missing person reports for him in October of 2000, after they had not heard from him for several months. At the time of his disappearance, Sarko resided with Appellant and Appellant's family at their residence at 829 South Mink Road. Three years earlier, Sarko had met Appellant at Muhlenberg Hospital, where both were psychiatric patients. Sarko moved in with Appellant and his family shortly thereafter and had resided there until his disappearance.

In June of 2000, Appellant and his family left the residence for a vacation in Ocean City, Maryland. Sarko remained at the residence to care for Appellant's mother, who suffered from Alzheimer's, and the family's various outdoor and household animals. During that time, Agent Kathy

Andrews of the Northampton County SPCA, responding to a complaint, arrived at Appellant's residence where she encountered Sarko. Agent Andrews found the condition of the various animals deficient. In the course of removing the animals, Sarko turned over two Pug puppies, begging Agent Andrews "not to tell [Appellant] that he gave them to [Agent Andrews] or [Appellant] would kill him." N.T., 7/11/12, at 25.

Appellant's family members testified that Sarko was at the residence the night they returned from vacation, but that was the last time they saw him. Appellant told his son that Sarko left in the middle of the night wearing clothing belonging to Appellant's mother. Sarko's belongings remained at the premises. The day after the family's return from Ocean City, Maryland, Brian Miller, the then fiancé of Appellant's oldest daughter, noticed a barn that was usually unlocked was now locked. The following weekend, upon returning from an outing with other members of the family, Miller noticed that a backhoe, which was kept on the property and used only by Appellant, had been moved.

Sometime later, but before Sarko's body was discovered, Appellant confessed to Miller that he had killed Sarko. Miller related Appellant's description of the killing as follows.

> He told me that nobody was around, Appellant had a van show up, [] Sarko walked over to the van, got hit in the head, drove somewhere. He then met up with him where he was tied up in a chair and blindfolded, said, 'you mess with me, you mess with

> my family.' Took the blindfold off, and shot him in the head.

N.T., 7/10/12, at 105. During subsequent inquiries by the police in response to Sarko's missing person case, Appellant instructed Miller to say that he didn't know Sarko. Miller complied and lied to authorities on a number of occasions. Appellant told Miller he "did a good job not saying nothing." ***Id.*** at 112. Around various times when the authorities were questioning Miller or his then fiancé, the frequency and duration of cell phone activity between Appellant and Miller increased. A day after Appellant's police interview, on February 26, 2002, Miller accompanied Appellant to Kris Snyder's Auto Sales.

Susan Hamm was employed at Kris Snyder's Auto Sales in 2002 as office manager. In February of 2002, another employee turned over a wallet found in one of the vehicles. Upon her inspection of the wallet, she ascertained it belonged to Sarko whose address appeared to be 829 South Mink Road. She sent a letter addressed to Sarko advising that the wallet had been found. Appellant turned this letter and others over to investigators on March 12, 2002. The police retrieved the wallet from Hamm in the condition she found it.

The wallet contained a typewritten letter, bearing Sarko's apparent signature, explaining why he left the 829 South Mink Road address, a receipt from K-Mart dated February 10, 2002, and the citations issued by Agent Andrews to Sarko in June of 2000. Police subsequently viewed relevant

security camera recordings from the K-Mart store. Sarko did not appear on the recordings but Appellant did. Forensic analysis determined the signature on the typed letter was not a natural signature.

When questioned at various times concerning his knowledge of Sarko's whereabouts of, Appellant gave conflicting responses. When questioned on November 7, 2000, Appellant said he had last seen Sarko in July "when he left in the middle of the night," taking the wrong bag. N.T., 7/12/12, at 50. On February 19, 2002, Appellant, then residing in Allentown, told investigators that he had last seen Sarko in December of 2001, that he was hanging out with heroin dealers, and that his appearance had changed from loss of weight. On February 25, 2002, Appellant told the police he had last seen Sarko in October of 2001 when Sarko signed a lease for the 829 South Mink Road property. On February 26, 2002, Appellant told police he had just seen Sarko a half hour earlier, and that Sarko was trying to get a ride to Maryland.

In January of 2002, Agent Andrews again investigated the 829 South Mink Road property, finding it vacant and in deplorable condition. She removed the animals and issued new citations. Appellant contacted Agent Andrews and advised her that Sarko was renting the property and was responsible for the animals. He claimed Sarko resided there with two people named Betty and James. On March 12, 2002, while at the magisterial district judge's court in connection with the animal cruelty citations,

Appellant told police that he had seen Sarko at various places in Allentown. During the hearing, however, Appellant stated that he had not seen Sarko since the day he left in the summer of 2000. After the hearing, Appellant again told police that he had not seen Sarko, but had put out word on the street that Sarko was a narc.

After Sarko disappeared, until payments were suspended in 2002, Sarko's social security checks continued to be sent or direct deposited. Subsequent investigation revealed that numerous checks and bank documents had been forged by Appellant, and that all payments from Sarko's account, into which the checks were deposited, were made payable to Appellant.

Appellant asserted that he made the subject transactions with Sarko's permission and that Sarko was often with him or waiting in the car when the transactions were made. Security camera recordings showed Appellant present during various transactions but never Sarko. Appellant also provided police with a copy of a purported lease of the 829 South Mink Road property from Appellant to Sarko for monthly rental of $350.00, but for which Sarko allegedly paid $555.00 per month. Subsequent investigation revealed that Sarko's signature on the lease was not genuine and that Appellant did not own the property during the period of the lease.

Shane Gallahan testified that he was associated with Appellant in selling drugs and that Appellant, at the time of Sarko's disappearance, held

guns for him and used Gallahan's van to get rid of things for him. Appellant related to Gallahan that he had fought with Sarko and "it got out of hand." N.T., 7/11/12, at 244. Appellant made a gesture that Gallahan interpreted to mean Appellant strangled Sarko. Appellant indicated the story would be that Sarko "went off his meds and he ran into the woods." ***Id.*** at 248. Later, Gallahan was concerned he might be implicated in whatever happened to Sarko, and Appellant assured him "he's in the woods, nobody's going to find him." ***Id.*** at 253.

In 2002, the new owners of the 829 South Mink Road property hired contractors to perform excavation on the premises in preparation for new construction. In the course of excavating a waterline trench, the excavator discovered a suspicious bone and reported it to the police. The bone was identified as human. The Coroner then supervised a further forensic excavation, unearthing more remains, including portions of a skull. The remains were submitted for forensic testing with the results as related above.

On July 12, 2012, the jury found Appellant guilty of first-degree murder. The trial court immediately sentenced Appellant to mandatory life imprisonment without the possibility of parole. Appellant filed timely post-sentence motions on July 16, 2012, requesting judgment of acquittal, or a

new trial. The trial court denied all Appellant's post-sentence motions on July 20, 2012. Appellant filed the instant appeal on July 23, 2012.[2]

On appeal, Appellant raises the following issues.

> A. Whether the Trial Court erred in denying Appellant's Post-sentence Motion in failing to find that the evidence presented at trial was insufficient as a matter of law to sustain a conviction for the offense of first-degree murder, Title 18 P.S. § 2502(A)?
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> B. Whether the Trial Court erred in denying Appellant's Post-sentence Motion in failing to find that the verdict was against the weight of the evidence in that the assessment of the factual evidence presented at trial indicated that the jury's verdict was against the weight of the evidence and could not support a conviction for first-degree murder?
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> C. Whether the Trial Court erred in denying Appellant's Motion In Limine to exclude victim's statements made to Northampton County S.P.C.A. Officer Kathy Andrews regarding Appellant on June 30, 2000?
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> D. Whether the Trial Court erred in denying Appellant's requested jury instruction pertaining to the heat of passion portion of voluntary manslaughter — murder in issue jury instruction 15.2503A(3) & (4) since the facts of record supported it?

Appellant's Brief at 3.

Appellant first challenges the trial court's denial of his motion for judgment of acquittal alleging insufficiency of the evidence presented by the

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[2] Appellant and the trial court have complied with Pa.R.A.P. 1925.

Commonwealth to sustain his conviction for first-degree murder. ***Id.*** at 7. "Appellant concedes the Commonwealth was able to prove that the victim was unlawfully killed. However, they failed to establish beyond a reasonable doubt at trial the next two elements, *i.e.*, Appellant was responsible for the killing and/or he acted with the specific intent to kill the victim." ***Id.*** at 8.

Our standard of review relating to this issue is clear. "A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge." ***Commonwealth v. Xander***, 14 A.3d 174, 177 (Pa. Super. 2011), *quoting* ***Commonwealth v. Hutchinson***, 947 A.2d 800, 805 (Pa. Super. 2008), *appeal denied*, 980 A.2d 606 (Pa. 2009).

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

Commonwealth v. Caban, 60 A.3d 120, 132-133 (Pa. Super. 2012), *quoting* ***Commonwealth v. Quel***, 27 A.3d 1033, 1037–1038 (Pa. Super. 2011).

The substance of Appellant's argument centers on his assertion that the evidence adduced by the Commonwealth from witnesses Miller and Gallahan is unworthy of belief. Appellant's Brief at 9-12. Specifically, Appellant notes Miller's admission that he repeatedly lied to the police during their investigation of Sarko's disappearance. ***Id.*** at 10-11. Appellant also describes supposed discrepancies in various details between the description of the killing that Miller attributed to Appellant and those described in the forensic reports. ***Id.*** at 9. "This clear contradiction as to the location of the point of impact clearly was enough to raise doubt as to the veracity of Miller's testimony." ***Id.*** Additionally, Appellant argues that Gallahan's admitted drug dealing and fear of being implicated in the crime taints his motive in testifying. ***Id.*** at 12. "It illustrated an individual known to deal and use drugs testify[ing] as to insure he would not be charged with any crime involving Sarko's disappearance and death." ***Id.***

These arguments do not suggest that the Commonwealth failed to present evidence of an essential element of the offense charged. Rather they suggest the evidence is not credible and ought not to be believed.

"Such claims are directed entirely to the credibility of [the witnesses'] testimony, and, as such, challenge the weight, not the sufficiency, of the evidence." ***Commonwealth v. Lopez***, 57 A.3d 74, 80 (Pa. Super. 2012), *appeal denied*, 62 A.2d 379 (Pa. 2013). Accordingly, Appellant's sufficiency of the evidence argument fails. We conclude the trial court did not err in determining the Commonwealth sustained its burden in this case or in denying Appellant's motion for judgment of acquittal.[3]

Appellant next challenges the trial court's denial of his post-sentence motion for a new trial based on his challenge to the weight of the evidence.[4] Appellant's Brief at 14. Essentially, Appellant reiterates his argument described above, that Miller's testimony is unworthy of belief. "[T]he pack of lies Miller admitted he told the investigative authorities over the years should have been enough for a jury to discredit all of his testimony as previously noted above and warrant the granting of a new trial." ***Id.***

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[3] Even if Appellant properly framed his sufficiency of the evidence claim, we would agree with the trial court that the circumstantial evidence presented by the Commonwealth in this case, as recited above, clearly supports the conclusion that Appellant acted with specific intent when killing Sarko. "[T]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence, coupled with the reasonable inferences drawn therefrom, overcomes the presumption of innocence." ***Commonwealth v. Stays***, 40 A.3d 160, 167 (Pa. Super. 2012) (citations omitted), *vacated on other grounds*, 63 A.3d. 253 (Pa. 2013).

[4] Appellant properly preserved this issue in his post-sentence motion and Rule 1925(b) statement. ***See*** Pa.R.Crim.P. 607(A)(3); Pa.R.A.P. 1925(b).

The following standards guide our consideration of this issue. "A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court." ***Commonwealth v. Diggs***, 949 A.2d 873, 879 (Pa. 2008), *cert. denied*, ***Diggs v. Pennsylvania***, 129 S. Ct. 1580 (2009).

> Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Gibbs, 981 A.2d 274, 282 (Pa. Super. 2009) (quotations and citations omitted), *appeal denied*, 3 A.3d 670 (Pa. 2010).

> In reviewing the entire record to determine the propriety of a new trial, an appellate court must first determine whether the trial judge's reasons and factual basis can be supported. Unless there are facts and inferences of record that disclose a palpable abuse of discretion, the trial judge's reasons should prevail. It is not the place of an appellate court to invade the trial judge's discretion any more than a trial judge may invade the province of a jury, unless both or either have palpably abused their function.
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> To determine whether a trial court's decision constituted a palpable abuse of discretion, an appellate court must "examine the record and assess the weight of the evidence; *not however, as the trial judge, to determine whether the preponderance of the evidence opposes the verdict, but rather to determine whether the court below in so finding plainly exceeded the limits of judicial discretion and invaded the exclusive domain of the jury.*" Where the record adequately supports the trial court, the

> trial court has acted within the limits of its judicial discretion.

Commonwealth v. Clay, 64 A.3d 1049, 1056 (Pa. 2013), *quoting* ***Commonwealth v. Brown***, 648 A.2d 1177, 1190 (Pa. 1994) (emphasis added in ***Clay***). "One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice." ***Commonwealth v. Brown***, 23 A.3d 544, 557-558 (Pa. Super. 2011) (*en banc*) (citations and internal quotation marks omitted).

The trial court expressed its reasons for denying Appellant's motion for a new trial in its Rule 1925(a) opinion. Relative to the testimony of Miller and Gallahan, the trial court noted as follows.

> In fairness, [defense counsel] did expose weaknesses in both witnesses' testimony on cross-examination. In particular, he underscored [] Miller's abrupt change in grand jury testimony and [] Gallahan's past criminal behavior. Either line of inquiry could have undermined the credibility of the witness in the eyes of the jury.
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> That said, a jury is entitled to believe all, part or none of the evidence presented. … Accordingly, we submit that the jury could legitimately have elected to believe all or part of [] Miller and [] Gallahan's testimony, notwithstanding the subject matter elicited on cross."

Trial Court Opinion, 2/4/13, at 22. The trial court then carefully reviewed all the evidence and concluded, "the Commonwealth introduced compelling

evidence of [] Appellant's criminal responsibility for [Sarko's] death. It follows that the jury's verdict of first-degree murder does not shock our sense of justice." ***Id.*** at 29.

Upon close review of the entire record, we discern no abuse of discretion by the trial court in refusing to grant a new trial on the ground the verdict is against the weight of the evidence. We determine that the record supports the trial court's conclusions and that neither the jury nor the trial court "have palpably abused their function." ***Clay***, ***supra***.

Appellant's third issue challenges the trial court's failure to grant his motion *in limine* seeking to bar admission into evidence the statements made by Sarko to Agent Andrews about his fear of Appellant's reaction if he learned that Sarko turned over the Pug puppies. Appellant's Brief at 15. "In applying the law to the case at bar, Appellant does not question the probative value of this statement, but contends the probative value of this statement is outweighed by the prejudicial effect which it eventually had on Appellant by virtue of the guilty verdict rendered." ***Id.*** at 16.

We review challenges to the evidentiary decisions of a trial court for abuse of discretion.

> The admissibility of evidence is within the sound discretion of the trial court, wherein lies the duty to balance the evidentiary value of each piece of evidence against the dangers of unfair prejudice, inflaming the passions of the jury, or confusing the jury. We will not reverse a trial court's decision concerning admissibility of evidence absent an abuse of the trial court's discretion.

Commonwealth v. Estepp, 17 A.3d 939, 945 (Pa. Super. 2011), *appeal dismissed as improvidently granted*, 54 A.3d 22 (Pa. 2012), *quoting* ***Commonwealth v. Ruffin****,* 10 A.3d 336, 341 (Pa. Super. 2010) (citations omitted).

> Not merely an error in judgment, an abuse of discretion occurs 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 on record.

Commonwealth v. Montalvo, 986 A.2d 84, 94 (Pa. 2009) (internal quotation marks and citation omitted), *cert. denied*, ***Montalvo v. Pennsylvania***, 131 S. Ct. 127 (2010).

> [When] the trial court indicate[s] the reason for its decision[,] our scope of review is limited to an examination of the stated reason. We must also be mindful that a discretionary ruling cannot be overturned simply because a reviewing court disagrees with the trial court's conclusion.

Commonwealth v. Lomax, 8 A.3d 1264, 1266 (Pa. Super. 2010) (internal quotation marks and citation omitted).

Instantly, citing Pennsylvania Rule of Evidence 403, Appellant filed a motion *in limine* on July 3, 2012, seeking to exclude "repeated statements [Sarko] made to then Northampton County S.P.C.A. Agent [] Andrews on June 30, 2000 …" because "the introduction of such evidence at trial is highly prejudicial in that the probative value it may have is outweighed by

the danger of unfair prejudice upon [Appellant]."[5] Appellant's Motion *In Limine* to Exclude Victim's Statements, 7/3/12, at 1-2, ¶¶ 3, 4. The trial court denied Appellant's motion during a pretrial conference on July 9, 2012.[6] N.T., 7/9/12, at 127.

The trial court noted Appellant did not dispute the evidence was relevant, which the trial court found supported "a reasonable inference regarding the existence of material fact," to wit, that Appellant intentionally shot Sarko. ***Id.*** The timing of the statement and its suggestion of motive enhanced the probity of the evidence. ***Id.***; Trial Court Opinion, 2/4/13, at 30. Furthermore, Appellant makes only a bald assertion that the evidence had "prejudicial effect." Appellant's Brief at 16. The comment to Rule 403 defines "unfair prejudice" as "a tendency to suggest decision on an improper

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[5] Rule 403 provides as follows.

> **Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**
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> The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Pa.R.E. 403.

[6] Accordingly, Appellant's objection to the evidence is preserved. ***See*** Pa.R.E. 103, effective January 1, 2002 (providing that evidentiary objections may be made by motion *in limine* and need not be reasserted at trial where a definitive decision appears in the record).

basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa.R.E. 403, Cmt. Appellant makes no suggestion of what is "improper" about the prejudicial effect of the evidence.

> Evidence is not unfairly prejudicial simply because it is harmful to the defendant's case. The trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand. Exclusion of evidence on the grounds that it is prejudicial is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.

Commonwealth v. Flamer, 53 A.3d 82, 88 n.7 (Pa. Super. 2012) (internal quotation marks and citations omitted).

Appellant's complaint that the evidence is prejudicial stems from its legitimate implication of Appellant's guilt, not on its introduction of some extraneous considerations that might influence a jury to enter a verdict on an impermissible basis. Accordingly, we discern no abuse of discretion by the trial court in denying Appellant's motion *in limine* and permitting the admission into evidence of Sarko's statements to Agent Andrews.

In his final issue, Appellant claims the trial court abused its discretion in "refusing to instruct the jury on Pennsylvania Suggested Standard [Criminal] Jury Instruction 15.2503A(3) & (4)." Appellant's Brief at 17. We note the following standard of review we apply when reviewing a trial court's instructions to a jury.

> When reviewing a challenge to jury instructions, the reviewing court must consider the charge as a whole to determine if the charge was inadequate, erroneous, or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. A new trial is required on account of an erroneous jury instruction only if the instruction under review contained fundamental error, misled, or confused the jury.

Commonwealth v. Miskovitch, 64 A.3d 672, 684 (Pa. Super. 2013) (emphasis removed), *quoting* ***Commonwealth v. Fletcher***, 986 A.2d 759, 792 (Pa. 2009).

The Commonwealth contends Appellant failed to preserve this issue for appeal. Commonwealth's Brief at 24. Upon careful review of the record, we agree. Instantly, Appellant asserts he requested the trial court give the portions of the voluntary manslaughter charge contained in Pa. SSJI (Crim) 15.2503A(3) & (4). Appellant's Brief at 17-18. While Appellant made an oral request for the voluntary manslaughter charge, he did not submit any written proposed points for charge in accordance with Pa.R.Crim.P. 647.

> **Rule 647. Request for Instructions, Charge to the Jury, and Preliminary Instructions**
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> (A) Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests and which instructions shall be

> submitted to the jury in writing. The trial judge shall charge the jury after the arguments are completed.
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> (B) No portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.
>
> …

Pa.R.Crim.P. 647(A), (B).

At the beginning of the charge conference the trial court noted it was considering giving a charge on voluntary manslaughter. N.T., 7/12/12, at 165. The Commonwealth argued against the charge. ***Id.*** at 178-179. The trial court then expressed its intention as follows.

> THE COURT: Well, my view … is that the Court is obligated to include if there is a request, the charge of voluntary manslaughter. But looking at the jury instruction/pattern [sic] jury instruction which I intend to use here, paragraphs [sic] numbers three through five inclusive do not fit the evidence here.
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> There would be no rational basis for the jury to consider those options which explain the heat of passion and other motivations for such a killing. Accordingly, I am going to overrule the Commonwealth's objection and believe that the trial court is required to give an instruction.
>
> I intend to instruct the jury on paragraphs one, two and six of the pattern [sic] jury instruction 15.2503A

Id. at 179-180. When subsequently asked by the trial court for comment, defense counsel stated, "I have no – I'm fine with the instructions." ***Id.*** at 182.

With respect to voluntary manslaughter, the trial court proceeded to instruct the jury as it represented it would during the charging conference. ***Id.*** at 272-273. Appellant interposed no objection to the charge. At the conclusion of the charge, the trial court inquired if there were any exceptions to the charge. Defense counsel responded, "No, your Honor." ***Id.*** at 274. These actions were insufficient to preserve any objection to the charge for appeal. Our Supreme Court has held as follows.

> [U]nder Criminal Procedural Rules 603 and 647(B), the mere submission and subsequent denial of proposed points for charge that are inconsistent with or omitted from the instructions actually given will not suffice to preserve an issue, absent a specific objection or exception to the charge or the trial court's ruling respecting the points.

Commonwealth v. Pressley, 887 A.2d 220, 225 (Pa. 2005). Accordingly, this Court has explained the following.

> A specific and timely objection must be made to preserve a challenge to a particular jury instruction. Failure to do so results in waiver. Generally, a defendant waives subsequent challenges to the propriety of the jury charge on appeal if he responds in the negative when the court asks whether additions or corrections to a jury charge are necessary.

Commonwealth v. Charleston, 16 A.3d 505, 527-528 (Pa. Super. 2011), *appeal denied*, 30 A.3d 486 (Pa. 2011), *quoting* ***Commonwealth v. Moury***, 992 A.2d 162, 178 (Pa. Super. 2010).

In light of these considerations, we conclude Appellant did not lodge a timely objection or exception to the trial court's charge to the jury.

Consequently, we deem Appellant's final issue is waived.[7] ***See*** Pa.R.Crim.P. 647(B).

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[7] Even if not waived, we agree with the trial court that instruction on heat of passion was not warranted by the facts in this case. Appellant argued that Gallahan's testimony presented a factual scenario justifying the instruction. Appellant's Brief at 17-18.

> During the charging conference, Appellant's counsel argued that a voluntary manslaughter jury charge was justified by Shane Gallahan's testimony that the Appellant confessed to having killed the victim during a fight that "got out of hand." It was also argued that an alleged cause of this fight was a possible affair between the victim and Appellant's wife.

Id.

That testimony, however, does not suggest that Appellant was thereby subject to provocation from Sarko. "[A] person is guilty of 'heat of passion' voluntary manslaughter if at the time of the killing he acted under a sudden and intense passion **resulting from serious provocation by the victim**." ***Commonwealth v. Ragan***, 743 A.2d 390, 396-397 (Pa. 1999) (emphasis added), ***see also Commonwealth v. Johnson***, 42 A.3d 1017, 1036 (Pa. 2012) (holding the evidence of both serious provocation and sudden intense passion resulting therefrom is required to support a voluntary manslaughter charge), *cert*. *denied*, ***Johnson v. Pennsylvania***, 133 S. Ct. 1795 (2013).

> [A] trial court shall only instruct on an offense where the offense has been made an issue in the case and where the trial evidence reasonably would support such a verdict…. Instructions regarding matters … which are not supported by the evidence serve no purpose other than to confuse the jury.

Commonwealth v. Patton, 936 A.2d 1170, 1176 (Pa. Super. 2007), *affirmed*, 985 A.2d 1283 (Pa. 2009), *quoting* ***Commonwealth v. Browdie***, 671 A.2d 668, 674 (Pa. 1996).

Based on the foregoing, we conclude that all of Appellant's issues on appeal are waived or otherwise without merit. Accordingly, we affirm the trial court's July 12, 2012 judgment of sentence.

Judgment of sentence affirmed.

Judge Colville concurs in the result.

Judgment Entered.

Prothonotary

Date: 6/27/2013