IN THE COURT OF COMMON PLEAS OF
NORTHAMPTON COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	)	**No. 620-2013**
	)	
v.	)	
	)	
RENE FIGUEROA, Defendant	)	

<u>MEMORANDUM OPINION PURSUANT TO Pa.R.A.P. 1925(a)</u>

Defendant has appealed to the Superior Court from the judgment of sentence imposed on January 23, 2015. Following a jury trial held from September 29, 2014, to October 31, 2014, Defendant was convicted of one count of involuntary manslaughter as a misdemeanor of the first degree,[1] one count of aggravated assault as a felony of the first degree,[2] one count of carrying a firearm without a license as a felony of the third degree,[3] and one count of receiving stolen property as a felony of the second degree.[4]

---

[1] 18 Pa.C.S.A. § 2504.
[2] *Id.* § 2702(a)(1).
[3] *Id.* § 6106(a)(1).
[4] *Id.* §§ 3903(a)(2), 3925.

On January 23, 2015, Defendant was sentenced to thirty to sixty months in state prison for involuntary manslaughter, a consecutive period of 108 to 216 months in state prison for aggravated assault, a consecutive period of forty-two to eighty-four months in state prison for carrying a firearm without a license, and a concurrent period of thirty to sixty months in state prison for receiving stolen property. In the aggregate, Defendant was sentenced to 180 to 360 months in state prison, or fifteen to thirty years.

On February 9, 2015, Defendant filed a Notice of Appeal.[5] On February 11, 2015, the Court entered an Order requiring Defendant to file a concise statement of errors complained of on appeal ("Concise Statement"), pursuant to Pennsylvania Rule of Appellate Procedure 1925(b)(1), within twenty-one days. On February 23, 2015, Defendant filed a Concise Statement, which consists of one numbered paragraph stating:

> 1. The testimony presented by the Commonwealth by Detective Fabian Martinez, introduced extraordinarily prejudicial hearsay testimony regarding the possession of a gun and a gun being handed to [Defendant] prior to the deadly incident. This testimony was clearly inadmissible and prejudicial to the intent of [Defendant]. A mistrial was requested and denied. Cautionary instruction was insufficient to overcome extreme prejudice.

(Concise Statement at 1.)

---

[5] Defendant did not file an optional post-sentence motion pursuant to Pennsylvania Rule of Criminal Procedure 720.

> [The Superior] Court has considered the question of what constitutes a sufficient 1925(b) statement on many occasions, and it is well-established that "Appellant's concise statement must properly specify the error to be addressed on appeal." *Commonwealth v. Hansley*, 24 A.3d 410, 415 (Pa. Super. 2011) (citation omitted). "[T]he Rule 1925(b) statement must be specific enough for the trial court to identify and address the issue an appellant wishes to raise on appeal." *Id.* (brackets, internal quotation marks, and citation omitted). Further, this Court may find waiver where a concise statement is too vague. *Id.* "When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review." *Commonwealth v. Dowling*, 778 A.2d 683, 686 (Pa. Super. 2001) (citation omitted). "A Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." *Id.* at 686–87.

In re A.B., 63 A.3d 345, 350 (Pa. Super. 2013). Defendant's imprecisely-drafted Concise Statement makes it difficult for the Court to identify the exact issues being raised in his appeal. Therefore, Defendant has arguably waived all issues on appeal.

Assuming that there has been no waiver, the Court perceives two distinct issues within Defendant's Concise Statement. First, Defendant complains of an incident that occurred during the direct testimony of the Commonwealth's police prosecutor, Detective Fabian Martinez, wherein Detective Martinez uttered Defendant's name when testifying about a statement given by Defendant's co-defendant, Javier Rivera-Alvarado ("Co-Defendant"), in violation of the doctrine of *Bruton v. United States*, 391 U.S. 123 (1968) (holding that, in joint trial involving co-defendants, admission into evidence of confession of one defendant that inculpates other defendant

violates non-confessing defendant's Sixth Amendment right to confront witnesses against him). Second, Defendant complains of an improper argument made by First Deputy District Attorney Terence Houck ("the Prosecutor") during his closing, when the Prosecutor read to the jury a portion of Co-Defendant's statement that had been precluded from being entered into, and/or was stricken from, the evidentiary record, prompting both defendants to move for a mistrial, which the Court denied. As these issues primarily concern Co-Defendant's statement and the entry of portions of that statement into evidence through the direct testimony of Detective Martinez, the Court will only briefly summarize the evidence of the events leading to Defendant's arrest before it begins its analysis of the two issues identified above.

Defendant's trial was conducted simultaneously with the trial of Co-Defendant pursuant to Pennsylvania Rule of Criminal Procedure 582(A)(2).[6] The evidence at trial established the following facts. On the night of December 1, 2012, Defendant and Co-Defendant were at the Puerto Rican Beneficial Society Club ("Puerto Rican Club"), a social club located on East Third Street in Bethlehem, Northampton County, Pennsylvania. Defendant was at the Puerto Rican Club to watch a boxing match, as were the following

[6] Co-Defendant was charged, in an information filed at docket number CV-48-CR-619-2013, with, *inter alia*, criminal attempt to commit criminal homicide, aggravated assault, and related conspiracy offenses. At the conclusion of the trial, the jury acquitted Co-Defendant of all charges.

individuals: Yolanda Morales, Co-Defendant, Orialis and Angel Figueroa ("Orialis" and "Angel"),[7] and Luis Rivera ("Rivera"). Orialis, Angel, and Rivera were the alleged victims of Defendant and Co-Defendant and are members of the same family. Ms. Morales was a friend of the alleged victims' family. On the night in question, a shootout between Defendant and Orialis occurred at approximately 2:30 a.m. on the street outside the Puerto Rican Club, resulting in the death of Ms. Morales and gunshot wounds to Defendant, Co-Defendant, Orialis, Angel, and Rivera. After the shootout, the injured individuals were transported to the emergency trauma center at St. Luke's Hospital. There, Detective Martinez conducted interviews with a number of the involved individuals.

On October 23, 2014, the eleventh day of the Commonwealth's case-in-chief, the Commonwealth recalled Detective Martinez as a witness. Detective Martinez testified that he received a call at approximately 3:30 a.m. informing him that a shootout at the Puerto Rican Club had occurred. (*See* N.T., 10/23/2014, at 115:19-22.) Detective Martinez reported to headquarters for a briefing, was assigned to the case as the lead detective, and then went to St. Luke's Hospital. (*Id.* at 115:23-116:17.) Detective Martinez first interviewed Orialis, who gave a statement describing the

[7] Orialis Figueroa and Angel Figueroa are brothers with no relation to Defendant. While the Court would not ordinarily refer to an individual by his or her first name, in light of the fact that Orialis Figueroa and Angel Figueroa share the same last name as Defendant, the Court will refer to Orialis Figueroa and Angel Figueroa by their first names, for ease of reference.

events leading up to the shootout. (*Id.* at 116:25-117:24.) Detective Martinez next interviewed Rivera, followed by Angel, who also gave statements. (*Id.* at 119:16-121:9-16.) Detective Martinez was unable to interview Defendant or Co-Defendant because of their medical conditions. (*Id.* at 120:16-121:5.)

The next morning, Detective Martinez returned to St. Luke's Hospital and interviewed Co-Defendant. (*Id.* at 135:22-136:3.) Co-Defendant gave a statement to Detective Martinez,[8] which was summarized in Detective Martinez's police report:[9]

> On December 1, 2012 at approximately 2200 hrs., [Co-Defendant] went to the Puerto Rican Club, with his wife Jasmine Suarez.
>
> Shortly after arriving to the club they were joined by their friends, [Defendant] Aka "Drama", vinny, and Reno.
>
> [Co-Defendant] told Detectives that he only knows the said individuals by their street names. [Co-Defendant] further stated that at some point during the night he noticed that a group of guys were checking out [Defendant]'s 50,000, necklace and jewelry.
>
> [Co-Defendant] stated that [Defendant] was wearing a lot of gold jewelry with diamonds, which caught the attention of the said individuals. [Co-Defendant] told [Defendant] to watch his

---

[8] At the time of Detective Martinez's trial testimony, the Court was privy to Co-Defendant's statement to Detective Martinez, having previously analyzed its admissibility in ruling on Co-Defendant's motion to suppress the statement, which was contained in an omnibus pretrial motion that Co-Defendant filed in his case on July 22, 2013. The motion to suppress was denied in an Opinion filed by the Court on February 17, 2014.

[9] With the exception of the bracketed material and correction of the paragraph formatting for ease of reference, the report is reproduced here verbatim, including grammar and punctuation errors.

back because the group of guys were watching him and looking at his gold.

Some time after he alerted [Defendant] about the group of guys, [Defendant] walked away. A short time after [Co-Defendant] noticed that [Defendant] was arguing with one of the guys from the group. [Co-Defendant] further stated that the guy [Defendant] was arguing with had long braids and dark hair.[10]

[Co-Defendant] stated that after the said argument started he told his wife that he wanted to leave. He then grabbed his wife by her hand and they both exited the [Puerto Rican Club]. He stated that once they were outside they both walked towards the parking lot. As they approached the parking lot he got struck on the head from behind. [Co-Defendant] stated that all he remembers after being struck is waking up in the hospital.

[Co-Defendant] was advised that it was very important for him to tell Detectives everything he saw the night of the shooting. [Co-Defendant] was also advised that a number of people were shot that night, and anything he saw could be of great value to the investigation.

[Co-Defendant] stated that as he was leaving the [Puerto Rican Club] with his wife one of the bouncers brought a gun out of the back room and showed it to [Defendant].

When this Detective asked [Co-Defendant] who was the bouncer, he responded by stating "I dont know,it was a one of bouncers".

When this Detective asked [Co-Defendant] which room in the back he was talking about, he responded by saying "the bathroom"[11]

When this Detective asked [Co-Defendant] *what did [Defendant] do with the gun* he responded by stating "I don't

---

[10] On the night of the incident, Orialis had long braids and dark hair. (Ex. C-1.)

[11] A gun was subsequently found in the trash can in the men's room at the Puerto Rican Club following the shootout. (Ex. C-44.)

know, we left and [Defendant] stayed behind talking to the bouncer".

[Co-Defendant] then told Detectives that he could not remember anything else other than waking up in the hospital. He stated that he did not have any other information available.

(N.T., 11/22/2013, Ex. CS-4 (emphasis added).)

Before Detective Martinez was to be questioned regarding the contents of Co-Defendant's statement, the following discussion was held at sidebar:

MR. McMAHON: Judge, may we see you?

THE COURT: Sure.

(The following discussion was held at sidebar.)

MR. McMAHON: Judge, we talked about this a long time ago, that if they were going to use this it would be a redacted version.

THE COURT: I assumed that you saw it.

MR. McMAHON: I never saw that redacted version. I mean we talked about it.

MR. HOUCK: Yes, we did.

THE COURT: I just assumed you talked this out.

MR. HOUCK: Yes. [Defendant] -- [Co-Defendant] refers to [Defendant]. What he's going to say is that his name was mentioned. He is going to just – he's going to say *a person with the group*, and I told Mr. McMahon.

THE COURT: His statement can only be used against [Co-Defendant]; am I right?

MR. McMAHON: Yes.

MR. HOUCK: That's correct.

THE COURT: All right.

MR. McMAHON: Okay, But, you're going to read the redacted version?

MR. HOUCK: Yes.

MR. McMAHON: Will you give them an instruction?

(End of discussion at sidebar.)

(*See* N.T., 10/23/2014, at 137:23-139:25.) At the conclusion of the sidebar discussion, the Court instructed the jury as follows: "[L]et me just tell [you] that any statement that [Co-Defendant] made can only be used against [Co-Defendant]. So with regard to any statements that the detective relays to you that were made by [Co-Defendant], you cannot consider them against [Defendant]." (*Id.* at 139:4-11.)

Detective Martinez then proceeded to testify as to the contents of Co-Defendant's statement, reaching as far as the sixth paragraph of the statement, as reproduced above, without issue or objection. (*Id.* at 139:14-140:23.) When Detective Martinez got to that portion of Co-Defendant's statement that suggested that Defendant was handed a gun by a bouncer shortly before the shootout, the following exchange occurred:

[MR. HOUCK:] Did he say anything occurred as he was leaving the club with his wife?

[DET. MARTINEZ:] Well, after he made a statement, he was again advised that we were trying to figure out what happened, we needed to know everything he saw.

He did state that, on his way out, one of the bouncers had come out of a back room and show *Rene Figueroa* --

[MR. HOUCK:] That wasn't -- that wasn't --

[DET. MARTINEZ:] I apologize.

[THE COURT:] Disregard that statement, ladies and gentlemen.

[MR. McMAHON:] Judge, I want -- I reserve.

[THE COURT:] Go ahead.

[MR. HOUCK:] Let's back up. *You said a bouncer brought a gun out of the back room*, right?

[THE COURT:] Well, at this point, Mr. Houck, I prefer that you not question about this area.[12]

[MR. HOUCK:] That's all right.

(*Id.* at 140:24-141:21 (emphasis added).) Detective Martinez then testified as to the remaining "non-gun" portion of Co-Defendant's statement, paragraphs eight and nine as reproduced above, thereby entering those portions of Co-Defendant's statement into evidence.[13] (*Id.* at 141:22-142:15.)

---

[12] The Court knew that Co-Defendant's statement, from there, suggested that a bouncer gave a gun to Defendant right before Defendant left the Puerto Rican Club and the killing of Yolanda Morales occurred. Knowing that Detective Martinez had just mistakenly referred to Defendant by name, the Court made a spontaneous decision to preclude the Commonwealth from using the remainder of the Co-Defendant's statement about the gun, as it would have placed a gun in Defendant's hand before he even left the club. (*See* N.T., 10/23/2014, at 146:9-18 (although the Court said "struck," the evidence had actually been "precluded," as its introduction was prohibited by the Court).

[13] Defendant did not object to that portion of Co-Defendant's statement being read into evidence.

In his Concise Statement, Defendant argues that this series of events during Detective Martinez's testimony resulted in the "introduc[tion of] extraordinarily prejudicial hearsay testimony regarding the possession of a gun and a gun being handed to [Defendant] prior to the deadly incident" and that "[t]his testimony was clearly inadmissible and prejudicial to the intent of [Defendant]." (Concise Statement at 1.)

As noted above, in an Opinion and Order filed on February 17, 2014, the Court denied Co-Defendant's motion to suppress the statement he gave to Detective Martinez. Accordingly, leading up to Detective Martinez's testimony, Co-Defendant's statement was admissible,[14] as a matter of law, the only caveat being compliance with *Bruton v. United States,* 391 U.S. 123 (1968) and its progeny, since the statement of Co-Defendant was incriminating to Defendant, on its face.

> In *Bruton,* the United States Supreme Court held that the admission into evidence of an extrajudicial statement of confession by non-testifying co-defendant A inculpating co-defendant B in the crime, violated co-defendant B's right of cross-examination under the Confrontation Clause of the Sixth Amendment. In other words, as the High Court stated subsequently in *Richardson v. Marsh,* 481 U.S. 200, 206, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." In reaching this holding, the High Court reasoned that, even if the jurors were instructed to the contrary, there

[14] (*See* N.T., 10/31/2014, at 14:18-15:22 (illustrating the Prosecutor's confusion regarding legal concepts distinguishing pre-trial *admissibility* of Co-Defendant's statement and its subsequent *admission* into the trial record or its *preclusion* from being admitted into the trial record).)

> remained a substantial risk that they would look to co-defendant A's incriminating extrajudicial statement in assessing co-defendant B's guilt. *Bruton, supra* at 126, 128–29, 88 S. Ct. 1620; *see id.* at 135, 88 S. Ct. 1620 ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."); *see id.* at 137, 88 S. Ct. 1620 ("[I]n the context of a joint trial we cannot accept limiting instructions as an adequate substitute for [a co-defendant's] constitutional right of cross-examination."). Thus, in *Bruton,* the High Court created a narrow exception to the general legal principle that the jury is presumed to follow the court's instructions. *Id.* at 135–37, 88 S. Ct. 1620; *Richardson, supra* at 206–07, 107 S. Ct. 1702.
>
> In *Richardson, supra* at 202, 107 S. Ct. 1702 the High Court considered whether *Bruton's* holding applies when co-defendant A's confession was redacted to omit any reference to co-defendant B, but co-defendant B was "nonetheless linked to the confession by evidence properly admitted against him at trial." In answering this question in the negative, the *Richardson* Court distinguished between a confession that was incriminating *on its face* to co-defendant B (which was clearly subject to *Bruton's* rule) and a confession that was incriminating to co-defendant B *only by inference* from evidence subsequently introduced at trial. The *Richardson* Court held that the latter was not subject to *Bruton's* rule. *Id.* at 208, 107 S. Ct. 1702. Thus, the High Court in *Richardson* limited *Bruton's* holding to statements of confession by co-defendant A that were facially incriminating to co-defendant B, exempting from *Bruton's* control those statements that were incriminating to co-defendant B only after connection with or linkage to other evidence admitted at trial. *Richardson, supra* at 208-09, 107 S. Ct. 1702; *see Gray v. Maryland,* 523 U.S. 185, 191, 195, 118 S. Ct. 1151, 140 L. Ed.2d 294 (1998); *see also Commonwealth v. Cannon,* 610 Pa. 494, 22 A.3d 210, 219 (2011) (applying *Richardson*); *Commonwealth v. Brown,* 592 Pa. 376, 925 A.2d 147, 157 (2007) (noting this Court's approval of the redaction practices permitted under *Richardson*).

Commonwealth v. Roney, 79 A.3d 595, 623-24 (Pa. 2013).

When Detective Martinez used Defendant's name while testifying as to Co-Defendant's statement, *Bruton* was clearly violated. However, Defendant's first issue does not entitle him to relief for the following reasons. First, Defendant did not object or move for a mistrial in response to the *Bruton* violation. (*See* N.T., 10/23/2014, at 141:1-147:2.) Thus, he has not preserved the issue for appellate review. *See* Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.")

Even if Defendant had preserved his first issue, the issue is without merit. Immediately after the *Bruton* violation occurred and before any additional testimony was offered, the Court ordered the jury to "[d]isregard that statement," by which it meant that Detective Martinez's testimony that Co-Defendant "did state that, on his way out, one of the bouncers had come out of a back room and [had] show[n] Rene Figueroa --" was stricken from the record and was not to be part of the jury's consideration of the case. (N.T., 10/23/2014, at 141:5-7.) The jury had previously been instructed by the Court as follows: "Sometimes I may order evidence stricken from the record after you hear it [and] [w]henever I . . . order evidence stricken from the record, *you must completely disregard that evidence when deciding the case*." (N.T., 10/8/2014, at 13:25-14:5 (emphasis added).)

Right after the *Bruton* violation, the Court's striking of the testimony, and the Court's cautionary instruction, the Prosecutor attempted to continue

the questioning about Co-Defendant's statement about the gun being shown to Defendant by asking the question, "Let's back up, you said a bouncer brought a gun out of the back room, right?" The Court once again immediately stepped in and precluded the line of questioning, stating, "I prefer that you not question about this area." (*Id.* at 141:16-20.) Despite the subsequent contention of the Prosecutor that he had not understood that the Court had precluded Detective Martinez from testifying as to the gun statement, (*See* N.T., 10/30/2014, at 273:1-12, 19-21.), the significance of the Court's action was clarified by the following discussion with counsel regarding whether the Prosecutor would later be permitted to question Detective Martinez about whether surveillance video footage showed a bouncer handling a gun:[15]

> THE COURT: What's he going to say?
>
> MR. HOUCK: That there was no bouncer that gave a gun to anybody else.
>
> MR. McMAHON: Or showed a gun to anybody else.
>
> MR. HOUCK: Or showed a gun to anybody else, that's correct. That's what he is going to say.
>
> MR. McMAHON: Well, he can put that testimony on. Maybe it was outside the video. It could have been. The video doesn't cover every inch of the place.

---

[15] In the case against Co-Defendant, the Commonwealth apparently wanted to introduce Co-Defendant's gun statement to discredit him by pointing out that nowhere on the video did a bouncer show a gun to anyone. In other words, the Commonwealth wanted to suggest that Co-Defendant lied to police.

. . . .

MR. HOUCK: You don't want me to bring up the fact that there was no gun?

THE COURT: I don't think you should because I struck that testimony, didn't I?[16]

MR. HOUCK: All right. I'll leave it out, then.

(N.T., 10/23/2014, at 145:20-146:14.) Even if the Court did not explicitly preclude the testimony, there was no need to, as the Prosecutor, apparently realizing that it could prompt a mistrial because of the earlier *Bruton* violation, agreed to forego putting that part of Co-Defendant's statement into the record. This exchange illustrates that the Prosecutor was fully-informed that Co-Defendant's statement to Detective Martinez that a bouncer had shown a gun to Defendant immediately prior to the shooting had *never* been placed into the record before the jury.

Moreover, the Prosecutor's question that included the statement, "[y]ou said a bouncer brought a gun out of the back room, right," did not reintroduce into evidence the stricken and/or precluded testimony; nor did it enter into evidence the reference to the gun because "[i]t is well settled in the law that attorneys' statements or questions at trial are not evidence." *Commonwealth v. Freeman*, 827 A.2d 385, 413 (Pa. 2003). In fact, the jury was clearly instructed in this regard in the Court's preliminary instruction. (*See* N.T., 10/8/2014, at 13:3-9 ("The questions that counsel put to the

---

[16] As noted above, the Court inartfully used the term "struck" but meant "precluded."

witnesses are not evidence. The same is true of any questions that I might ask. You should not guess that a fact is true just because one of the attorneys or I ask a question about it. It is the witness's answers that provide the evidence.").) Additionally, even if the Court were to assume, contrary to the plain language of Defendant's Concise Statement, that Defendant's first matter complained of is based upon prosecutorial misconduct stemming from the Prosecutor's asking of that question,

> even if th[e] question was unfairly prejudicial . . . the . . . [C]ourt immediately [intervened], and it was never answered. Given that the question was not answered, and the [C]ourt instructed the jury that questions posed by counsel are not themselves evidence, . . . the question at issue did not amount to prosecutorial misconduct warranting reversal.

Commonwealth v. Baez, 720 A.2d 711, 732 (Pa. 1998).

Finally, and most clearly, Defendant's argument that Detective Martinez's testimony prejudiced him before the jury has no merit because the Court, in its final instructions to the jury and in response to the Commonwealth's improper closing argument discussed *infra*,[17] ultimately struck from the record and removed from the jury's consideration any and all evidence of Co-Defendant's statements to police, thereby removing all doubt as to whether any part of Detective Martinez's testimony regarding Co-Defendant's statement was part of the evidentiary record that the jury was permitted to consider. (*See* N.T., 10/31/2014, at 47:16-48:8.) "[A]

---

[17] The Prosecutor's closing argument is the subject of what the Court believes to be Defendant's second issue complained of on appeal.

jury is presumed to follow a trial court's instructions." *Commonwealth v. Reid*, 99 A.3d 470, 501 (Pa. 2014). Thus, as it is clear that the complained-of testimony was not part of the evidentiary record that the jury considered in reaching its verdict, Defendant's argument that the same testimony constituted inadmissible, prejudicial hearsay is without merit.

Ironically, while the absence from the evidentiary record of that portion of Co-Defendant's statement regarding a gun being shown to Defendant by a bouncer is dispositive of Defendant's first issue, it is precisely the opposite with regard to what the Court views as Defendant's second issue, namely, whether a mistrial was warranted when the Prosecutor discussed the same portion of Co-Defendant's statement to police in his closing argument, the relevant part of which was delivered as follows:

> [Co-defendant] went on to say -- he wasn't done with his statement. He went on to say when he was leaving the club with his wife, one of the bouncers brought a gun out from the back room and showed it to the guy. [Co-Defendant] when asked, he said I don't know, it was one of the bouncers. When asked which room in the back he was referring to, he responded the bathroom. When asked what happened to the gun, he said I don't know, we left and he stayed behind talking to the bouncer.

(N.T., 10/30/2014, at 263:3-13.)[18]

---

[18] Prior to reading Co-Defendant's statement to police to the jury during his closing, the Prosecutor went to counsel table and picked up a document that appeared to the Court to be Detective Martinez's police report. (*See* N.T., 10/31/2014, at 3:7-4:7.) Because the Prosecutor was not allowed to use this portion of Co-Defendant's statement to discredit Co-Defendant by showing that the video did not portray a bouncer showing a gun to Defendant, the Court can only assume that the Prosecutor intended to use the statement against Defendant in his closing to imply that a bouncer had given Defendant a gun prior to

Defendant moved for a mistrial following the Commonwealth's closing argument. However, his request for a mistrial was properly denied by the Court. As discussed above, that portion of Co-Defendant's statement to police regarding a gun being shown to Defendant by a bouncer prior to the shooting was not part of the evidentiary record when the Commonwealth closed to the jury; yet the Prosecutor discussed that portion of the statement in his closing argument, in contravention of the principle that "a closing argument must be based upon evidence in the record or reasonable inferences therefrom." *Commonwealth v. Culver*, 51 A.3d 866, 878 (Pa. Super. 2012). Thus, it is clear that the Prosecutor argued improperly and committed prosecutorial misconduct.[19] *Id.* However, a mistrial was not

---

Defendant leaving the Puerto Rican Club, which would have bolstered the Commonwealth's argument that Defendant left the club with the intent to kill.

[19] In *Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa. Super. 2006) (citations omitted), the Superior Court stated the following:

> In defining what constitutes impermissible conduct during closing argument, Pennsylvania follows Section 5.8 of the American Bar Association (ABA) Standards. Section 5.8 provides:
>
> Argument to the jury.
>
> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader

warranted in this case because any prejudice to Defendant was cured, and any error arising from the Commonwealth's closing argument was harmless.

"When an event prejudicial to the defendant occurs during trial . . . the defendant may move for a mistrial." Pa.R.Crim.P. 605(B).

> A motion for mistrial is a matter addressed to the discretion of the court. A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. . . . A mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice.

Commonwealth v. Fetter, 770 A.2d 762, 768 (Pa. Super. 2001) (citations omitted).

> 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. *See Commonwealth v. Simpson,* 562 Pa. 255, 754 A.2d 1264, 1272 (2000). "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." *Christianson v. Ely,* 575 Pa. 647, 838 A.2d 630, 634 (2003) (internal quotations omitted). 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." *Simpson,* at 1272.

Commonwealth v. Wright, 961 A.2d 119, 142 (Pa. 2008).

> In considering a claim of prosecutorial misconduct, [the] inquiry is centered on whether the defendant was deprived of a fair trial,

---

than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

> not deprived of a perfect one. Thus, a prosecutor's remarks do not constitute reversible error unless their unavoidable effect . . . [was] to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. Further, the allegedly improper remarks must be viewed in the context of the closing argument as a whole.

Com. v. Luster, 71 A.3d 1029, 1048 (Pa. Super.), *appeal denied*, 83 A.3d 414 (Pa. 2013) (quoting *Commonwealth v. Smith*, 985 A.2d 886, 907 (Pa. 2009) (citations omitted)).

In this case, the isolated commentary in the Commonwealth's closing argument on a matter outside the evidentiary record did not prejudice the jury or form in their minds a fixed bias or hostility towards Defendant such that they could not objectively weigh the evidence and render a true and fair verdict. First, the Court clearly instructed the jury, both in its instructions at the beginning of the case and prior to closing arguments, that the arguments made by counsel are not evidence. (*See* N.T., 10/8/2014, at 12:22-13:2; N.T., 10/30/2014, at 4:2-24.) Second, the Court took swift, deliberate, and forceful action in response to the Commonwealth's improper argument when it instructed the jury, in its final instructions, that

> [t]he Commonwealth introduced evidence in this case of a statement that it claims [Co-Defendant] gave to the police, and at the time that evidence was offered I told you that the statement could only be used in the case against [Co-Defendant] and not in the case against [Defendant]. Based upon certain arguments about [Co-Defendant's] statement that the Commonwealth made during the closing argument, I have now ruled as a matter of law that you may not . . . consider any portion of [Co-Defendant's] statement, as I have stricken it from

> the record. Therefore, you may not consider any portion of [Co-Defendant's] statement to the police in any way or for any purpose in your deliberations in either case against either defendant.

(N.T., 10/31/2014, at 47:16-48:8.) In delivering this instruction, the Court removed any prejudice that arose from the Commonwealth's improper closing argument by cautioning the jury and highlighting the Prosecutor's improper argument as the reason for the Court's curative action. By completely severing Co-Defendant's statement to police from the rest of the evidentiary record, the Court made it less likely that the jury would consider the portions of the statement, that *were* properly in evidence, in a tainted and improper manner because of the *Bruton* violation that was compounded by the improper closing argument. Instead, the Court's instruction mandated that the jury skip over Co-Defendant's statement entirely, including the *Bruton* violation and the improper mention of the statement in the Commonwealth's closing argument, in its deliberations. The Court is confident that the jury did just that because, as stated above, "[a] jury is presumed to follow a trial court's instructions." *Reid*, 99 A.3d at 501. Lastly, in the event that, notwithstanding the full range of curative and cautionary instructions delivered by the Court, the Commonwealth's closing argument produced some level of error that clung to the jury and followed it into the deliberation room, any such error was harmless in light of the fact that Defendant's counsel conceded moments earlier, in his own closing

argument, that Defendant handled and fired a gun during the incident,[20] the *de minimis* nature of any prejudice created, and the overwhelming independent evidence of Defendant's guilt. *See Commonwealth v. Molina*, 104 A.3d 430, 453-54 (Pa. 2014).

BY THE COURT:

/s/ Anthony S. Beltrami
ANTHONY S. BELTRAMI, J.

Date: May 27, 2015

---

[20] (N.T., 10/30/2014, at 84:6-85:22.)