IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	No. 104 CR 2009
	:	
FRANK DUANE SWARTZ,	:	
Defendant	:	

James Lavelle, Esquire — Counsel for Commonwealth
Michael P. Gough, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – June 6, 2012

On December 13, 2011, Defendant, Frank Duane Swartz, was found guilty, after a jury trial, of fourteen counts of arson endangering persons,[1] one count of arson endangering property,[2] fifteen counts of possession of incendiary materials or devices,[3] fifteen counts of risking a catastrophe,[4] and fifteen counts of maliciously setting or causing a fire.[5] These charges relate to a series of sixteen separate brush fires set in Carbon County during a one-month period in 2008, all in the same general vicinity, with Defendant being charged with four different counts for each fire and, with respect to two of the fires, an additional charge of arson endangering property.

[1] 18 Pa.C.S.A. § 3301(a)(1)(i).
[2] 18 Pa.C.S.A. § 3301(c)(2).
[3] 18 Pa.C.S.A. § 3301(f).
[4] 18 Pa.C.S.A. § 3302(b).
[5] 32 Pa.C.S.A. § 344(b).

Defendant was subsequently sentenced on January 30, 2012, to an aggregate sentence of not less than two hundred sixteen months nor more than four hundred thirty-two months of incarceration in a state correctional facility. In his post-sentence motion, now before us, Defendant seeks a new trial, a judgment of acquittal, an arrest of judgment, and/or a modification of sentence. Following a review of the record, we deny all of Defendant's requests.

FACTUAL AND PROCEDURAL BACKGROUND

The evidence introduced at trial established the following. From March 17, 2008 until April 18, 2008, sixteen separate brush fires were intentionally set in three adjoining municipalities in Carbon County: Lower Towamensing Township, Franklin Township, and the Borough of Parryville. Approximately thirty-one incendiary devices – consisting of a lit cigarette inserted in a matchbook, held together with a rubber band – were recovered at these sites. Forensic testing of three of the devices revealed a DNA profile recovered from the cigarette filter matching that of Defendant's, and on one of these devices, a latent fingerprint recovered from the matchbook matching Defendant's right index finger.

Using this information, Trooper David Klitsch, a fire investigator with the Pennsylvania State Police, obtained a

search warrant for Defendant's residence in Summit Hill, his vehicle, and to obtain a DNA sample. Trooper Klitsch and other officers executed the warrant on November 24, 2008, in the presence of Defendant's fiancée, Carol Nickerson. At the time of the search, Defendant was hunting with his fiancée's two sons, Donnie Christman and Harold Nickerson Jr. As a result of the search, police seized two clear plastic bags of colored rubber bands and two white in color matchbooks matching those used on the incendiary devices. Upon completion of their search, the police waited outside of Defendant's residence for Defendant to return home.

Defendant returned shortly after 5:00 P.M. At that time, Trooper Klitsch informed Defendant that the police had executed a search warrant of his residence, that they needed him to provide a DNA sample, and that they wished to speak with him regarding a series of brush fires. Defendant denied any knowledge of the fires, however, he agreed to meet the trooper at the Summit Hill Police Station. While at the station, and after being given his Miranda warnings, Defendant confessed, both through oral and written statements, to being involved in sixteen of the nineteen fires for which he was questioned.[6] As a

[6] The three fires for which Defendant did not admit responsibility were located in another area of the county. The fires admitted to were all along or close to the route Defendant would travel between his home in Summit Hill and his father's home in Lower Towamensing Township.

result, a criminal complaint was filed against Defendant on December 29, 2008. That same day, he was arrested.

On January 8, 2010, Defendant entered a plea of guilty. However, on February 25, 2010, he filed a *pro se* motion to withdraw his guilty plea. Following a hearing on the matter, we granted Defendant's motion and allowed him to proceed to trial.

A jury trial began on December 5, 2011, and ended on December 13, 2011, when the jury returned a verdict of guilty on sixty of the sixty-six counts charged. On January 30, 2012, following a pre-sentence investigation report, Defendant was sentenced as previously stated. On February 6, 2011, Defendant filed the instant post-sentence motion. We discuss each of the items raised in this motion in the order advanced by Defendant, as phrased by him.

DISCUSSION

1. THE DEFENDANT WAS DENIED A FAIR TRIAL AS BOTH THE ORAL AND WRITTEN INCRIMINATING STATEMENTS ATTRIBUTABLE TO THE DEFENDANT ON NOVEMBER 24, 2008 WERE THE PRODUCT OR RESULT OF IMPROPER AND UNCONSTITUTIONAL AGREEMENTS ON THE PART OF A LAW ENFORCEMENT OFFICER DESIGNED TO INDUCE THE DEFENDANT TO WAIVE *MIRANDA*, AS WELL AS IMPERMISSIBLE ASSISTANCE RENDERED BY THAT SAME OFFICER, AND THEREFORE SHOULD HAVE BEEN SUPPRESSED.

This court has previously ruled on this matter by Order and Opinion filed on June 21, 2011. Consequently, we do not address Defendant's contention further. Rather, we affirm our previous findings in holding that we did not err in permitting the

introduction of Defendant's oral and written statements at the time of trial.

2. A VIOLATION OF PENNSYLVANIA RULE OF CRIMINAL PROCEDURE NUMBER 646 AND THE RIGHT TO A FAIR TRIAL OCCURRED WHEN, FOLLOWING THE COMMENCEMENT OF DELIBERATIONS, THIS COURT ULTIMATELY DETERMINED TO READ ALOUD TO THE JURY ON MORE THAN ONE OCCASION THE ENTIRE CONTENT OF THE NOVEMBER 24, 2008 WRITTEN STATEMENT ALLEGEDLY ATTRIBUTABLE TO THE DEFENDANT.

Rule 646(C) provides that upon deliberation, the jury is not to be given a copy of the transcript, a written confession, or any of the other items specifically prohibited by the Rule. Pa.R.Crim.P. 646(C). Since the jury was never given a physical copy of the written statement during deliberations, we find the Rule inapplicable in this case. *See, e.g.,* Commonwealth v. Gladden, 665 A.2d 1201, 1205-06 (Pa.Super. 1995) (the rule, prohibiting the jury from having a copy of a written confession made by defendant with them during deliberation, does not apply to a reading by the court reporter of defendant's confession after the jury had been sent to deliberate), *appeal denied*, 675 A.2d 1243 (Pa. 1996).

Rather, when the jury asks for testimony to be read to refresh its recollection, it is within the court's discretion to grant or deny the request. Commonwealth v. Manley, 985 A.2d 256, 273 (Pa.Super. 2009), *appeal denied*, 996 A.2d 491 (Pa. 2010). In granting the request, we must be careful so as not to

place undue emphasis on the testimony being read. Commonwealth v. Toledo, 529 A.2d 480, 484 (Pa.Super 1987), *appeal denied*, 538 A.2d 876 (Pa. 1987).

In this case, we properly exercised our discretion in granting the jury's requests. On both occasions, the jury expressly asked that the Court read Defendant's entire written statement – a three-page document consisting of several "yes" or "no" questions and a narrative detailing Defendant's involvement in the sixteen fires. (N.T. 12/12/11, pp. 356, 361); *see* Commonwealth v. Bell, 476 A.2d 439, 449 (Pa.Super. 1984) ("The parameters concerning the extent that testimony should be read to the jury are set by the juror's request."). In so doing, we took every precaution necessary to ensure that the statement was accurately read: the reading was done in open court, it was made a part of the record, and the statement was read in its entirety - all three pages verbatim. (N.T. 12/12/11, pp. 354-66); *see* Commonwealth v. Johnson, 838 A.2d 663, 678 (Pa. 2003) (no error where court allowed testimony of witness to "be read in its entirety, including direct and cross-examinations, so that neither portion received greater emphasis"). Furthermore, we repeatedly instructed the jury not only what must be found by them before they could consider the statement but also that they "should consider the facts and circumstances surrounding the

making of the statement, along with all other evidence in the case in judging its truthfulness and deciding how much weight the Defendant's statement deserves on the question of whether the Defendant has been proven guilty." (N.T. 12/12/11, pp. 292, 339).

3. THIS COURT SHOULD HAVE DECLARED A MISTRIAL, EITHER UPON DEFENSE REQUEST OR *SUA SPONTE*, BASED ON PREJUDICIAL REMARKS ELICITED DURING *VOIR DIRE*, TESTIMONY FORTHCOMING FROM A COMMONWEALTH WITNESS, A REMARK BY THE PROSECUTOR DURING CROSS-EXAMINATION OF THE DEFENDANT, AND THE REPRESENTATION BY THE JURY THAT IT WAS UNABLE TO REACH A UNANIMOUS DECISION.

We begin with our standard. Pennsylvania Rule of Criminal Procedure 605(B) provides:

> When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity.

Pa.R.Crim.P. 605(B). It is within the trial court's discretion to *sua sponte* declare a mistrial upon a showing of manifest necessity. Commonwealth v. Hoovler, 880 A.2d 1258, 1260 (Pa.Super. 2005), *appeal denied*, 890 A.2d 1057 (Pa. 2005). "Where there exists manifest necessity for a trial judge to declare a mistrial *sua sponte*, neither the Fifth Amendment to the United States Constitution, nor Article I, § 10 of the Pennsylvania Constitution will bar retrial." *Id.*

> The determination by a trial court to declare a mistrial after jeopardy has attached is not one to be lightly undertaken, since the defendant has a substantial interest in having his fate determined by the jury first impaneled. Additionally, failure to consider if there are less drastic alternatives to a mistrial creates doubt about the propriety of the exercise of the trial judge's discretion and is grounds for barring retrial because it indicates that the court failed to properly consider the defendant's significant interest in whether or not to take the case from the jury.

Commonwealth v. Kelly, 797 A.2d 925, 936 (Pa.Super. 2002) (citations and quotation marks omitted). Moreover, "[w]e are mindful that doubts concerning the necessity of a mistrial must be resolved in favor of the defendant." Commonwealth v. Gains, 556 A.2d 870, 876 (Pa.Super. 1989).

With respect to a mistrial requested by the Defendant,

> 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. Likewise, a mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice.

Commonwealth v. Fletcher, 41 A.3d 892, 894-95 (Pa.Super. 2012) (citation and quotation marks omitted).

A. *Voir Dire*

Defendant contends that we erred in failing to grant defense counsel's request for a mistrial during *voir dire* as the prejudicial remarks made by two potential jurors tainted the

entire jury pool and prevented them from being fair and impartial.

The first remark was volunteered as part of a potential juror's response to the Commonwealth's question of whether anyone knew Defendant personally. The juror indicated that he had known Defendant and his family for thirty years, and that his "mind was made up when I heard who he was." (N.T. 12/05/11, p. 24). Following this statement, defense counsel objected to the remark and moved for a mistrial. We denied the request and gave a cautionary instruction asking the jurors to disregard this remark.[7]

Shortly thereafter, the second remark was produced by another potential juror. In response to the Commonwealth's questions of whether the juror could set aside his knowledge of Defendant's family in judging Defendant's credibility, the juror

[7] The instruction was as follows:

> Before we continue *voir dire*, I do want to caution the jurors, prospective jurors, that this is only *voir dire* where questions are asked of potential jurors. The responses of the potential juror are only being used for counsel to see and determine whether or not a prospective juror can be fair and impartial. The responses are not evidence in the case. The responses should not be considered by any of you in any way if you are selected to hear this case as to how you should decide the case.
>
> I know that a response was just given that some of you reacted to. Again, that should not be considered or given any weight by you if you are selected in this case. Please keep that in mind. This is not evidence. This is to see who can be fair and impartial. Responses go a long way to counsel determining whether or not that individual who has answered the question can be fair and impartial. The responses are only for that purpose. It's not to make any determination or any reason to judge this person substantively as to whether or not he is guilty or not guilty of the charges made.

(N.T. 12/05/11, pp. 26-7).

replied that he was not sure because "I know some other stuff, so. . ." (N.T. 12/05/11, p. 30). Again, defense counsel objected. We denied this request and instructed the remaining jurors to disregard the remark.[8]

"The mere expression of a prospective juror's personal opinion [is] not itself so prejudicial as to require the granting of a mistrial." Commonwealth. v. Frazier, 410 A.2d 826, 831 (Pa.Super. 1979) (no mistrial where potential juror indicated that her mind was made up after the first trial). In order for a mistrial to be declared, "[t]he comment must be of such a nature or made in such a manner as to deprive the defendant of a fair and impartial trial." *Id.* In this case, both jurors were rendering their opinion and in both instances it is unclear as to whether their opinion was of a negative or positive nature. Nevertheless, we immediately gave cautionary instructions to prevent any potential prejudice. Furthermore, prior to being selected, all jurors indicated that they were able to be fair and impartial.

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[8] The cautionary instruction charged the jury as follows:

> I know I already made this comment to the prospective jurors. Please keep in mind that the questions that are being asked of prospective jurors are only for purposes of determining who should be selected in this case. They are not to be used for any other purpose. They are being used only for that purpose by Counsel. So, again, I know we just had a response that could be interpreted in more than one way. It's important that however it is interpreted, that none of the prospective jurors and no one who is selected to hear this case interpret that adversely to the defendant or adversely to the Commonwealth.

(N.T. 12/05/11, p. 32).

Since the record does not indicate that the remarks deprived Defendant of a fair and impartial trial, we find no error occurred.

B. Trooper John Corrigan's Testimony

Next, Defendant asserts that we erred in failing to declare a mistrial *sua sponte* in response to allegedly prejudicial testimony given by Trooper John Corrigan of the Pennsylvania State Police.

As part of the investigation, Trooper Corrigan processed several pieces of evidence for latent fingerprints. As a result, eight latent prints were developed, one of which was of AFIS quality. When questioned by the Commonwealth on what the Trooper meant by an AFIS quality print, he responded:

> Mr. Corrigan: By AFIS quality, I am referring to the Automated Fingerprint Identification System. That's at the PSP Wyoming Crime Lab, where the terminal we use is located. Fingerprints that have enough quality and quantity of detail are submitted there. The operator at that terminal will process it through the AFIS terminal. Basically, it does a search of tens and tens of millions of criminal record fingerprints.
>
> Assistant District Attorney: Any other people besides criminals in that database?
>
> Mr. Corrigan: I believe AFIS it's actually just a criminal record database.

(N.T. 12/08/11, p. 68).

Defendant now asserts that this testimony gave rise to manifest necessity such that this Court was required, at that time, to declare a mistrial *sua sponte* notwithstanding the fact that no objection was raised. *Cf.* Commonwealth v. Montalvo, 641 A.2d 1176, 1184 (Pa.Super. 1994) ("In order to preserve an issue for review, a party must make a timely and specific objection at trial.").[9]

As a general rule, the Commonwealth may not present evidence of prior criminal acts against a defendant that have no relation to his present charge. Not all improper references to past criminal activities, however, warrant a new trial. In determining whether to declare a mistrial, "the operative question is whether the jury could *reasonably* infer from the facts presented that the accused had engaged in prior criminal activity." Commonwealth v. West, 656 A.2d 519, 521 (Pa.Super. 1995) (citation and quotation marks omitted), *appeal denied*, 668 A.2d 1131 (Pa. 1995). Furthermore, the mere reference of a defendant's prior criminal activity does not warrant a new trial unless the record shows that prejudice resulted from the testimony. Commonwealth v. Valerio, 712 A.2d 301, 303 (Pa.Super. 1998), *appeal denied*, 732 A.2d 1210 (Pa. 1998).

[9] At trial, defense counsel concurred with the Court's decision not to interject at the time this testimony occurred in order not to highlight an issue that was only briefly and rapidly touched upon by the witness. (N.T. 12/09/11, p. 9).

Applying these criteria to the testimony, we conclude the record does not support Defendant's position that the testimony gave rise to a reasonable inference that Defendant had committed a prior criminal act. Essentially, what Trooper Corrigan testified to was that AFIS is a criminal database. He further testified that he submitted the AFIS quality print to AFIS on April 18, 2008. At no point during his testimony, or the testimony of any other witness, was it ever indicated that the AFIS search yielded a match to Defendant's fingerprints. (N.T. 12/09/11, pp. 9, 71-72); *see* Commonwealth v. Claffey, 400 A.2d 173, 174 (Pa.Super. 1979) (testimony by detective that he submitted fingerprints lifted from the scene of the burglary to the Federal Bureau of Investigation for comparison did not provide a reasonable inference implying that defendant had engaged in prior criminal acts).

Moreover, later testimony indicated that on or about November 21, 2008, Trooper Klitsch was informed that a DNA profile recovered from a cigarette filter retrieved from one of the fires matched that of Defendant's. With this information, Trooper Klitsch contacted Trooper David Andreuzzi, a fingerprint comparison and identification expert with the Pennsylvania State Police, and asked that he run a comparison between the AFIS quality print and the known fingerprints of Defendant. Once

finished with the comparison, Trooper Andreuzzi was able to identify the latent print as that of Defendant's right index finger, thus offering an explanation to the jury as to how Defendant's fingerprint was matched with the AFIS quality print. Trooper Andreuzzi never identified the database or source he accessed to compare with the latent print. *Cf*. Commonwealth v. Hall, 399 A.2d 767 (Pa.Super. 1979) (court properly denied counsel's motion for a mistrial after officer testified to comparing defendant's fingerprint found at the scene with his BCI Rap Sheet, where later testimony indicated that defendant's fingerprints, used for comparison, were those obtained on the day of his arrest for the crimes charged, and not from the BCI Rap Sheet).

In short, the record does not indicate that any prejudice resulted from Trooper Corrigan's testimony. Indeed, had defense counsel raised an objection, the issue could have been cured by a cautionary instruction requesting the jury to disregard the remark. *Cf*. Hall, 399 A.2d at 769 (court cautioned the jury not to attach any significance to comments make in regard to BCI Rap Sheet); *see also* Commonwealth v. Bibbs, 970 A.2d 440, 454 (Pa.Super. 2009) (court cautioned as to source of photographs used to identify defendant), *appeal denied*, 982 A.2d 1227 (Pa. 2009).

C. References to Defendant's Imprisonment

Defendant further asserts that we erred in failing to declare a mistrial *sua sponte* because of prejudicial remarks made by the Commonwealth, as well as reference in a defense witness's testimony read to the jury, indicating that Defendant had been incarcerated.

Due to his poor health, Timothy Swartz, Defendant's father, was unavailable to testify at trial. Consequently, Timothy Swartz's deposition, taken on December 22, 2010, was read to the jury. During the Commonwealth's cross-examination, defense counsel requested two sidebars – both times asking that the witness refrain from reading any reference to Defendant's imprisonment. Notwithstanding this fact, in response to the question, "You did not regard it as a threat to your property?" (N.T. 12/09/11, pp. 280-81), the witness read from the deposition: "No. As a matter of fact, I do want to tell you this. Since Frank is in jail . . . ." (N.T. 12/09/11, p. 281). At that point, we instructed the jury to disregard the last answer given by the witness.[10]

The second reference to Defendant's imprisonment was made by the Assistant District Attorney. When questioning Defendant

[10] The exact instruction, which defense counsel also concurred in, was as follows: "What I am going to ask, first of all, is that the last answer that was given by Mr. Devlin, that answer be disregarded by the jury." (N.T. 12/09/11, p. 283).

on whether any promises were made in exchange for his confession, Attorney Lavelle stated: "Okay. Because by New Years, you were in jail or - - well, by New Years, you had to turn yourself in." (N.T. 12/12/11, p. 168). Defense counsel objected, and after a sidebar we gave the jury another cautionary instruction.[11]

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[11] The instruction given was as follows:

> Members of the jury, individuals who are facing criminal charges may or may not be placed in custody for various reasons. Whether they have been has absolutely nothing to do with guilt or innocence. It may be a diversion from that issue before you. Therefore, to the extent there may have been references in this proceeding to whether or not Mr. Swartz may have been in jail or may not have been put in jail, that has absolutely no bearing on what you have to decide. It is totally irrelevant to his guilt or innocence in this case.
>
> So, I am giving you a cautionary instruction that to the extent a question may have implied that he was in jail, to the extent you may have heard testimony during the course of this proceeding that he may have been in jail, to the extent that there may have been something that you believe would indicate he was in jail, completely disregard that.
>
> Because in all truthfulness and fairness to Mr. Swartz, it has absolutely nothing to do with what you have to decide. So I just want to caution you on that.

(N.T. 12/12/11, p. 170-71). We further instructed the jury, in our closing instructions, as follows:

> The defendant, Frank Duane Swartz, comes before you presumed to be innocent, and these are not just empty words. It's a fundamental principal of our system of criminal law that the defendant is presumed to be innocent. The mere fact that he was arrested and a criminal complaint was filed against him accusing him of a crime, or even the fact that he may have been held in custody, is not any evidence against him. Sometimes a person is held in custody for reasons which have nothing to do with guilt or innocence. You cannot in any way consider that as evidence one way or the other.

(N.T. 12/12/11, p. 270). *See* Commonwealth v. Carson, 741 A.2d 686, 702 (Pa. 1999) (approving substance of similar charge conveying to the jury that whether the defendant is in the custody of law enforcement officials is irrelevant to the determination of guilt or innocence; court concluded that possibility that some of jurors may have seen defendant in handcuffs while being escorted into courtroom is not so inherently prejudicial as to deprive defendant of the presumption of innocence), *abrogated on other grounds by* Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003); Commonwealth v. Evans, 348 A.2d 92, 93-94 (Pa. 1975) (same).

As previously stated, not all references which indicate prior criminal activity require a mistrial. "Mere passing references to criminal activity will not require reversal unless the record indicates that prejudice resulted from the reference." Commonwealth v. Guilford, 861 A.2d 365, 370 (Pa.Super. 2004); *see also* Commonwealth v. Miller, 481 A.2d 1221, 1222 (Pa.Super. 1984) (passing reference to defendant having been in jail, where offer to give a cautionary instruction was refused, was insufficient to justify a mistrial). "[T]he nature of the reference and whether the remark was intentionally elicited by the Commonwealth are considerations relevant to the determination of whether a mistrial is required." Commonwealth v. Kerrigan, 920 A.2d 190, 199 (Pa.Super. 2007), *appeal denied*, 932 A.2d 1286 (Pa. 2007).

In neither instance were the statements intentionally elicited by the Commonwealth. In fact, as to the first remark, counsel had previously agreed at side bar to have the witness skip over any remarks made referencing Defendant's imprisonment. In addition, the testimony was unsolicited and unresponsive to the question asked, as the Commonwealth was inquiring on whether the witness felt that his home was threatened by the fires. As to the second remark, the Commonwealth quickly rectified its mistake by changing the question prior to receiving Defendant's

response. Moreover, at no time did the Commonwealth try to take advantage of the reference made. *See* Commonwealth v. Zook, 615 A.2d 1, 10 (Pa. 1992).

While it's unfortunate that these references were made, any prejudice created by these statements was cured by the cautionary instructions given. *Id.* at 10 ("An immediate curative instruction to the jury may alleviate any harm to the defendant that results from reference to prior criminal conduct."). Unless shown to the contrary, it is presumed that the jury follows the court's instructions. Commonwealth v. Laird, 988 A.2d 618, 629 (Pa. 2010).

D. Jury Deliberation

Lastly on this topic, Defendant contends we erred in failing to grant defense counsel's request for a mistrial because of the prolonged duration of jury deliberations.

After five and a half days of trial, the jury began deliberations on December 12, 2011, at approximately 6:03 P.M. A few hours later, they returned the following question to the court: "If we can't come to a unanimous decision, what should we do?" (N.T. 12/12/11, p. 340).

While in chambers, defense counsel requested a mistrial based upon the fact that the jury had been deliberating for five hours and had yet to reach a verdict. We denied this request.

Instead, we brought the jury into open court and informed them that they could exercise one of three options: recess for the night and return to continue deliberations in the morning; render a verdict as to charges they agreed upon; or be given a hung jury instruction and attempt to further deliberate that evening. Upon further discussion, the jury informed the Court that they would like to recess for the night.

The jury was dismissed at 11:30 P.M. and asked to return to recommence deliberations at 10:00 A.M. the next day. At approximately 1:04 P.M., on December 13, 2011, defense again requested that we declare a mistrial based upon the duration of the deliberations, and again we denied the request. The verdict was eventually rendered at 2:33 P.M.

"The duration of jury deliberations is a matter within the sound discretion of the trial court, whose decision will not be disturbed unless there is a showing that the court abused its discretion or that the jury's verdict was the product of coercion or fatigue." Commonwealth v. Moore, 937 A.2d 1062, 1077 (Pa. 2007). Only "[w]here the jury, after full consideration of the case, fails to agree and there is no reasonable basis for believing that they will be able to agree after further deliberation, [does] a manifest necessity exist for their discharge." Commonwealth v. Verdekal, 506 A.2d 415, 417

(Pa.Super. 1986), *appeal denied*, (Pa. 1986). Moreover, the factors taken into consideration in deciding whether to grant a mistrial include the complexity of the issues, the seriousness of the charges, the amount of testimony, length of trial, the solemnity of the proceedings, and indications from the jury on the possibility of reaching a verdict. Commonwealth v. Marion, 981 A.2d 230, 235 (Pa.Super. 2009), *appeal denied*, 990 A.2d 729 (Pa. 2010).

Here, the trial lasted five and one-half days. At the conclusion of closing arguments, the jury was given instructions relating to four separate charges which Defendant faced with respect to each of the sixteen fires set, together with two additional charges. In total, the jury was asked to make a determination of Defendant's guilt on sixty-six counts.

After deliberating for five hours, the jury indicated that it had a question regarding what would happen if they could not reach a verdict. Once apprised of their options, they indicated their willingness to return the following day to continue their deliberations. After roughly three more hours of deliberations, the jury rendered its verdict.

Where the issues are complex, it is not uncommon for the court to instruct the jury to continue deliberations when only a brief period has passed. *See, e.g.,* Commonwealth v. Bridges,

757 A.2d 859 (Pa. 2000) (trial court did not abuse its discretion in instructing the jury to continue deliberations after a six day trial, and four hours of deliberations had elapsed), *abrogated on other grounds by* Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003); Commonwealth v. Zook, 615 A.2d 1 (Pa. 1992) (trial court did not abuse its discretion in instructing the jury to continue deliberations after a five day trial, and four and a half hours of deliberations had elapsed). Moreover, at no point in time during these two days did the jury indicate that it was at a standstill. *See* Commonwealth v. Johnson, 668 A.2d 97, 109 (Pa. 1995) (trial court did not abuse its discretion in instructing jury to continue deliberations where it did not indicate that it was hopelessly deadlocked). Consequently, no error occurred.

4. THE VERDICT RETURNED BY THE JURY WAS AGAINST THE WEIGHT OF THE EVIDENCE AS THERE WAS A BREAK IN THE CHAIN OF CUSTODY OF THE PHYSICAL EVIDENCE SUBMITTED FOR FINGERPRINT AND DNA ANALYSIS WHICH CALLS INTO QUESTION THE RESULTS OF THE ANALYSIS AND WHICH THEREBY ELIMINATES ALL PHYSICAL EVIDENCE LINKING THE DEFENDANT TO ANY OF THE SIXTEEN SUBJECT FIRES.

A motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict, but contends that it is against the weight of the evidence. Commonwealth v. Bennett, 827 A.2d 469, 481 (Pa.Super. 2003), *appeal denied*, 847 A.2d 1277

(Pa. 2004). "For a new trial to lie on a challenge that the verdict is against the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." Commonwealth v. Shaffer, 722 A.2d 195, 200 (Pa.Super. 1998), *appeal denied*, 739 A.2d 165 (Pa. 1999). Defendant challenges the weight of the evidence on the grounds that there is a break in the chain of custody of the DNA and fingerprint evidence linking Defendant to the fires.

Our review of the record indicates that Wesley Keller of the Pennsylvania Bureau of Forestry testified that thirty-one incendiary devices were recovered and placed with him for processing. As the devices were collected, he would seal each individual device in a separate container, document it, and place the container in his evidence locker. He would then personally transport the evidence to the Wyoming Regional Laboratory of the Pennsylvania State Police for DNA and fingerprint testing. (N.T. 12/06/11, pp. 180-81).

The record further indicates that Trooper Corrigan of the State Police Forensic Services Unit in Hazleton recalled receiving thirty matchbook devices, most of which were hand delivered by Mr. Keller, to be processed for latent fingerprints. Upon receipt of this evidence, Trooper Corrigan testified he removed the intact devices from their containers,

photographed them, removed the cigarette butts – consisting of the filter portion and any unsmoked or unburnt portion remaining on the cigarette - placed these inside of a separate white envelope for possible future DNA testing, and processed the matchbooks for latent fingerprints. (N.T. 12/08/11, p. 66). Once finished processing this evidence, Trooper Corrigan repackaged and resealed these items. (N.T. 12/08/11, p. 76).

Particularly relevant to Defendant's present contention are seven incendiary devices Trooper Corrigan received from Wes Keller on March 28, 2008. It was from one of these match packs that he developed the AFIS quality print previously referred to. From that same device, as well as a second device, the cigarette butts were removed from the matchbooks and placed in a separate white envelope. These devices, each in a separate container, were taken by Wes Keller to the Wyoming Crime Lab for further analysis. (N.T. 12/08/11, pp. 72-75; Commonwealth Exhibit 16 (Keller Request for Forensic Analysis)).

Brunee Coolbaugh, a serologist with the Pennsylvania State Police Crime Laboratory in Wyoming, Pennsylvania, became involved with the investigation on April 23, 2008, when she was provided three incendiary devices for DNA analysis. These devices, each in separate containers, had previously been hand-delivered to the Wyoming Laboratory by Mr. Keller on March 31,

2008. (N.T. 12/08/11, p. 127). Item number one contained a cigarette inside a matchbook held together by a rubber band. Items number two and three contained a matchbook, a rubber band, and a white envelope with a cigarette butt inside. As to all three items, Ms. Coolbaugh removed the cigarette butts and packaged them for DNA analysis. (N.T. 12/08/11, pp. 109-14). She then sent the items, via UPS, to the Bethlehem DNA laboratory for DNA testing on April 24, 2008. (N.T. 12/08/11, p. 121; Commonwealth Exhibit 20).

Geena Musante, a forensic scientist at the Bethlehem State Police Crime Laboratory, received these items on April 25, 2008. DNA profiles were developed for each item and found to match with one another, implying each might come from the same source. Additionally, by reference to CODIS (Combined DNA Indexing System), it was determined that the likely source of the DNA found on the cigarette butts was Defendant's. A subsequent comparison of DNA obtained from the buccal swab taken from Defendant on November 24, 2008, confirmed Defendant as the source.

The standard for establishing the chain of custody for admission of physical evidence was set forth by the Pennsylvania Supreme Court in Commonwealth v. Hudson, 414 A.2d 1381 (Pa. 1980):

> The admission of demonstrative evidence is a matter committed to the discretion of the trial court. Furthermore, there is no requirement that the Commonwealth establish the sanctity of its exhibits beyond a moral certainty. Every hypothetical possibility of tampering need not be eliminated; it is sufficient that the evidence, direct or circumstantial, establishes a reasonable inference that the identity and condition of the exhibit remained unimpaired until it was surrendered to the trial court. Finally, physical evidence may be properly admitted despite gaps in testimony regarding its custody.

Id. at 1387 (citations omitted).

Instantly, Defendant argues that because Trooper Corrigan testified that in processing the incendiary devices he received from Wes Keller he separated the matchbooks from the cigarette butts and because Ms. Coolbaugh testified that of the three devices she received, two had the cigarette butt separated from the matchbooks but the other did not, the integrity of the DNA and fingerprint testing was somehow compromised. This conclusion sought by Defendant is neither legally nor logically sustainable.

A number of reasons can explain this apparent discrepancy seized upon by Defendant. For instance, Trooper Corrigan may have been mistaken in his belief that he separated each incendiary device he processed when the cigarette was intertwined with the matches; Ms. Coolbaugh may have been mistaken that the one device she processed was still intact; or,

since Mr. Keller testified that thirty-one incendiary devices were recovered and Trooper Corrigan testified that he received thirty matchbooks from Mr. Keller, the difference may be that the extra matchbook which was not processed by Trooper Corrigan was the one Ms. Coolbaugh found intact.[12] The reconciliation of the alleged discrepancy argued by Defendant among the possibilities mentioned, together with others which may exist, are questions of credibility, not admissibility, and are thus questions for the jury to decide.

More importantly, there is nothing in the record to suggest that the cigarettes which Ms. Coolbaugh prepared for DNA analysis and forwarded to the Bethlehem DNA laboratory had been tampered with. At most, even if the one device was untouched and intact, there is no reason to believe that this would affect either the fingerprint obtained by Trooper Corrigan from the matchbook or the DNA subsequently recovered from the cigarette butts. Nor is there any testimony that there was a mix-up in the evidence such that what was recovered and sent for testing was not actually evidence obtained at the scene of the subject fires.

[12] It is important to understand that at no time was Trooper Corrigan specifically asked if he separated the cigarette butt from each incendiary device he processed. (N.T. 12/08/11, p. 66). Further, Ms. Coolbaugh did acknowledge a descriptive error in her laboratory report, Commonwealth Exhibit 20) (N.T. 12/08/11, p. 120).

Trooper Corrigan expressly testified that the AFIS quality fingerprint he had lifted from one matchbook was personally transported by him to the Wyoming Crime Lab. (N.T. 12/08/11, p. 104). Further, the DNA profile developed from all three cigarette butts processed by Ms. Coolbaugh for DNA analysis all matched with Defendant's DNA. Under these circumstances, absent evidence indicating that either the matchbook from which the AFIS quality print was lifted or that the three cigarette butts submitted for DNA analysis were altered, a reasonable inference exists that the identity and physical condition of these items remained unimpaired from the time they were recovered by the police until the time they were presented in court at trial. *See* Commonwealth v. Hudson, 414 A.2d at 1387-1388 (discussing discrepancies in the condition of black electrical tape used in the commission of a crime between the time of its recovery by police and the time of its presentation in court as insufficient to negate the chain of custody; *cf*. Commonwealth v. Hess, 666 A.2d 705 (Pa.Super. 1995) (finding chain of custody not met where two vials of blood were drawn from defendant for blood analysis and placed in evidence locker, but three vials were removed from locker and tested by forensic scientist), *appeal denied*, 674 A.2d 1067 (Pa. 1996).

5. THE DEFENDANT IS ENTITLED TO A JUDGMENT OF ACQUITTAL/ARREST OF JUDGMENT AS THE COMMONWEALTH

FAILED TO PRODUCE AT TRIAL LEGALLY SUFFICIENT EVIDENCE THAT IT WAS THE DEFENDANT WHO WAS RESPONSIBLE FOR ANY OF THE SIXTEEN FIRES IN QUESTION.[13]

In reviewing a challenge to the sufficiency of the evidence, we must determine "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." Commonwealth v. Hutchinson, 947 A.2d 800, 805 (Pa.Super 2008), *appeal denied*, 980 A.2d 606 (Pa. 2009). In so doing, "we may not weigh the evidence and substitute our judgment for the fact-finder." *Id*. Additionally, the Commonwealth may sustain its burden of proving each element of the crime beyond a reasonable doubt through the use of circumstantial evidence. *Id*. at 806. "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable

[13] Both a motion for judgment of acquittal and a motion for an arrest of judgment challenge the sufficiency of the evidence. *Compare* Commonwealth v. Hutchinson, 947 A.2d 800, 805 (Pa.Super. 2008) (stating that the standard of review for a motion for judgment of acquittal is sufficiency of the evidence), *appeal denied*, 980 A.2d 606 (Pa. 2009); Commonwealth v. Marquez, 980 A.2d 145, 147 (Pa.Super. 2009) (stating that the standard of review for a motion for arrest of judgment is sufficiency of the evidence), *appeal denied*, 987 A.2d 160 (Pa. 2009). Since these claims are interrelated, we address them together.

doubt.'" Jackson v. Virginia, 443 U.S. 307, 318-19 (1979), *quoted in* Hutchinson, 947 A.2d at 806.

Under this test, the evidence introduced at trial established that over a period of one month sixteen separate brush fires were set in three adjoining municipalities in Carbon County. Robert McJilton, a fire investigator for the Bureau of Forestry, offered his opinion that the fires were intentional in nature, as all accidental causes were ruled out and several incendiary devices were found at many of the sites. Firefighters as well as private citizens assisted in suppressing the fires. In one instance, a personal care home was threatened and forced to be evacuated due to the fire's proximity.

Forensic testing of three of the devices found provided a DNA profile and a latent fingerprint matching Defendant's. A search of Defendant's residence revealed two clear plastic bags of colored rubber bands and two white in color matchbooks similar to those used on the incendiary devices. When questioned by police, Defendant confessed to being responsible for causing all sixteen fires.

Here, the evidence supports the jury's conclusion that Defendant not only possessed the incendiary devices, but also was the person responsible for setting the fires: Defendant's fingerprint and DNA were found on three devices; the supplies

needed to make the devices - the rubber band and matchbook - were found at Defendant's residence; Defendant admitted to being a smoker and to being familiar with this type of incendiary device and how to assemble it; and Defendant confessed to police to being the person responsible for causing the fires. That in so doing he risked a catastrophe and endangered others, as well as property, is also clear: all sixteen fire sites were located on woodlands; firefighters and private citizens responded to suppress the fires; and residents of a personal care home were evacuated.

Thus, when the evidence is viewed in the light most favorable to the Commonwealth and allowing all reasonable inferences therefrom, the evidence is sufficient to support Defendant's convictions of arson endangering persons, arson endangering property, possession of incendiary materials or devices, risking a catastrophe, and maliciously setting or causing a fire.

6. THE COMMONWEALTH FAILED TO TIMELY BRING THE WITHIN MATTER TO TRIAL.

We have previously addressed most of Defendant's contentions raised on this issue by Order dated December 9, 2010. Thus, we address here only the period of time from June 21, 2010, through June 22, 2011, consisting of 366 days and

representing the time that elapsed from Defendant's filing of his motion to suppress and the order dismissing that motion.

In assessing a prompt trial claim, a court must determine whether any excludable time and/or excusable delay exists. While excludable time is expressly defined by Rule 600(C), excusable delay is not. *See* Commonwealth v. Hunt, 858 A.2d 1234, 1241 (Pa.Super. 2004), ("'Excusable delay' is not expressly defined in Rule 600, but the legal construct takes into account delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence."), *appeal denied*, 875 A.2d 1073 (Pa. 2005).

The days that elapsed between the filing of the motion on June 21, 2010, and the hearing on November 12, 2010, constitute excludable time, as Defendant was unavailable. See, e.g., Commonwealth v. Hill, 736 A.2d 578, 587 (Pa. 1999) ("[T]he mere filing of a pretrial motion by a defendant does not automatically render him unavailable. Rather, a defendant is only unavailable for trial if a delay in the commencement of trial is caused by the filing of a pretrial motion."). On the other hand, the days that elapsed following the hearing and concluding with the order on June 22, 2011, constitute excusable delay, as this was a circumstance outside of the Commonwealth's control.

As to the period of exclusion, Rule 600 "requires a showing of due diligence in order for the Commonwealth to avail itself of an exclusion." Hill, 736 A.2d at 586 (quotation marks and citation omitted). Arguably, the Commonwealth failed to act with due diligence in two instances. The first was on August 13, 2010, when the Commonwealth requested a continuance of the hearing on the Motion to Suppress, resulting in a delay of 28 days. The second was on October 18, 2010, when the Commonwealth once again requested a continuance of the hearing on this matter, resulting in a delay of 25 days. However, both requests were agreed to by Defendant.

By consenting to both continuances, Defendant essentially waived his Rule 600 rights with respect to these 53 days. *See* Hunt, 858 at 1243 (finding defendant's consent, without objection, to the Commonwealth's continuance requests constituted a waiver of his Rule 600 rights). Accordingly, this entire time period is either excluded or excused for purposes of Rule 600.

7. THE SENTENCE AS METED OUT BY THIS COURT ON FEBRUARY 3, 2012 SHOULD BE MODIFIED TO REFLECT CONCURRENCY IN SENTENCING AS TO CERTAIN OF THE FIRST DEGREE FELONY CHARGES AS NO EXPRESS OR IMPLIED CONSIDERATION WAS GIVEN TO THE REHABILITATIVE NEEDS OF THE DEFENDANT.

A challenge to the discretionary aspects of sentencing is not absolute. Rather, a pre-condition to review of the merits

of such a challenge is the articulation of a substantial question as to the appropriateness of the sentence. 42 Pa.C.S. §9781(b); Commonwealth v. Paul, 925 A.2d 825, 828 (Pa.Super. 2007) ("The determination of whether a particular issue constitutes a substantial question as to the appropriateness of sentence must be evaluated on a case-by-case basis."). In order to raise a substantial question, Defendant must advance "a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." Commonwealth v. Phillips, 946 A.2d 103, 112 (Pa.Super. 2008) (citation omitted), *appeal denied*, 964 A.2d 895 (Pa. 2009).

The sentence imposed was supported by a pre-sentence investigation report, was not manifestly excessive, was accompanied by reasons stated on the record, and was within the standard range of the sentencing guidelines. Defendant has not identified any specific provision of the Sentencing Code that has been violated or any violation of the fundamental norms underlying the sentencing process. The sole issue raised by Defendant, that the Court failed to consider his rehabilitative needs, does not raise a substantial question that the sentence imposed was, in fact, inappropriate. *See* Commonwealth v.

Mobley, 581 A.2d 949, 952 (Pa.Super. 1990)(claim that sentence imposed for narcotics offense failed to take into consideration defendant's rehabilitative needs and was manifestly excessive did not raise a substantial question where sentence was within the statutory limits and within sentencing guidelines).

As such, Defendant has failed to present a substantial question as to the appropriateness of his sentence.

CONCLUSION

In accordance with the forgoing, we believe Defendant's contentions to be wholly without merit and deny Defendant's request for post-sentence relief.

BY THE COURT:

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P.J.