

Commonwealth of Pennsylvania v. Mark Delmonico**COMMONWEALTH OF PENNSYLVANIA v. MARK DELMONICO****Criminal Law – Weight of Evidence – Due Process – COVID-19**

Summary: Defendant appeals from the judgments of sentence imposed after Defendant was convicted by a jury and sentenced on two counts of Delivery of a Controlled Substance, Conspiracy, and related offenses. Defendant argues that the verdicts were against the weight of the evidence, and that he was deprived of a fair jury trial on due process grounds, as he was denied the opportunity to observe the reactions of the prospective jurors to questioning due to the use of social distancing and face masks during voir dire. Regarding the weight of the evidence claim, the trial court found no material inconsistencies in the cooperating witness's testimony, which also corroborated the multiple police witnesses. The verdict did not shock the Court's conscience. Regarding the due process issue, the trial court found no prejudice to the Defendant as the Commonwealth was subject to the same restriction. Further, the Court was able to observe the demeanor of the prospective jurors sufficiently to facilitate the removal of panelists with predisposed opinions, the purpose of voir dire, such that Defendant was afforded a jury free of bias or prejudice. Accordingly, the Court asks that the Superior Court affirm the judgments of sentence.

Commonwealth of Pennsylvania v. Mark Delmonico, Appellant

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA,
CRIMINAL DIVISION

No. CP-06-CR-0003573-2019

OPINION AND ORDER

Paul M. Yatron, J.

October 13, 2020

Before the court are Appellant's Statement of Errors Complained of on Appeal. Appellant asserts two errors of this court. First, Appellant alleges that the verdict of the jury is against the weight of the evidence and that this court erred in denying his post-sentence motion seeking a new trial thereupon. Further, Appellant raises on appeal the issue of whether he was denied the right to choose a fair jury because the venire was required to wear facemasks throughout the voir dire process and the trial. For the reasons set forth herein, we find that all alleged errors lack merit.

FACTUAL BACKGROUND

On Tuesday, July 17, 2018, a confidential informant ("C.I.") working with the Pennsylvania State Police ("PSP"), picked up Joshua West ("West") and West's girlfriend, Mackenzie Wyatt ("Wyatt") and traveled to Appellant, Mark Delmonico's house, where he dropped West off and proceeded to a nearby Turkey Hill gas and convenience store. Prior to dropping West off, the C.I. gave West \$1,000

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to effectuate a drug purchase. West walked to Appellant's house, and the two went inside, where West gave Appellant the \$1,000 and Appellant retrieved an ounce of methamphetamine. Rather than give the drugs to West, Appellant insisted that he drive West to Turkey Hill and deliver the drugs himself. Once at Turkey Hill, Appellant approached the C.I. and handed him the drugs. The C.I., West and Wyatt then left. The C.I. then dropped West and Wyatt off at a diner and proceeded to a prearranged location where he and his vehicle were searched and he surrendered the purchased drugs.

On Monday, July 23, 2018, the C.I. again picked West up and traveled to Appellant's residence. Again, the C.I. gave West \$1,000 to purchase methamphetamine. Upon arrival at Appellant's home, Appellant met West and the C.I. outside, in the driveway, where Appellant and the C.I. surveyed Appellant's truck in contemplation of a possible purchase of the truck. West and Appellant then entered Appellant's home. Inside, West gave Appellant the money and Appellant retrieved the drugs. The two continued back outside and Appellant then handed the drugs to the C.I. The C.I. again dropped West off and proceeded to a prearranged location where he and his vehicle were searched and he relinquished the purchased methamphetamine.

PROCEDURAL HISTORY

Appellant was charged with two counts each of Delivery of a Controlled Substance¹, Possession with Intent to Deliver a Controlled Substance², Possession of a Controlled Substance³, Possession of Drug Paraphernalia⁴, and Criminal Conspiracy⁵ as to all counts. Appellant filed an omnibus pretrial motion on October 16, 2019, which was thereafter denied by Order and Opinion dated December 24, 2018. The case was thereafter schedule for trial during the trial term beginning March 11, 2020. Due to circumstances surrounding the health restrictions and public safety orders, the matter was continued for trial during the trial term beginning on July 1, 2020. On June 25, 2020, Appellant filed a Habeas Corpus/Motion to Review Motion to Dismiss. The motion was denied on June 27, 2020. The matter proceeded to trial on July 8, 2020.

On the day of the trial, prior to voir dire, Defense Counsel placed on the record her objection to the potential jurors wearing masks because she was "concerned about [her] ability to be able to gauge the jury's reaction to certain things." Notes of Testimony of July 8-9, 2020, Jury Trial "Trial N.T." at 3. This court overruled Defense Counsel's objection. *Id.* at 4.

At trial, the Commonwealth first called Christopher Zukowsky ("Trooper Zukowsky"), a thirteen-year veteran with the PSP assigned to the Drug Law Enforcement Division Northeast Strike Force of the Bureau of Criminal Investigation

¹ 35 P.S. § 780-113(a)(30)

² 35 P.S. § 780-113(a)(30)

³ 35 P.S. § 780-113(a)(16)

⁴ 35 P.S. § 780-113(a)(32)

⁵ 18 Pa.C.S.A. § 903(a)(1)

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(“Northeast Strike Force”)⁶. *Id.* at 71. Trooper Zukowsky testified that on July 17, 2018, the C.I.⁷, met with Trooper Zukowsky and other members of the Northeast Strike Force at a prearranged location in Hamburg, Berks County, during which the officers searched the C.I.’s person and vehicle to ensure that the C.I. was not in possession of any contraband, including illegal drugs, firearms or uncontrolled currency, of which none were found. Trial N.T. 73-74, 81-82.

The C.I. indicated that he would be purchasing methamphetamine from an individual named West, but the C.I. understood that West was being supplied through a larger scale dealer. *Id.* at 83. The troopers then provided the C.I. with \$1,000 dollars in recorded currency to effect the controlled buy. *Id.* The C.I. then drove his vehicle to West’s residence while troopers maintained surveillance on the vehicle. *Id.* at 84. Once at West’s residence, the C.I. learned that West did not possess any methamphetamine and West relayed to the C.I. that they needed to go pick the drugs up. *Id.* at 85.

The C.I., West, West’s girlfriend and Wyatt then traveled in the C.I.’s vehicle to Appellant’s residence, whereupon West exited the vehicle and entered Appellant’s residence. *Id.* The C.I. and Wyatt then proceeded to a nearby Turkey Hill gas station. *Id.* at 86. Shortly thereafter, a white Ford F-250 pickup truck operated by Appellant with West as a passenger, arrived at Turkey Hill. *Id.* at 87. West and Appellant briefly entered the Turkey Hill store and, upon reemerging, Appellant approached the passenger-side window of the C.I.’s vehicle. *Id.* West entered the C.I.’s vehicle and they left while the troopers continued to surveille the C.I.’s vehicle. *Id.* at 88. At the request of West and Wyatt, the C.I. stopped at a restaurant and both West and Wyatt exited the vehicle. *Id.* at 88. The C.I. then returned to the prearranged meeting location in Hamburg, where he voluntarily relinquished a clear plastic bag containing approximately one ounce of methamphetamine. *Id.* at 88-89. The C.I. and his vehicle were again searched and no other contraband was found, nor was any portion of the \$1,000 previously provided to the C.I. found. *Id.* at 89-90. Trooper Zukowsky confirmed that surveillance of the C.I. was maintained throughout the events described and there appeared no opportunity for the C.I. to obtain the recovered drugs other than through the controlled buy. *Id.* at 90.

Trooper Zukowsky then testified that on July 23, 2018, he again met with the C.I. at the prearranged location in Hamburg. *Id.* at 91. The C.I. and his vehicle were searched, during which no contraband, currency or weapons were found, and he was provided with \$1,000 in recorded currency to conduct a controlled buy of methamphetamine. *Id.* at 93. The C.I. traveled under surveillance to West’s residence

⁶ Trooper Zukowsky described the Northeast Strike Force as essentially an undercover unit similar to a vice unit operating across twelve counties in the northeast that investigates strictly drug and firearms crimes. Trial N.T. 71-72. Trooper Zukowsky further testified that while Berks County is within the area assigned to the Southeast Strike Force based out of Norristown and Philadelphia, it is not unusual for the Northeast Strike Team to perform operations in Berks County, or to assist the Southeast Strike Team therein. Trial N.T. 72.

⁷ Trooper Zukowsky testified that the C.I. was an individual facing charges in Lehigh County, who expressed an interest in cooperating with law enforcement regarding his supplier. Trial N.T. 74-75.

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where he picked up West and a small dog, and proceeded to Appellant's residence. *Id.* While Trooper Zukowsky did not personally observe what occurred at Appellant's residence, he testified that the C.I. returned to the prearranged location and relinquished another ounce of methamphetamine, which was wrapped in a yellow and white money wrapper. *Id.* at 94.

On cross-examination, Trooper Zukowsky explained that the C.I. and West met through their job as landscapers and West was identified as an individual with access to a source for illegal narcotics. *Id.* at 107. Furthermore, while the controlled buys were occurring, West had no knowledge of the PSP investigation, or his involvement in the investigation. *Id.* at 107-08. Trooper Zukowsky admitted that West and Wyatt were not searched prior to entering the C.I.'s vehicle and that he had no personal knowledge as to whether either possessed contraband at that time. *Id.* at 108-09. However, Trooper Zukowsky posited that if either West or Wyatt had provided the drugs, then it would be inconsistent with the conversations between West and the C.I. and with the actions of both in traveling to Appellant's residence in order to obtain the methamphetamine. *Id.* Trooper Zukowsky also admitted that he did not directly observe any of the activity that occurred in Appellant's residence, and that he did not witness any actual transaction between West and Appellant. *Id.* at 112-13.

Francis Carito ("Trooper Carito"), who has been a trooper with the PSP since 2011, testified that on July 17, 2018, he was assisting his partner, Trooper Zukowsky, in handling the C.I. during the investigation. *Id.* at 122. Trooper Carito helped search the C.I.'s vehicle prior to the controlled buy and that he found no controlled substances, weapons or currency during the search. *Id.* at 123. Trooper Carito also participated in the surveillance of the C.I., traveling in his vehicle. *Id.* at 123-24. Trooper Carito further testified that he observed the C.I. pick up two individuals in Shoemakersville, and that he later saw Appellant approach the C.I.'s vehicle as it was parked in the Turkey Hill parking lot. *Id.* at 124-25. Trooper Carito continued to assist Trooper Zukowsky on the C.I.'s return to the prearranged meeting location, whereupon the C.I. provided the clear plastic baggie containing the methamphetamine and subsequent search of the C.I. and his vehicle. *Id.* at 126-27.

On July 23, 2018, Trooper Carito again participated in the controlled buy with Trooper Zukowsky and the same C.I. *Id.* at 128. Trooper Carito again participated in the search of the C.I. and his vehicle, during which no illegal weapons, contraband, or currency were found. *Id.* at 128-29. Similarly, Trooper Carito joined in the subsequent surveillance of the C.I. who picked up a male with a dog. *Id.* at 130. Upon completion of the controlled buy, and the return of the C.I. to the prearranged location, Trooper Carito again assisted in the search of the C.I. and his vehicle whereupon no contraband or currency was discovered, other than the purchased methamphetamine that the C.I. surrendered. *Id.* at 130-32.

Corporal Javier Garcia ("Corporal Garcia"), a seventeen-year veteran of the PSP and a member of the Southeast Strike Force, testified that on July 17, 2018, as he was part of the surveillance detail, he observed Appellant park and exit his pickup truck in his driveway. *Id.* at 136-37. Corporal Garcia then saw Appellant

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meet up with a man in front of the house and the two entered the residence. *Id.* at 137. Approximately ten minutes later, both men exited the residence, got into the pickup truck, and drove to Turkey Hill. *Id.* 138-39. Corporal Garcia indicated that he was also part of the surveillance team following the C.I.'s vehicle as it traveled from the prearranged location to Turkey Hill and back again, and he confirmed that he did not see anyone approach the vehicle or throw anything into the vehicle during those trips. *Id.* 139.

Additionally, Corporal Garcia participated in the surveillance of the July 23, 2018 controlled buy. *Id.* 140-41. During the second controlled buy, Corporal Garcia surveilled Appellant's residence where he observed Appellant, the C.I. and West looking at Appellant's pickup truck. *Id.* at 141. Corporal Garcia observed an exchange occur between the C.I. and Appellant in the driveway of Appellant's residence, though he admitted that he did not see exactly what was exchanged between the two. *Id.* at 142-43, 146.

Trooper Sean Taylor ("Trooper Taylor"), who has been with the PSP for twenty-two years, next testified that he participated in the surveillance of both controlled buys involving Appellant. *Id.* at 147-48. Trooper Taylor described watching the C.I. pick up West and Wyatt on July 17, 2018 and confirmed that he did not see anyone else enter the vehicle or place anything inside the vehicle. *Id.* at 149. During the second controlled buy on July 23, 2018, Trooper Taylor assisted in surveillance and the search of the C.I.'s vehicle both prior to, and subsequent to, the controlled buy. *Id.* at 150. Trooper Taylor testified that no contraband, weapons or currency were found pursuant to the search. *Id.* at 150-51. While surveilling the C.I.'s vehicle during the second controlled buy, Trooper Taylor did not observe anyone other than the C.I. and West enter the C.I.'s vehicle or place anything else inside the vehicle. *Id.* at 151. On cross-examination, Trooper Taylor admitted that he did not search West, Wyatt or the dog that accompanied the C.I. during the controlled buys. *Id.* at 152.

Joshua West next testified that he was facing various drug-related charges in Berks County related to the July 17 and July 23 controlled buys, and that no one had forced, threatened or promised him anything concrete in return for his testimony, but that he was hoping for consideration. *Id.* at 154-56. West stated that he met Appellant two years prior at a gas station while he was filling his tires with air. *Id.* at 156-57. Appellant told West that he had tires to sell and the two met up again approximately two weeks later when West purchased the tires from Appellant. *Id.* at 157. During the second meeting, West and Appellant used methamphetamine together. *Id.* Subsequently, West began to obtain methamphetamine from Appellant on a regular basis of at least once a week. *Id.* at 158-59.

West continued that approximately one week prior to July 17, 2018, Appellant asked West to help find a buyer for an ounce of methamphetamine. *Id.* at 160-61. West knew the C.I. through a long-time friend and West and Appellant facilitated the drug purchase. *Id.* at 161. On July 17, 2018, West and the C.I. were communicating via text message and the C.I. then picked West and Wyatt up at West's residence. *Id.* at 161-62. During the car ride the C.I. gave West \$1,000 in cash. *Id.* at 164. Appellant

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had previously instructed West not to allow the C.I. to pull up directly in front of his home, so West directed the C.I. to stop about a block away, where West alighted the vehicle. *Id.* at 163. The C.I. then proceeded with Wyatt to Turkey Hill. *Id.*

West then walked the short distance to Appellant's residence, knocked on the door, and Appellant let West into the house. *Id.* Once inside the house, West gave the \$1,000 to Appellant who proceeded downstairs and returned with a clear bag containing methamphetamine. *Id.* at 165-66. West testified that he planned on walking back to Turkey Hill to meet with the C.I. and Wyatt, but Appellant insisted on driving West. *Id.* at 166. Appellant and West then drove in Appellant's pickup truck to Turkey Hill, where they both exited the truck. *Id.* at 167. West stated that Appellant then approached the driver's side of the C.I.'s vehicle and introduced himself to the C.I. *Id.* As the two engaged in a brief conversation, Appellant made a hand-to-hand exchange of the bag containing the methamphetamine to the C.I. *Id.* Appellant then went into the store and West left in the C.I.'s vehicle with the C.I. and Wyatt. *Id.* at 168-69. The C.I. later dropped West and Wyatt off at a diner. *Id.* at 169.

On July 23, 2018, the C.I. arrived at West's residence and picked up West and his dog and then proceeded to Appellant's home. *Id.* at 171. During the car ride, the C.I. gave West the \$1,000 in cash. *Id.* at 172-73. Upon arriving at Appellant's home, West testified that Appellant came out of the house and the two began to look at Appellant's pickup truck. *Id.* at 172. According to West, Appellant had orchestrated the deal, which was an exchange of \$1,000 for an ounce of methamphetamine. *Id.* at 172. After looking at the pickup truck, both West and Appellant proceeded into Appellant's home. *Id.* at 173. Once again, West gave Appellant the \$1,000 in cash, Appellant walked downstairs, and reemerged with the drugs in hand. *Id.* West and Appellant then continued back outside, where Appellant conversed with the C.I., during which Appellant handed off the drugs to the C.I. *Id.* at 174. Although West admitted that he did not actually see the handoff occur, he testified that the C.I. showed him the drugs on the way home. *Id.* at 175.

On cross-examination, Defense Counsel noted that West's recollection of events from July 17, 2018, differed from his earlier testimony at the preliminary hearing in that he earlier testified that Appellant approached the passenger side of the C.I.'s vehicle and talked with Wyatt. *Id.* at 180. West clarified that Appellant first approached the driver side of the C.I.'s vehicle, prior to entering Turkey Hill, gave the C.I. the drugs, and then Appellant approached the passenger side upon exiting Turkey Hill, whereupon Appellant conversed with Wyatt. *Id.* at 180-81. West also admitted that Appellant had helped him by loaning West money and tools. *Id.* at 181-84.

Both parties stipulated that the substance obtained both on July 17, 2018, and on July 23, 2018, were tested by Rebecca Patrick, a Forensic Scientist with the PSP Laboratory, who has previously testified as an expert witness in Pennsylvania courts. *Id.* at 186-87. Furthermore, the parties stipulated that the results of the testing indicated that the substances from both dates were, in fact, methamphetamine, a controlled substance under Pennsylvania law. *Id.* at 186-87.

At the conclusion of the trial on July 9, 2020, the jury found Appellant guilty

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of all charges. Sentencing was deferred on request of Appellant. On July 23, 2020, this court sentenced Appellant to an aggregate term of imprisonment of two and one-half to eight years, with four years of probation to follow.

On August 3, 2020, Appellant, through new counsel, filed post-sentence motions, which were denied by order dated August 5, 2020. Appellant filed his Notice of Appeal on August 13, 2020. On August 18, 2020, we issued an order directing Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant filed his concise statement on September 8, 2020. We submit this opinion pursuant to Pa.R.A.P. 1925(a) and request that the Superior Court affirm Appellant's judgment of sentence.

DISCUSSION

In his concise statement, Appellant alleges the following errors:

1. Whether the trial court erred in denying Appellant's Post-Sentence Motion challenging the weight of the evidence where it is clear from the record that the trial testimony of the co-defendant, Joshua West, the only eyewitness to the alleged controlled buys, was purely self-serving and given the hopes of receiving a favorable treatment from the Commonwealth in exchange for his helpful testimony against [Appellant], and was replete with inconsistencies and utterly without support or proof, thereby rendering the verdict issued unreliable, tainted, questionable and contrary to the weight of the evidence?
2. Whether the trial court erred in allowing, over the objection of counsel, jury selection to proceed in such a manner that counsel was denied the opportunity to observe the reactions of the prospective jurors and/or address them as a group, thereby robbing the Appellant of his right to pick a fair jury?

(Appellant's Concise Statement ¶¶ 1-2).

WEIGHT OF EVIDENCE

Appellant first contends that this court committed an error in denying his post-sentence motion challenging that the jury's verdict is against the weight of the evidence. Specifically, Appellant alleges that West's testimony was self-serving and "replete with inconsistencies and utterly without support or proof."

A motion for 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. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. An allegation that the verdict is against the weight of the evidence is addressed to the

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discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Commonwealth v. Widmer, 744 A.2d 745, 751–52 (Pa. 2000) (internal citations and quotation marks omitted). “When a trial court evaluates a weight of the evidence claim, the trial court may award relief only when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.” *Commonwealth v. Clemons*, 200 A.3d 441, 463 (Pa. 2019), *cert. denied sub nom. Clemons v. Pennsylvania*, 140 S.Ct. 176 (2019). “[A]ppellate review is limited to whether the trial judge’s discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion.” *Commonwealth v. Houser*, 18 A.3d 1128, 1136 (Pa. 2011). We are likewise aware that:

The weight of the evidence is exclusively for the finder of fact, who is free to believe all, none or some of the evidence and to determine the credibility of the witnesses. Resolving contradictory testimony and questions of credibility are matters for the fact-finder. It is well-settled that we cannot substitute our judgment for that of the trier of fact.

Commonwealth v. Cramer, 195 A.3d 594, 600 (Pa.Super. 2018) (internal citations and quotation marks omitted). “A verdict is said to be contrary to the evidence such that it shocks one’s sense of justice when ‘the figure of Justice totters on her pedestal,’ or when ‘the jury’s verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience.’” *Commonwealth v. Lineman*, 219 A.3d 684 (Pa.Super. 2019) (internal citations omitted).

At trial, the Commonwealth presented testimony from four separate members of the PSP who participated in the operation, including those who surveilled both the C.I. and Appellant throughout the controlled buys. The Commonwealth also presented Joshua West who testified that he participated, though unwittingly at the time, in the controlled buys, confirming the testimony of law enforcement officers.

Our recall of the testimony at trial, and our subsequent review of the record notes of testimony, belie the allegations of Appellant. While it is true that West sought leniency in testifying on behalf of the Commonwealth, no agreement was

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promised or assured to West. Moreover, we fail to find demonstrable inconsistencies as alleged. There was no indication that West demonstrated any personal vendetta or animosity toward Appellant. In fact, upon cross-examination, it was revealed that West and Appellant had a fairly convivial relationship, with Appellant having helped West out with money and tools. Defense Counsel likewise attempted, through cross-examination, to point out inconsistencies in West's testimony, no material inconsistency was demonstrated.

Moreover, the jury was free to afford the weight and credibility it saw fit to the testimony and evidence presented at trial. It is clear from the verdicts rendered, that the jury found the testimony of West to be credible. We find nothing in the jury's verdict that shocks the conscience of this court or that is so contrary to the evidence as to characterize a miscarriage of justice. As such, we find that Appellant's alleged error lacks merit.

VOIR DIRE

Appellant next argues that this court erred in allowing jury selection to proceed over the objection of Trial Counsel. Specifically, Appellant claims that he was denied the right to pick a fair jury by this court for permitting jury selection to continue while the potential juror panel was required to wear facemasks, thus preventing Appellant and Trial Counsel from adequately observing the individual and collective reactions of the potential jurors.

In December of 2019, a novel coronavirus began infecting humans in China, which by March of 2020, had spread throughout 144 countries, including the United States. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 877 (Pa. 2020), *cert. denied*, 19-1265, 2020 WL 5882242 (U.S. Oct. 5, 2020). On March 16, 2020, in response thereto, and upon request of the Commonwealth's Secretary of Health, the Pennsylvania Supreme Court declared a general, statewide judicial emergency because of the coronavirus that causes COVID-19. *In re Einloth*, 533 WDA 2020, 2020 WL 4783307, at *2 (Pa.Super. Aug. 18, 2020).

In its March 16, 2020 declaration and in its subsequent extensions, the Court authorized the President Judges of each judicial district to likewise declare a judicial emergency within their district, and further, "[t]o take any action permitted pursuant to Rule of Judicial Administration 1952(B)(2)." *In re Gen. Statewide Judicial Emergency*, 228 A.3d 1281 (Pa. 2020). Rule 1952(B)(2)(d) grants to the President Judge of a judicial district, in the event of an emergency, and upon authorization of our Supreme Court, to "take necessary action to provide for (i) the safety of court personnel, court users and the public, and (ii) the security of court facilities, financial and cash operations, equipment and records" PA ST J ADMIN Rule 1952(B)(2)(d). Moreover, the Supreme Court's declaration likewise provided that "[t]o the degree practicable in light of the necessity for some in-person appearances and proceedings, safety measures should be employed that are as consistent as possible with the federal and state executive guidance associated with countering the spread of the COVID-19 virus." *In re Gen. Statewide Judicial Emergency*, 230 A.3d 1015,

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1016 (Pa. 2020). On June 1, 2020, President Judge Parisi issued a Supplemental Emergency Order indicating that jury trials in the Court of Common Plea of Berks County would resume “on or after June 15, [2020], consistent with prevailing health and safety norms.” *In Re: 23rd Judicial District*, Emergency Judicial Order No. 20-3264 (Berks C.P. June 1, 2020). The June 1, 2020 Supplemental Order also required “[a]ll persons entering county buildings for court business will wear a mask covering their nose and mouth at all times, unless otherwise specifically permitted or directed by a judge.” *Id.*

In accordance with the June 1, 2020 Supplemental Emergency Order, individuals reporting for the venire in Appellant’s trial on July 8 and 9, 2020, were required to wear a mask upon entering, and throughout the duration of their presence in County buildings. While this court permitted counsel to remove their masks during voir dire, and permitted both counsel and witnesses to remove their masks during trial testimony, we granted no such exception for potential jurors who were socially distanced during voir dire, but were still congregated into a single auditorium. This decision reflected our understanding of policies in effect both in the Commonwealth generally, in accordance with the Centers for Disease Control and Prevention guidelines, and pursuant to the June 1, 2020 Supplemental Emergency Order from the President Judge.

“The jury is a central foundation of our justice system and our democracy.” *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 860, 197 L.Ed.2d 107 (2017). Our Supreme Court has elucidated:

A criminal defendant’s right to an impartial jury is explicitly granted by Article 1, Section 9 of the Pennsylvania Constitution and the Sixth Amendment of the United States Constitution. The jury selection process is crucial to the preservation of that right. The purpose of voir dire is to provide an opportunity for counsel to assess the qualifications of the prospective jurors to serve. It is therefore appropriate to use such an examination to disclose fixed opinions or to expose other reasons for disqualification. It is well settled that the sole purpose of examination of jurors under voir dire is to secure a competent, fair, impartial and unprejudiced jury. While considerable latitude should be permitted on voir dire, the inquiry should be strictly confined to disclosing qualifications of a juror and whether the juror has formed a fixed opinion or may be otherwise subject to disqualification for cause.

Commonwealth v. Ellison, 902 A.2d 419, 423–24 (Pa. 2006) (internal citations omitted). Whereas the sole purpose of the voir dire examination is to provide the accused with a competent, fair, impartial, and unprejudiced jury, it is not designed to provide a defendant with twelve persons devoid of emotion or opinion. *Commonwealth v. Short*, 420 A.2d 694, 698–99 (Pa.Super. 1980). Therefore, “the inquiry must be directed at ascertaining whether the venireperson is competent and capable of render-

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ing a fair, impartial and unbiased verdict.” *Commonwealth v. Drew*, 459 A.2d 318, 320 (Pa. 1983). Although “the scope of voir dire is within the sound discretion of the trial court... the United States Supreme Court has stated that the exercise of the trial court’s discretion, and the restriction upon inquiries at the request of counsel, are ‘subject to the essential demands of fairness.’” *Commonwealth v. Le*, 208 A.3d 960, 973 (Pa. 2019).

The Pennsylvania Rules of Criminal Procedure provide that “[v]oir dire of prospective trial jurors and prospective alternate jurors shall be conducted, and the jurors shall be selected, in the presence of a judge, unless the judge’s presence is waived by the attorney for the Commonwealth, the defense attorney, and the defendant, with the judge’s consent.” Pa.R.Crim.P. 631(A). Likewise, Rule 631 provides that:

Prior to voir dire, each prospective juror shall complete the standard, confidential juror information questionnaire as provided in Rule 632. The judge may require the parties to submit in writing a list of proposed questions to be asked of the jurors regarding their qualifications. The judge may permit the defense and the prosecution to conduct the examination of prospective jurors or the judge may conduct the examination. In the latter event, the judge shall permit the defense and the prosecution to supplement the examination by such further inquiry as the judge deems proper.

Pa.R.Crim.P. 631(E).

In the matter *sub judice*, the prospective jurors completed and submitted questionnaires pursuant to Rule 631, which were then provided to both the Commonwealth and Defense Counsel for review. During voir dire, Defense Counsel was neither prohibited, nor prevented from presenting questions to the potential jury members. Similarly, neither Appellant, nor Defense Counsel was sequestered away from the venirepersons during the process and both were able to hear the responses to questions posed during the process of voir dire. Moreover, Appellant was not prejudiced by the health requirement that potential jurors, along with all other individuals admitted to the courthouse, were required to wear a mask, as the Commonwealth was subject to the same restriction.

“The trial court makes the determination [of whether or not to strike a juror for cause] based on the prospective juror’s answers to questions and demeanor.” *Commonwealth v. Bridges*, 757 A.2d 859, 873 (Pa. 2000), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). Our Supreme Court has held that “[t]he opportunity to observe the demeanor of the prospective juror and the tenor of the juror’s answers is indispensable to the judge in determining whether a fair trial can be had in the community.” *Commonwealth v. Bachert*, 453 A.2d 931, 937 (Pa. 1982), *cert. denied*, 460 U.S. 1043, 103 S.Ct.1440, 75 L.Ed.2d 797 (1983). Moreover, “the scope and form of voir dire examination rests in the sound discretion of the trial judge, whose decisions will not be reversed absent a palpable

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abuse of discretion.” *Commonwealth v. Croll*, 480 A.2d 266, 272 (Pa.Super. 1984). “The purpose of voir dire is to draw out any bias or prejudice, and thereby facilitate the removal of jurors with predisposed opinions.” *Id.* at 273. Based on this court’s observations and the responses provided by the potential jurors, we find that this objective was achieved and Appellant was afforded a jury free of bias or prejudice. As such, we find no merit in Appellant’s allegation of error.

CONCLUSION

For all of the foregoing reasons, this Court respectfully requests that the Superior Court affirm Appellant’s judgment of sentence. We will issue an order consistent with the foregoing.

ORDER

AND NOW, to wit, this 13th day of October, 2020, upon consideration of Appellant’s Concise Statement of Matters Complained of on Appeal, and upon the record of this case, we find that all alleged errors lack merit and we request the Superior Court to dismiss the appeal.

Pursuant to Pa.R.A.P. 1931, the Clerk of Courts of Berks County is hereby directed to transmit the record of this case, including this Order and Opinion, to the Prothonotary of the Superior Court of Pennsylvania.

BY THE COURT:

/s/ Paul M. Yatron

PAUL M. YATRON, J.