

PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Becky Robbins and Stephen Robbins v. ERMC, Hertzberg, J.Page 1
Directed Verdict—Negligence—Slip and Fall

Commonwealth of Pennsylvania v. Shawn Matthew Hickman, Reilly, S.J.Page 8
Robbery—Insufficient Evidence—Request for Mistrial

Commonwealth of Pennsylvania v. Jonathan Perez, Mariani, J.Page 1
2nd Degree Murder—Robbery—Felony Murder Rule

Commonwealth of Pennsylvania v. Allan Moorefield, Rangos, J.Page 5
1st Degree Murder—Suppression—5th Amendment Right Not to Testify—Mistrial

Commonwealth of Pennsylvania v. Joshua Hathaway, Rangos, J.Page 7
Probation Violation—Sentencing

CAPSULE SUMMARIES

Richard Geiser v. Dora Geiser, Bubash, J.Page 10
Business Valuation—Alimony

M.H. v. J.H., Wecht, J.Page 10
Spousal Support—Entitlement Defense

PLJ

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OPINIONS

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**Becky Robbins and Stephen Robbins v.
ERMC**

Directed Verdict—Negligence—Slip and Fall

No. GD 07-17139. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—November 12, 2010.

OPINION

Plaintiffs Becky and Stephen Robbins have appealed to the Superior Court of Pennsylvania from a jury verdict against them relative to “slip and fall” injuries sustained by Becky Robbins. Plaintiffs’ appeal is premised upon their single allegation of an error by me for not directing a verdict that Defendant ERMC was negligent. This Opinion explains my decision not to direct a verdict that ERMC was negligent, but to instead submit the decision to the Jury.

In August of 2005 Ms. Robbins was a customer walking in the food court inside of Monroeville Mall when she slipped on a clear liquid on the floor. She flew into the air and landed on her left knee. Ms. Robbins suffered very serious injuries. Her kneecap shattered, and the tendon attached to her kneecap detached from it. She had surgery to remove portions of her kneecap and to reattach the tendon to the parts of her kneecap that remained. Ms. Robbins then participated in extensive physical therapy that enables her to walk with a less than perfect gait. The knee did not and will not return to the condition it was in before her fall, and it limits many of Ms. Robbins’ activities. She suffered severe pain throughout the course of treatment and rehabilitation, and she continues to feel some pain.

During the jury trial held in May of 2010, Robert Brehm testified that he was employed by ERMC at Monroeville Mall on the day in August of 2005 when Ms. Robbins was injured. He worked there since 1994 in the food court where he had responsibility for cleaning the tables, removing leftover food and wiping up food or drink spilled on the floor. On the day Ms. Robbins was injured, another female food court customer showed Mr. Brehm where a clear liquid with ice cubes had been spilled on the floor. Transcript of Jury Trial, pp. 129-144. Mr. Brehm acknowledged he knew this condition was dangerous but difficult for customers to discover. *Id.* Mr. Brehm first looked around for a coworker to help him, but the coworker was on the other side of the food court. He next looked for a chair to place over the spill, but the food court was busy and all the seats were occupied. Next, Mr. Brehm walked about ten feet to get his broom and dustpan to use to clean the spill, but he found there was debris in the dustpan. As he was emptying the debris, he heard a scream, which turned out to be that of Ms. Robbins when she slipped and fell. *Id.*

Plaintiff then argued that the testimony of Mr. Brehm established ERMC’s negligence as a matter of law and requested a directed verdict as to negligence. I denied the request. The issue of negligence then was submitted to the Jury, which determined that ERMC was not negligent. The Plaintiffs filed Post Trial Motions, which I denied. Then, they appealed to the Superior Court.

In the Robbins’ Statement of Matters Complained of on Appeal, they contend ERMC had a duty to either immediately clean the spill, warn of its existence, or, be negligent as a matter of law. However, I could not find any statute or caselaw that imposes such a specific duty on ERMC. Rather, the law in Pennsylvania is that ERMC had to “use reasonable care to protect” Ms. Robbins from the danger posed by the spilled water. Pa. SSJI (Civ) No. 702A(3). The failure to use reasonable care is also known as “negligence,” and the question of negligence usually should be submitted to the jury, unless the facts “leave no room for doubt...” *Schmoyer v. Mexico Forge*, 437 Pa.Super 159, 163, 649 A.2d 705, 707 (1994) citing *Johnson by Johnson v. Walker*, 376 Pa. Super. 302, 307, 545 A.2d 947, 950 (1988), *allocatur denied*, 522 Pa. 577, 559 A.2d 38 (1989). The Robbins argue ERMC failed to use reasonable care by not allowing Mr. Brehm to have a walkie-talkie that could have been used to call for help while he remained at the spill. They also argue ERMC failed to use reasonable care by not providing Mr. Brehm with a portable wet floor sign to place on the spill when he left it. ERMC argues Mr. Brehm used reasonable care by first looking for help from a coworker, then looking for a chair to place over the spill, and finally walking ten feet away from the spill to a broom and dust pan. I find these facts leave sufficient “room for doubt” as to whether ERMC did not use reasonable care to protect Ms. Robbins from the danger posed by the spilled water to submit the question to the Jury. Since the Jury would be authorized in making a finding either that reasonable care was or was not used, the decision should be made by the Jury, not the Judge.

BY THE COURT:
/s/Hertzberg, J.

**Commonwealth of Pennsylvania v.
Jonathan Perez**

2nd Degree Murder—Robbery—Felony Murder Rule

No. CC 200911415. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—October 29, 2010.

OPINION

This is a direct appeal wherein the defendant, Jonathan Perez, appeals from the judgment of sentence of April 15, 2010, which became final on May 12, 2010. At CC200411415, after a jury trial, the jury returned a verdict of guilty against Mr. Perez as to the charge of second degree murder and robbery. This Court sentenced Mr. Perez to a mandatory term of life imprisonment on the second-degree murder conviction. The robbery conviction merged with the other conviction for purposes of sentencing.

On June 9, 2010, Mr. Perez filed a Notice of Appeal. The Court thereafter received a Concise Statement of Errors Complained Of On Appeal alleging the following errors:

- a. The evidence in this case was insufficient to support a guilty verdict for second degree murder. For a finding of second degree murder, the homicide must be committed “while defendant was engaged as a principal or accomplice in the perpetration of a felony.” Here, the underlying felony was robbery. However, the robbery did not occur until after the stab-

bing occurred. Further, not only was the robbery later in time than the stabbing, the homicide was not committed in order to facilitate the robbery. The robbery was wholly unconnected. Rather, when the defendant knew that police would arrive because of the stabbing, he asked the dying victim where his drugs were and took them away for two purposes: (1) because he had intended to purchase the drugs anyway, and he did leave his money behind with the victim, and (2) because he did not want the police to find drugs on the body. He was attempting to keep the victim, should he have survived, from having to deal with a drug possession charge. Thus, these are two wholly separate incidents. Since the Court ruled at trial that the first degree homicide had not been proven, what remained was either a third degree conviction or voluntary manslaughter conviction. However, the jury found Mr. Perez not guilty of those. The murder conviction must be overturned.

Moreover, the robbery/serious bodily injury conviction is not supported by sufficient evidence. The plain language of the statute requires that the infliction of serious bodily injury occur during the commission of the theft. Here, the two were separate events. The defendant did not stab the victim *in order* to rob him of drugs, as explained above. The theft could only be called a robbery under section (v) of the statute, “physically tak[ing] or remov[ing] property from the person of another by force however slight.” The Defendant would argue that no force at all was used to take the drugs, thus robbery does not apply at all to these facts. This conviction likewise should be overturned.

b. In the alternative, should it be found that the evidence was sufficient to support the guilty verdicts, both guilty verdicts are against the weight of the evidence. Again, the homicide was not committed in the course of committing another felony. The theft of drugs (although the defendant did pay for them) was an afterthought, it occurred after the victim was already down. The homicide was not committed in order to facilitate the theft of the drugs - a buyer of the drugs had been called and was on the way to the location to purchase them when the incident occurred. Taking the drugs only occurred because the defendant did not want the police to find them, and because there was a payment coming. Second degree homicide simply does not apply here. The verdict should have shocked the conscience of the court when it was rendered, such that it must be overturned for a new trial. Similarly, the robbery conviction is against the weight of the evidence. No taking occurred during the infliction of serious bodily injury. The taking produced no injury at all. This is not a robbery under any of the sections of the statute. Again, this conviction is against the weight of the evidence. Mr. Perez should have a new trial ordered thereon.

The testimony concerning the events that transpired between the defendant and the victim was supplied by three witnesses. Anitra Bolton testified that she received a telephone call from the victim in this case, Jaquet McGrady, on July 23, 2009. Ms. Bolton and Mr. McGrady were acquaintances that had recently met on a social networking website in connection with their interests in tattoos. On the night at issue, Mr. McGrady called Ms. Bolton and asked her to give Mr. McGrady a ride to the Bellevue area of Pittsburgh. Ms. Bolton picked Mr. McGrady up and drove him to the location he requested. When they arrived in that area, Mr. McGrady directed Ms. Bolton to a house. The defendant was standing in front of the house. The defendant got into Ms. Bolton's vehicle and Ms. Bolton drove both men approximately 100-150 feet around the corner to a residence containing apartments located at 70 Kendall Avenue. Both men got out of the vehicle. As they were exiting, Mr. McGrady told the defendant that he needed to see “his girl”. Both men exited the vehicle and walked toward the residence. At this time, Ms. Bolton received a telephone call from her mother. She became preoccupied during the telephone call and, according to her testimony, she looking out of the driver's side window of her vehicle throughout the telephone conversation. After speaking to her mother for some time, she turned her attention to the passenger's side window and she observed the defendant and Mr. McGrady “tussling”. The defendant was on top of Mr. McGrady. The defendant pulled a long kitchen knife out of his shorts and begin stabbing Mr. McGrady. The defendant stabbed Mr. McGrady in the upper part of his body multiple times. After the defendant was done stabbing Mr. McGrady, the defendant went through Mr. McGrady's pockets and removed something from those pockets and fled the scene with the item(s) he took. After the defendant fled the scene, Ms. Bolton exited her vehicle and attempted to move Mr. McGrady into her vehicle to transport him to the hospital. Due to Mr. McGrady's weight, she couldn't move him. A neighbor who witnessed the stabbing came to her aid and helped place Mr. McGrady into her vehicle. She took him to the hospital, where he later died.

Ryan Meadows testified that he was sitting in his apartment on July 23, 2009 when he heard arguing outside. He observed Mr. McGrady and the defendant arguing with each other. He then noticed the defendant pull out a knife and stab Mr. McGrady. He saw Mr. McGrady fall to the ground and he saw the defendant flee from the scene. Mr. Meadows asked his girlfriend to call 9-1-1. From his window, he noticed Ms. Bolton having difficulty getting Mr. McGrady into her vehicle. He left his apartment and went outside to help her get Mr. McGrady into her vehicle. After he helped her get Mr. McGrady into the vehicle, he accompanied her to the hospital.

The Commonwealth also presented the testimony of Lauren Turnbull. Ms. Turnbull was the defendant's girlfriend. She testified that both she and the defendant were heroin addicts. She testified that Mr. McGrady was a supplier of heroin. She testified that she and the defendant attempted to obtain heroin on July 23, 2009 by sending a telephonic text message to Mr. McGrady and advising him that they had money to purchase a brick of heroin from him to sell to somebody else.¹ She testified that Mr. McGrady did come to her apartment. She was there with the defendant. While Mr. McGrady was there, they remained outside the apartment on the porch. When Mr. McGrady arrived at the apartment, he became upset because they did not actually have the money. The defendant asked to see the heroin that Mr. McGrady brought to determine if it was of high quality. The defendant then asked Mr. McGrady if Ms. Turnbull could have a couple bags of heroin to satisfy her habit. At this point, Mr. McGrady became angry and accused the defendant of taking advantage of him. Mr. McGrady and the defendant began arguing. According to Ms. Turnbull, Mr. McGrady grabbed the defendant around the neck and shoved him against the wall. The two men began fighting. Ms. Turnbull then ran into the apartment. After approximately three minutes, she came back outside and saw the two men in the yard. She saw blood on Mr. McGrady's shirt. She noticed a knife in the defendant's hand. She testified that Mr. McGrady charged the defendant and she saw the defendant stab Mr. McGrady one time. She testified that she and the defendant fled the scene into her apartment. The defendant put the knife into water in the kitchen sink. She testified that she and the defendant fled to a garage. When they got to the garage, the defendant began snorting heroin and crying over the fact that he killed Mr. McGrady and that he wasn't trying to kill him.

Immediately after the stabbing, police officers were dispatched to the area of the stabbing. A police dog was introduced to the

area to begin searching for the actor who stabbed Mr. McGrady. The police dog alerted to a garage in the area located at 62 Kendall Avenue. After a search of the garage, police officers discovered the defendant and Ms. Turnbull hiding in the corner. They were placed in custody. The defendant provided a false name to the officers. He explained that he was hiding in the garage because he was scared because he saw police in the area and assumed someone's house was robbed. Ms. Turnbull told the police that the two of them were "just homeless people". A subsequent search of the garage discovered two bundles of stamp bags of heroin in the corner where the defendant and Ms. Turnbull were found.

Police officers searched the apartment shared by the defendant and Ms. Turnbull located at 70 Kendall Avenue. Empty heroin stamp bags were found there. The knife used in the stabbing was found there immersed in water in the kitchen sink. While the defendant was in custody, ten stamp bags of heroin were recovered from him.

After his arrest, the defendant was interviewed. The defendant told two stories. In his first story, the defendant advised detectives that he was homeless. He had known Mr. McGrady for about 10 years. He explained that on the date in question he and his girlfriend were going to walk Main Street in Bellevue to ask people for money. He stated that he bumped into a person who wanted to buy a brick of heroin. The defendant then called Mr. McGrady to purchase heroin to sell to this person. The defendant indicated that Mr. McGrady agreed to supply the heroin. They two met and Mr. McGrady supplied the defendant with heroin. According to the defendant, Mr. McGrady and the defendant then proceeded to a residence to sell the heroin. The defendant's version of events was that the buyer then refused to purchase the heroin. An argument supposedly ensued resulting in the prospective purchaser stabbing Mr. McGrady. The defendant stated that he ran to help Mr. McGrady. While he was holding Mr. McGrady, the defendant claimed, the prospective buyer attempted to stab him. The defendant moved which resulted in Mr. McGrady being stabbed again. The defendant claimed that he then began to fight with the unknown buyer. The knife fell and the defendant grabbed it. The unknown buyer fled the scene. According to the defendant, he removed heroin from Mr. McGrady's pockets because he didn't want the police to find heroin on his injured friend. He claimed to have tossed the knife over his shoulder but noticed the knife was gone from the scene when he left. He assumed the unknown buyer came back and took the knife. Detectives told the defendant that they knew this story was false.

The defendant was provided another opportunity to explain the circumstances of the events at issue. He then changed his story. In his next version, the defendant indicated that the unknown buyer's name was "Ed". The defendant indicated that he owed Mr. McGrady money and when they met on July 23rd, Mr. McGrady threatened him that if he didn't pay the money, Mr. McGrady would "put a bullet in his head". The defendant indicated that he knew Mr. McGrady had a gun on him. He maintained that he was going to obtain heroin from Mr. McGrady to sell to "Ed" and that they went to a residence to sell the heroin. He claimed that Mr. McGrady became agitated when "Ed" didn't appear to buy the heroin. He stated that Mr. McGrady slapped him in the face. The defendant noticed a knife on the porch of the residence and he grabbed it. He claimed that Mr. McGrady taunted him and pushed him so he stabbed Mr. McGrady once. They began fighting and they fell over the rail of the porch. According to the defendant, when they went over the rail, the knife went into Mr. McGrady's back. He claimed that Mr. McGrady ran back to Ms. Bolton's vehicle. The defendant stated that he ran after Mr. McGrady, who fell to the ground. The defendant stated that he took heroin from Mr. McGrady's pocket. The defendant claimed he stabbed Mr. McGrady in self-defense. The defendant eventually admitted that he put the knife in the sink of the apartment.

Further testimony at trial disclosed that the victim suffered three stab wounds to his torso. One of the wounds was in his back. These wounds were the cause of his death. The knife that was recovered from the kitchen sink at 70 Kendall Avenue was the only weapon found during the investigation of this case.

Mr. Perez challenges the sufficiency of the evidence relative to his convictions for second-degree murder and robbery. The test for sufficiency is whether viewing the evidence, and all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the fact finder reasonably could have determined that all the elements of the crime were established beyond a reasonable doubt. *Commonwealth v. May*, 584 Pa. 640, 647, 887 A.2d 750, 753 (2005); *Commonwealth v. Mackert*, 781 A.2d 178, 186 (Pa.Super. 2001). It is for the trier of fact to make credibility determinations. *Commonwealth v. Schoff*, 911 A.2d 147, 159 (Pa.Super. 2006). Any doubts concerning a defendant's guilt are to be resolved by the fact finder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from the evidence. *Id.* Credibility determinations must be given great deference. The trier of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. See *Commonwealth v. O'Bryon*, 820 A.2d 1287, 1290 (Pa.Super. 2003).

"Murder of the second degree is a criminal homicide committed while a defendant was engaged as a principal or an accomplice in the perpetration of a felony." *Commonwealth v. Lambert*, 795 A.2d 1010 (Pa. Super. 2002). 18 Pa.C.S.A § 2502(b). Title 18 Pa.C.S.A § 2502(d) defines "perpetration of a felony" as:

the act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

18 Pa.C.S.A. § 2502(d); *Commonwealth v. Gladden*, 445 Pa. Super. 434, 665 A.2d 1201, 1209 (Pa. Super. 1995) (*en banc*), *appeal denied*, 675 A.2d 1243 (Pa 1996).

As set forth in *Lambert*, "[t]he malice or intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim." *Id.* citing *Commonwealth v. Mikell*, 556 Pa. 509, 729 A.2d 566, 569 (Pa. 1999); *Commonwealth v. Holcomb*, 508 Pa. 425, 498 A.2d 833, 855 (Pa. 1985), *cert. denied*, 475 U.S. 1150, 106 S. Ct. 1804, 90 L. Ed. 2d 349 (1986). The elements of second-degree murder do not require that the murder be foreseeable. The only requirement is that the accused participate in conduct as a principal or an accomplice in the perpetration of a felony. *Lambert*, 795 A.2d at 1023.

Moreover, a defendant is culpable for second-degree murder if that defendant is an accomplice. Where the evidence demonstrates that someone other than the actual killer conspired to commit the underlying felony and an act by the actual killer caused the death of the victim in furtherance of the underlying felony, the accomplice is culpable for second-degree murder. *Lambert* at 1023; *Commonwealth v. Middleton*, 320 Pa. Super. 533, 467 A.2d 841, 848 (Pa. Super. 1983); *Commonwealth v. Waters*, 491 Pa. 85, 95, 418 A.2d 312, 317 (1980) *Commonwealth v. Allen*, 475 Pa. 165, 379 A.2d 1335, []; *Commonwealth v. Banks*, 454 Pa. 401, 311 A.2d 576 (1973); *Commonwealth v. Williams*, 443 Pa. 85, 277 A.2d 781 (1971); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958). In fact,

When an actor engages in one of the statutorily enumerated felonies and a killing occurs, the law, via the felony murder rule, allows the finder of fact to infer the killing was malicious from the fact the actor was engaged in a felony of such a dangerous nature to human life because the actor, as held to the standard of a reasonable man, knew or should have known that death might result from the felony.

Commonwealth v. Legg, 491 Pa. 78, 82, 417 A.2d 1152, 1154 (1980); *Middleton*, 467 A.2d at 848. See also, *Commonwealth v. Johnson*, 336 Pa. Super. 1, 485 A.2d 397, 401 (Pa. Super. 1984). See *Commonwealth v. Melton*, 406 Pa. 343, 178 A.2d 728, 731 (Pa. 1962), cert. denied, 371 U.S. 851, 9 L. Ed. 2d 87, 83 S. Ct. 93 (1962), (not only the killer, but all participants in a felony, including the getaway driver, are equally guilty of felony murder when a killing by a felon occurs.)

The predicate felony alleged in this case is robbery. The robbery statute provides, in relevant part:

- (1) A person is guilty of robbery if, in the course of committing a theft, he:
 - (i) inflicts serious bodily injury upon another;
 - (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
 - (iii) commits or threatens immediately to commit any felony of the first or second degree;
 - (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or
 - (v) physically takes or removes property from the person of another by force however slight.
- (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission. 18 Pa.C.S.A. § 3701.

A review of the record reflects that Mr. Perez was involved in the perpetration of a robbery, an enumerated felony in 18 Pa.C.S.A. § 2502(d), when the killing of the victim occurred. The evidence in this case was sufficient to support the verdict in this case. Based on the evidence presented at trial, the jury was free to believe that both Ms. Turnbull and the defendant were heroin addicts. The defendant and Ms. Turnbull contacted Mr. McGrady to obtain a brick of heroin from him. They falsely informed him that they had the money necessary to make the purchase. When Mr. McGrady arrived to make the sale and learned that the defendant and Ms. Turnbull did not have the money, an argument ensued. The defendant had already armed himself with a kitchen knife. During the course of the argument, the defendant wielded the kitchen knife and fatally stabbed Mr. McGrady three times. After Mr. McGrady had been incapacitated, the defendant took heroin from Mr. McGrady's pockets. The jury was free to believe that the defendant used force, namely deadly force, to take the heroin from Mr. McGrady. Possessing and wielding the kitchen knife alone is circumstantial evidence that the defendant threatened force to obtain the heroin. Using a knife to mortally stab Mr. McGrady in order to obtain the heroin is clearly sufficient to demonstrate that the defendant committed the theft by the use of force. The evidence was sufficient to convict and this claim of error is without merit.

Mr. Perez finally claims that both convictions were against the weight of the evidence, as set forth in *Criswell v. King*, 834 A.2d 505, 512. (Pa. 2003)

Given the primary role of the jury in determining questions of credibility and evidentiary weight, the settled but extraordinary power vested in trial judges to upset a jury verdict on grounds of evidentiary weight is very narrowly circumscribed. A new trial is warranted on weight of the evidence grounds only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence that it shocks one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

834 A.2d at 512. *Armbruster v. Horowitz*, 572 Pa. 1, 813 A.2d 698, 703 (Pa. 2002); *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177, 1189 (Pa. 1994).

The initial determination regarding the weight of the evidence is for the fact-finder. *Commonwealth v. Jarowewski*, 923 A.2d 425, 433 (Pa. Super. 2007). This trier of fact was free to believe all, some or none of the evidence. *Id.* Reassessment of the credibility of the witnesses is generally not proper in reviewing weight claims. *Commonwealth v. Manley*, 985 A.2d 256, 261 (Pa. Super. 2009); *Commonwealth v. Gibbs*, 981 A.2d 274 (Pa. Super. 2009). Unless the evidence is so unreliable and/or contradictory as to make any verdict based on such evidence pure conjecture, a weight challenge shall fail. *Gibbs*, at 981 A.2d at 282. A reviewing court is not permitted to substitute its judgment for that of the fact-finder. *Commonwealth v. Small*, 741 A.2d 666, 672 (Pa. 1999). A verdict should only be reversed based on a weight claim if the evidence is so tenuous, vague and uncertain that the verdict was so contrary to the evidence as to shock one's sense of justice. *Id.*; *Commonwealth v. Sullivan*, 820 A.2d 796, 806 (Pa. Super. 2003) (quoting *Commonwealth v. La*, 433 Pa. Super. 432, 640 A.2d 1336, 1351 (Pa. Super. 1994), appeal denied, 540 Pa. 597, 655 A.2d 986 (Pa. 1994)). See also *Commonwealth v. Habay*, 934 A.2d 732, 736-737 (Pa. Super. 2007). Importantly "[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 claims 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 (Pa. 2000); see also *Commonwealth v. Morgan*, 913 A.2d 906 (Pa. Super. 2006) (a weight argument concedes sufficiency but contests which evidence is to be believed).

This Court has reviewed the trial record. A finding by the jury that defendant used force to take heroin from the victim and that the victim died as a result of that force has more than ample support in the record and does not shock any rational sense of justice. The jury was permitted to make its own credibility determinations concerning the evidence and this claim of error should be rejected.

For the foregoing reasons, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: October 28, 2010

¹ A brick of heroin is 50 individually wrapped packages of heroin.

**Commonwealth of Pennsylvania v.
Allan Moorefield**

1st Degree Murder—Suppression—5th Amendment Right Not to Testify—Mistrial

No. CC 200811367. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—October 29, 2010.

OPINION

On February 18, 2010, Appellant, Allan Moorefield, was convicted by a jury of his peers of two counts of Murder of the First Degree and one count of Firearms not to be Carried without a License. Appellant was sentenced to two consecutive life terms of incarceration for the murder convictions, and a consecutive sentence of two to four years for the firearms violation. Post sentence motions were denied on May 7, 2010 and Appellant filed a Notice of Appeal on May 26, 2010. Appellant filed a Statement of Errors Complained of on Appeal on August 19, 2010.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises eleven issues on appeal. First, Appellant asserts that his statements to police should have been suppressed as he could not make a knowing, intelligent and voluntary waiver of his rights due to his mental status, which was debilitated by shock, distress and sadness. (Statement of Errors to be Raised on Appeal, p. 3) Next, Appellant asserts that the evidence was insufficient in that the Commonwealth failed to prove that Appellant shot and killed anyone, failed to prove the requisite mental state for Murder in the First Degree, and failed to disprove self-defense. *Id.* at 3-5. Further, Appellant asserts that the convictions were against the weight of the evidence. *Id.* at 5. Appellant also alleges that the Court erred in instructing the jury on flight as consciousness of guilt. *Id.* at 6-7. Appellant asserts that this Court erred in failing to instruct the jury that a potential witness had invoked his Fifth Amendment right not to testify. *Id.* at 6. Finally, Appellant asserts a mistrial should have been granted on several instances: after the Commonwealth elicited a response regarding Appellant's right to remain silent; after the Commonwealth elicited testimony regarding Appellants criminal history and prior bad acts; after a witness invoked his Fifth Amendment rights; and after the same witness indicated that he had taken a polygraph examination to exclude himself as a suspect. *Ibid.*

HISTORY OF THE CASE

The testimony in this case is summarized as follows. On July 5, 2008, Christopher Brandyburg and William Walker were shot to death inside a minivan in the Homewood section of the City of Pittsburgh. Security guards heard gunshots and saw car glass explode out from the inside of the minivan. Glass was found outside the van in the vicinity of where the security guards heard gunfire. The van drove away with the guards in hot pursuit. The van eventually returned to its starting point and the driver and Appellant exited the vehicle. The two individuals ran away from the guards but Appellant was quickly apprehended.

A police detective testified that he inserted trajectory rods into bullet holes in the van to determine the flight path of the bullets. (Tr. 558) After being mirandized, Appellant initially told police that the victims were shot from outside the van by a passing car as a consequence of a drug deal gone wrong. Appellant was not only unable to offer corroborating evidence in support of this account, but when police confronted him on the inconsistency of his explanation, including both physical and forensic evidence, Appellant put his head down and refused to speak further with the police.

DISCUSSION

Appellant first argues that this Court erred in denying a Motion to Suppress statements made to police by Appellant. The standard of review in determining whether the trial court appropriately denied a suppression motion is whether the record supports the factual findings and whether the legal conclusions drawn from these facts are correct. *Commonwealth v. Stevenson*, 894 A.2d 759, 769 (Pa. Super. 2006).

Appellant alleges that his statements were not knowing, intelligent and voluntary because he was in a debilitated state caused by shock, distress and sadness. Voluntariness is determined from the totality of the circumstances surrounding the statement. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Commonwealth v. Jones*, 683 A.2d 1181 (Pa. 1996). The Commonwealth has the burden of proving by a preponderance of the evidence that the defendant's statement was voluntarily. *Commonwealth v. Watts*, 465 A.2d 1288 (Pa. Super. 1983), *affd* 489 A.2d 747 (Pa. 1985); *see also Colorado v. Connelly*, 479 U.S. 157 (1986). When assessing voluntariness pursuant to the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion *Commonwealth v. Edmiston*, 634 A.2d 1078 (Pa. 1993).

The mental state of the accused is one relevant factor in determining voluntariness, but the record does not support Appellant's claim that he was in a debilitated state. While a person would understandably be in a distressed state following two violent shootings, a car chase and foot pursuit, particularly if the individual was the shooter, that alone would not negate the voluntariness of the statement. Furthermore, the statement which Appellant sought to suppress, wherein he stated that a second vehicle shot into the van and killed the victims, was made several hours later while in police custody. Appellant had been read his *Miranda* rights and indicated that he understood them. In fact, several times Appellant indicated he understood his rights. Appellant did not establish that he was subjected to a long or difficult interrogation. He did not offer any witness to suggest his emotional state was unsettled in any way at the time of the statement. He did not present expert testimony tending to show that, as a result of traumatic events, he was unable to give a voluntary statement. As such, he is not entitled to relief.

Next, Appellant challenges the sufficiency of the evidence. The test for reviewing a sufficiency of the evidence claim is well settled:

[W]hether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt... This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. *Commonwealth v. Hardcastle*, 546 A.2d 1101, 1105 (Pa. 1988) (citations omitted)

Com. v. Torres, 617 A.2d 812, 236-237 (Pa. Super. 1992)

Appellant alleges that the evidence was insufficient to convict in that the element of malice was not established beyond a reasonable doubt. Respectfully, this Court disagrees.

The legal concept of malice was explained to the jury as follows:

The word “malice,” as I am using it, has a special legal meaning. It does not mean simply hatred, spite or ill will. Malice is a shorthand way of referring to any of three different mental states that the law regards as being bad enough to make a killing murder.

The type of malice differs for each degree of murder. For murder of the first degree, a killing is with malice if the perpetrator acts with, first, an intent to kill or, as I will explain in my definition of first degree murder, the killing is willful, deliberate and premeditated.

Tr. 1496. This instruction is taken from the 2010 Standard Jury Instructions and goes on to explain that a defendant who kills in the heat of passion following serious provocation commits manslaughter, not murder.

Given the testimony, the jury had sufficient evidence upon which to find malice. The Commonwealth presented evidence that Appellant shot the victims multiple times, using a deadly weapon on a vital part of the victims’ bodies. The jury was well within its discretion to determine that Appellant had specific intent to kill.

Appellant alleges, in the alternative, that his claim of self-defense was not disproven beyond a reasonable doubt. Giving the Commonwealth the benefit of all proper inferences, a jury could reasonably reject the uncorroborated and self-serving statements of Appellant and instead, rely on the numerous witness and forensic evidence supporting a theory of the case wherein Appellant was the aggressor and not an innocent victim forced to shoot both decedents multiple times in self-defense.

Appellant’s next issue, that the verdict was against the weight of the evidence, is equally meritless. The standard for a “weight of the evidence” claim is as follows:

Whether a new trial should be granted on grounds that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial judge, and [her] decision will not be reversed on appeal unless there has been an abuse of discretion.... The test is not whether the court would have decided the case in the same way but whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail.

Commonwealth v. Taylor, 471 A.2d 1228, 1230 (Pa.Super. 1984) *See also, Commonwealth v. Marks*, 704 A.2d 1095, 1098 (Pa.Super. 1997) (citing *Commonwealth v. Simmons*, 662 A.2d 621, 630 (Pa. 1995))

The evidence supported the jury finding that all of the elements of the crimes for which Appellant was convicted were established beyond a reasonable doubt. Security guards observed the glass of the van exploding outward and heard the shots fired. The guards followed the van and ultimately engaged in a high speed chase of the van. After the van came to a sudden stop, Appellant jumped out of the rear passenger side door of the van, was chased on foot and eventually caught by the guards. A second individual jumped out of the driver’s door, was also pursued on foot but was not apprehended at that time. Of the four individuals in the van, two were dead, one (the driver, later identified as Victorio Hinton) was excluded as the shooter based on the angles of the bullet wounds which penetrated the victims, the bullet holes in the van and the blood spatter on Appellant. The only logical conclusion, the one which the jury reached, is that Appellant was the shooter. Therefore, Appellant is not entitled to a new hearing.

Appellant asserts that this Court erred in permitting a witness, Michael Bigstaff, to invoke his Fifth Amendment right not to testify. After in camera discussion on the record with both counsel and Appellant, the Court determined that Bigstaff could be subject to criminal consequences if he testified. Bigstaff was on state parole at the time. If the Pennsylvania Board of Probation and Parole became aware of his testimony, in which he would have admitted to participating in criminal activity, he could have been subjected to a parole violation hearing. As such, the witness had a Fifth Amendment right not to testify and chose to invoke it.

Under the law, a jury is not permitted to make any inference in a situation when a witness invokes his or her right to not testify against his penal interest. *Com. v. Davis*, 454 A.2d 595, 598 (Pa.Super. 1982) Appellant asserts he was prejudiced by the witness invoking his Fifth Amendment right. Appellant alleges that if he had known that this Court would permit him to refuse to testify, Appellant would have objected to earlier testimony. Counsel during any trial must make strategic decisions and, as testimony and circumstances evolve, make adjustments to that strategy as necessary. Counsel can not possibly foresee the outcome of each and every evidentiary issue and must prepare, to the extent possible, for all possible twists and turns a case may take. Neither the Court nor the Commonwealth made any promise to Appellant on whether the witness in question had a Fifth Amendment right to assert and, if so, whether he would choose to assert it.

Next, Appellant asserts that this Court erred in failing to declare a mistrial on a number of occasions. The standard of review for a mistrial is well settled:

[A] mistrial...is required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial trial. It is well within the trial court’s discretion to determine whether a defendant was prejudiced by the incident that is the basis of a motion for mistrial. *Com. v. Tejada*, 834 A.2d 619, 623 (Pa.Super. 2003) (citations, footnotes, and internal quotes omitted)

Com. v. Hudson, 955 A.2d 1031, 1034 (Pa.Super. 2008)

Appellant asserts that this Court should have declared a mistrial after the Commonwealth asked a witness if he ever indicated that he did not want to speak with police. (Tr. 459) Appellant argued that the question was asking whether the witness had invoked his Fifth Amendment rights. (Tr. 460) The Commonwealth argued that the question was intended to elicit that the witness voluntarily cooperated with police. (Tr. 460-461) This Court permitted the vagaries of the initial question to be resolved by allowing the Commonwealth to rephrase the question. (Tr. 462) A mistrial, under these circumstances, would not have been the proportionate remedy.

Appellant also asserts that this Court erred in denying a motion for a mistrial upon the Commonwealth eliciting testimony regarding prior bad acts and criminal activity of Appellant. Appellant specifically did not request a mistrial. Counsel merely stated, “I think it’s a mistrial if he goes there.” (Tr. 926) Without the request for a mistrial, Appellant is precluded from raising the issue on appeal. To the extent the issue is not waived, Appellant would not be entitled to a mistrial. The Commonwealth asked a question of the witness regarding prior bad acts. Appellant objected and asked for an anticipatory ruling that would preclude the Commonwealth from delving into the prior drug dealings of Appellant. (Tr. 923) This Court directed the Commonwealth to steer away from Appellant’s prior bad acts. (Tr. 927) The Commonwealth, as a result of this Court’s instruc-

tion, abandoned this line of questioning and moved along, which was the appropriate response to the situation. Not every objectionable question is grounds for a mistrial. Mere passing reference to criminal activity will not require reversal. *Com. v. Blystone*, 725 A.2d 1197 (Pa. 1999).

Appellant next asserts that this Court erred in denying his objection and should have declared a mistrial upon witness Deshrick Lewis invoking his Fifth Amendment rights. The witness told a representative of the Commonwealth, in a pre-trial interview, that he had never entered into a drug transaction with either Appellant or the driver of the car. This Court conducted an in camera on the record colloquy of the witness, advising him of the potential consequences of his testimony. The witness requested counsel and then consulted with an attorney from the Public Defender's office. Upon resumption of the colloquy, with the Public Defender present to represent him, the witness indicated that he would truthfully answer all questions, and would not invoke his Fifth Amendment rights. The witness was also instructed not to mention taking a polygraph, and he agreed not to do so.

On the stand, the witness, Lewis, stated that Hinton, the driver of the van, never told him that he (Hinton) was in the van at the time of the incident. The Commonwealth asked Lewis about his previous narcotics transactions, at which time the witness pled the Fifth Amendment. After another lengthy colloquy in chambers, counsel for Appellant stated that Lewis had no Fifth Amendment right to assert. The Public Defender who advised Lewis also indicated that Lewis had no Fifth Amendment right under the circumstances. This Court struck Lewis' invocation of the Fifth Amendment and gave the jury a cautionary instruction. The grant of a mistrial is unnecessary where an adequate cautionary instruction is given to overcome any potential prejudice. *Com. v. Johnson*, 846 A.2d 161, 166-167 (Pa. Super. 2004).

Subsequently, and despite the Court's previous instruction to him, Lewis referenced taking a polygraph. Appellant asked for dismissal of the charges based on prosecutorial misconduct. This motion was denied as the nature of the question asked by the District Attorney could not reasonably have been anticipated to elicit that response. Furthermore, the witness had been instructed not to mention that he had taken a polygraph. Dismissal is not warranted whenever a witness veers off course from the Commonwealth's line of questioning. As Justice Cappy, in *Commonwealth v. Shaffer*, 712 A.2d 749, 752 (Pa. 1998), explained:

Dismissal of criminal charges punishes not only the prosecutor...but also the public at large, since the public has a reasonable expectation that those who have been charged with crimes will be fairly prosecuted to the fullest extent of the law. Thus, the sanction of dismissal of criminal charges should be utilized only in the most blatant cases. Given the public policy goal of protecting the public from criminal conduct, a trial court should consider dismissal of charges where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed.

Id. at 752; See also *Commonwealth v. McElligott*, 432 A.2d 587, 589 (Pa. 1981) ("The remedy of discharge without a fair and complete fact-finding procedure is extreme and will not be invoked absent deliberate bad faith prosecutorial misconduct").

After this Court denied his Motion to Dismiss, Appellant considered but ultimately elected not to move for a mistrial. (Tr. 1181) Instead, both counsel and the Court constructed the following cautionary instruction to be read to the jury:

Good afternoon, ladies and gentleman. I am striking from the record the witness' last answer to the extent that he referred to a polygraph. You are not to consider that testimony in any way. There is no evidence of record of whether anyone in this case submitted to a polygraph. Polygraphs are not considered to be scientifically reliable, are not admissible in court.

You, the jurors, are the sole judges of the facts and the credibility of all of the witnesses. Again, any evidence that I have ordered stricken from the record may not be considered by you for any reason.

(Tr. 1186) This instruction specifically and emphatically addressed the concern of Appellant that the jury would in some way be influenced by hearing the witness' statement that he had taken a polygraph. Furthermore, counsel for Appellant agreed to the instruction as given. (Tr. 1185)

Turning to the allegation of error with the jury instructions, Appellant alleges this Court erred in instructing the jury on flight as evidence of consciousness of guilt. To be entitled to a consciousness of guilt charge, the trial record must provide factual support for the jury instruction. As stated above, security guards testified that, after a car chase, Appellant exited the van and attempted to run from the scene. (Tr. 185) This testimony was sufficient to support a consciousness of guilt charge.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

Commonwealth of Pennsylvania v. Joshua Hathaway

Probation Violation—Sentencing

No. CC 200812837, 200706049. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—November 15, 2010.

OPINION

On August 4, 2010, Appellant, Joshua Hathaway, appeared before this Court for a probation violation hearing. The violations alleged included a conviction for possession of drugs and paraphernalia, disorderly conduct and resisting arrest, as well as nine technical violations. This Court revoked probation and sentenced Appellant as follows: on count one, Simple Assault, six to twelve months incarceration with credit for time served; and on count two, Terroristic Threats, two and one half years to five years incarceration. Appellant's Post-Sentence motion was denied on August 24, 2010. Appellant filed a Notice of Appeal on September 10, 2010 and a Concise Statement of Errors Complained of on Appeal on October 4, 2010.

ERRORS COMPLAINED OF ON APPEAL

Appellant's Statement of Errors Complained of on Appeal raises five issues, all of which assert that this Court made various errors with respect to the imposition of sentence. (Concise Statement of Matters Complained of on Appeal, p. 2-3) Specifically, Appellant "requests a sentence consistent with what would have been the appropriate sentence under the guidelines of the Pennsylvania Commission on sentencing," thereby asserting that this Court failed to do so. *Id.* at 2. Appellant also "objects to the negative light in which he was cast[,] most notably as a result of his insistence that he did not agree to the terms of a particular Service Plan." *Ibid.* Furthermore, "Appellant objects to the fact that the Service Plan presented at his violation hearing was the Service Plan he agreed to for the present case." *Ibid.* Additionally, Appellant objects to the use at sentencing of his failure to comply with the Service Plan. *Ibid.* Finally, "Appellant believes his sentence is excessive because he questioned the presented Service Plan. [given] the fact that his record does not reflect a history of violent behavior and the fact that he has never been convicted of a felony." *Id.* at 3.

DISCUSSION

Appellant's fundamental assertion is that this Court abused its discretion by imposing an excessive sentence. Before addressing the reasonableness of the Court's sentence, this Court notes that Appellant must first establish that a substantial question exists that his sentence is inappropriate under the Sentencing Code. 42 Pa.C.S.A. § 97181(b); *Commonwealth v. Urrutia*, 653 1 A.2d 706, 710 (Pa. Super. 1995) The determination of whether a particular issue constitutes a "substantial question" can only be evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa.Super. 1988). It is appropriate to allow an appeal "where an appellant advances a colorable argument that the trial judge's actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Commonwealth v. Losch*, 535 A.2d 115, 119-120 n. 7 (Pa.Super. 1987). Appellant has not established a substantial question. Appellant essentially argues that his sentence is unreasonable because it is excessive. Appellant's unhappiness with his outcome does not create a substantial question for appellate review.

Assuming, *arguendo*, that Appellant had raised a substantial question, the standard of review with respect to sentencing is whether the sentencing court abused its discretion. *Commonwealth v. Smith*, 673 A.2d 893, 895 (Pa. 1996) A court will not have abused its discretion unless "the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality; prejudice, bias or ill-will." *Ibid.* It is not an abuse of discretion if the appellate court may have reached a different conclusion. *Grady v. Frito-Lay, Inc.*, 613 A.2d 1038, 1046 (Pa. 2003)

This Court sentenced Appellant to six to twelve months incarceration with credit for time served for the Simple Assault charge and two and one half years to five years incarceration on the Terroristic Threats charge. (Transcript of Probation Violation Hearing of August 4, 2010, hereinafter ST 14) Appellant, in his Concise Statement of Errors on Appeal, "requests" a sentence consistent with the guidelines of the Pennsylvania Commission on sentencing. (Concise Statement of Errors Complained of on Appeal at 2) To the extent Appellant contends that he is entitled to a guidelines sentence, this Court notes that "the guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors...they recommend, however, rather than require a particular sentence." *Commonwealth v. Walls*, 956 A.2d 957, 964 (Pa. 2007) Furthermore, the Sentencing Commission has not yet adopted guidelines for probation or parole violations. The sentence imposed by this Court at his violation hearing is not manifestly unreasonable even if it exceeds the standard range of the Sentencing Guidelines that applied at the time he was originally sentenced.

This Court is required to consider the protection of the public, the gravity of the offense in relation to the impact on the victim and community and the rehabilitative needs of the defendant. 42 Pa. C.S. § 9721(b) While this Court considered Appellant's lack of a history of violent behavior or felonious conduct, more dispositive in the Court's eyes was Appellant's failure to comply with his Forensic Service Plan. Such consideration is warranted as it relates to Appellant's amenability to treatment, which this Court must consider. This Court also considered Appellant's conduct with the probation department and at trial, and did not find his explanation of his failure to comply with the terms of his probation to be credible. (ST 14) Furthermore, this Court had previously indicated to Appellant that he was getting a break on sentencing, and if he violated probation he would receive a state sentence. (ST 12) Considering the totality of the circumstances, including the subsequent criminal activity, his failure to complete drug and alcohol treatment, and his defiant attitude toward probation and this Court, his sentence was not excessive or unreasonable.

CONCLUSION

For all of the above reasons, no reversible error occurred and the findings and rulings of this Court should be AFFIRMED.

BY THE COURT:

/s/Rangos

Commonwealth of Pennsylvania v. Shawn Matthew Hickman

Robbery—Insufficient Evidence—Request for Mistrial

No. CC 200710232, 200617304. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Reilly, S.J.—November 15, 2010.

OPINION

The defendant, Shawn Hickman, was found guilty in a jury trial of one count of robbery at CC2007-10232; six counts of burglary, three counts of theft by unlawful taking, three counts of receiving stolen property, one count of criminal attempt-burglary, and one count of criminal conspiracy-burglary at CC2006-17304. The defendant was subsequently found guilty of numerous summary offenses. On January 29, 2010, the defendant was sentenced to 8 to 16 years confinement for the robbery conviction (CC2007-10232); and 2 to 4 years confinement and 5 years probation for the burglary convictions (CC2006-17304) to be served consecutive to the robbery sentence. Appeals have been filed to the convictions. On October 27, 2010, a concise statement of matters com-

plained of on appeal, in accordance with Pa.R.A.P. Rule 1925(b), was filed in the CC2007-10232 case. In this statement defendant asserts that the trial court erred in: failing to grant defendant's motion for mistrial, and that there was insufficient evidence to convict the defendant of the robbery conviction.

The cases involved a robbery at gunpoint which occurred in the Penn Hills area of Allegheny County on June 27, 2007, and various burglaries which occurred over several years. At trial, the Commonwealth presented evidence through many of the victims, various police and investigative witnesses, as well as others involved in the crimes. The armed robbery occurred on June 27, 2007, at a pallet business owned by Tom Gordon. At that time three masked armed gunmen came into his business. Mr. Gordon fled and hid in the bathroom. Mr. Gordon testified that the defendant said "Tom come out". Even though the defendant had a mask covering his face, Mr. Gordon recognized the defendant's voice, as the defendant had been friendly with Mr. Gordon's son and had spoken to Mr. Gordon many times over approximately 10 years. The defendant while holding a gun took approximately \$200. When exiting, the defendant stated "this is for TJ". TJ being a reference to Mr. Gordon's son.

The Commonwealth presented witnesses who were either with the defendant when burglaries were committed, or the defendant had spoken to them regarding his role in the burglaries. These witnesses included Thomas Gordon III (TJ), who had been involved with the defendant in various burglaries. The credibility of the witnesses who had committed burglaries with the defendant or other crimes was a significant factor which was presented to the jury. Each of these prosecution witnesses was questioned extensively with regard to their criminal actions and reasons for testifying. In addition to the victims of many of the burglaries, Detective William Krut of the Monroeville Police Department detailed various burglaries in which the defendant was charged. The detective outlined the dates, locations, damages, and items stolen. At the conclusion of the Commonwealth's case some of the original counts were dismissed by the court.

The defendant initially complains that the trial court should have granted his request for mistrial, when during the jury deliberations there arose questions in which the jury was returned to the courtroom for further instructions. After the court re-charged on various definition items, the jury foreperson asked whether two audiotapes of the defendant's jailhouse calls could be played again. While all the calls were admitted, this request included one that had not been previously played for the jury. When counsel for the defendant objected, the foreperson made a comment that "you put him on the stand". The court then returned the jury to the deliberation room while the attorneys and the court discussed the matter. Ultimately, the court determined that the tapes could not be replayed for the jury at this point. As a general rule, the trial court is in the best position to gauge potential bias and deference is due the trial court when the grounds for the mistrial relate to jury prejudice. *Arizona v. Washington*, 434 U.S. 497, 513-514, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). From this court's vantage point, having the opportunity to observe the jurors and the attorneys to evaluate the scope of any prejudice, there was no apparent harm from the spontaneous remark made by the jury foreperson. Consequently, the defense motion for mistrial was denied.

Next, the defendant asserts that the evidence was insufficient to convict the defendant of the robbery and burglaries. The facts presented and inferences requested to be drawn therefrom through the witnesses for the prosecution, which on some points were in conflict with each other, were presented to the jury. As such, credibility and concluding the facts was the cornerstone of the fact finder's duties. The determination submitted to the jury was based upon the facts, whether the prosecution had proved the defendant's guilt beyond a reasonable doubt.

All of the factors were placed before the jury for its consideration regarding the testimony and the weight to be placed thereon. In a jury trial, the function of the fact finder is to weigh conflicting evidence. *Commonwealth v. Tumminello*, 292 Pa.Super., 437 A.2d 435 (1981). Additionally, the fact finder viewing the witnesses makes credibility determinations with regard to their testimony. The fact finder is free to believe all, some, or none of the evidence presented. *Commonwealth v. Miller*, 555 Pa. 354, 724 A.2d 895, certiorari denied, *Miller v. Pennsylvania*, 120 S.Ct. 242, 528 U.S. 903, 145 L.E.d. 2d 204 (1999). The number of witnesses offered by one side or the other does not in itself determine the weight of the evidence. The fact finder determines the credibility of witnesses presented and the weight of their testimony. *Commonwealth v. Dunn*, 424 Pa.Super. 521, 623 A.2d 347 (1993). In this case the jury acting as the fact finder, found the testimony of the Commonwealth's version of the witnesses sufficient to prove the elements of some of the crimes beyond a reasonable doubt. Since many of the counts alleged against the defendant resulted in non-guilty verdicts, it is apparent that in some instances the Commonwealth did not sustain its burden. As such, the defendant was found guilty of some crimes and not guilty of others.

BY THE COURT:
/s/Reilly, Jr., S.J.

Date: November 15, 2010

CAPSULE SUMMARIES

Richard Geiser v. Dora Geiser

Business Valuation—Alimony

1. The parties were married for twenty six years with the marital estate including the husband's interest in a scrap metal corporation. At the time of trial, the wife presented expert testimony as to the valuation of this business; however, the husband, who had hired an expert and indicated that the expert would be testifying, did not have any expert testify at the time of trial. The court accepted the wife's valuation as the husband was seen to have provided no evidence that would support his claimed value. The court also was clear to state that the valuation accepted did not include the husband's income in the determination of the reasonable fair market value. No double-dip occurred whereby the husband's income would be included in the valuation and also seen as income available for support.

2. The trial court also regarded the alleged transfer of a portion of the husband's business to the husband's paramour to be a sham and included the alleged transferred asset in the marital estate for equitable distribution purposes. The paramour was not credible in her testimony that her company had no relation to the husband's business, when the evidence clearly showed otherwise.

3. The wife was awarded alimony in the amount of \$3,000 per month for a period of five years, with the court basing this alimony on the relative earnings and earning capacities of the parties, the duration of the marriage, and the relative needs of the parties. The court did find that the wife's budget was excessive and, therefore, awarded a lesser amount of alimony than was requested.

(Christine Gale)

Brian C. Vertz, Esquire for Plaintiff/Husband.

Jamie Spero, Esquire for Defendant/Wife.

No. FD06-007978-008. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Bubash, J.—November 17, 2010.

M.H. v. J.H.

Spousal Support—Entitlement Defense

1. The parties were married for two and one-third years prior to their separation and are the parents of one minor child. The wife sought child and spousal support, with the hearing officer awarding child support, but denying the wife's request for spousal support.

2. The hearing officer determined that the wife enjoyed an earning capacity, finding that she quit her job as a corrections officer because of a relationship she had with an inmate. The wife was not credible in her testimony and the husband successfully presented an entitlement defense.

3. The husband successfully argued before the hearing officer that he believed that the wife left the marriage so as to move to a new residence in order for the inmate to move in with her upon his release from jail. The wife was not entitled to support even though it was not clear that adultery was proven as the wife's relationship with another man may constitute the fault of indignities.

4. The reviewing court determined that there may be an indignities argument that would sustain the entitlement defense. This was not fully explored on the record and, therefore, the matter was remanded to address the issue of whether or not the fault of indignities could be sustained so as to find that the entitlement defense was successfully presented such that the wife's claim for spousal support would be denied.

(Christine Gale)

Donald H. Presutti, Esquire for Plaintiff/Wife.

Angelica L. Revelant, Esquire for Defendant/Husband.

No. FD10-4372-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Wecht, J.—November 23, 2010.