PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

PLJ

The Pittsburgh Legal Journal Opinions *are published fortnightly by the*
Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org

Circulation 5,999

PLJ Editorial Staff

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Commonwealth of Pennsylvania v. Nygel Jack

Criminal Appeal—PCRA—Ineffective Assistance of Counsel—Jury Instructions—Credibility—Lack of Prejudice

PCRA petitioner raises multiple claims of Ineffective Assistance of Counsel; all are denied because evidence of guilt was overwhelming

No. CC 200803132. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—February 16, 2016.

OPINION

The appellant, Nygel Jack, (hereinafter referred to as "Jack"), has filed the instant appeal as a result of the denial, following a hearing, of his petition for post-conviction relief. In his statement of matters complained of on appeal, Jack has set forth ten alleged claims of error with numerous subparts, all predicated upon the alleged ineffectiveness of his trial counsel. Jack's claims of error remind one of the observation once made by the Honorable Ruggero Aldisert, commenting upon effective appellate advocacy.

> Finally, both the Commonwealth and Superior Court are correct in emphasizing the importance of expert, focused appellate advocacy. While criminal defendants often believe that the best way to pursue their appeals is by raising the greatest number of issues, actually, the opposite is true: selecting the few most important issues succinctly stated presents the greatest likelihood of success. We concur with the view of an eminent appellate jurist, Judge Ruggero Aldisert, that the number of claims raised in an appeal is usually in inverse proportion to their merit and that a large number of claims raises the presumption that all are invalid. As Judge Aldisert puts it, "Appellate advocacy is measured by effectiveness, not loquaciousness." R. Aldisert, "The Appellate Bar: Professional Competence and Professional Responsibility-A View From the Jaundiced Eye of One Appellate Judge," 11 Cap.U.L.Rev. 445, 458 (1982).
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> *Com. v. Ellis*, 534 Pa. 176, 183, 626 A.2d 1137, 1140-41 (1993)

In this Court's original Opinion, it set forth the facts of Jack's case as follows:

> The evidence presented at a rather lengthy trial reflected that on September 8, 2007, a bar fight began at approximately 4:30 a.m. at Sallade's Bar in West Tarentum, Pennsylvania. The testimony reflected that Amanda Gould; her mother, Cindy Gould; and several other family members and friends were having a party at Sallade's Bar. At some point, Gould and her friends and family left Sallade's to drink at several other establishments in Allegheny County. Gould and her mother and friends later returned to Sallade's Bar, where drinking continued after the closing hour. Jack and two of his friends were seen at another bar and apparently were invited back to Sallade's.
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> After some period of drinking and conversing in an apparent civil manner, a fight broke out. One of the patrons at the bar, Tom Shirey, was apparently more intoxicated than most. Shirey was shut off from further alcohol, responded in a belligerent fashion, and apparently fell after being confronted by individuals telling him to respect the bartender, who was the girlfriend of one of Jack's friends. Some of the other patrons, having seen Shirey fall, apparently believed that Jack and his friends caused this fall. A fight then broke out between Jack, his friends and other patrons in the bar, including Tyrone Woodey. The fight eventually involved nearly everybody in the bar and lasted for quite some time. At some point, Jack either removed himself from the bar or retreated to a hallway area. Several individuals observed Jack at this time with a gun in his hand. Within seconds of the observations of Jack with a firearm, at least one shot was fired. This shot struck Woodey, proceeded through him, and struck Amanda Gould. Cindy Gould, the owner of the bar, apparently attempted to wrestle the gun from Jack's hand. Cindy Gould identified Jack as the individual with a gun in his hand. Amanda Gould likewise identified Jack as the individual with a gun in his hand, while a third individual, Ashley Catalano, also identified Jack as the individual with a gun in his hand. Catalano, who was not drinking, was struck in the head after having observed Jack with the gun and before any shots were fired. Amanda Gould observed Jack point the gun at Woodey. As Amanda Gould attempted to call 911, she heard a shot and felt a burning sensation. This burning sensation was the result of her being struck with the bullet that apparently passed through Woodey before striking her. As noted, several individuals identified Jack as the person at the bar that possessed the firearm and who possessed the firearm within seconds of the shot being fired. While the testimony at trial varied in many respects, and while nearly all of the patrons had been drinking with the exception of Catalano, the testimony was consistent that only Jack had a firearm and that Jack had this firearm within seconds of a shot being fired.

In *Commonwealth v. Montalvo*, 114 A.3d 401, 409-410 (Pa. 2015), the Pennsylvania supreme Court set forth the requirements that one must establish not only in determining eligibility for relief under the Post-Conviction Relief Act but, also, what an appellant is required to prove when the claim that his counsel was ineffective.

> To be entitled to PCRA relief, an appellant must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors in 42 Pa.C.S.A. § 9543(a)(2); his claims have not been previously litigated or waived, *id.* § 9543(a)(3); and the failure to litigate the issue prior to or during trial or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel. *Id.* § 9543(a)(4). An issue is previously litigated if "the highest appellate court in which [the appellant] could have had review as a matter of right has ruled on the merits of the issue." *Id.* § 9544(a)(2). An issue is waived if appellant "could have raised it but failed to do so before trial, at trial, ... on appeal or in a prior state postconviction proceeding." *Id.* § 9544(b).
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> In order to obtain relief on a claim of ineffectiveness of counsel, a PCRA petitioner must satisfy the performance and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Pennsylvania, we have applied the *Strickland* test by requiring that a petitioner establish that (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (2001). In other words, prejudice is assessed in terms of whether the petitioner has shown that the demonstrated

> ineffectiveness *410 sufficiently undermines confidence in the verdict. *Commonwealth v. Fletcher*, 586 Pa. 527, 896 A.2d 508, 516 n. 10 (2006). Counsel is presumed to have rendered effective assistance, and, if a claim fails under any required element of the *Strickland* test, the court may dismiss the claim on that basis. *Commonwealth v. Ali*, 608 Pa. 71, 10 A.3d 282, 291 (2010).
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> *Com. v. Montalvo*, 114 A.3d 401, 409-10 (Pa. 2015)

Jack's initial claim of error he maintains that his trial counsel was ineffective for failing to fully develop through cross-examination and argument to the jury that various witnesses had testified on the basis of information that had been supplied to them rather from their individual memories. In particular, Jack maintains that the testimony of Tyrone Woody, John Woody and Jeffrey Lanious, was not appropriately discredited by his trial counsel. With respect to the testimony of Jeffrey Lanious who was the bartender when the shooting occurred, Jack maintains that his trial counsel should have cross-examined him on the fact that in the statement that he gave to the police, he identified Jack as the shooter despite the fact that when he testified at the time of trial, he said that while he was behind the bar he did not see the shooter. Jack's trial counsel testified that the did not try to impeach Lanious since he did not hurt him with his direct testimony and the Commonwealth never sought to impeach its own witness by presenting that statement to Lanious that he previously told the police that Jack was the shooter.

As with Lanious' testimony, Jack maintains that his trial counsel should have cross-examined John Woody on the basis of his statement to the police that he saw Jack with a gun and identified him as the shooter when John Woody testified that he did not see Jack or anyone else with a gun. In addition to that testimony, John Woody, while maintaining that he was not drunk but did have a significant buzz from the number of drinks that he had, that he could not identify anyone who was in the fight and he did not have a picture perfect memory of the whole night.

Jack also maintains that counsel was ineffective for failing to vigorously cross-examine Tyrone Woody's testimony since he also told the police that Nygel Jack had a gun. While testifying at the time of trial, he had no memory of the incident. Tyrone Woody testified that he was extremely drunk since he had four or five beers plus four or five double shots of Southern Comfort at Praha's Bar before they went to Sallades, where he had another beer and another double. He testified that he did not remember a thing about that night except that after he was shot he recalled that it hurt and he recalled seeing a helicopter and also recalled waking up in the hospital. Other than those three things, he had no memory of what happened that evening. As with the other witnesses, Jack's trial counsel said that none of their direct testimony in any way implicated Jack and it was of no benefit for him to raise the specter that these individuals had said at a previous time that Jack possessed a firearm. It is clear that Jack's trial counsel's decision not to attempt to impeach these witnesses by their prior statements was a competent trial strategy and his failure to do so in no way prejudiced Jack.

Jack next maintains that trial counsel was ineffective for failing to object to the arresting officer's use of the word warrants when he described his interaction with Jack. Officer Michael Murphy of the Akron Ohio Police Department responded to a domestic dispute wherein the appellant gave his name as Michael Cool and had no memory of what his social security number was. Officer Murphy took him into custody and had him printed and when his prints were put in the national database, it was determined that the individual who was part of this domestic dispute was, in fact, the appellant and that he had a warrant outstanding. Shortly thereafter making reference to the fact that Jack was wanted by the police, he used the term warrants. (Trial Transcript, page 453). During the examination of Murphy, the term warrant and warrants were interchangeably used. Jack now maintains by using the word warrants implied that he had a significant criminal background. The problem with this contention is that when questioned about warrants, Officer Murphy testified that Jack had two outstanding warrants, one in Pennsylvania for "aggravated homicide" and another in Ohio. There was no basis to object to the use of this term since there were multiple warrants outstanding for Jack.

Jack next maintains that his trial counsel was ineffective in failing to object to Allegheny County Police Detective Scherer's endorsement of the veracity of the statement made by Amy Verri to him when he stated that it was consistent with the statement that she made to the Tarentum Police. In Ms. Verri's statement to Detective Scherer, she identified the individual with the gun as a light-skinned male, possibly Latino, five foot ten, thin, defined jaw and having diamond-studded ears. She identified that individual as the person who identified himself as Mac. This description did not match Jack but rather matched an individual by the name of Jeffrey MacNeil who the Tarentum Police believed to be a possible suspect. As with the other witnesses who Jack maintains that his trial counsel did not effectively cross-examine, there was no reason to attempt to impeach Verri's statements since she identified the shooter as being someone other than Jack.

Jack next maintains that his counsel was ineffective for failing to object to the testimony of Detective Scherer when he referred to Jack as the shooter. Detective Scherer testified that he had three witnesses who saw Jack with the gun. There was no testimony presented that any other individual in the bar had a weapon. The logical and reasonable inference drawn therefrom was that Jack was the shooter since he was the only one that possessed a firearm. Jack testified that he was not the shooter but, rather, the shooter was Mac, Jeffrey MacNeil, whose street name was Mac. Both the Commonwealth and the defense acknowledge that there was a shooter and this term was only used for the purpose of identifying the individual who committed this particular crime.

Jack next maintains that when Detective Scherer testified, "we ascertained exactly who the shooter is" that he invaded the province of the jury in determining who was ultimately responsible for the commission of these crimes. Detective Scherer's testimony as to who the shooter was was nothing more than his review of the investigation that the police had undertaken to make that particular determination. In the abstract it would appear that Detective Scherer had made the determination for the jury as to who the shooter was, however, this Court in instructing the jury, advised them that they were the ultimate fact-finders and they would make the determination as to the credibility of each and every witness and what the facts were. It is clear that Detective Scherer's comments were nothing more than his recital of the police investigation and not the ultimate determination as to the individual responsible for these shootings.

Jack next maintains that his trial counsel should have objected to the question proposed to Detective Scherer as to whether or not Verri had faked her story several times. The problem with this particular contention is that Detective Scherer testified that Verri was consistent throughout her testimony not only in the statement that was given to him, but also, in the statement given to the Tarentum Police. There was nothing to be gained by making an objection to that question and, in fact, Jack would have lost the conclusion of Detective Scherer as to the truthfulness of Verri's statement which supported his contention that Mac the shooter.

Jack also maintains that his trial counsel was ineffective for failing to challenge Detective Scherer's statement that he had

three or more individuals who identified Jack as the shooter. The Commonwealth presented ten witnesses who testified as to the shooting that occurred within the bar and there were numerous statements as to who the shooter was with respect to each and every one of these witnesses. The fact that Detective Scherer stated that he had three witnesses when there may have been only two is not readily apparent from the record. What is apparent is that there were a number of individuals who made statements to the police as to who the shooter was and also made statements that they had no idea who the shooter was. It was for the jury to make the determination as to what the ultimate facts were in this case and the jury made that determination when they found Jack guilty of these charges. Whether there were two or three witness is immaterial to the ultimate disposition of the charges in this case and as Jack's trial counsel testified, which testimony is in accordance with this Court's recollection of Jack's case, the jury was amused by the testimony that was given by Detective Scherer. To challenge the Detective on a minute point as to whether there were two witnesses or three witnesses, may have been counter-productive to what Jack's trial counsel had already accomplished.

Jack next maintains that his trial counsel was ineffective for failing to object to this Court's charge to the jury on direct evidence. While Jack is correct that this Court stated that they should consider all of the evidence in this case and that the direct evidence was the evidence presented by the Commonwealth's witness, had an objection been interposed, Jack would have been entitled to receive a curative instruction to make it clear that the jury was to consider the testimony of both the Commonwealth and the defense. In reviewing a challenge to the charge, all of the charge has to be reviewed. *Commonwealth v. Einhorn,* 911 A.2d 960 (Pa. Super. 2006). When looking at the charge in its totality, it is clear that the jury was fully instructed as to how they were to consider the evidence in this case. The jury was instructed as to the credibility of all of the witnesses and the jury was also instructed as to the credibility determination to be made with respect to Jack's testimony. The jury further was instructed as the ultimate fact-finder, that they were in a position to accept the testimony of the witnesses in their entirety, to reject a witness' testimony or to accept only a portion of the witnesses' testimony that the jury believed to be credible. In light of the fact that Jack was the only individual to testify on behalf of the defense, it is abundantly clear that the jury was fully aware that they had to consider his testimony since there was a specific instruction as to how to assess his credibility. The fact that this Court misspoke when it talked about direct testimony in no way prejudiced Jack since his jury was fully apprised as to who they were to consider and how they were to consider the testimony of each and every witness, including Jack's testimony.

Jack next maintains that his trial counsel was ineffective for failing to object to the hearsay testimony of the witnesses when they labeled Jack as the shooter. The problem with this particular contention is that these statements are not hearsay but, rather, they are the observations of the witnesses who were present at the scene. The fact that they did not see Jack pull the trigger does not diminish the fact that there was only one gun in the bar where two people were shot. The logical and reasonable conclusion is the individual who possessed the gun was the individual responsible for this shooting.

Jack's final contention of error is that his trial counsel did not raise the claim of the insufficiency of the evidence as to Jack's conviction of the crime of a person not to possess a firearm since the certified conviction offered by the Commonwealth was never admitted. Prior to the selection of the jury in this matter, the charge of person not to possess a firearm was severed from the other charges since the Commonwealth was required to prove that Jack had a prior felony conviction. The Commonwealth, after it had concluded its case and the jury had been sent to deliberate, offered into evidence a certified copy of Jack's conviction of the crime of possession with intent to deliver. The fact that this Court did not state that that exhibit had been admitted is irrelevant since this Court was the ultimate fact-finder. Pursuant to Pennsylvania Rule of Evidence 902, the certified conviction was a self-authenticating document and as a result of which was admissible. This Court obviously accepted that self-authenticating document since it found Jack guilty of this particular crime. Had Jack raised the claim that the evidence was insufficient, that claim would have been rejected out of hand since the Commonwealth established each and every element of the offense of that particular offense. More importantly, as noted by the Superior Court in its original Opinion (Footnote 1), Jack never challenged his conviction for the crime of person not to possess and it was of no moment to his appeal since he received a sentence of no further penalty for that conviction.

BY THE COURT:
/s/Cashman, A.J.

Dated: February 16, 2016

Commonwealth of Pennsylvania v. Larue Graves

Criminal Appeal—Homicide—PCRA—Second Strike—Time Barred

Serial PCRA petition alleging an illegal sentence is time-barred

No. CC 200518626. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—February 16, 2016.

OPINION

The appellant, Larue Graves, (hereinafter referred to as "Graves"), has appealed from the Order denying his petition for post-conviction relief. Pursuant to this Order, Graves has filed a concise statement of matters complained of on appeal. The sole issue that Graves seeks to raise is whether he was sentenced under an illegal sentence, when he was sentenced to life in prison pursuant to 42 Pa.C.S. §9715, the second strike provision. Graves maintains that his sentence was unconstitutional, based upon the United States Court's decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

Graves was charged with homicide at Criminal Court No. 200518626. He proceeded to trial by jury before the Honorable John K. Reilly, Jr. On May 12, 2006, Graves was found guilty of third-degree murder and carrying a firearm without a license.

The Commonwealth filed a notice of its intention to proceed under 42 Pa.C.S. §9715 on May 15, 2006. This statute requires a mandatory sentence of life imprisonment where an individual who has been convicted of third-degree murder has previously been convicted at any time of murder or voluntary manslaughter. Section 9715(b) provides that the sentencing provision is not an

element of the crime and notice shall not be required to a defendant prior to conviction. Graves was sentenced on October 18, 2006 to the mandatory sentence of life imprisonment. A direct appeal was pursued to the Pennsylvania Superior Court. That Court denied relief in an unpublished Memorandum decision on April 7, 2008 at 847 WDA 2007. A petition for allowance of appeal was then filed with the Pennsylvania Supreme Court. That petition was denied on January 13, 2009.

A pro se petition for post-conviction relief was then filed on July 20, 2009. Following the denial of that petition, Graves appealed to the Superior Court of Pennsylvania at 1033 WDA 2012. On January 28, 2014, a panel of that Court denied the requested relief. Graves again filed a petition for allowance of appeal to the Pennsylvania Supreme Court. That petition was denied on June 11, 2014. The instant petition for post-conviction relief, which was dated November 21, 2014, was docketed on December 1, 2014, in the Court of Common Pleas of Allegheny County, Pennsylvania. The Commonwealth filed an answer to Graves' petition for post-conviction relief on January 7, 2015. On July 15, 2015, this Court dismissed Graves' most recent petition for post-conviction relief. Graves then filed the instant appeal.

It appears that Graves' petition is time-barred. The Pennsylvania Superior Court denied his original appeal on August 7, 2008. The Pennsylvania Supreme Court denied a petition for allowance of appeal on January 13, 2009. Graves then had a ninety-day period in which to see review by the United States Supreme Court. His sentence, therefore, would have become final on April 13, 2009. The petitioner did file a petition for post-conviction relief on July 29, 2009. As previously noted, that petition ran its course through our Appellate Courts as well. This is Graves' second attempt at seeking post-conviction relief. "Nevertheless, there is no formal mechanism in the PCRA for a second round of collateral attack focusing upon the performance of PCRA counsel . . ." *Commonwealth v. Holmes*, 79 A.3d 562, 583 (Pa. 2013).

Even assuming that Graves is not jurisdictionally barred, his argument is without merit. The United States Supreme Court's decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), specifically noted that the parties were not contesting the continued vitality of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that penalty provisions that enhance a statute based upon prior convictions did not create a separate crime. *Alleyne, supra. at 1221, note 1*. Thus, even if not jurisdictionally time-barred, Graves' claim is without merit. Accordingly, this Court properly denied Graves' second petition for post-conviction relief.

BY THE COURT:
/s/Cashman, A.J.

Dated: February 16, 2016

Commonwealth of Pennsylvania v. John Rush

Criminal Appeal—Sufficiency—Weight of the Evidence—Jury Instruction—Sentencing (Discretionary Aspects)—Malice—Crying Juror

Multiple issues in case involving death of police dog and attacks on police officers

No. CC 201402090. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—February 16, 2016.

OPINION

On December 15, 2014, Appellant, John Rush, was convicted by a jury of four counts of Aggravated Assault, and one count each of Disarming a Law Enforcement Officer, Torture of a Police Animal, Cruelty to Animals, Resisting Arrest, Escape, and Possession of a Weapon.[1] This Court sentenced Appellant on March 10, 2015 to an aggregate term of fourteen years ten months to thirty-six years six months incarceration, with consecutive probation of eight years. This Court denied Appellant's Post-Sentence Motion on April 16, 2015. Appellant filed a Notice of Appeal on May 15, 2015 and his Statement of Errors Complained of on Appeal on September 8, 2015.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges that the Court abused its discretion when it failed to grant a pretrial motion for a change in venue due to the extensive pretrial publicity. Next, Appellant alleges that this Court erred in failing to dismiss a juror who cried during the testimony of the death of a police dog. Appellant further alleges that this Court erred in preventing counsel for Appellant from playing the 911 recordings in their entirety to the jury. Appellant alleges this Court erred in failing to give the definition of malice in its jury instructions. Appellant alleges insufficiency of evidence in numerous aspects as well as alleging that the verdicts were against the weight of the evidence. Lastly, Appellant asserts this Court erred by imposing an excessive, unreasonable sentence. (Statement of Errors to be Raised on Appeal, p. 3-4)

SUMMARY OF THE EVIDENCE

At trial, Allegheny County Sheriff's Office Deputy John Herb testified that on January 28, 2014, he was assigned to the fugitive squad, and was looking for Appellant, John Rush. (TT 50-51) Appellant had a warrant out for his arrest for violating the conditions of his probation for a prior conviction. (TT 52) Deputy Herb had received information that Appellant was in the Lawrenceville section of Pittsburgh. *Id.* Once Deputy Herb reached Butler Street in Lawrenceville, he observed an individual who roughly matched the description of Appellant. (TT 53) That individual identified himself to the Deputy as "John" and, shortly thereafter, lunged at the Deputy's handgun. (TT 55) A physical struggle ensued. The Deputy successfully pushed away from "John" and once he had created some distance between them, the Deputy fired his taser which struck "John" but had no effect. (TT 57-58) Immediately thereafter, "John" charged the Deputy and multiple punches were exchanged. (TT 59) At the conclusion of the skirmish, "John" ran away from the Deputy. (TT 60) The Deputy pursued, yelling at "John" that he was under arrest. *Id.* Deputy Herb eventually lost sight of "John". *Id.* Deputy Herb radioed a report of the incident including the location. Approximately 40 minutes later, Deputy Herb, who was still searching for Appellant, became aware of a report of a suspicious male in a house at 3701 Butler Street. (TT 64) Along with other members of law enforcement, Deputy Herb responded to that address. Deputy Herb secured the rear of the building and once Appellant was captured, he identified Appellant as the individual who earlier had

identified himself as "John" and had assaulted him. (TT 66)

Timothy McGill testified that he resided with his fiancée Stephanie Kerr at 3701 Butler Street, Apartment 2 on January 28, 2014. (TT 126) McGill testified that Appellant awoke to a loud knock on his door. (TT 132) Appellant asked McGill to let him into the apartment to use the bathroom. (TT 134) McGill refused and a heated argument ensued, which ended when McGill slammed the door in Appellant's face and locked him out. *Id.* McGill dressed and went down to the laundry room, where he had heard a noise, and upon further investigation discovered Appellant inside, crouched down with his back against the wall. (TT 138) McGill testified that he became infuriated at that point. (TT 139) He said to Appellant that he had no business being in the building. Appellant jumped to his feet and McGill observed that Appellant now had a knife in his left hand. (TT 140) McGill retreated and saw Appellant flee down the steps but not out the front door. *Id.* As the only other option from that location would be the basement, McGill assumed Appellant had gone down the basement stairs. McGill exited the building, took a position from which he could watch the front door, called his fiancée, and told her to lock the door and call the police. (TT 143) Ten to fifteen minutes later, police officers arrived at the scene. (TT 145)

Allegheny County Sheriff's Office Detective Barbara Sparrow testified that she was also a member of the fugitive task force searching for Appellant on January 28, 2014. (TT 198) She heard Deputy Herb on her radio say that Appellant tried to take the Deputy's weapon. (TT 204) She and her partner Detective Ninehouser went to Deputy Herb's location on Butler Street. (TT 205) She switched channels on her radio and asked officers from the City of Pittsburgh to assist the Sherriff's Office in capturing Appellant. (TT 206) About 40 minutes later, she heard the call of a mysterious man in a building at 3701 Butler Street. (TT 207) Upon arrival at the scene, she saw copper taser wires against the side of the building leading up the front stairs. (TT 209) One of the residents let Detective Sparrow into the building and informed her that a strange man had been in the laundry room but that she was not sure where he was at that time. (TT 211) Subsequently, Deputy Sparrow heard other officers loudly announce four or five times from the top of the basement stairs that if anybody is down there they needed to come up. (TT 212, 214) She testified that she went down to the basement with other officers once she realized that Appellant was there. (TT 212)

Officer Daniel Nowak of the Pittsburgh Police testified that he responded to a report of a suspicious male at 3701 Butler Street on January 28, 2014. (TT 310) His initial report indicated that the individual involved had earlier attempted to fight with and disarm a sheriffs' deputy. *Id.* Upon arrival at scene, several officers and sheriffs were searching for the basement based on reports that the suspect had gone into the basement. (TT 311) A perimeter search of the exterior of the building revealed no footprints in the freshly fallen snow. (TT 312) Officer Nowak rang a number of doorbells and was eventually let into the building by an unknown female. (TT 314) Upon gaining entry, he went to the top of the basement steps and looked down. (TT 316)

Officer Nowak yelled as loud as he could, three times, "Pittsburgh Police." "Give up. Surrender." (TT 317-318) He heard no response to any of the verbal commands. (TT 318) Sergeant Henderson decided to send a canine officer alone with his dog down to the basement. (TT 319) Officer Phillip Lerza arrived at the scene with Rocco, his police dog. (TT 321) Officer Lerza also yelled down to the basement three times without any response. *Id.* Officer Lerza and Rocco proceeded to the basement, followed by Officer Nowak and Officer Robert Scott. (TT 322) Officer Lerza requested that Officers Nowak and Scott remain on the stairs while Officer Lerza and Rocco searched the room. *Id.*

As Officer Lerza and Rocco approached the rear part of the basement, Appellant jumped out from behind the right-hand side of a doorway. (TT 328) Officer Nowak observed Appellant immediately start striking Rocco in a downward punching motion on his back. (TT 329) Appellant struck Rocco from behind with both fists. (TT 330) As Officer Lerza moved toward Appellant and Rocco, Appellant disengaged with Rocco and struck Officer Lerza with both hands, fists closed. (TT 331) Officer Nowak yelled out and ran toward the melee. (TT 332) Appellant stopped fighting Officer Lerza and charged Officer Nowak. The two collided at high speed. (TT 333) Appellant swung wildly at Officer Nowak with both hands. (TT 334) Officer Nowak blocked punches with his left hand and struck Appellant with the flashlight he held in his right hand. *Id.* During the combat, Officer Nowak injured his finger and his ankle. (TT 335-336) Officer Nowak gained leverage, took Appellant to the ground and got on top of him. *Id.* Appellant continued to fight, despite the Officer commanding him to stop resisting. (TT 336) Officer Lerza grabbed Appellant's arms but could not get handcuffs on Appellant due to Appellant's resistance. (TT 336-337)

Officer Baker arrived to assist Officers Lerza and Nowak, but the three of them were still unable to handcuff Appellant. (TT 337) A sheriff's deputy came down with his taser in dry stun mode. (TT 338) The Deputy tased Appellant in the leg to no effect. (TT 339) Officer Nowak pulled Appellant's shirt over his head and instructed the Deputy to tase Appellant on the uncovered skin. *Id.* After three applications of the taser to Appellant's bare skin, Appellant stopped fighting and the officers were able to handcuff Appellant. (TT 340) Once Appellant was restrained, Officer Nowak observed Officer Lerza pat Rocco and discover that Rocco was covered in blood. (TT 341) Officer Nowak saw a knife on the ground near Appellant and observed Officer Lerza pick up Rocco and run upstairs. (TT 341-342)

Officer Philip Lerza testified that he arrived on scene with Rocco and was told the suspect may be in the basement of the building. (TT 394) Officer Lerza yelled three separate voice commands from the top of the basement stairs. (TT 395) The first command that the Office gave was "Pittsburgh Police canine. Anyone in the building, sound off now, or I'll send in the dog." *Id.* Next the Officer said, "Pittsburgh Police canine. Anyone in the building, sound off now, or I'll send in the dog and you will be bit." *Id.* Lastly, he said, "Pittsburgh Police canine. Anyone in the building, sound off now, or I'll send in the dog." *Id.* Officer Lerza did not hear any response. (TT 396) The Officer released Rocco's leash and followed the dog into the basement. (TT 397) Rocco cleared one area of the basement at a time, with Officer Lerza four to six feet behind. (TT 400) When Rocco reached the back of the basement, he stopped abruptly by the back right pillar of an archway. (TT 401) Rocco snapped his head to the right, which alerted Officer Lerza that somebody was in that area. (TT 402) Appellant then jumped out swinging his hands wildly at Rocco. (TT 403) Appellant struck Rocco on his back towards his rear. (TT 403-404) Officer Lerza did not see a weapon on Appellant at that time. (TT 404)

As Officer Lerza approached, Appellant came at him. *Id.* Officer Lerza blocked Appellant's punches, grabbed Appellant and pushed him away to the right, towards the wall. (TT 405) Officer Nowak, Rocco, Officer Lerza and Appellant converged in the middle of the room. (TT 406) Appellant hit Rocco in the face and snout. *Id.* Officer Nowak and Appellant ended up on the ground, with Officer Nowak telling Appellant "You're under arrest. Stop resisting." (TT 406-407) Officer Lerza and other officers struggled to subdue Appellant. (TT 408) Eventually they were able to handcuff Appellant. (TT 409) Once Appellant was restrained, Officer Lerza reached back to pet Rocco and his hand returned covered in blood. (TT 410) He said, "I think my dog got stabbed," and started to take Rocco out of the basement. *Id.* As he was walking upstairs, he heard someone say he had found a knife. *Id.* Officer Lerza rushed Rocco to a local veterinary hospital. While Rocco was being examined, Officer Lerza noticed pain in his shoulder. (TT 413)

Upon closer examination, he discovered that he had been stabbed through several layers of clothing. *Id.*

Pittsburgh Police Officer Robert Scott testified similarly regarding the moments before Rocco was sent to the basement. He heard the verbal commands without reply, saw Rocco and Officer Lerza head into the basement. (TT 463-464) When he heard Appellant actively fighting with Rocco and Officers Lerza, he ran down the stairs to assist but fell, injuring his knee. (TT 467)

Pittsburgh Police Officer John Baker testified that he also heard the loud verbal prompts before Rocco was deployed, and went down the stairs when he heard one of the officers say "There he is." (TT 482) He first encountered the injured Officer Scott, who directed him to assist in the attempt to handcuff Appellant, who was fighting with the other Officers. (TT 482-483) Appellant was then still throwing punches with both hands. (TT 484) One of the punches from Appellant's left hand struck Officer Baker in the face. Officer Baker attempted to grab Appellant's left hand and felt a sharp object which the Officer believed was a knife. *Id.* Eventually the Officers subdued Appellant and recovered a knife in close proximity to where the struggle had occurred. (TT 487) Officer Baker later observed that his coat was sliced on his right shoulder. (TT 490)

Detective Thomas Ninehouser of the Allegheny County Sheriff's Office testified that on the day in question he was the partner of Detective Sparrow, and a member of the Fugitive Squad searching for Appellant. (TT 511) When he responded to 3710 Butler Street, he entered and proceeded to the top of the basement stairs. (TT 513, 515) Detective Ninehouser testified that he heard Officer Lerza give three commands to Appellant to come out of the basement. (TT 516) When nobody responded, Officer Lerza then advised that he was going to release the dog. *Id.* Once Officer Lerza and Rocco were in the basement, Detective Ninehouser heard a lot of commotion. *Id.* The Detective proceeded into the basement and saw three city police officers struggling to subdue Appellant. *Id.* He described Appellant's demeanor as "[C]razy, uncooperative, resisting." *Id.* The Officers attempting to subdue Appellant verbally instructed Appellant to stop resisting several times to no effect. (TT 517) Detective Ninehouser tased Appellant once in the leg (through his clothing) with no effect and then once in the stomach on exposed skin which resulted in Appellant saying that he gave up. (TT 517-518)

Dr. Julie Compton, a Board-certified veterinary surgeon, testified as an expert in veterinary surgery. (TT 276) Dr. Compton testified that she worked at the Pittsburgh Veterinary Specialty and Emergency Center (PVSEC), and in that capacity became familiar with a dog named Rocco who had been stabbed. (TT 277-278) Initially, Dr. Compton testified that she was at home but was notified by her resident that Rocco was stabile with a laceration about three centimeters long. (TT 278)

Forty-five minutes later, she received another call that Rocco's condition had worsened. (TT 279) Dr. Compton arrived and performed two surgeries. During the first surgery, she discovered that Rocco's left kidney had sustained irreversible damage. (TT 285) She also observed that his aorta and vena cava were stripped of all soft tissues and the external wound of three centimeters was approximately five inches long internally. *Id.* Two days later she performed a second surgery. (TT 287) Rocco had liters of blood in his abdomen indicative of extensive internal hemorrhaging. *Id.* Dr. Compton could not find the source of the bleeding. While attempting to find the source of the bleeding, Dr. Compton discovered that Rocco's spine had been fractured by the knife wound. (TT 287-288) She stated that "to shred a piece of bone off of a dog's spine underneath inches of muscle would take a very large amount of force." (TT 288) Dr. Compton said that Commonwealth Exhibit 14, a pocket knife with the tip broken off, was consistent with the weapon that caused Rocco's injuries. (TT 289-290) She testified that the force required to break off the tip of the blade would be similar to the force required to injure the dog's spine. (TT 290) Further, she testified that the length of the blade would have been sufficient to cause Rocco's wounds, assuming the knife was fully inserted into the dog. *Id.* Rocco died on January 30, 2014 from hemorrhaging resulting from a stab wound. (TT 291)

Pittsburgh Police Officer Jeffrey Palmer testified that he collected and processed Officer Lerza's clothing. (TT 569) Officer Palmer testified that he observed "a cut-type mark in the shoulder area consistent with the location of [Officer Lerza's] wound, [in] his undershirt, his uniform shirt and his uniform jacket." *Id.* The cuts in each piece of clothing coincided with the laceration Officer Lerza sustained. *Id.*

Aaron Schneider of the Allegheny County Office of the Medical Examiner testified as an expert witness in serology and forensic science. (TT 575-576) He tested the knife that was recovered from the basement of the apartment building. (TT 578) While blood was not visible on the knife, when the knife was sprayed with Luminol, a white glow appeared indicative of the presence of blood. *Id.* However, a subsequent phenolphthalein test was negative for the presumptive presence of blood. (TT 584)

Anita Kozy of the Allegheny County Office of the Medical Examiner testified as an expert witness in forensic biology. (TT 589-590) She tested a stained flannel jacket, and she determined that the jacket contained both human and canine blood. (TT 592, 595) Detective Brian Weismantle later testified that Appellant was wearing the red flannel jacket that Kozy tested when Appellant was taken out of the basement. (TT 657)

DISCUSSION

Appellant alleges that this Court erred in denying a Motion for Change of Venue due to pretrial publicity. Granting or denying a change of venue is within the sound discretion of the trial court. *Commonwealth v. Daugherty,* 426 A.2d 104, 105 (Pa. 1981). In order for Appellant to establish that a change of venue is warranted, he must establish either that the pre-trial publicity is so pervasive and inflammatory as to be inherently prejudicial or actual juror prejudice. *Id.* at 106. Even if pre-trial publicity was sensational, inflammatory, or slanted toward conviction, a change of venue is only required if the publicity has been so extensive, sustained and pervasive that the community is saturated with it and no time has elapsed for the prejudice to dissipate. *Id.* After participating in *voir dire* of a test panel, Appellant withdrew this motion on November 7, 2014. Therefore the issue was not preserved for appellate review. Furthermore, as Appellant has not alleged (nor could he establish) actual juror prejudice, Appellant must establish an environment of pervasive, inflammatory pre-trial publicity which was inherently prejudicial. Appellant has not put evidence on record of such an environment and his bald assertions after the fact are not sufficient to establish a need for a change in venue.

Appellant's next allegation of error is that this Court failed to dismiss a juror who cried during testimony regarding the death of the police dog, Rocco. The showing of emotion, in and of itself, during upsetting testimony, does not require juror dismissal. Pursuant to Pa.R.Crim.P. 1108(a), a trial court may seat an alternate juror whenever a principal juror becomes unable or disqualified to perform his duties. The standard of review for examining a trial court judge's decision to seat an alternate juror is abuse of discretion. *Commonwealth v. Jacobs,* 639 A.2d 786 (Pa.1994).

This Court did not abuse its discretion. Appellant has not established that a juror's crying during extremely emotional testimony, during which the witness also cried, in any way impeded the juror's ability to fulfill the oath to judge the case based on the facts and not on emotion. In addition, this Court emphasized during its closing instructions to the jury that the case must be decided

based on the evidence as it was presented, and that the jury was not to be swayed by emotion, bias or prejudice. (TT 907-908) A jury is presumed to be able to follow the instructions of the court. *Commonwealth v. Jones*, 668 A.2d 491, 494 (Pa. 1995).

Next, Appellant alleges that this Court erred in preventing his counsel from playing 911 recordings in full to the jury. Trial counsel for Appellant attempted to play the 911 tape as part of his cross-examination of Deputy Herb. (TT 98) Deputy Herb testified that he relayed information to his supervisors who then put information out on the radio. The 911 dispatch recording did not contain Deputy Herb's statements. Without having the supervisor who actually made the statements on the stand testifying, the statements contained in the 911 recording are hearsay on hearsay. Neither counsel for Appellant nor the Assistant District Attorney knew the identity of the voices on the 911 tape. As the scene involved numerous police officers and sheriff deputies in a fluid and chaotic environment, none of the witnesses presented were able to identify the voices on the 911 recordings.

This Court offered Appellant the opportunity to ask each witness if he or she had broadcast any information during the events on the night in question. Only if a witness had broadcast any of the information could that witness be cross-examined on where he obtained that information. Counsel also attempted to play the tape as part of his cross-examination of Detective Barbara Sparrow, because her voice was on the tape. However, counsel wished to introduce the tape to refresh her recollection of the initial encounter between Deputy Herb and Appellant. Detective Sparrow had testified that she was monitoring the channel but was not present for Appellant's encounter with Deputy Herb. As such, the problem of hearsay within hearsay remained. Counsel did not ask the declarent, Sergeant Faulds, what he said to dispatch, but instead attempted to "refresh" Detective Sparrow. Ultimately, this Court did permit that portion of the 911 tape to be played during the testimony of Deputy Herb. (TT 110-111)

Appellant next alleges that this Court erred in failing to give a requested jury instruction on the definition of malice. As the Pennsylvania Supreme Court has made clear:

> When reviewing a challenge to part of a jury instruction, we must review the jury charge as a whole to determine if it is fair and complete. A trial court has wide discretion in phrasing its jury instructions, and can choose its own words as long as the law is clearly, adequately, and accurately presented to the jury for its consideration. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law. *Commonwealth v. Jones*, 954 A.2d 1194, 1198 (Pa.Super.2008) (citation omitted).

Com. v. Baker, 963 A.2d 495, 507 (Pa. Super 2008). Counsel for Appellant requested that this Court provide the jury an instruction on malice for the animal cruelty and police animal charges that counsel had adapted from the definition provided for third degree murder. (TT 852) Counsel's adapted jury instructions would have placed an additional evidentiary burden on the Commonwealth not found in the relevant statutes, standard jury instructions or case law. *See Commonwealth v. Shickora*, 116 A.3d 1150, 1156-1157 (Pa. Super. 2015). Counsel argued to add to the Animal Cruelty and Police Animals charges a requirement that the perpetrator act maliciously, that is, that his actions show a wanton and willful disregard of an unjustified and extremely high risk that his conduct would result in death or serious bodily injury to the dog. As counsel's proposed instruction would have resulted in an inaccurate statement of the law, this Court correctly denied counsel's request for the proposed jury instruction.

Appellant alleges that the evidence was insufficient to establish guilt beyond a reasonable doubt on the counts related to Appellant's encounter with Deputy Herb, specifically the Disarming a Law Enforcement Officer, Aggravated Assault, Flight to Avoid Apprehension, and Escape. Appellant also alleges the evidence was insufficient as to the remaining Aggravated Assault counts, in that the Commonwealth failed to prove beyond a reasonable doubt that Appellant intended to cause or knowingly caused bodily injury to any police officer. 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).

"[T]he jury is free to believe all, part, or none of the evidence presented at trial." *Commonwealth v. Gonzalez*, __A.3d__, 2015 WL 252446 (Pa. Super 2015). The victim's testimony standing alone if believed is enough to sustain a conviction. *Commonwealth v. Gabrielson,* 536 A.2d 401 (Pa. Super 1988). The evidence was sufficient for the jury to find Appellant guilty. As to the encounter with Deputy Herb, the Deputy had been given a physical description, including clothing, of an individual with an outstanding warrant. He encountered a man who not only matched to a significant degree that physical description but also was located in the same geographic area as Appellant's girlfriend had reported earlier. Further, he identified himself to the Deputy as "John." Appellant was apprehended a few blocks from this initial encounter, and Officer Herb identified Appellant at the scene of his arrest as the individual named John who had attempted to disarm and assault him and then fled while being told he was under arrest. These facts, taken together, suffice to establish the basis for Appellant's convictions on the charges related to Deputy Herb.

Appellant alleges that the Commonwealth failed to prove beyond a reasonable doubt that Appellant intended to cause or knowingly caused bodily injury to any police officer. The testimony of the Officers and Deputies, as well as the physical evidence, support a conclusion that Appellant, knowing he was about to be arrested, wielded a knife, used it to kill a police animal, and continued to use the knife to attack the law enforcement personnel who were trying to arrest him. Most notably, Officer Lerza's testified that he was stabbed through several layers of clothing which contradicts Appellant's assertion that he did not intend to cause or did not knowingly cause bodily injury. Additionally, Officer Baker testified that while battling with Appellant in an attempt to arrest him, Appellant attempted to use his left hand to strike Baker. Baker was able to deflect the blow but felt a sharp object in Appellant's left hand and later observed that the right shoulder of his coat had been sliced. Appellant argues that he was merely resisting arrest. The jury was free to find that repeatedly stabbing at law enforcement officers with a knife was circumstantial evidence of Appellant's intent to cause bodily injury.

> [E]vidence of Appellant initiating an aggressive confrontation with the victim, his use of a previously hidden deadly weapon on a vital part of the victim's body, his consequent flight, and his attendant and subsequent statements all support an inference beyond a reasonable doubt that Appellant acted with the requisite specific intent.

Commonwealth v. Braswell, No. 2928 EDA 2013, 2015 WL 7723021, at *2 (Pa. Super. Jan. 23, 2015). *See also Commonwealth v. Brown*, 23 A.3d 544 (Pa.Super.2011), (Defendant raised a challenge to his conviction for aggravated assault, claiming he did not intentionally cause an officer bodily injury in resisting the officer's attempts to handcuff him. The Court upheld the defendant's conviction as the evidence showed the defendant attempted to cause the officer bodily injury by wildly flailing his arms, throwing the officer to the ground, and striking him repeatedly in the arm, shoulder, and mouth. *Id.* at 560–61.)

Alternatively, Appellant alleges that the verdicts were against the weight of the evidence because the testimony of the police officers was both internally inconsistent and inconsistent with the other evidence presented at trial. 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)).

Appellant testified it was "a giant coincidence" that the fugitive squad was searching for him in the same part of Pittsburgh in which he was ultimately apprehended. (TT 726) Furthermore, he argues that Deputy Herb's altercation with a man matching Appellant's description named "John" on Butler Street not far from where Appellant was apprehended, was coincidence. Appellant testified that the fact that "John" was carrying garbage bags and was heavily cloaked, the same description Appellant's girlfriend had given the sheriffs earlier that night, was mere happenstance. Appellant also argues it was a coincidence that he was leaving the apartment building on Butler Street, the same building where the taser wires deployed by Deputy Herb during the earlier encounter with "John" were discovered, just as the police arrived. Appellant instead claimed he was visiting McGill, whom he knew, to resolve a dispute. McGill testified, however, that he called the police after Appellant, whom he knew only casually, knocked at his door, attempted to force his way inside and, when unsuccessful, first hid in the laundry room then fled to the basement. Appellant testified that he stabbed Rocco but threw the knife aside before the officers captured him. (TT 702-704) Appellant claims that Officer Baker made up the statement that he felt a sharp object and that Officer Lerza either stabbed himself or came to work stabbed that night with a pre-existing stab wound. Appellant's version of events borders on fantasy. The jury was free to find the testimony of the Commonwealth witnesses to be truthful and to find that Appellant's self-serving testimony lacked credulity.

Appellant's final allegation is that this Court erred in imposing a sentence that was manifestly excessive, unreasonable, and an abuse of discretion. Appellant alleges this Court improperly considered some of the sentencing factors of 42 Pa.C.S. § 9721 and failed to consider other sentencing factors. In addition, Appellant alleges this Court erred in deferring to its "policy" of consecutive sentencing for crimes involving separate victims. Lastly, Appellant alleges this Court failed to mention the guideline ranges at sentencing.

"[T]here is no absolute right to appeal when challenging the discretionary aspect of a sentence." *Commonwealth v. Crump*, 995 A.2d 1280, 1282 (Pa. Super2010); 42 Pa.C.S. § 9781(b). An "[a]ppeal is permitted only after this Court determines that there is a substantial question that the sentence was not appropriate under the sentencing code." *Crump*, 995 A.2d at 1282. 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).

> An allegation that a sentencing court "failed to consider" or "did not adequately consider" certain factors does not raise a substantial question that the sentence was inappropriate. *Commonwealth v. McKiel*. 427 Pa. Super 561, 629 A.2d 1012 (1993); *Commonwealth v. Williams,* 386 Pa. Super 322, 562 A.2d 1385 (1989) (*en banc*). Such a challenge goes to the weight accorded the evidence and will not be considered absent extraordinary circumstances. *McKiel*, 427 Pa. Super at 564, 629 A.2d at 1013.

Commonwealth v. Urrutia, 653 A.2d 706, 710 (Pa. Super 1995). Appellant's allegation of error does not raise a substantial question for appellate review because it fails to allege either inconsistency with the sentencing code or that the sentence stood in contrast to the fundamental norms underlying the sentencing process. However, to the extent a substantial question is raised, and in an abundance of caution, this Court will address the merits of Appellant's challenge to his sentence.

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." *Id.* 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 considered numerous factors in sentencing Appellant, including a Pre-Sentence report. (Transcript of Sentencing hearing of December 10, 2014, hereinafter ST at 2)[2] The Pennsylvania Supreme Court has held:

> Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors… Having been informed by the pre-sentence report, the sentencing court's discretion should not be disturbed.

Commonwealth v. Devers, 546 A.2d 12, 18 (Pa. 1988). This Court imposed sentences, at each count on which a sentence was imposed, either within or below the standard range of the Sentencing Guidelines, which carries its own presumption of reasonability. *Commonwealth v. Walls*, 926 A.2d 957, 964-965 (Pa. 2007).

A sentencing court need not undertake a lengthy discourse of its reasons for imposing a sentence or specifically reference the statute in question, but the record as a whole must reflect the sentencing court's consideration of the facts of the crime and character of the offender. *Commonwealth v. Malovich*, 903 A.2d 1247 (Pa.Super. 2006). In this case, this Court considered that this crime continued a pattern of significant and concerning crimes involving violence. Furthermore, this Court considered Appellant's

lengthy criminal history, which dates back to his juvenile record, his apparent inability or unwillingness to refrain from criminal conduct, and his attempt to manipulate the criminal justice system through coercion and threats. The sentence imposed reflects this Court's determination that the community's need to be protected from Appellant is paramount. Thus, this Court did not err in imposing an aggregate sentence of fourteen years ten months to thirty-six years six months incarceration, with consecutive probation of eight years.

Appellant alleges having a policy of consecutive sentencing for separate victims frustrates the Pennsylvania requirement of individualized sentencing. This Court notes that numerous cases support the principle of consecutive sentences for each victim. *See Commonwealth v. Watson,* 457 A.2d 127 (Pa.Super. 1983) (although separate sentences for indecent assault and corruption of minors were improper because they related to the same criminal act, the court could properly impose separate sentences with respect to each of two victims); *Commonwealth v. Lockhart*, 296 A.2d 883 (Pa.Super. 1972) (several victims robbed during same holdup). Furthermore, this Court's general philosophy toward consecutive sentencing to reflect separate crimes committed on separate victims neither precludes argument as to why such sentences should not be imposed in a particular case nor prevents this Court from imposing a sentence in each case appropriate to the facts of the case and the circumstances of the defendant. This Court imposed sentences in this case based on the facts of this case and the circumstances of this Appellant.

Appellant lastly alleges that this Court failed to mention the guideline ranges for his sentence. All of Appellant's sentences were within or below the Sentencing Guidelines, which this Court reviewed and correctly applied. Appellant has not established a claim for which he is entitled to relief.

> When the record demonstrates that the sentencing court was aware of the guideline ranges and contains no indication that incorrect guideline ranges were applied or that the court misapplied the applicable ranges, we will not reverse merely because the specific ranges were not recited at the sentencing hearing.

Commonwealth v. Canfield, 639 A.2d 46, 50–51 (Pa.Super. 1994).

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.

[1] Appellant was found not guilty of Burglary.

[2] Appellant was given the opportunity at sentencing to note any additions or corrections to the record. Appellant noted some minor discrepancies, but did not address the quote in the Pre-Sentence Report which he now disputes. (ST 2-3)

Commonwealth of Pennsylvania v. Terrill Javon Hicks

Criminal Appeal—Homicide—Sentencing (Discretionary Aspects)—Juvenile Resentencing—Mandatory Sentence

Juvenile convicted of first-degree murder challenges sentence of 35 years to life plus 12½ to 25 years of incarceration.

No. CC 200706205. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—February 29, 2016

OPINION

On October 23, 2014, after a remand from the Superior Court of Pennsylvania,[1] this Court re-sentenced[2] Appellant, Terrill Javon Hicks, on one count each of Murder of the First Degree, Criminal Attempt-Homicide, Aggravated Assault, Possession of a Firearm by a Minor, and Criminal Conspiracy. This Court sentenced Appellant to 35 years to life imprisonment for the Murder in the First Degree conviction, 10 to 20 years for the Criminal Attempt-Homicide conviction, 2 ½ to 5 years for the Aggravated Assault conviction, both sentences to be served consecutive to the Homicide sentence, and no further penalty on the remaining counts. This Court denied Appellant's Motion for Post Sentence Relief on October 28, 2015. Appellant filed a Notice of Appeal and a Statement of Errors Complained of on Appeal on November 3, 2015.

MATTERS COMPLAINED OF ON APPEAL

Appellant, in his Concise Statement, raises four issues on appeal. First, Appellant contends that the re-sentences of 35 years to life imprisonment for Murder in the First Degree, 10 to 20 years imprisonment for Criminal Attempt-Homicide and 2 ½ to 5 years imprisonment for Aggravated Assault, imposed consecutively, resulted in a sentence which was individually and manifestly excessive. (Statement of Errors to be Raised on Appeal, p. 12) Next, Appellant contends that the evidence was insufficient on the Conspiracy and Aggravated Assault charges, in that the evidence presented at trial did not establish a conspiracy and that victim Michael Harris was not the target of the shooter, but rather, was actually inside the house when the shooting occurred. *Id.* Next, Appellant asserts that the convictions were contrary to the weight of the evidence due to incredible and inconsistent testimony from the Commonwealth's witnesses. *Id.* Finally, Appellant asserts that this Court erred in denying Appellant's Motion in Limine, in that the prejudicial effect of testimony regarding an alleged shooting four months after the instant homicide outweighed any probative value. *Id.*

SUMMARY OF EVIDENCE

For a factual summary of the case and testimony, *See Opinion*, February 8, 2012*, at 3-6.

DISCUSSION

Appellant's issues not related to sentencing have been addressed by this Court's prior Opinion. Therefore, this Court adopts and attaches its Opinion dated February 8, 2012 as its full response to these issues once again raised by Appellant.

Regarding Appellant's remaining issue, that his sentence is excessive individually and in the aggregate, the Court notes that in order to address an alleged sentencing error, Appellant must first establish a substantial question that his sentence is 1) inconsistent with a specific provision of the Sentencing Code; or 2) contrary to the fundamental norms which underlie the sentencing process. *Id.* at 364. 42 Pa.C.S. §9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa.Super. 1995). This determination is evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa.Super. 1988). The court's discretion in imposing consecutive as opposed to concurrent sentences is not viewed as a substantial question granting the allowance of an appeal. *Commonwealth v. Marts*, 889 A.2d 608, 612 (Pa.Super. 2005). A substantial question may be raised if the result of an aggregate sentence creates a penalty that no longer fits the crime. *Commonwealth v. Mastromarino*, 2 A.3d 581, 586 (Pa.Super. 2010).

Out of an abundance of caution, this Court will address the merits of Appellant's allegation of error. The standard of review with respect to sentencing is whether the 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." *Id.* In sentencing Appellant, this Court must consider the protection of the public, the rehabilitative needs of the offender, and the gravity of the offense as it relates to the victim and the community. 42 Pa.C.S. § 9721(b).

Appellant was originally sentenced to a mandatory term of life imprisonment on the Murder of the First Degree conviction. Due to the decision in *Miller v. Alabama*, Appellant was re-sentenced.[3] In response to *Miller v. Alabama*, Pennsylvania enacted 18 Pa.C.S. § 1102.1, which provides the mandatory minimum sentences for juvenile murderers. A court is required to sentence a juvenile between ages 15-18 who commits a Murder in the First Degree to at least 35 years to life imprisonment. 18 Pa.C.S. § 1102.1(a)(1).

In accordance with § 1102.1, this Court resentenced Appellant to 35 years to life imprisonment. This Court sentenced Appellant to the mandatory minimum required by Pennsylvania law on the Murder in the First Degree count. As the sentence was statutorily required, his claim of excessiveness as to this count lacks merit.

Appellant was sentenced in the standard range for the counts of Criminal Attempt-Homicide and Aggravated Assault. None of these sentences are individually excessive because they are each within the required or standard range proscribed by the Pennsylvania Sentencing Guidelines. A standard range sentence carries its own presumption of reasonability. *Commonwealth v. Walls*, 926 A.2d 957, 964-965 (Pa. 2007).

Furthermore, the aggregate sentence imposed is not excessive upon consideration of the sentencing factors of § 9721. Appellant heinously murdered 16 year-old Kevin Harrison on his own front porch and attempted to do the same to Kendall Dorsey and Michael Harris. Appellant is not entitled to a volume discount nor should he receive a benefit for his poor aim. It is this Court's obligation to protect the public from those who commit vicious crimes such as those committed by Appellant. This Court did not act unreasonably or with prejudice. This sentence is thoroughly reflective of the gravity of the offense as it relates to the three victims, particularly Kevin Harrison who was robbed of his life, and of the need to protect the community, yet allows the possibility, for Appellant to reenter society as a rehabilitated man in 47 ½ years.

CONCLUSION

For the above reasons, no abuse of discretion occurred and the rulings of this Court shall be AFFIRMED.

BY THE COURT:
/s/Rangos, J.

[1] This case was remanded for re-sentencing pursuant to recent case law developments regarding juvenile life sentences without possibility of parole. *Commonwealth v. Hicks*, 91 A.3d 1293 (Pa.Super. 2013).

[2] For a detailed summary of the prior procedural history, *See Opinion*, February 8, 2012 (attached).

[3] In *Miller v. Alabama*, the Supreme Court held that "mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

*Commonwealth of Pennsylvania v. Terrill Hicks

No. CC 200706205. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—February 8, 2012*

OPINION

On May 3, 2010, Appellant, Terrill Hicks, was convicted by a jury of his peers of one count of Murder of the First Degree, two counts of Aggravated Assault, one count of Criminal Attempt-Homicide, one count of Possession of Firearm by a Minor and one count of Criminal Conspiracy. On August 2, 2010, this Court sentenced Appellant to life without the possibility of parole on the charge of Murder in the First Degree, a consecutive ten to twenty years for the Criminal Attempt-Homicide count, a consecutive five to ten years for the Aggravated Assault and no further penalty on the remaining charges. Post sentence motions were denied on August 25, 2010 and Appellant did not file a timely Notice of Appeal. On June 29, 2011, Appellant filed a *pro se* Post-Conviction Relief Act petition seeking to have his appellate rights reinstated *nunc pro tunc*. On November 7, 2010, this Court reinstated appellate rights to Appellant. Appellant filed a Notice of Appeal on November 17, 2010 and a Statement of Errors Complained of on Appeal on November 30, 2010.

MATTERS COMPLAINED OF ON APPEAL

Appellant essentially raises three issues on Appeal. First, Appellant asserts that the evidence was insufficient on the Conspiracy charge and one of the Aggravated Assault charges, in that the evidence presented at trial did not establish a conspiracy and that victim Michael Harris was not the target of the shooter but rather was actually inside the house at which the shooting occurred. (Statement of Errors to be Raised on Appeal, p. 10) Next, Appellant asserts that the convictions were contrary to the weight of the evidence due to incredible and inconsistent testimony from the Commonwealth's witnesses. *Ibid.* Appellant lastly asserts that this

Court erred in denying Appellant's Motion in Limine, in that the prejudicial effect of testimony regarding an alleged shooting four months after the instant homicide outweighed any probative value. *Id.* at 16.

HISTORY OF THE CASE

The testimony in this case is summarized as follows. Kendall Dorsey testified that on December 23, 2006, while sitting on the front porch with his friend Kevin Harrison, he saw Appellant shooting at him and at Harrison. (Transcript of Jury Trial April 27-May 3, 2010, hereinafter TT 108-9) Dorsey saw co-Defendant Raymont Walker standing with Appellant. (TT 109) Dorsey scurried into the house and avoided injury, but Harrison was shot and killed. (TT 109-10)

Dorsey testified that a few days earlier he was at his friend John McDonald's house. (TT 97) He heard a knock on the door. Another friend, Michael Harris, answered the door. Immediately, Appellant attempted to pull Harris out of the house, but the attempt was unsuccessful as Harris was able to close the door. (TT 98) Dorsey testified that he went upstairs, looked out a window and observed Appellant and Walker in the street holding pistols. *Ibid.*

The following day, the day before the shooting, Dorsey testified that he had an encounter in the neighborhood with Appellant. Appellant said that he had been robbed, and that he thought that Dorsey, Harris and Harrison did it. (TT 100) Dorsey denied robbing Appellant. *Ibid.*

The next day, the day of the murder, Dorsey testified that Appellant and Walker drove up to Dorsey and Harrison while they were walking a dog. Appellant and Walker exited the car, and Walker said, "Where is Mike [Harris] at?" (TT 102) Dorsey observed that both Appellant and Walker had weapons. (TT 103) Dorsey and Harrison lied, denying that they knew Harris' location, and eventually Appellant and Walker got back in their car, a white Chevrolet Impala, and left. (TT 104)

After that incident, Dorsey testified that he and Harrison immediately returned to Harrison's house, where they knew Harris was. *Ibid.* Dorsey noticed a white Chevrolet Impala circling the house, the same car in which he had just seen Appellant and Walker. *Ibid.* He safely entered the residence but eventually went outside to the front porch with Harrison to smoke a cigarette. (TT 105-6) Dorsey told Harris not to join them on the porch because Appellant and Walker were looking for him. (TT 106) Appellant and Walker approached the house. Appellant fired approximately ten shots, killing Kevin Harrison.

John McDonald corroborated Dorsey's testimony regarding the incident at his house. McDonald said that he encountered Appellant at a gas station the day before Appellant came to his house. McDonald said Appellant was upset because he had been robbed. (TT 192) Appellant told McDonald he did not know who had robbed him. *Ibid.*

McDonald said that, on the following day, Appellant came to his house and attempted to forcibly remove Harris from McDonald's home when Harris answered the door. (TT 190) The day after, Appellant and Walker came to his house again. (TT 191) By that point, Appellant had become convinced that Harris, Harrison and a third individual nicknamed "Dee" had robbed him. (TT 192-3) Appellant told McDonald that he was looking for the people that he thought had robbed him, and if Appellant found them, either they would get hurt or someone would die. (TT 196) Walker added that what the robbers had done "wasn't cool" and that he "was going to ride with [Appellant,]" his best friend. (TT 199) McDonald, an army sergeant with eight years of military experience, observed that Appellant was carrying a gun which he recognized as a "Glock 45." (TT 196)

Michael Harris testified that he was inside Harrison's house on the couch in the front living room when the shots were fired. (TT 240) He heard the shots hit the house, so he moved to the floor and exited toward the rear of the house. He also reiterated that Appellant had attempted to pull him out of McDonald's residence on the day before the shooting. (TT 239)

John Betarie, a Homestead police officer, testified that he recovered six shell casings at the scene of the shooting in the location where Dorsey said Appellant was standing, and three additional projectiles on the kitchen floor. (TT 86) These shell casings were sent to the crime lab for analysis. *Ibid.* Dr. Robert Levine, a forensics expert at the crime lab, testified that the 45 caliber casings found at the scene were all fired from the same weapon. (TT 347)

Dr. Abdulrezak Shakir, a forensic pathologist with the Allegheny County Medical Examiner's Office, conducted the autopsy of Kevin Harrison. (TT 357-8) Dr. Shakir stated that Harrison was shot three times. (TT 358) He concluded that Harrison died as a result of a gunshot wound to the head, and ruled the manner of death as homicide. (TT 362)

DISCUSSION

With regard to the first issue on appeal, sufficiency of evidence, the Superior Court set forth the following standard:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact[,] while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Com. v. Frisbie, 889 A.2d 1271, 1274-1275 (Pa.Super. 2005) (citation omitted).

Appellant alleges insufficient evidence of a conspiracy and of an intent to shoot Harris. This Court disagrees with both arguments. As to the conspiracy charge, an eyewitness identified Appellant as the shooter and identified Walker as being with Appellant. A few days earlier, Appellant, again accompanied by Walker, tried unsuccessfully to pull Harris into the street, presumably to exact revenge against the individual Appellant concluded had robbed him. Then later Appellant and Walker together went looking for Harris in the neighborhood. At least two witnesses testified to seeing one or both men with guns on these earlier occasions. The white Impala they had been using was observed circling Harris' residence. Later, Dorsey observed Appellant and Walker across the street from Harris' residence with a gun. At all times Walker was with Appellant, his self-described best friend. Appellant made a statement that he was going to "ride" with Appellant, a statement which, given the context, easily could be interpreted beyond its literal meaning. Given the totality of circumstances, it was not error for the jury to find Appellant and Walker conspired to commit the offenses for which Appellant was convicted

Regarding the Aggravated Assault charge, even assuming the evidence did not support that Harris was an intended target of Appellant, Appellant is incorrect in asserting that he cannot be convicted of Aggravated Assault on an unintended victim. Aggravated Assault is defined as follows:

> 2702. Aggravated assault
>
> (a) Offense defined.--A person is guilty of aggravated assault if he:
>
> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

Appellant's assertion that aggravated assault requires an assailant to intend to cause serious bodily injury to a victim is clearly erroneous. Under a plain reading of the statute, one who causes serious bodily injury to another recklessly under circumstances manifesting extreme indifference to the value of human life is guilty of this offense. Shooting multiple rounds at people standing on the front porch of a house demonstrated Appellant's extreme indifference to the value of human life. *Commonwealth v. Hunter,* 644 A.2d 763 (Pa.Super 1994). This reckless conduct alone is sufficient to support his conviction for Aggravated Assault on a person inside the house, especially when shell casings were recovered from the floor inside that house.

Defendant'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.

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

Appellant alleges the testimony of several witnesses were incredible and inconsistent. The trier of fact is free to determine the credibility of witnesses and may believe all, some or none of the evidence presented at trial. *Commonwealth v. Solano*, 906 A.2d 1180, 1186 (2006). While Dorsey acknowledged lying to the shooter about Harris' whereabouts, likely to protect his friend, his statements regarding the shooting and the events leading up to it were corroborated by other witnesses and physical evidence. Dorsey testified that Appellant shot at the house and at Harrison, killing him. The angle of the bullets were consistent with having been fired from the location where Dorsey testified Appellant was standing with Walker. The casings all matched one weapon, a 45 caliber. A witness familiar with weapons had earlier observed Appellant with a 45 caliber weapon. Taking the evidence in the light most favorable to the Commonwealth, the verdict in this case does not shock one's conscience to the extent that a new trial would be warranted.

Finally, Appellant alleges this Court erred in denying Appellant's Motion in Limine, in that the prejudicial effect of testimony regarding an alleged shooting four months after the instant homicide outweighed any probative value. Specifically, Dorsey testified that four months after witnessing the homicide, a number of individuals shot at him and other members of his family. (TT 115, 118-119) Dorsey believed that he and his family were in danger. As a result of this incident Dorsey decided to reveal additional information to the police. (TT 116, 163, 174)

"Evidence of a defendant's distinct crimes are not *generally* admissible against a defendant solely to show his bad character or his propensity for committing criminal acts, as proof of the commission of one offense is not *generally* proof of the commission of another." *Commonwealth v. Billa,* 555 A.2d 835, 838 (Pa. 1989)(emphasis in original); *See* Pa.R.E. 404; *See also Commonwealth. v. Lark,* 543 A.2d 491, 497 (Pa. 1988). However, this general proscription against admission of a defendant's distinct bad acts is subject to numerous exceptions if the evidence is relevant for some legitimate evidentiary reason and not merely to prejudice the defendant by showing him to be a person of bad character. *Billa, supra.* Exceptions that have been recognized as legitimate bases for admitting evidence of a defendant's distinct crimes include, but are not limited to:

> (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design such that proof of one crime naturally tends to prove the others; (5) to establish the identity of the accused where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other; (6) to impeach the credibility of a defendant who testifies in his trial; (7) situations where defendant's prior criminal history had been used by him to threaten or intimidate the victim; (8) situations where the distinct crimes were part of a chain or sequence of events which formed the history of the case and were part of its natural development (sometimes called "res gestae" exception).

Ibid. citing Pa.R.E. 404(b); *See also Lark, supra*. This list is by no means exhaustive. *See Commonwealth v. Watkins*, 843 A.2d 1203, 1215 n. 1 (Pa. 2003). Additional exceptions are recognized when the probative value of the evidence outweighs the potential prejudice to the trier of fact. *Commonwealth v. Claypool*, 495 A.2d 176 (Pa. 1985) For example, an additional exception, explaining a delay in reporting a crime, was recognized in *Commonwealth v. Dillon*, 925 A.2d 131, 139 (Pa. 2007).

In the case *sub judice,* the critical eye-witness, Dorsey, delayed in fully reporting a crime. Only the testimony regarding the subsequent attempted shooting can explain to the fact finder such a delay. Thus, the probative value of this evidence is significant. The prejudicial effect of testimony regarding a later shooting, in which Appellant may have been involved but was not directly implicated, in the context of a homicide trial, while not insignificant, was considerably less than the probative value. The testimony of the shooting four months after the homicide does not establish any element of the crimes for which Appellant is charged, but it does explain the eyewitness' delay in coming forward. As such, this Court did not err in determining that its probative value outweighs any resulting prejudice to Appellant.

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.