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PLJ

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Opinions

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Commonwealth of Pennsylvania v. Jeffrey Cristina

Criminal Appeal—JLWOP—Resentencing—Batts—20 Years to Life

Resentencing of former juvenile defendant sentenced to life without parole results in 20 years to life sentence.

No. CC 197601478, 197602462 107602464. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Mariani, J.—April 19, 2017.

OPINION

Defendant, Jeffrey Cristina, was a juvenile at the time he was convicted of second degree murder in 1977. The sentencing court originally imposed a mandatory term of life imprisonment on Mr. Cristina. After various post-conviction filings proved unsuccessful, Mr. Cristina's counsel eventually filed an amended petition pursuant to the Post-Conviction Relief Act seeking to have Cristina's life sentence vacated as a result of the United States Supreme Court's pronouncement in *Miller v. Alabama*, 567 U.S. __ (2012) which invalidated automatic sentences of life imprisonment without parole imposed upon juvenile offenders. Upon the United States Supreme Court's decision in *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) deeming the holding of *Miller v. Alabama* to be retroactive, the Pennsylvania Supreme Court remanded this matter to the instant court for resentencing. The defendant's original sentence was vacated and this Court resentenced the defendant to a term of imprisonment of not less than twenty years nor more than life imprisonment. The defendant appeals that sentence claiming that

> [t]he Court's interpretation and strict reliance on *Batts* holding [sic] that it must sentence Mr. Cristina to a minimum term of years to a mandatory life sentence (20 to life) violates the Eighth Amendment to the United States Constitution as interpreted by *Miller* and *Montgomery*."

Because this Court is bound by Pennsylvania Supreme Court precedent and it relied on that precedent in *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) in fashioning the sentence in this case, the judgment of sentence should be affirmed.

In *Batts*, Chief Justice Saylor specifically explained that with respect to defendants who were sentenced as juveniles prior to the decision in Miller:

> **it is our determination here that they are subject to a mandatory maximum sentence of life imprisonment as required by *Section 1102(a)*, accompanied by a minimum sentence determined by the common pleas court upon resentencing.** Defendants in the latter category are subject to high mandatory minimum sentences and the possibility of life without parole, upon evaluation by the sentencing court of criteria along the lines of those identified in *Miller*. See *18 Pa.C.S. §1102.1*. Nevertheless, in the absence of a claim that such difference violates constitutional norms, we have interpreted the statutory provisions applicable to Appellant (and all others similarly situated) in accord with the dictates of the *Eighth Amendment* as set forth in *Miller*, as well as the Pennsylvania Legislature's intent as reflected in the relevant statutory provisions (emphasis supplied).

Accordingly, the Pennsylvania Supreme Court has specifically mandated that Mr. Cristina receive a maximum sentence of life imprisonment and has rejected the notion that such a sentence violates the *Eighth Amendment*. The judgment of sentence should, therefore, be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: April 19, 2017

Commonwealth of Pennsylvania v. Phillip Grayson

Criminal Appeal—Sex Offenses—Guilty Plea—Ineffective Assistance of Counsel—Special Conditions of Probation

Defendant claims his plea was not knowingly entered because he was unaware of the special conditions attached to his sentence.

No. CC 201503163. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. McDaniel, J.—May 5, 2017.

OPINION

The Defendant has appealed from the judgment of sentence entered on September 19, 2016. However, a review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, the judgment of sentence should be affirmed.

The Defendant was charged with Aggravated Indecent Assault of a Child,[1] Unlawful Contact with a Minor,[2] Corruption of Minors,[3] Indecent Assault of a Person Under 13[4] and Endangering the Welfare of a Child[5] in relation to an incident wherein the Defendant touched his four (4) year old granddaughter's genital area and inserted his finger into her vagina while he was babysitting. He appeared before this Court on September 19, 2016 and, pursuant to a plea agreement, pled guilty to Corruption of Minors (graded as a first-degree misdemeanor), Indecent Assault (graded as a second-degree misdemeanor) and Endangering the Welfare of a Child. The Aggravated Indecent Assault and Unlawful Contact charges were withdrawn. The Defendant was immediately sentenced to the agreed-upon term of probation of 12 years with special conditions including no contact with the victim and no contact with any minors, no sexual paraphernalia and no internet access. A timely Post-Sentence Motion to Withdraw his Guilty Plea was filed on September 28, 2016 and a hearing was held on that Motion on December 7, 2016, at which time this Court modified the special conditions to allow the Defendant to have supervised contact with his minor biological children. At the

conclusion of the hearing, the Defendant's Motion to Withdraw was denied on the record and a written Order was subsequently filed on December 6, 2017. This appeal followed.

On appeal, the Defendant raises several claims of error, which are discussed as follows:

1. Knowing, Voluntary and Intelligent Plea

Initially, the Defendant argues that this Court erred in denying his Post-Sentence Motion to Withdraw his Guilty Plea because the plea was not knowing, voluntary and intelligent. Specifically he avers that he was not made aware of the special conditions including no contact with minors and use of the internet. A review of the record reveals that this claim is meritless.

Initially, we note that "there is no absolute right to withdraw a guilty plea and the decision as to whether to allow a defendant to do so is within the sound discretion of the trial court." *Commonwealth v. Pollard*, 832 A.2d 517, 522 (Pa.Super. 2003). "'Post-Sentence motions for withdrawal are subject to higher scrutiny since courts strive to discourage entry of guilty pleas as sentence-testing devices'…A defendant must demonstrate that manifest injustice would result if the court were to deny his post-sentence motion to withdraw a guilty plea." *Commonwealth v. Broaden*, 980 A.2d 124, 129 (Pa.Super. 2009). "The reviewing court will evaluate the adequacy of the plea colloquy and the voluntariness of the resulting plea by examining the totality of the circumstances surrounding the entry of that plea… Pennsylvania law presumes a defendant who entered a guilty plea was aware of what he was doing, and the defendant bears the burden of proving otherwise." *Commonwealth v. Kpou*, 2016 WL 7474401, p. 2 (Pa.Super. 2016).

The law regarding the voluntariness of guilty pleas is well-settled. Our courts "do not require that a defendant be pleased with the outcome of his decision to plead guilty…[only] that a guilty plea be knowing, intelligent and voluntary." *Commonwealth v. Martin*, 611 A.2d 731, 733 (Pa.Super. 1992). In *Commonwealth v. Cole*, 564 A.2d 203 (Pa.Super. 1989), our Superior Court extensively discussed the requirements of a knowing, voluntary and intelligent plea. It stated:

> 'A guilty plea is not a ceremony of innocence, it is an occasion where one offers a confession of guilt… The defendant is before the court to acknowledge facts that he is instructed constitute a crime… He is then to voluntarily say what he knows occurred, whether the Commonwealth would prove them or not, and that he will accept their legal meaning and their legal consequence'… A criminal defendant who elects to plead guilty has a duty to answer questions truthfully…
>
> Pennsylvania has constructed its guilty plea procedures in a way designed to guarantee assurance that guilty pleas are voluntarily and understandingly tendered… The entry of a guilty plea is a protracted and comprehensive proceeding where the court is obliged to make a specific determination after extensive colloquy on the record that a plea is voluntarily and understandingly tendered. A guilty plea colloquy must include inquiry as to whether (1) the defendant understood the nature of the charge to which he is pleading guilty; (2) there is a factual basis for the plea; (3) the defendant understands that he has the right to a jury trial; (4) the defendant understands that he is presumed innocent until he is found guilty; (5) the defendant is aware as to the permissible range of sentences; and (6) the defendant is aware that the judge is not bound by the terms of any plea agreement unless [s]he accepts such agreement… Inquiry into these six areas is mandatory in every guilty plea colloquy.

Commonwealth v. Cole, 564 A.2d 203, 206-207 (Pa.Super. 1989), *internal citations omitted*.

Prior to the plea hearing, the Defendant completed an extensive written colloquy wherein he acknowledged, *inter alia*, that he understood the charges, their factual bases and their possible sentences, that he had the right to a jury trial and was presumed innocent, that he was freely entering the plea and his attorney had not forced him to enter the plea or promised him anything as an incentive to enter the plea, that he had ample opportunity to consult with his attorney prior to entering the plea and that he was satisfied with the services of his attorney. (Guilty Plea Explanation of Defendant's Rights, p. 1-11). In addition, the Defendant signed the "Charge Specific Conditions" form, which states, in part:

> *CONTACT:*
> *The offender is not to have contact with children under the age of 18, beyond incidental business contact, unless approved by the probation/parole officer. The offender is not to loiter within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18.*
>
> *The offender shall further not associate with children under the age of 18, except in the presence of a responsible adult who is aware of the nature of the offender's current offense, criminal background and who has been approved by the probation officer.*
>
> …
>
> *COMPUTER/INTERNET ACCESS:*
> *The Defendant shall not possess or use a computer with access to any "online computer service" or any other electronic device that allows internet connections and/or access at any location (including employment) without the prior written approval of the probation/parole officer. This includes any interest services provided, bulletin board system or any other public or private computer network.*

(Charge Specific Conditions, p. 1-2).

Thereafter, the following occurred at the plea hearing:

> THE COURT: Okay. Ms. Goldfarb, I understand this is a plea agreement as to the charges?
>
> MS. GOLDFARB: That is correct, Your Honor. The Defendant will plead guilty to Count 3, as amended as a misdemeanor of the first degree.
>
> Count 4, which would be the A(1) without consent, and Count 5 as it is currently charges.
>
> We are asking for 12 years of probation on this case. The Defendant would register for Megan's Law for 15 years. There would be no contact with the victim, as well as the other Sex Offender Court requirements.

THE COURT: You mean the special conditions?

MS. GOLDFARB: That is correct, Your Honor.

THE COURT: Mr. Grayson, will you state your name for the record.

THE DEFENDANT: Phillip Grayson.

THE COURT: How old are you?

THE DEFENDANT: 47.

THE COURT: How much education have you had?

THE DEFENDANT: High school. College.

THE COURT: Are you able to read, write and understand the English language?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you had any drugs or alcohol within the last 48 hours?

THE DEFENDANT: No, ma'am.

THE COURT: You understand that you are now charged with Count 3 of being over the age of 18 and corrupting or intending to irrupt the morals of a child under the age of 18, punishable by five years of imprisonment.

Count 2 alleges that you had indecent contact with Jane Doe without her consent.

Count 5 alleges that you were the parent or guardian or person supervising the welfare of Jane Doe, a child under the age of 18, and that you endangered her welfare, punishable by five years of imprisonment.

Do you understand the charges against you?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Thomassey, you agree to stipulate to the Affidavit of Probable Cause?

MR. THOMASSEY: I do, Your Honor.

THE COURT: Anything in addition to the affidavit, Ms. Goldfarb?

MS. GOLDFARB: No, Your Honor. We would rely upon the Affidavit of Probable Cause for the factual basis of this case.

MR. THOMASSEY: That is correct, Your Honor.

THE COURT: Mr. Thomassey, any additions or corrections?

MR. THOMASSEY: No, ma'am.

THE COURT: Mr. Grayson, you are entering a plea of guilty. Are you entering the plea of guilty because you are guilty?

THE DEFENDANT: Yes, ma'am.

THE COURT: You filled out the Guilty Plea Explanation of Defendant's Rights. Did you read, understand and answer all the questions?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you do so while your attorney was present?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you satisfied with he services of Mr. Thomassey?

THE DEFENDANT: Yes, ma'am.

THE COURT: I find that you understand the proceedings. That your plea is knowingly, intelligently and voluntarily made.

(Plea Hearing Transcript, p. 2-5).

In his written Post-Sentence Motion to withdraw his plea, the Defendant claimed not to be aware that the special condition of no-contact with minors applied to his own children. At the hearing on the Defendant's Motion, this Court agreed to modify that condition to allow him to have supervised contact with his biological children (Post-Sentence Motion Hearing Transcript, p. 2). However, the Defendant indicated that he wished to proceed with his Motion to Withdraw, now citing complaints with the services of his attorney, Patrick Thomassey, Esquire:

MS. WILLIAMS: Can you tell the Court what the basis is for you wanting to withdraw the guilty plea. Did you feel -

THE COURT: No. Let him answer.

THE DEFENDANT: Your Honor, this has been going on for over two years. I've always requested to Mr. Thomassey we have a jury trial. Mr. Thomassey was not prepared to proceed with a jury trial. He never questioned or interviewed any of my witnesses. He made no attempts to properly defend me. That's why Mr. Thomassey was terminated and new counsel was hired.

I just respectfully request the opportunity to have my Constitutional right to due process upheld by the Court. In fact,Your Honor, when you were imposing sentence, I tried to stop Mr. Thomassey then, and he told me to be quiet in the courtroom.

(P.S.M.T., p. 4).

However, upon further questioning and discussion regarding the visitation provision, it was revealed that the Defendant's dissatisfaction with the no contact order was the basis for his motion to withdraw, despite his awareness of those conditions at the time of the plea:

> THE COURT: Well, did your probation officer not tell you that you couldn't visit your children unless super - at all?
>
> THE DEFENDANT: Yes, ma'am, he did tell me that.
>
> THE COURT: Did you get angry with the probation officer and tell him that in that case you were going to withdraw your plea?
>
> THE DEFENDANT: No, ma'am. That's not what I said. When I first met the probation officer I told him that the plea was going to be withdrawn. It had nothing to do with that. That only came up after he told me I wasn't permitted to return home. But I made it clear -
>
> THE COURT: Are you his -
>
> THE PROBATION OFFICER: No, Your Honor. I'm standing in for Mr. Arietta. I could not answer that.
>
> THE COURT: What does his report say?
>
> THE PROBATION OFFICER: Your Honor, the report indicates that Defendant reported for the initial interview. He was residing with his wife and four children, three of which were minors. And due to the condition of no contact with minors, he was instructed to leave the home, provide an alternative address. That's when he became irate and indicated he was withdrawing the plea.
>
> THE DEFENDANT: That's not true. He knew I was withdrawing the plea when we first had our first conversation with each other.
>
> THE COURT: Well, why did you plead guilty to touching your granddaughter?
>
> THE DEFENDANT: Mr. Thomassey told me to do that.
>
> THE COURT: If I told you to jump off the Smithfield Street Bridge, would you?
>
> THE DEFENDANT: No, ma'am. Absolutely not.
>
> THE COURT: Well, you see my problem.
>
> THE DEFENDANT: Yes, ma'am, I do. But Mr. Thomassey was not prepared, and he told me that there was going to be no more continuances. And I knew that I either took the plea and was permitted by law to give it back in 10 days or we had to go to trial right then and there, and he was not prepared. He said -
>
> THE COURT: You know, I've worked with Mr. Thomassey for 40 years. He is without question the finest lawyer in this building. No offense. And I know that Mr. Thomassey would not be unprepared for a case.
>
> I also know that he would not talk somebody into pleading that wasn't guilty. In fact, my biggest complaint with Mr. Thomassey is that he thinks all of his people are innocent and all of his people deserve a break. He is passionate about the people he represents.
>
> I find what you're saying to be untruthful. I am sure there is a transcript that exists where you told me that you were pleading guilty because you were guilty.

(P.S.M.H.T., p. 4-7).

Upon reviewing the Defendant's Post-Sentence Motion and the testimony elicited at the hearing on that Motion, this Court was unable to discern a manifest injustice in relation to the entry of the Defendant's guilty plea. Although the Defendant initially averred that his reason for seeking to withdraw his plea was the no-contact provision, when this Court modified the condition to allow the Defendant to have contact with his biological children, the Defendant changed his proffered reason to complaints regarding his attorney, though as this Court stated, this was clearly an untruthful reason. Rather, as the Defendant's own words indicate, he entered the plea with the intent to withdraw it, presumably upon his determination of whether the no-contact provision would be enforced. As discussed in *Broaden*, supra, the use of a guilty plea as a sentence-testing device is inappropriate and is not a sufficient basis for the subsequent withdraw of the plea.

Moreover, as our Supreme Court recently held in *Commonwealth v. Carrasquillo*, 115 A.3d 1284 (Pa. 2015), "we are persuaded by the approach of other jurisdictions which require that a defendant's innocence claim must be at least plausible to demonstrate, in and of itself, a fair and just reason for presentence withdrawal of a plea…More broadly, the proper inquiry on consideration of such a withdrawal motion is whether the accused has made some colorable demonstration, under the circumstances, that permitting withdrawal of the plea would promote fairness and justice. The policy of liberality remains extant but has its limits, consistent with the affordance of a degree of discretion to the common pleas courts." *Commonwealth v. Carrasquillo*, 115 A.3d 1284, 1292 (Pa. 2015). The Defendant has not made any assertions of innocence and has provided no other reasons to justify a finding that withdrawal of the plea would promote fairness and justice.

Ultimately, a review of the written and oral colloquies revels that the Defendant indicated he understood the offenses, their grading, the possible sentences he could receive and the terms of the plea agreement he had reached with the Commonwealth. He further specifically acknowledged his understanding of the no-contact provision as a special condition of his probation. Taken together, the written and oral colloquies clearly demonstrate that the Defendant's plea was knowing, voluntary and intelligent. The Defendant's unhappiness with the length of his sentence does not rise to the level of manifest injustice necessary to require the withdrawal of his plea and therefore this Court did not err in denying the Motion. This claim is meritless.

2. Special Conditions

Next, the Defendant argues that this Court erred in ordering that he have no contact with his biological children as a condition of his probation. Again, this claim is meritless.

Generally speaking, probation orders are "constructed as an alternative to imprisonment and [are] designed to rehabilitate a criminal defendant while still preserving the rights of law-abiding citizens to be secure in their persons and property…When conditions are placed on probation orders, they are formulated to insure or assist a defendant in leading a law-abiding life." *Commonwealth v. Koren*, 646 A.2d 1205, 1208 (Pa.Super. 1994). "However, a person placed on probation 'does not enjoy the full panoply of constitutional rights otherwise enjoyed by those who [have] not run afoul of the law'… A probation order with conditions placed on it will to some extent always restrict a person's freedom." *Id.* at 1209, citing *Commonwealth v. McBride*, 433 A.2d 509, 510 (Pa.Super. 1981).

Pursuant to 42 Pa.C.S.A. §9754, this Court is permitted to impose special conditions on probation, as follows:

> ***§9754. Order of probation.***
>
> *(a) General rule. - In imposing an order of probation the court shall specify at the time of sentencing the length of any term during which the defendant is to be supervised, which term may not exceed the maximum term for which the defendant could be confined, and the authority that shall conduct the supervision.*
>
> *(b) Conditions generally. - The court shall attach such of the reasonable conditions authorized by subsection (c) of this section as it deems necessary to insure or assist the defendant in leading a law-abiding life.*
>
> *(c) Specific conditions. - The court may as a condition of its order require the defendant:*
>
> *…*
>
> *(13) To satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.*

42 Pa.C.S.A. §9754.

Our courts have repeatedly held that "no contact" orders "are neither unreasonable nor unduly restrictive of a person's liberty." *Koren, supra*, at 1209. Moreover, when a defendant has been convicted of a crime against a minor, a "no contact" order prohibiting contact with all minors has been held to be reasonable. *Commonwealth v. Reggie*, 399 A.2d 1125 (Pa.Super. 1979).

As noted above, the Defendant pled guilty to Corruption of Minors, Indecent Assault of a Person Under 13 and Endangering the Welfare of a Child in relation to his touching of his four (4) year old granddaughter's vagina. Given these factual circumstances, a no-contact with minors order was appropriate and not unduly restrictive of the Defendant's liberty. Neither is the fact that the Order applies to his biological children (although this Court did agree to modify the condition to allow him supervised contact with them) unduly restrictive, as the Defendant's victim was his own granddaughter, and so a familial relationship is obviously not a deterrent to the Defendant's criminal actions.

Given the Defendant's actions in assaulting his own four (4) year old granddaughter, this Court was well within its discretion in imposing a no contact with minors order as a condition of his probation. This claim must fail.

3. Ineffective Assistance of Counsel

Finally, the Defendant asserts that his attorney was ineffective for failing to object to the no-contact condition at the time of the plea. However there is not currently a sufficient record to support adjudication of this claim at this time. Under such circumstances, ineffectiveness claims are properly deferred until collateral review. *Commonwealth v. Grant*, 812 A.2d 726 (Pa. 2002). Because this claim is not reviewable at this time, it should be dismissed pending collateral review.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on September 19, 2016 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

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[1] 18 Pa.C.S.A. §3125(b)

[2] 18 Pa.C.S.A. §6318.1

[3] 18 Pa.C.S.A. §6301(a)(1)(ii)

[4] 18 Pa.C.S.A. §3126(a)(7)

[5] 18 Pa.C.S.A. §4304(a)

Commonwealth of Pennsylvania v. Jake Knight

Criminal Appeal—Homicide (2nd Degree)—Weight of the Evidence—Identification—Waiver—Burglary—DNA Software (TrueAllele)—404(b) Evidence

Multiple claims related to a second degree homicide conviction, including a challenge to identification evidence.

No. CC 201406386. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Borkowski, J.—May 8, 2017.

OPINION

PROCEDURAL HISTORY

Appellant, Jake Knight, was charged by criminal information (CC 201406386) with one count of criminal homicide,[1] one count of criminal conspiracy,[2] one count of burglary,[3] three counts of aggravated assault,[4] one count of carrying a firearm without a license,[5] three counts of recklessly endangering another person,[6] and one count of defiant trespass.[7]

Appellant's case was originally assigned to the Honorable Jeffrey A. Manning. On August 22, 2016, Judge Manning granted the Commonwealth's motion for *nolle prosse* as to one count of aggravated assault, one count of carrying a firearm without a license, and one count of defiant trespass.

On August 23, 2016, Appellant's case was reassigned to the Honorable Edward J. Borkowski, and Appellant appeared before that court for a jury trial. At the conclusion of the trial, Appellant was found guilty of second degree murder, conspiracy to commit burglary, burglary, and three counts of recklessly endangering another person. Appellant was found not guilty of first degree murder and aggravated assault.

On November 17, 2016, Appellant was sentenced by the Trial Court to the following:

Count one: second degree murder – life imprisonment;

Count two: conspiracy to commit burglary – one to two years incarceration to be served consecutive to the period of incarceration imposed at count one;

Count eight: recklessly endangering another person – six to twelve months incarceration to be served consecutive to the period of incarceration imposed at count two;

Count nine: recklessly endangering another person – six to twelve months incarceration to be served consecutive to the period of incarceration imposed at count eight;

Count ten: recklessly endangering another person – six to twelve months incarceration to be served consecutive to the period of incarceration imposed at count nine.

Appellant received an aggregate sentence of life imprisonment, followed by two and one-half to five years incarceration.

Appellant filed a post sentence motion on November 18, 2016, which was denied by the Trial Court on February 15, 2017.

This timely appeal follows.

STATEMENT OF ERRORS ON APPEAL

Appellant raises the following issues on appeal, and they are presented below exactly as Appellant presented them:

6. The jury's verdict of second degree murder, conspiracy, burglary, and recklessly endangering another person (3 counts) was against the weight of the evidence. A claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Widmer,* 744 A.2d 745, 752 (Pa. 2000). A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror; rather, 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. *Id.*

a. The jury improperly afforded too much weight to the statements of the witnesses in the apartment, who each acknowledged their inability to clearly view the masked actors. *Jury Trial Transcript ("J.T.T.")*, at 358, 363, 422, 424, and 440.

b. The jury improperly afforded too much weight to the gun-shot residue analysis, which showed only a single particle of gun-shot residue on Mr. Knight's clothing and only five total particles on his hands. *J.T.T.*, 311.

7. The trial court abused its discretion in allowing certain witnesses to make in-court eyewitness identifications despite being incompetent to do so, as they were unable to reliably and accurately perceive the individuals who entered the apartment due to the individuals wearing masks or other face coverings, the short duration of the interaction, the witnesses' own focus on the presence of a weapon, and the witnesses each fleeing to other areas of the apartment immediately upon seeing a weapon. Although every person is generally competent to testify, the Pennsylvania Rules of Evidence provide exceptions. Pa.R.E., Rule 601. A person is incompetent to testify if the court finds that because of a mental condition or immaturity, the person is, or was, at any relevant time, incapable of perceiving accurately. Pa.R.E., 601(B)(1), *see also, Commonwealth v. Ware*, 329 A.2d 258, 268 (Pa. 1974) *and Commonwealth v. Baker,* 353 A.2d 454, 457 (Pa. 1976) (both holding that the main factors for determining the competency of a witness is the person's ability to observe the events, remember them, and recount the events). It has long been established that the capacity to perceive is an essential element of testimonial competency. *Ware*, 329 A.2d at 268. Further, it is essential that the witness must be able to present a "substantially accurate account of the event witness." *Id.*, at 268-69.

8. The trial court abused its discretion in denying Mr. Knight's pre-trial discovery request for the source-code to the TrueAllele software program used in this matter.

a. The trial court's failure to require the Commonwealth to produce the software source code violated Mr. Knight's confrontation rights under both the Pennsylvania and United States Constitutions. *See Crawford v. Washington*, 541 U.S. 36 (2004) *and Commonwealth v. Yohe*, 79 A.3d 520, 532 (Pa. 2013) (holding that a toxicology report was testimonial in nature entitling the defendant to a full and fair opportunity of cross-examination).

b. The request for the production of the source-code was reasonable and would not have prejudiced the Commonwealth. Further, the trial court, in its discretion, could have entered a protective order that would have addressed any concerns from the Commonwealth or Dr. Perlin regarding the proprietary nature of the information. Pa.R.Crim.P. 573.

9. The trial court abused its discretion in allowing the jury to hear evidence of a prior bad act that Mr. Knight was alleged to have been involved with in violation of Pa.R.Evid.404(b), as the Commonwealth was unable to introduce evidence to first, substantiate Mr. Knight as an actor in the prior event, and second, establish that the prior event was, in fact, criminal in nature. *J.T.T.*, 9-16, 110-115.

FINDINGS OF FACT

On the evening of April 10, 2014, Tailyn Howard and Janelle Jones invited Lee Williams, Wesley Francis, and Roneka Baker to their apartment (17H) in Hawkins Village, in the Borough of Rankin, Allegheny County. (T.T.(I) 48; T.T.(II) 354-355, 415-416, 433).[8] Francis and Baker arrived together, but Baker left shortly thereafter to check on her children in another apartment in Hawkins Village. Once Williams arrived, he, Francis, Howard, and Jones sat in the living room with the front door open, awaiting Baker's return. (T.T.(II) 356, 416-417, 434, 436-437).

At approximately 8:00 P.M., Appellant and another individual entered Building 17, each armed with a gun, and each wearing a half-mask and all-black clothing. They ran up the staircase to Apartment 17H, and stood in the entrance to the living room. (T.T.(I) 47; T.T.(II) 356, 358-359, 364, 417-419, 437-439). Appellant and his accomplice pointed their guns at the individuals in the living room, and Appellant commanded them to "lay down." (T.T.(II) 360, 419-420). Williams and Francis stood up and told the masked intruders to "get the f- out," but Appellant and his accomplice remained in the apartment with their guns pointed at Francis, Williams, Jones, and Howard. (T.T.(II) 361, 421).

Williams picked up the coffee table that was in the middle of the room, and threw it towards Appellant and his accomplice. At the same time, Williams, Francis, Howard, and Jones fled towards the rear of the apartment, and Appellant shot Williams in the chest. Francis and Howard ran into separate bedrooms, and Jones ran into the laundry room; they closed their respective doors and hid. Wounded by the gunshot, Williams managed to run into the bathroom and close the door. (T.T.(I) 63, 320; T.T.(II) 362-363, 365-366, 398, 400-402, 421-422, 440).

Appellant and his accomplice immediately fled from Building 17 and ran to the rear of Building 35. Appellant resided in Apartment 35B with his mother, who was known in the neighborhood as Miss Roxie. (T.T.(I) 48, 80; T.T.(II) 422-423, 441).

After Appellant and his accomplice fled, Williams, Francis, Howard, and Jones slowly emerged from their hiding spots. Williams was bleeding profusely, and collapsed as he made his way into the kitchen. Francis, Jones, and Howard attempted to stop the bleeding, but Williams continued to bleed profusely as he lay on the kitchen floor, choking on his own blood. (T.T.(I) 63; T.T.(II) 363, 366, 441). Francis called 911, and paramedics arrived shortly thereafter. The paramedics removed Williams to an ambulance and attempted life-saving procedures. Their efforts were to no avail, and Williams was pronounced dead in the ambulance. (T.T.(II) 367, 441). The medical examiner later determined that Williams died from a penetrating gunshot wound to the trunk. (T.T.(I) 331).

Police officers from the Allegheny Housing Authority and detectives from the Allegheny County Police Homicide Division responded to the scene and canvassed the area for the two masked gunmen. During their search, they recovered two firearms beneath the rear steps to Building 35, one Glock Model 31 .357 pistol and one Kel-Tec Model P-11 9mm Luger caliber pistol, each with a partially loaded magazine, and each with a cartridge in the chamber. (T.T.(I) 48, 56, 80, 82, 85, 134-135). The firearms were not there when Chief Mike Vogel of the Allegheny County Housing Authority searched under the same steps earlier in the day while on routine patrol. (T.T.(I) 93-95).

Officers interviewed Francis, Howard, and Jones. All three individuals identified Appellant as one of the masked gunmen. (T.T.(I) 153-155; T.T.(II) 361, 367-368, 424, 442-445). This information was relayed to officers on scene. (T.T.(I) 155). A search warrant for Appellant's apartment was secured and executed at approximately 11:45 P.M. Appellant answered the door after several minutes, and the officers entered the apartment to conduct the search. (T.T.(I) 97-99, 104, 121, 128-129). Appellant stated that he had been sleeping when the officers knocked. Chief Vogel observed fresh condensation on the bathroom walls and water beads in the shower, as if someone had recently showered. (T.T.(I) 99, 101). Several articles of black clothing were seized, including a black neoprene half-mask, which was submitted to the crime lab for testing. (T.T.(I) 123-125, 128).

Appellant was detained and transported to homicide headquarters for an interview. (T.T.(I) 155-156). A gunshot residue kit was performed on Appellant's hands, a DNA swab was obtained, and his clothes were collected for testing at the crime lab. (T.T.(I) 156-157, 161). During Appellant's interview, he indicated that he had invited friends over to his apartment that evening, and that he was in his apartment until police arrived. Appellant again stated that he had taken a shower earlier in the day, not that evening. When asked about the firearms that were found under the steps to Building 35, Appellant stated that they had nothing to do with him. (T.T.(I) 158-160, 162-163).

A gunshot residue kit was performed on Appellant's hands and jeans. The crime lab was unable to determine whether the components on Appellant's hands were gunshot residue because they were only single components and not characteristic particles, but the crime lab was able to determine that Appellant's jeans were positive for gunshot residue.[9] (T.T.(I) 311).

One .357 SIG shell casing was recovered from the living room of Apartment 17H. It was submitted to the crime lab for testing, along with the recovered firearms and a deformed hollow point 9mm projectile recovered from Williams during autopsy. The crime lab was able to determine that the recovered shell casing was discharged from the .357 Glock, and the projectile, while too damaged to make a precise match, was of the same class as the test projectile fired from the Glock. (T.T.(I) 63, 65, 319, 324, 327, 337; T.T.(II) 346). Following a national database search, the Glock was also matched to a shell casing recovered from an incident in Hawkins Village on March 30, 2014. In that incident Appellant was identified as being involved in a "shootout" in Hawkins Village, and similarly removing a firearm from his person behind Building 35. (T.T.(II) 346-347, 349, 369, 371).

Appellant was subsequently arrested and charged as noted hereinabove.

DISCUSSION

I.

Appellant alleges in his first claim that the verdict was against the weight of the evidence. Specifically, Appellant challenges the weight of the evidence as to every count based on the argument that the jury placed too much weight on: (1) the eyewitness testimony because "each acknowledged their inability to clearly view the masked perpetrators;" and (2) the results of the gun-shot residue analysis. This claim is without merit.

With respect to a weight challenge based on the credibility of witness testimony, the Superior Court has held:

> When the challenge to the weight of the evidence is predicated on the credibility of trial testimony, our review of the trial court's decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of

> whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Trippett, 932 A.2d 188, 198 (Pa. Super. 2007) (citations and quotations omitted).

An abuse of discretion will only be found where the decision of the trial court is "manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will." *Commonwealth v. Clay*, 64 A.3d 1049, 1055 (Pa. 2013). Furthermore, the fact finder is free to believe all, part, or none of the testimony offered in assessing the credibility of witnesses. *Commonwealth v. DeJesus*, 860 A.2d 102, 107 (Pa. 2004). The fact finder is to resolve any conflicts in evidence or contradictions in testimony, and a new trial should not be granted because of a mere conflict. *Commonwealth v. Lofton,* 57 A.3d 1270, 1273 (Pa. Super. 2012).

Despite the half-mask Appellant wore to cover the bottom half of his face, all three eyewitnesses were still able to identify Appellant. Francis recognized Appellant's distinctive voice; Jones recognized Appellant's hair and mustache; and Howard recognized Appellant's voice and eyes. (T.T.(II) 360-361, 387-388, 392, 424, 428-429, 442-446, 460). Francis and Jones both identified the half-mask found in Appellant's apartment as the mask he wore during the incident. (T.T.(II) 359, 439). Further, both Francis and Jones identified Appellant during a "blind" photo array procedure the night of the incident. (T.T.(II) 293-298).[10] All three eyewitnesses testified before the jury, and were subjected to extensive cross-examination regarding the accuracy of their identifications. Part of this cross-examination included highlighting that Howard was only fifty percent certain of his identification on the night of the incident. (T.T.(II) 373-408, 424-431, 446-459).

Finally, the Trial Court, in addition to the standard instruction on witness credibility, gave a specific instruction on identification testimony. (T.T.(II) 549-554).

As to the gunshot residue analysis, the testimony clearly explained this area of forensic science, and that Appellant's hands were not positive for gunshot residue because they only contained single components. Furthermore, Appellant's attorney conducted thorough cross-examination, emphasizing the difference between single components and characteristic particles. (T.T.(I) 313-316). *See also supra* note 9.

Juries are free to believe all, part, or none of the testimony offered by a witness, and it is not the duty of the reviewing court to reassess credibility or the weight given to specific items of evidence. *DeJesus*, 860 A.2d at 107. The verdict was not contrary to the weight of the evidence, and the Trial Court properly denied Appellant's motion for a new trial. *Commonwealth v. Cox*, 72 A.3d 719, 722-723 (Pa. Super. 2013) (defendant's argument that the jury afforded too much weight to the victim's testimony is without merit as it is not the function of the appellate court to reassess witness credibility, and the evidence was sufficient to support the verdict).

Appellant's claim is without merit.

II.

Appellant alleges in his second claim that the Trial Court abused its discretion in allowing certain witnesses to make in-court identifications despite being incompetent. Appellant's challenge to the competency of the three eyewitnesses is waived. Appellant did not challenge the competency of the witnesses prior to their testimony, and proceeded to thoroughly cross-examine each witness at trial. *See Commonwealth v. Speicher,* 393 A.2d 904, 906 (Pa. Super. 1978) (citing *Commonwealth v. McKinley,* 123 A.2d 735 (Pa. Super. 1956) (failing to object to competency of witness prior to witness testifying constitutes waiver of the issue for appeal); *Commonwealth v. Smith,* 606 A.2d 939, 942 (Pa. Super. 1992) (defendant's claim of incompetency was waived on appeal where witness testified and was cross-examined without reference or objection to his competency). Appellant's claim is waived.

Insofar as Appellant challenges the identifications themselves, this claim goes to the weight of the evidence, not its admissibility or the competency of the witness. The Trial Court thoroughly addressed the weight and credibility of the eyewitness identifications hereinabove, and the Trial Court now incorporates that by reference for purposes of the present discussion. *See supra*, pp. 12-13.

III.

Appellant alleges in his third claim that the Trial Court abused its discretion in denying Appellant's pre-trial discovery request for TrueAllele's source code, in violation of Appellant's confrontation rights. This claim is without merit.

Discovery matters are vested in the sound discretion of the trial court, and will not be reversed absent an abuse of discretion. *Commonwealth v. Rucci*, 670 A.2d 1129, 1140 (Pa. 1996). A trial court may allow discovery of items that are material and reasonable. Pa. R. Crim. P. 573(B)(2). As to the confrontation clause, the Pennsylvania Supreme Court has held as follows:

> The Confrontation Clause merely guarantees a defendant the ability to question adverse witnesses; that ability does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. In short, the Confrontation Clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Thus, the right to confront one's witnesses is satisfied if defense counsel receives wide latitude at trial to question witnesses.

Commonwealth v. Wilson, 602 A.2d 1290, 1296 (Pa. 1992) (citations and quotations omitted).

Here, Appellant sought to compel discovery of the source code for Dr. Mark Perlin's TrueAllele software program. This request was denied by the Honorable Jeffrey A. Manning. Several courts of concurrent jurisdiction have addressed the discoverability of TrueAllele's source code. Here, Judge Manning relied on the reasoning of the Honorable Jill E. Rangos in one such case, and incorporated that decision and record in denying Appellant's request herein. See Orders of Court, March 28, 2016; Order of Court, April 11, 2016. In her memorandum opinion, Judge Rangos relied on *Commonwealth v. Foley*, 38 A.3d 882 (Pa. Super. 2012), and held that TrueAllele was not novel science, the reliability of TrueAllele could be determined without the source code, and "the source code [was] not material to the defendant's ability to pursue a defense." *Commonwealth v. Robinson*, CC 201307777, Memorandum Order by the Honorable Jill E. Rangos, February 4, 2016, p. 2.

Judge Manning properly found that the source code itself was not material to the credibility of Dr. Perlin and the reliability of TrueAllele, and that those were matters properly addressed by cross-examination.[11] Judge Manning did not abuse his discretion in denying Appellant's motion to compel discovery of the source code. *See Foley,* 38 A.3d at 889-890 (release of TrueAllele's source

code is unnecessary to test its reliability, TrueAllele has been tested and validated without release of the source code, and there is no legitimate dispute over Dr. Perlin's methodology).

Appellant's claim is without merit.

IV.

Appellant alleges in his final claim that the Trial Court abused its discretion in allowing the jury to hear prior bad acts evidence. This claim is without merit.

The admission of evidence is a matter vested in the sound discretion of the trial court, and will only be reversed on appeal for an abuse of discretion. In determining whether a specific piece of evidence should be admitted at trial, the trial court must weigh the relevance and probative value of the challenged evidence against any prejudicial effect it may have upon the defendant. *Commonwealth v. Rollins*, 580 A.2d 744, 747 (Pa. 1990).

The Pennsylvania Supreme Court has stated the applicable standard of review for admission of such evidence as follows:

> Generally, evidence of a distinct crime is inadmissible against a defendant who is being tried for another crime solely to establish his or her bad character or a propensity for committing criminal acts. Evidence of other distinct crimes may, however, be admitted in certain circumstances where the evidence is relevant for some other legitimate purpose and not merely to prejudice the defendant by showing him or her to be a person of bad character. For example, a defendant's other criminal acts may be admitted to prove, *inter alia*: (1) motive; (2) intent; (3) absence of mistake; (4) common scheme or plan; (5) identity of the person charged with the crime; and (6) to impeach the credibility of a defendant who testifies in his or her trial.

Rollins, 580 A.2d at 747 (citations omitted).

Here, Appellant alleges that the Trial Court erred in admitting the evidence of the March 30, 2014 incident because the Commonwealth failed to prove that Appellant was an actor in the prior event, and failed to prove that the prior event was criminal in nature. In this regard, the Superior Court has held that Pa. R.E. 404(b):

> is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court. It encompasses both prior *crimes* and prior *wrongs and acts*, the latter of which, by their nature, often lack "definitive proof." Essentially, Lockcuff's complaint about the evidence goes not to its admissibility, but to the weight to be accorded it, a decision clearly left to the fact finder. Thus, Lockcuff would be free to cross-examine Shaner on the facts surrounding the stove incident, her memory of it and her knowledge of who possessed a key to her apartment. But Lockcuff cannot dispute that the Shaner incident was probative of the identity of the perpetrator of the arson.

Commonwealth v. Lockcuff, 813 A.2d 857, 861 (Pa. Super. 2002).

Here, the firearm which discharged the projectile that killed Lee Williams was also discharged during a shootout just ten days prior in Hawkins Village. Wesley Francis identified Appellant as being present during the incident, fleeing that confrontation, and then removing a firearm and mask from his person in the rear of Building 35. (T.T.(II) 347-349, 370-371).

Thus, this evidence established that Appellant had previously disarmed himself behind Building 35, and was associated with the firearm that was used to kill Lee Williams. This evidence was admissible to establish the identity of the actor in this case. *See Commonwealth v. Reid*, 626 A.2d 118, 121 (Pa. 1993) (evidence of second murder was admissible to prove identity of defendant as shooter in the first murder where empty shell casings from the same weapon were found at both murder scenes, and defendant was identified as the shooter in the second murder). The Trial Court did not err in admitting this evidence for the limited purpose of identity. Furthermore, Appellant was not prejudiced by its admission as the Trial Court instructed the jury on the limited use of that evidence. (T.T.(II) 554).

Appellant's claim is without merit.

CONCLUSION

Based upon the foregoing, the judgment of sentence imposed by this Court should be affirmed.

BY THE COURT:
/s/Borkowski, J.

Date: May 8, 2017

[1] 18 Pa. C.S. § 2501(a).

[2] 18 Pa. C.S. § 903(a)(1).

[3] 18 Pa. C.S. § 3502(a)(1).

[4] 18 Pa. C.S. § 2702(a)(1).

[5] 18 Pa. C.S. § 6106(a)(1).

[6] 18 Pa. C.S. § 2705.

[7] 18 Pa. C.S. § 3503(b)(1).

[8] The designation "T.T.(I)" followed by numerals refers to Jury Trial Transcript, Volume I, August 23-24, 2016. The designation "T.T.(II)" followed by numerals refers to Jury Trial Transcript, Volume II, August 25-26, 2016.

[9] A characteristic particle contains all three of the explosive materials from a cartridge: lead, antimony, and barium, and indicates the presence of gunshot residue. A consistent particle contains two of the above elements, and a single component only contains one of the three elements. Here, the gunshot residue kit collected from Appellant's hands revealed three single components on his left palm, and two single components on his right palm. These single components are insufficient for the crime lab to determine whether the particles were from gunshot residue. However, Appellant's jeans had one characteristic particle, one consistent particle, and four single components. This data was sufficient for the crime lab to conclude that Appellant's jeans were positive for the presence of gunshot residue. (T.T.(I) 305, 310-311).

[10] Detectives often utilize a "blind" photo array procedure, wherein one detective creates a photo array based on a specific suspect, and a second detective, with no knowledge of the suspect's identity or placement in the array, administers the array to the witness. (T.T.(II) 296).

[11] At trial, Dr. Perlin explained the methodology of TrueAllele, and was subjected to extensive and thorough cross-examination on the reliability and testability of TrueAllele. (T.T.(I) 265-289).

Commonwealth of Pennsylvania v. William M. Daniels, Jr.

Criminal Appeal—PCRA—Homicide (1st Degree)—Fifth Petition—Not After Discovered Evidence

Affidavits do not qualify as after-discovered evidence relative to homicide conviction when the court finds the witnesses to be not credible.

No. CC 1995-16251, 1996-02235, 1997-02083. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Bigley, S.J.—May 9, 2017.

OPINION

On January 23, 2017, the Defendant filed an appeal to the Pennsylvania Superior Court from this Court's Order of January 3, 2017, which dismissed the Defendant's PCRA Petition that was filed on September 26, 2015, the counseled PCRA Petition that was filed February 24, 2016, and the Amended PCRA Petition that was filed April 25, 2016. The Defendant filed a Motion for Clarification, which this Court denied on January 17, 2017. This Court ordered Defendant to file a 1925(b) Statement of Errors Complained of on Appeal on February 3, 2017. The Defendant's 1925(b) Statement was timely filed on February 24, 2017.

On September 24, 1998, a jury found Defendant guilty of First Degree Murder, Violation of the Uniform Firearms Act, and Criminal Conspiracy. Defendant was acquitted on the charge of Intimidation of a Witness. On November 23, 1998, the Honorable Gerard M. Bigley imposed an aggregate sentence of life imprisonment, plus a consecutive 13 1/2 to 27 years.

The Defendant filed numerous appeals and PCRA petitions. On December 22, 1998, the Defendant filed a direct appeal to the Pennsylvania Superior Court. Counsel was appointed to represent the Defendant. Judgement was affirmed by the Pennsylvania Superior Court on November 27, 2000, and allocator was denied by the Pennsylvania Supreme Court on June 22, 2001. The Defendant did not appeal to the United States Supreme Court.

Judgment of Sentence became final on September 20, 2001, and Defendant had until September 20, 2002 to file a timely PCRA petition. On July 23, 2002, Defendant filed his first PCRA petition, which was a timely filed. Counsel was appointed to represent the Defendant. This Court dismissed Defendant's PCRA petition on July 13, 2004. The Pennsylvania Superior Court affirmed the dismissal on July 6, 2005. Defendant filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which was granted for the consideration of one issue. On March 8, 2006, the Pennsylvania Supreme Court dismissed the issue without prejudice to Defendant's right to raise it in a subsequent PCRA Petition.

On October 24, 2005, Defendant filed a 2nd PCRA Petition. The PCRA court issued an opinion on December 7, 2005, deferring review until after the disposition of the allowance of appeal with the Supreme Court.

On May 19, 2006, the Defendant filed a counseled Supplemental PCRA Petition, which was his 3rd PCRA Petition, alleging he was entitled to relief due to the after-discovered evidence of the recantation statements of two witnesses. A counseled Amended PCRA Petition was filed. This Court held a PCRA hearing on July 15, 2008, in which one witness refused to testify and the other testified. On July 15, 2008, this Court dismissed Defendant's PCRA Petition. The dismissal of Defendant's 3rd PCRA Petition was affirmed by the Pennsylvania Superior Court on May 5, 2009, and Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on September 30, 2009.

On or about June 5, 2006, Defendant filed a Petition for Writ of Habeas Corpus in the U.S. District Court for the Western District of Pennsylvania. The Petition was dismissed on November 17, 2010, and Certificate of Appealability was denied.

On July 9, 2013, Defendant filed his 4th PCRA Petition. Counsel was appointed and Counsel filed a *Turner Finley* No-Merit Letter. In response to the no-merit letter, Defendant retained different counsel, who petitioned to amend the PCRA Petition. The Petition to Amend was granted. On February 11, 2014, Defendant filed a counseled Petition for *Habeas Corpus* Relief. On March 7, 2014, this Court dismissed Defendant's 4th PCRA Petition. The dismissal was affirmed by the Pennsylvania Superior Court on January 8, 2015. Petition for Allowance of appeal was denied by the Pennsylvania Supreme Court on August 4, 2015.

Defendant filed the instant *pro se* PCRA Petition on September 26, 2015, which was his 5th PCRA Petition. Counsel was appointed but withdraw after Timothy J. Lyon, Esquire, entered his appearance on December 4, 2015. Counsel filed an Amended PCRA Petition on April 25, 2016. The Commonwealth filed an Answer on May 27, 2016.

This matter involves the fatal shooting of a jitney driver, Ronald Hawkins, on September 20, 1994, at approximately 10:00p.m. The facts are summarized as follows. As the Defendant was standing with his companions in the Northside of Pittsburgh, someone rode up the street on his bicycle shouting "The OGs is coming up in a gray car". (Trial Transcript, hereinafter "TT") at 127, 171). The Defendant retrieved his gun and two of his companions (Dale and Thornton) also drew guns. (TT 128, 172-173). The three men ran toward a dark gray Buick that was driven by the victim, who yelled that he was just a jitney driver. (TT 129-130, 173-174). Defendant and the two other armed perpetrators fired their weapons into the car, killing Hawkins. The victim had been shot six times in the abdomen and four times in the arm.

During the trial, Tina Banks testified for the Commonwealth, stating that the shooting was committed by perpetrators that ran on foot to the victim's car and shot the victim many times. Ms. Banks testified that she recognized the Defendant as one of the shooters. Thomas-Carr also testified for the Commonwealth, stating that he witnessed the shooting and it was committed by the

Defendant, who, with two other young men, ran to the victim's car and began shooting.

In the instant PCRA Petition, Defendant attached the affidavits of two alleged eye-witnesses to the shooting. Their affidavits claimed that Defendant was not involved in the shooting, which occurred when a vehicle stopped next to the victim's vehicle and the occupants shot into the victim's car. The alleged witnesses, Tiara Horn and Jacques Early, provided affidavits in the Amended PCRA Petition and testified at an evidentiary hearing before this Court on October 7, 2016.

The Defendant's instant PCRA petition was untimely filed 13 years after the period for a timely PCRA had expired. Therefore, Defendant must prove that any of the timeliness exceptions under 42 Pa.C.S.9545(b)(i-iii) are applicable to his case. There are three exceptions to the PCRA time-bar: (1) interference by government officials in the presentation of the claim; (2) after-discovered evidence; or (3) a newly recognized and retroactively applied constitutional right. *Commonwealth v. Beasley*, 741 A.2d 1258 (Pa 1999). The after-discovered evidence exception requires the defendant to prove that the facts upon which the claim is based were not previously known to him, and that they could not have been obtained earlier through due diligence. If the defendant is able to establish one of the above exceptions, a petition must be filed within 60 days of the date that the claim could have been presented. The defendant has the burden of proof that a timeliness exception applies. *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa 1998).

The Commonwealth argues that the Defendant previously presented a similar claim, which was rejected by the Superior Court. In the PCRA filed on July 23, 2002, (Defendant's first PCRA), Defendant presented an affidavit from Jermale Walker, stating that he was the passenger of the jitney that was shot at and he witnessed the shooting which was perpetrated by occupants of a car that pulled up next to the victim's vehicle. The Commonwealth argues that new sources for the same information ("drive by" shooting, not "walk up" shooting) does not satisfy the exception for newly discovered evidence. New sources (the two new witnesses) for the same information (shooting committed by occupants of car) are not an exception to an untimely PCRA. The Commonwealth cites *Commonwealth v. Marshall*, 596 Pa. 587, 947 A.2d 714 (2008), to support its argument. The after-discovered evidence exception requires newly discovered facts, not newly discovered source for previously known facts. *Id.* at 596 Pa. 596, 947 A.2d 720, citing *Commonwealth v. Johnson*, 598 Pa. 594, 863 A.2d 423, 427 (2004).

The Defendant's first PCRA Petition contained the affidavit of Jermale Walker, who claimed he was a passenger in the victim's car at the time of the shooting and that it was a drive-by shooting, not a walk-up shooting. This Court did not hold an evidentiary hearing, and the Superior Court affirmed. In their July 6, 2005, non-precedential Memorandum, the Superior Court concluded that Walker's affidavit did not present sufficient credible facts to justify a hearing, since Walker only averred "…that he was at the crime scene, heard shots, and took flight, but does not assert that he saw anything". However, in the instant PCRA petition, the affidavits claim that the witnesses saw the shooting. The affidavits are not from the same source that Defendant has already submitted since the present affidavits claim the witnesses saw the shooting. Therefore, this Court held a hearing to assess the credibility of the witnesses and to determine whether the Defendant established after-discovered evidence.

The Defendant presented the testimony of Tiara Horn and Jacques Early during the PCRA hearing of October 7, 2016. Ms. Horn testified that she has known the Defendant for 30 years. She was at a nearby playground on September 20, 1994, the night of the shooting. (PCRA Hearing Transcript (Hereinafter referred to as "HT") at 8). She stated that she was in front of the park talking with someone when she saw a car pull up and the second car started shooting at the first car. She saw someone, not the Defendant, exit the car and run. (HT at 9). Ms. Horn did not see the driver or the passengers in either vehicle. (HT at 10). She only saw the person who exited the first car and ran, and she knew he was not the Defendant. (HT at 9). She testified that she knew the Defendant was convicted of the shooting but did not do anything about it until December of 2016, which was over 21 years after the incident. (HT at 11). Ms. Horn could not recall any specifics about that night, such as weather, or day of the week. Ms. Horn claimed she heard about the Defendant's arrest but she didn't know it was for this situation. (HT at 16). She alleged that she knew to go to the office of Defendant's attorney's after talking with Defendant's lady friend. (HT at 17). Ms. Horn did not have a specific reason for waiting over 20 years and then coming forward with the information in January 2016. She merely stated that "I guess because I'm older now and I feel like I should tell what I saw." (HT at 16).

This Court determined that the testimony of Horn was not credible. This Court does not believe that Ms. Horn witnessed the shooting in 1994, knew the Defendant and knew he was convicted, then waited until January of 2016 to contact Defendant's attorney with information that conflicted with the evidence presented at trial (drive-by shooting, not walk-up shooting). Additionally, even if this Court believed Horn's testimony (which it did not), Ms. Horn stated that she did not see the occupants of the vehicles that she claimed were involved in the shooting. (HT at 10). Therefore her testimony did not exclude the Defendant as a perpetrator of the shooting. Since this Court did not find Ms. Horn's testimony to be credible, and her testimony failed to exclude the Defendant, her testimony does not qualify for the after-discovered evidence exception to the PCRA time-bar.

The Defendant's other witness to testify at the PCRA hearing was Jacques Early, who grew up on the same street as the Defendant. Mr. Early stated the he does not know the Defendant well, since he's about 10 years younger than the Defendant. (HT at 19, 37). Mr. Early testified that on the night of September 20, 1994, he was in the area of the shooting, riding his bike, when he saw a grayish car with a guy named Jermale Walker in the front passenger seat (the alleged after-discovered witness from the first PCRA petition). Walker was from a different gang (the OGs). (HT at 20, 31). Mr. Early warned people in the playground that the OGs were coming. (HT at 20). He saw a grayish car pull up towards the playground, and another car speed up around the side and start shooting at the grayish car. (HT at 21). Mr. Early testified that he saw Walker get out of the grayish car and run down the alleyway, and the shooters "…jumped out and started firing, you know, I guess chasing him down, but they continued to fire at the other car." (HT at 23). Mr. Early testified that he saw all of this from the park. (HT at 34). He stated that he recognized Robert Robinson as one of the three occupants in the shooter's car, and the Defendant was not in the shooter's car. (HT at 22). Mr. Early knew Robinson and knew he was the leader of a gang. Mr. Early said he never told the police what he saw because he believed there was a warrant out for him and he was afraid of Robinson. (HT at 25).

Mr. Early claimed that he was arrested shortly after that and did not return home until early 1995, so he did not know that Defendant was arrested for the murder. (HT at 26). He claims that he did not know that Defendant was arrested for the murder until late December of 2015. (HT at 27). Mr. Early said that he had been at SCI Huntingdon for 8 years, before he saw Defendant's cousin, and talked with him and learned of Defendant's murder conviction for the instant matter. (HT at 37). Mr. Early knew

Robinson was dead at the time he submitted his affidavit claiming that Robinson was the shooter (HT at 28).

When police detectives interviewed Mr. Early about the upcoming PCRA hearing, Mr. Early only discussed the alleged corruption of a homicide detective. (HT at 39, 50). He did not tell the detectives that he had witnessed the shooting and it was perpetrated by occupants of a vehicle, not the Defendant.

This Court does not find the testimony of Mr. Early to be credible. Mr. Early did not remember the weather or the day of the week that the shooting occurred. This Court does not believe that Mr. Early witnessed the shooting in 1994, but did not learn the identity of the person that was convicted for this crime until 2015 and that he did not inform the Defendant about what he had witnessed until late December of 2015. This Court assessed the demeanor of the witness and found him to be incredible.

This Court, as trier of fact, was free to determine the credibility of the witnesses, and the weight of their testimony, and was allowed to believe all, part, or none of the evidence presented. *Commonwealth v. Ratsamy*, 594 Pa. 176, 934 A.2d 1233, 1235 (Pa. 2007). Here, this Court determined that neither Ms. Horn nor Mr. Early was a credible witness, and believed none of their testimony presented at the PCRA hearing. The testimony of those engaged in a criminal lifestyle can be viewed as unbelievable. *Commonwealth v. Robinson*, 780 A.2d 675, 676-77 (Pa.Super. 2001). Mr. Early's testimony that he witnessed the shooting, saw the perpetrators, and identified the shooter as Robinson (who is now dead), was found by this Court to be unbelievable. Additionally, Mr. Early's testimony that he waited until December of 2015 to inform Defendant about what he saw is also incredible. The PCRA court determines the credibility of witnesses at PCRA hearings, and "...its credibility determinations should be provided great deference by reviewing courts...". *Commonwealth v. Dennis*, 609 Pa. 442, 17 A.3d 397, 301 (Pa. 2011).

The Defendant has failed to satisfy his burden of proving that one of the timeliness exceptions applies. In order to succeed on an after-discovered evidence claim, the Defendant had to prove that: (1) the evidence has been discovered after the trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) the evidence would likely compel a different verdict. *Commonwealth v. D'Amato*, 579 Pa 490, 519, 856 A.2d 806, 823 (Pa. 2004). Defendant failed to satisfy the above criteria. The testimony at the PCRA hearing was found to be incredible. Furthermore, the testimony was being used to impeach the credibility of the trial witnesses that testified that Defendant (and others) walked to the victim's vehicle and shot the victim.

Since this Court did not find the testimony of Defendant's witnesses to be credible, Defendant did not prove an exception to the PCRA time-bar under 42 Pa.C.S.9545(b)(i-iii). The Defendant's instant PCRA petition was untimely filed over 13 years after the period for a timely PCRA had expired. This Court has no jurisdiction to consider the claims raised in in Defendant's untimely PCRA because he did not prove that an exception to timeliness requirement applies.

This Court's Order of January 3, 2017, should be affirmed for the reasons contained herein.

BY THE COURT:
/s/Bigley, S.J.

Commonwealth of Pennsylvania v. Gene Brown

Criminal Appeal—Sufficiency—Identification—Weight of the Evidence—Sentencing (Discretionary Aspects)—Grading of Offense

Various claims after a robbery conviction where a woman was forced to undress in an alley.

No. CC 201502887. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—May 16, 2017.

OPINION

On February 17, 2016, following a non-jury trial, the appellant, Gene Brown, (hereinafter referred to as "Brown"), was found guilty of the charge of robbery, graded as a felony in the first degree. A presentence report was ordered and in light of the fact that a presentence report had been prepared for Judge Williams as a result of Brown's conviction of another robbery charge, this Court scheduled sentencing for February 22, 2016. Following a sentencing hearing, Brown was sentenced to a period of incarceration of not less than three and one-half nor more than seven years consecutive to any sentence he was now serving, which was to be followed by a period of probation of seven years, during which he was to undergo random drug screening. Brown filed timely post-sentence motions on March 3, 2016, which motions, following a hearing, were denied on April 26, 2016.

Brown filed a timely appeal to the Superior Court and was directed, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), to file a concise statement of matters complained of on appeal. In that statement, Brown has raised seven claims of error. Initially Brown maintains that the evidence was insufficient to support the conviction for robbery since the Commonwealth did not prove beyond a reasonable doubt the identity of the individual who committed this crime. Brown next maintains that the grading of the charge of robbery should have been a felony in the second degree since the Commonwealth did not establish that he threatened the victim with or put her in fear of serious bodily injury. Brown also maintains that his conviction for the crime of robbery was against the weight of the evidence. Brown also maintains that the Court erred in sentencing him when the guidelines incorporated the deadly weapons enhancement. Brown also suggests that this Court abused its discretion when it imposed what he believes to be a manifestly excessive sentence in view of the totality of the circumstances. Brown further maintains that this Court abused its discretion when it imposed the sentence consecutive to any sentence that he was now serving. Finally, Brown maintains that this Court abused its discretion when it denied his request to modify his sentence which was filed in his post-sentence motions.

On December 27, 2014, at approximately 11:45 p.m., the victim, Taneisha Helms, (hereinafter referred to as "Helms"), was returning to her residence located at 2337 Reed Street in the City of Pittsburgh after making purchases of some snacks and cigarettes at a Sunoco service station. In addition to the bag containing her purchases, she also had a cell phone. As she was walking in an alleyway from the Sunoco station to her residence, someone ran up behind her and told her to "Shut the "F" up or he would blow her head off." This individual demanded her money and her phone then pushed her into a corner of the alley while he was holding a shotgun that was pointed at her head. Helms gave him the ten dollars that she had and her phone. He then ordered her to take off her clothing and as she dropped each article of clothing, the assailant would grab those items and put them in a bin at the other end of the alleyway. He did this with her shoes, socks, pants and her underwear, each time separately taking those items to the end of the alley.

Helms had an opportunity to view her assailant in light of the numerous times that he picked up her clothing from her and she described him as being all dressed in black with a black hoodie, a black Carhartt jacket, black jeans and black shoes. When her assailant was placing the last item of her clothing at the other end of the alley, someone opened their window, looked down and saw her attacker, at which point he told Helms to get out of there and she ran from him and never looked back.

Helms ran to her mother's residence which was two doors down from hers and had her mother make a call to the police since she no longer had a phone. The police arrived and she advised them of what had transpired and also told them about the fact that she had been forced to strip and that her attacker placed her items of clothing at the other end of the alley. The police went to the alley and then recovered her clothing. When she was interviewed by the police, she described her attacker as being a black male, somewhere between the ages of eighteen and twenty-two, approximately five foot six to five foot seven and one hundred fifty pounds with a thin build. She told them that she did not know this person and that she was able to recognize him because although he had a hoodie, it was covering his head and not his face. She was shown a photo array and immediately picked out Brown as the individual who robbed her. After she identified him from the photo array, Helms remembered that she had babysat for him until he was approximately two years old and that she knew Brown's mother.

Brown was arrested on January 12, 2015, and he had a telephone conversation with his sister on January 16, 2015. In that phone conversation, Brown asked his sister to contact Delisha Woodson and try to talk to her. His sister then asked him is that the woman that he made strip and he said no, that woman lives behind the Sunoco station. His sister then advised him that the one that he made strip is the one that is on the news. She asked him if he knew that to which he provided no response. His sister then told him that the woman he made strip is the one that she should talk to.

Brown elected to testify and when he was asked by his counsel how he knew that the woman was caused to be stripped lived behind the Sunoco station, Brown stated that before this phone call to his sister, he went to a preliminary hearing and received the paperwork which provided him with the address for the victim and incident report with respect to what had happened. With this information he became aware of where she lived and what her address was. On cross-examination, Brown stated that he got the information from watching news coverage while he was in the jail.

Brown has maintained that the evidence was insufficient to support the verdict against him since the Commonwealth did not establish beyond a reasonable doubt the identity of Helms' attacker. He further maintains that the verdict was against the weight of the evidence. In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), the Supreme Court set forth the standards to be employed when confronted with the claims that the evidence was insufficient to support the verdict and the verdict was against the weight of the evidence and the significance of those particular claims

> Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to how the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.
>
> In order to address this claim we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*
>
> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975). When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).
>
> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211.[FN3] An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson, supra*. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Id.*

FN3. In *Tibbs*, the United States Supreme Court found the following explanation of the critical distinction between a weight and sufficiency review noteworthy:

> When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different…. The [trial] court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

Tibbs 457 U.S. at 38 n. 11, 102 S.Ct. 2211 quoting *United States v. Lincoln*, 630 F.2d 1313 (Cir. 8 th 1980).

With respect to the claim that the evidence was insufficient to support the verdict against him because the Commonwealth failed to establish the identity of the individual who robbed him, Brown points out the conflict in the information given to the police and Brown's physical description. When Helms was initially interviewed by the police, she told them that her assailant was anywhere between five six and five seven, one hundred and fifty pounds, with a thin build and was approximately eighteen to twenty-two years old. Brown was eighteen at the time, six feet one and two hundred and twenty pounds. Brown believes that this testimony was more than sufficient to discredit Helms' identification of him as her assailant. This contention ignores the fact that Helms identified him from a photo array, identified him at the preliminary hearing that was ultimately held on March 2, 2015, and also identified him at the time of trial. While there was some dispute as to the description given by Helms as to the person that robbed her, her identification of Brown was supported by Brown's own statements in a phone conversation that he had with his sister. When he sister asked him if Delisha Woodson was the individual he made strip, he said no, that individual lived right behind the Sunoco station. Brown maintained that he was able to make this statement based upon the information that he had acquired at the preliminary hearing when he was given the discovery material in his case and was given the victim's address. It should be noted that a review of the criminal complaint and the affidavit of probable cause does not disclose the victim's address and Brown's preliminary hearing occurred almost two months after he was arrested since it had been continued several times. If he would have obtained the information in the discovery materials as to the victim's address when he got that material at his preliminary hearing, then he would have obtained that information almost two months after he had the conversation with his sister, which was four days after he was arrested. In viewing in the light most favorable to the Commonwealth and all reasonable inferences drawn therefrom, it is clear that the Commonwealth established the identity of Helms' attacker and that Brown was properly convicted of that charge.

An Appellate Court's standard of review when presented with the claim that the verdict was against the weight of the evidence is distinct from the standard of review applied by the Trial Court

> **Appellate review** of a weight claim is a **review** of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. *Brown*, 648 A.2d at 1189. Because the trial judge has had the opportunity to hear and see the evidence presented, an **appellate** court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. *Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545 (1976). One of the least assailable reasons for *322 granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice. *Brown*, *supra*.
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> *Com. v. Widmer*, 560 Pa. 308, 321–22, 744 A.2d 745, 753 (2000).
>
> . . .
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> The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.
>
> *Com. v. Widmer,* 560 Pa. 308, 322, 744 A.2d 745, 753 (2000)

In using these standards, it is clear that this Court acting as the fact-finder in the non-jury trial, had a full opportunity to review the testimony in this matter and observe the witnesses that were called to testify, specifically the victim and the appellant, who elected to testify. Helms was unequivocal in her identification of Brown at the time that she was presented with a photo array, at the preliminary hearing and at the time of trial. Although there was a discrepancy in what she initially reported to the police and Brown's physical size, that description did not mean that she was inaccurate in identifying him as the person that robbed her. Brown on the other hand never denied robbing her to his sister during their phone conversation and, in fact, provided his sister with information that he had to know prior to his preliminary hearing since he had not been given the discovery material until almost two months after he was arrested. In taking these factors into consideration, it is clear that the verdict was appropriate and not against the weight of the evidence.

Brown next maintains that he was improperly convicted of the crime of robbery graded as a felony in the first degree as opposed to robbery, a felony in the second degree. The crime of robbery is set forth at 18 Pa.C.S.A. §3701 as follows:

> §3701. Robbery
>
> **(a) Offense defined.—**
>
> (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;

(v) physically takes or removes property from the person of another by force however slight; or

(vi) takes or removes the money of a financial institution without the permission of the financial institution by making a demand of an employee of the financial institution orally or in writing with the intent to deprive the financial institution thereof.

(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.

(3) For purposes of this subsection, a "financial institution" means a bank, trust company, savings trust, credit union or similar institution.

(b) Grading.—

(1) Except as provided under paragraph (2), robbery under subsection (a)(1)(iv) and (vi) is a felony of the second degree; robbery under subsection (a)(1)(v) is a felony of the third degree; otherwise, it is a felony of the first degree.

(2) If the object of a robbery under paragraph (1) is a controlled substance or designer drug as those terms are defined in section 2 of the act of April 14, 1972 (P.L. 233, No. 64),1 known as The Controlled Substance, Drug, Device and Cosmetic Act, robbery is a felony of the first degree.

Brown maintains that based upon the evidence presented at the time of trial, he should have been convicted of the crime of robbery as identified under §3701(e)(1)(iv), which means that at the time of the commission of the robbery, the victim was threatened or intentionally put in fear of immediate bodily injury as opposed to the crime of robbery under §3701(a)(2), where the victim is threatened with or intentionally put in fear of immediate serious bodily injury. The undisputed testimony in this case is that Brown came up from behind Helms with a shotgun and pointed it at her head and told her to be quiet or he would blow her head off. This threat can only be considered a threat to inflict serious bodily injury or death. Brown continued these threats when he continually pointed the shotgun at Helms' head during the course of this robbery and when he was forcing her to disrobe. Nothing about this threat which would suggest that the injury that was threatened was anything but serious bodily injury. It is clear that when he threatened to blow her head off that he was placing her in fear of serious bodily injury or death.

Brown next maintains that this Court erred when it used the deadly weapons enhancement in determining the guidelines for Brown's sentence. In this regard while Brown maintains that the applicability of the deadly weapon enhancement had to be proven beyond a reasonable doubt in light of the decisions in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348 (2000). This contention has been rejected in Pennsylvania in *Commonwealth v. Buterbaugh*, 91 A.3d 1247, 1270 (Pa. Super. 2014), when the Court noted that the deadly weapon enhancement did not prescribe a standard range beyond the statutory maximum and, accordingly, the factors to consider the deadly weapon enhancement only had to be proved by the preponderance of the evidence. It should be noted that even using the sentencing guidelines where the deadly weapon enhancement has been invoked, Brown's sentence of three and one-half to seven years was near the bottom end of the standard range.[1]

Brown's final three claims of error all deal with sentencing in that he maintains that his sentence was manifestly excessive in view of the totality of the circumstances; that this Court abused its discretion when it ordered that his sentence be served consecutive to any sentence he was now serving; and, that this Court abused its discretion when it denied the modification of his sentence. In *Commonwealth v. Mouzon,* 828 A.2d 1126, 1128-1129 (Pa. Super. 2003), the Court examined the claim of whether or not a sentence was excessive and set forth the factors that were to be considered in making that determination.

> Sentencing is a **matter vested** in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. *Commonwealth v. Johnson*, 446 Pa.Super. 192, 666 A.2d 690 (1995). "To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive." *Commonwealth v. Gaddis,* 432 Pa.Super. 523, 639 A.2d 462, 469 (1994) (citations omitted). In this context, an abuse of discretion is not shown merely by an error in judgment. *Commonwealth v. Kocher,* 529 Pa. 303, 602 A.2d 1308 (1992). Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. *Commonwealth v. Rodda*, 723 A.2d 212 (Pa.Super.1999).
>
> In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference. *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa.Super.1997). Where an excessiveness claim is based on a court's sentencing outside the guideline ranges, we look, at a minimum, for an indication on the record that the sentencing court understood the suggested sentencing range. 42 Pa.C.S.A. § 9721(b); *Rodda*, 723 A.2d at 214. When the court so indicates, it may deviate from the guidelines, if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offenses as it relates to the impact on the life of the victim and the community, so long as the court also states of record "the factual basis and specific reasons which compelled him to deviate from the guideline range." *Commonwealth v. Cunningham,* 805 A.2d 566, 575 (Pa.Super.2002) (quoting *Commonwealth v. Burkholder,* 719 A.2d 346, 350 (Pa.Super.1998)).
>
> In evaluating a claim of this type, an appellate court must remember that the sentencing guidelines are merely advisory, and the sentencing court may sentence a defendant outside of the guidelines so long as it places its reasons

> for the deviation on the record. *Cunningham*, 805 A.2d at 575. "Our Supreme Court has indicated that if the sentencing court proffers reasons indicating that its decision to depart from the guidelines is not unreasonable, we must affirm a sentence that falls outside those guidelines...." *Commonwealth v. Davis*, 737 A.2d 792, 798 (Pa.Super.1999) (citing *Commonwealth v. Smith*, 543 Pa. 566, 673 A.2d 893 (1996)).

In reviewing Brown's sentence, it is clear that there is nothing manifestly excessive about his sentence. His sentence was near the bottom end of the standard range and was three and one-half to seven years to be followed by a period of probation of seven years. This Court had the benefit of those guidelines and a presentence report which showed a continuing escalation of Brown's violent criminal behavior. His first contact with the criminal justice system occurred when he was eleven years old when his mother filed a petition for dependency stating that her son was out of control, aggressive and defiant and would leave their residence for a week without permission. Approximately one year later on December 22, 2008, a petition was filed charging him with failure to comply with a lawful sentence for his failure to pay fines and costs relative to an adjudication of harassment. Another petition for dependency was filed on February 3, 2009 when it was alleged that he would not follow the rules at his home, including curfew and school attendance and he was being verbally abusive to his mother. On January 19, 2011, another petition was filed charging failure to comply as a result of his purchase of alcoholic beverages by a minor, disorderly conduct and harassment. During the summer of 2012, he was sent to Orlando, Florida to reside with a relative and while there, he was charged as a juvenile with sexually assaulting an eleven-year-old boy. On December 13, 2012, his mother once again filed a petition for dependency and a petition for protection of abuse since he continued to be violent and was threatening everyone in his house and was using drugs. His mother stated in this petition that he had pictured himself on Facebook holding a gun and displaying various gang signs. His mother's petition for protection from abuse was granted and the defendant was adjudicated dependent and placed with his grandparents. In 2013 he was suspended from school for five days for bringing marijuana to school. While he was at the Ward home, he was charged and adjudicated of the charges of simple assault, terroristic threats and recklessly endangering another person.

As an adult, he was convicted of the charge of possession with intent to deliver a controlled substance in January of 2015. In November of 2015, he was found guilty following a bench trial before the Honorable Joseph Williams of the crime of robbery, serious bodily injury, and criminal conspiracy. On January 5, 2016, he pled guilty to receiving stolen property, although he had also been charged with burglary and theft by unlawful taking, which charges were withdrawn in exchange for his plea to the charge of receiving stolen property. In reviewing his continually aggressive and violent behavior, his failure to avail himself of the rehabilitation opportunities offered to him in the Juvenile Court system and his threat to kill his victim, it is clear that the sentence that was imposed upon him was not manifestly excessive but appropriate for the protection of the public, his rehabilitative needs and for protection of society in general.

This Court decided to run his sentence consecutive to the sentence imposed upon him by Judge Williams for the other robbery in which he was involved which followed almost the same pattern as the robbery in this case with the exception that he did not require his victim to strip. The presentence report in this matter clearly showed an individual who was violent, who was armed with deadly weapons and made threats to use those deadly weapons if his desires were not met. In weighing all of the factors to be considered, it was clear that his sentence should be consecutive rather than concurrent which would have provided him with a volume discount for the commission of his crimes.

Brown filed a post-sentence motion seeking to modify his sentence in which he alleged that in light of Brown's young age, that he should be afforded an opportunity to reestablish his life since he had lost his educational opportunity and his ability to play football. None of these contentions impact the configuration of his sentence because Brown was willing to use a deadly weapon and threatened people with the use of that deadly weapon by stating that he would blow the victim's head off if she did not do what he said. Compounding his violent nature was the fact that he sought to demean and to degrade his victim by forcing her to strip off her clothes to ensure his getaway from this robbery. There was no basis that this Court saw that would necessitate the changing either the length of Brown's sentence or the fact that it should be served consecutive to his other sentence for robbery.

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

Dated: May 16, 2017

[1] The Sentencing Guidelines using the deadly weapon enhancement show a mitigated range sentence of twenty-eight months, a standard range sentence of forty to fifty-four months, and an aggravated range of sixty-six months.

Commonwealth of Pennsylvania v. Patrick Gorman

Criminal Appeal—Sufficiency—Theft Offenses

Defendant took money from funeral homes for military honor guard expenses and failed to turn money over to American Legion or VFW.

No. CC 201503667. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—May 17, 2017.

OPINION

The appellant, Patrick Gorman, (hereinafter referred to as "Gorman"), has appealed from the sentence imposed upon him on April 7, 2016, of eleven and one-half to twenty-three months incarceration to be followed by a five year period of probation as well

as costs and restitution. Pursuant Pennsylvania Rule of Appellate Procedure 1925(b), the appellant has filed a concise statement of matters complained of on appeal. This document challenges the sufficiency of the evidence to sustain the appellant's conviction at all of the five counts for which he was found guilty.

Gorman proceeded to trial before this Court in a bench trial that started on January 6, 2016. On January 12, 2016, this Court found Gorman of two counts of theft, one count of receiving stolen property and two counts of misapplication of entrusted property. On April 7, 2016, Gorman was sentenced to eleven and one-half to twenty-three period of incarceration at count one of the information, followed by five years of probation at count two. Gorman was also sentenced to pay the costs of prosecution and to pay restitution in the amount of forty-four thousand, three hundred twelve dollars and ninety-three cents. A timely notice of appeal was filed on Gorman's behalf. A concise statement of matters complained of on appeal was filed. As previously noted, this document challenged the sufficiency of the evidence to support the convictions at all counts.

The evidence presented at trial, taken in the light most favorable to the Commonwealth as verdict-winner, established that Gorman approached Henry Manella in 2010 when Manella was the Post Commander for the VFW Post 1810 in the Brentwood area of Allegheny County, Pennsylvania. Gorman approached Manella about starting an Honor Guard to appear at Veterans' funerals. Gorman indicated to Manella that he would need the rifles that belonged to the VFW Post 1810 to perform these services. The evidence established through numerous witnesses that it was customary for funeral directors to suggest to family members of deceased Veterans that a donation was appropriate to the Honor Guard appearing at the funerals of the loved ones. These donations were sometimes in cash, sometimes in check from the family members. Other times, the funeral directors would present a check to the Honor Guard and add that cost to the funeral bill received by the family of the deceased.

Funds received by the VFW were to be under the control of the quarter master. At some point Manella learned that donations were being sent to Gorman's address at his home and not being presented to the VFW. The VFW Post 1810 learned that in 2014, Gorman had a separate checking account. The funds were being placed into Gorman's separate account rather than going to the VFW Post 1810. The prayer cards used by Gorman at the Veterans' funerals bore his address, rather than the address of VFW Post 1810. According to the VFW bylaws, all cash had to go through the VFW Post 1810's checking account for disbursement. The money being placed into Gorman's separate checking account was not being processed through VFW Post 1810's checking account.

The evidence established that Gorman was operating the Honor Guard that appeared at Veterans' funerals. Many of the funeral home directors believed that Gorman's Honor Guard was under the auspices of the American Legion post. Gorman also had his Honor Guard appear under the guise of the American Legion, wearing jackets and hats, bearing the name Nix-Vogel American Legion on them, the name of the American Legion Post 935. (TT 78). The testimony established that all of the proceeds from donations were to be used to purchase uniforms and for the betterment of the American Legion itself. Funds received by Gorman's Honor Guard, rather than going to the American Legion, again went to Gorman's personal checking account. When the American Legion sought an inquiry into the status of the Honor Guard's finances, Gorman closed the accounts, preventing the Commander from getting access to those accounts. (TT 85). Gorman's group again used the American Legion's rifles, much like he used the VFW's rifles. The testimony established that the Army required that the rifles to be kept at the Post in their gun safe. (TT 87).

While testimony varied somewhat among the numerous funeral directors called, the consensus was that the money donated was to go for dry cleaning uniforms, gas money, lunch money, the replenishment of bullets fired and similar expenditures. Testimony established that Gorman was trained in the use of these funds. Testimony further established that Gorman asked that checks be made out to him or to cash. The perception of many of the funeral home directors was that they were dealing with either the VFW or American Legion when Gorman's Honor Guard appeared. The testimony reflected that it was not the intent to personally give money to Gorman, but rather to give the money to the groups that had been affiliated with either the VFW or the American Legion.

Testimony was presented by Jacquelyn Weibel, a detective with the District Attorney's Office. (TT 364). Weibel, who is a certified fraud examiner, was assigned to investigate the complaint from the VFW Post 1810 against Gorman. (TT 365). Weibel quickly learned that there were two accounts at the DSB Bank. One account was titled in the American Legion Post 935 which had three names as signatories, one of whom was Gorman, and a second account in the name of "Military Honor Guard" which had only one signatory, Gorman. The American Legion account was closed on or about October, 2010, around the time that the Military Honor Guard account was opened. Gorman persuaded one of the other signatories to the American Legion account to close that account so that a new account could be created which only had Gorman as a signatory. Weibel determined from her analysis of the records that there were many payments going to two credit cards from these accounts. Weibel's search of these accounts resulted in the preparation of a spreadsheet that was a summary of checks that had a payee of American Legion, VFW or some other veterans' service organization. She did not include any checks made personally to Gorman, or to cash, or to checks that said Military Honor Funeral Guard. The analysis Weibel performed established that ten thousand two hundred fifty dollars worth of checks that had a veterans' service organization in the payee line were found in the American Legion Post 935 account and twelve thousand seventy-five dollars worth of checks with a veterans' service organization were posted to the Military Veterans Funeral Honor Guard account. Weibel's analysis of the records established that there were numerous payments to a Capital One account as well numerous payments to the First National Bank of Omaha account. (TT 377). Weibel then served search warrants on both Capital One and First National Bank of Omaha to obtain credit card statements. Her search determined that both of the accounts were titled in the name of Patrick Gorman. Thus, the evidence established that credit card payments to two Gorman accounts were being made out of the veterans' service organization bank accounts. (TT 377-378).

Weibel also looked for anything that appeared to be a suspicious transaction in her analysis of these accounts. She found payments for wine and spirits as well as country club payments. (TT 378). She determined that five thousand twenty-four dollars and sixty cents had improperly been diverted from the American Legion account and that seventeen thousand, one hundred eighty-three dollars and sixty-two cents had been misappropriated from the VFW. (TT 379).

Weibel also testified regarding her interview of Gorman and her review with him of many personal expenses. (TT 380-381). Anything that Gorman could establish was a legitimate expense, Weibel removed from the calculation. (TT 382). Gorman admitted that some of the expenses were not proper Honor Guard expenses. He at one point indicated that his son may have gotten ahold of his credit card and used it. (TT 382). He also admitted other expenses were not Honor Guard expenses. (TT 383).

Gorman could not explain how a water bed and furniture were Honor Guard expenses. (TT 384).

The evidence amply established that Gorman used the donations made for the Honor Guard services for his own personal benefit. As the Assistant District Attorney ably argued, these were not funds received for performance of a service but, rather were donations to an organization. The evidence clearly establishes that Gorman used these donations as his own funds for various personal expenses. The evidence thus supports the verdicts of guilty of Gorman on each of the counts listed in the information.

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

Dated: May 17, 2017