PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

PLJ

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

Circulation 5,814

PLJ Editorial Staff

Opinion Selection Policy

Opinions selected for publication are based upon precedential value or clarification of the law. Opinions are selected by the Opinion Editor and/or committees in a specific practice area. An opinion may also be published upon the specific request of a judge.

Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. All opinions submitted to the Pittsburgh Legal Journal (PLJ) are printed as they are received and will only be disqualified or altered by Order of Court, except it is the express policy of the Pittsburgh Legal Journal (PLJ) not to publish the names of juveniles in cases involving sexual or physical abuse and names of sexual assault victims or relatives whose names could be used to identify such victims.

Opinions

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

Commonwealth of Pennsylvania v. William George Thompson

Criminal Appeal—PCRA—DNA—Request for Testing

DNA testing must only be done when the item requested to be tested would help to establish the identity of perpetrator.

No. CC 200202610, 200206828. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Cashman, A.J.—September 19, 2016.

OPINION

The appellant, William G. Thompson, (hereinafter referred to as "Thompson"), has filed the instant appeal as a result of the denial of his petition for post-conviction relief requesting DNA testing. This Court treated that petition as a motion pursuant to 42 Pa.C.S.A. §9543.1 which allows for post-conviction DNA testing. Based upon the review of the record in Thompson's case it was readily apparent that this motion did not meet the requirements of the post-conviction DNA testing statute and, accordingly, said motion was denied.

Thompson was directed to file a concise statement of matters complained of on appeal and has alleged four claims of error. Initially, Thomson maintains that this Court erred in denying his petition for DNA testing since no DNA testing was ever performed on the sneakers that were alleged to have been is. He next maintains that this Court erred when it stated that DNA testing would not establish Thompson's innocence in light of his admission that he had killed the victims. Thompson further maintains that this Court erred when it noted that DNA testing would only establish the ownership of the Nike sneaker and, finally, this Court should have ordered DNA testing since there was a dispute as to whether or not the sneakers were, in fact, Thompson's.

The facts of Thompson's case have been set forth in this Court's earlier eighty-six-page Opinion with regard to the claims asserted on the direct appeal by Thompson and his co-defendant, Andre Crisswalle. A recitation of those facts are incorporated herein by reference thereto.

In order to be entitled to DNA testing, a defendant must stablish that he meets the requirements of the post-conviction DNA testing Act which provides as follows:

(a) Motion.--

(1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment or awaiting execution because of sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.

(2) The evidence may have been discovered either prior to or after the applicant's conviction. The evidence shall be available for testing as of the date of the motion. If the evidence was discovered prior to the applicant's conviction, the evidence shall not have been subject to the DNA testing requested because the technology for testing was not in existence at the time of the trial or the applicant's counsel did not seek testing at the time of the trial in a case where a verdict was rendered on or before January 1, 1995, or the applicant's counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request despite the client's indigency.

(b) Notice to the Commonwealth.--

(1) Upon receipt of a motion under subsection (a), the court shall notify the Commonwealth and shall afford the Commonwealth an opportunity to respond to the motion.

(2) Upon receipt of a motion under subsection (a) or notice of the motion as applicable, the Commonwealth and the court shall take the steps reasonably necessary to ensure that any remaining biological material in the possession of the Commonwealth or the court is preserved pending the completion of the proceedings under this section.

(c) Requirements.--In any motion under subsection (a), under penalty of perjury, the applicant shall:

(1) (i) specify the evidence to be tested;

(ii) state that the applicant consents to provide samples of bodily fluid for use in the DNA testing; and

(iii) acknowledge that the applicant understands that, if the motion is granted, any data obtained from any DNA samples or test results may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(2) (i) assert the applicant's actual innocence of the offense for which the applicant was convicted; and

(ii) in a capital case:

(A) assert the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) (relating to sentencing procedure for murder of the first degree) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(B) assert that the outcome of the DNA testing would establish a mitigating circumstance under section 9711(e)(7) if that mitigating circumstance was presented to the sentencing judge or jury and facts as to that issue were in dispute at the sentencing hearing.

(3) present a prima facie case demonstrating that the:

(i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and

(ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:

(A) the applicant's actual innocence of the offense for which the applicant was convicted;

(B) in a capital case the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(C) in a capital case, a mitigating circumstance under section 9711(e)(7) under the circumstances set forth in subsection (c)(1)(iv).

(d) Order.--

(1) Except as provided in paragraph (2) the court shall order the testing quested in a motion under subsection (a) under reasonable conditions designed to preserve the integrity of the evidence and the testing process upon a determination, after review of the record of the applicant's trial, that the:

(i) requirements of subsection (c) have been met;

(ii) evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect; and

(iii) motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice.

(2) The court shall not order the testing requested in a motion under subsection (a) if after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that:

(i) would establish the applicant's actual innocence of the offense for which the applicant was convicted;

(ii) in a capital case, would establish the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(iii) in a capital case, would establish a mitigating circumstance under section 9711(e)(7) under the circumstances set forth in subsection (c)(1)(iv).

42 Pa. Stat. and Cons. Stat. Ann. § 9543.1 (West)

In filing a motion request post-conviction DNA testing a defendant must establish that the identity of the perpetrator of the crime was at issue, which it was in Thompson's case, and that DNA testing would establish the defendant's actual innocence of the crimes for which he was convicted. Thompson maintains that DNA testing of the black Nike sneakers found in his apartment would establish that the sneakers were not his and might provide the identity of the individual who owned or wore those sneakers. The sneakers were part of the evidence introduced against Thompson since one of the witnesses to these homicides noted that the taller of the two defendants wore black Nike sneakers with a black swoosh. The only thing that would result from DNA testing of these sneakers would be the identity of the individual who might have worn them. It would not establish the identity of the individual responsible for these homicides nor would it provide exculpatory evidence to Thompson.

The police conducted interviews at Mr. Tommy's Restaurant shortly after the shootings and Brian Shealy, during the course of his interview, identified one of the two shooters as being over six foot three, slender and with bug eyes. He also noted that this individual wore black Nike sneakers with a blacks swoosh. In a second interview, Shealy told the police that Thompson was the taller of the two shooters and that he knew Thompson by his street name of Munch since they had worked on repairing a car together. An arrest warrant subsequently was issued for Thompson and after his arrest, the police obtained a search warrant for his apartment which was located a block away from Mr. Tommy's Restaurant and found a pair of black Nike sneakers with a black swoosh. After Thompson was arrested he was lodged on Pod 7D of the Allegheny County Jail. Also on this pod was Octavia Rodriquez who was a cousin of Paris Freeman, one of the homicide victims. Rodriquez had received a telephone call from his mother who told him that Thompson had been arrested for the killings that occurred at Mr. Tommy's Restaurant. Rodriquez then went to the restricted area of Pod 7D and asked Thompson why he killed the little girl. Thompson denied killing Taylor Coles and said that he shot one time and that his gun jammed. He also told Rodriquez that William Mitchell was murdered because he owed money for drugs.

When Thompson was arrested, he had a cell phone on him and the police obtained a search warrant to search his phone and discovered a number of phone numbers that repeatedly appeared. In investigating these phone calls, especially in light of the time that they were made shortly after the shootings, the police were able to determine that one of the individuals that Thompson was calling was Melissa Cox who was interviewed by the police and Cox told them that approximately two hours after the shooting, she received a phone call from Thompson in which he said he had killed some people in Homewood and that he sounded scared.

In *Commonwealth v. Williams*, 35 A.3d 44, 49-50 (Pa. Super. 2011), the Court noted that a request for DNA testing must establish that such testing would produce exculpatory evidence that would establish a petitioner innocence for the crimes of which he had been convicted.

The statute sets forth several threshold requirements to obtain DNA testing: (1) the evidence specified must be available for testing on the date of the motion; (2) if the evidence was discovered prior to the applicant's conviction, it was not already DNA tested because (a) technology for testing did not exist at the time of the applicant's trial; (b) the applicant's counsel did not request testing in a case that went to verdict before January 1, 1995; or (c) counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request despite the client's indigency. 42 Pa.C.S.A. § 9543.1(a)(2). Additionally,

> [T]he legislature delineated a clear standard—and in fact delineated certain portions of the standard twice. Under section 9543.1(c)(3), the petitioner is required to present a prima facie case that the requested DNA testing, assuming it gives exculpatory results, would establish the petitioner's actual innocence of the crime. Under section 9543.1(d)(2), the court is directed not to order the testing if it determines, after review of the trial record, that there is no reasonable possibility that the testing would produce exculpatory evidence to establish petitioner's actual innocence. From the clear words and plain meaning of these provisions, there can be no mistake that the burden lies with the petitioner to make a prima facie case that favorable results from the requested DNA testing would establish his innocence. We note that the statute does not require petitioner to show that the DNA testing results would be favorable. However, the court is required to review not only the motion [for DNA testing], but also the trial record, and then make a determination as to whether there is a reasonable possibility that DNA testing would produce exculpatory evidence that would establish petitioner's actual innocence. We find no ambiguity in the standard established by the legislature with the words of this statute.

Commonwealth v. Smith, 889 A.2d 582, 584 (Pa.Super.2005), *appeal denied*, 588 Pa. 769, 905 A.2d 500 (2006) (emphasis added). The text of the statute set forth in Section 9543.1(c)(3) and reinforced in Section 9543.1(d)(2) requires the applicant to demonstrate that favorable results of the requested DNA testing would establish the applicant's actual innocence of the crime of conviction. *Id.* at 585. The statutory standard to obtain testing requires more than conjecture or speculation; it demands a prima facie case that the DNA results, if exculpatory, would establish actual innocence. *Id.* at 586.

Com. v. Williams, 2011 PA Super 275, 35 A.3d 44, 49–50 (2011)

It is abundantly clear that DNA testing of the Nike sneakers would not have established Thompson's innocence since he admitted to both Melissa Cox and Octavia Rodriquez that he was one of the two shooters in the killings that occurred at Mr. Tommy's Restaurant. He was also identified by Brian Shealy who knew him from working on a car with him as being one of the two shooters. Since Thompson was unable to establish a prima facie case for DNA testing, this Court properly denied his request to have that testing done.

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

Dated: September 19, 2016

Commonwealth of Pennsylvania v. Marvin Leo Graves

Criminal Appeal—VUFA—Suppression—Sufficiency—Pro Se Appellant—Automobile Search—Plain View—Jury Question

A pro se appellant raises several claims including a challenge to a warrantless automobile search.

No. CC 201413769. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—July 28, 2016.

OPINION

On August 27, 2015, following a jury trial, the appellant, Marvin Leo Graves, (hereinafter referred to as "Graves"), was found guilty of two counts of violation of the Uniform Firearms Act, the first being person not to possess a firearm[1] and the second being, possession of a firearm without a license.[2] A presentence report was ordered and sentencing was scheduled for November 24, 2015. On that date, Graves was sentenced to a period of incarceration of not less than five nor more than ten years to be followed by a period of probation of three years, which had the requirement of random drug screening. It was noted at the time of sentencing that Graves was not RRRI eligible.

On December 30, 2015, a notice of appeal was filed with the Superior Court. On January 12, 2016, a rule to show cause was issued by the Superior Court to Graves to make a determination as to whether or not his appeal was timely filed since on its face, it appears that it was not. On January 13, 2016, a response was filed by Graves and as a result of that response, an Order was issued by the Superior Court on January 22, 2016, discharging the rule to show cause. On February 1, 2016, Graves' counsel filed a motion for extension of time to file a concise statement of matters complained of on appeal and also a motion to withdraw as counsel, depending on the determination of the *Grazier* hearing, which was to be scheduled. The Superior Court remanded the record to this Court for the purpose of holding a *Grazier* hearing which was held on April 21, 2016 at which time a determination was made that Graves could represent himself on appeal and an extension was granted to him for the purpose of filing a concise statement of matters complained of on appeal.

Graves, acting as his own appellate counsel, has filed his concise statement of matters complained of on appeal and in that statement has raised four claims of error. Initially, Graves maintains that this Court erred in denying his suppression motion on the basis that a search of his car was unreasonable and violated the provisions of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections one and eight of the Pennsylvania Constitution. In his second claim of error, Graves maintains that the evidence was insufficient to prove beyond a reasonable doubt that he possessed the firearm. Graves next maintains that this Court erred in re-reading testimony to the jury exceeding parameters set by the jury. Finally, Graves maintains that this Court failed to credit him with the time that he spent in custody prior to trial.

Graves' trial counsel filed a motion to suppress the evidence seized as a result of the search of Graves' motor vehicle on the basis that it was warrantless search and the police did not have probable cause to search that vehicle. The Commonwealth presented testimony of two Pittsburgh Police Officers Louis Schweitzer and Matthew Poling, who were on patrol in the Homewood and Larrimer Sections of the City of Pittsburgh. They had been assigned that area since the Serenity Night Club was open during the weekend and that area was a high crime area, having numerous fights and shots fired in and around that club. The two Officers were conducting a park and walk around the area of the night club illuminating motor vehicles to see if they could identify any guns in plain view.

The Officers came upon a four-door white Volkswagen parked on Enterprise Street and when they illuminated the interior of the car, they saw a gun. Officer Poling indicated that he observed this gun in the driver's side rear seat pocket. The Officers then decided to set up surveillance of this automobile from a parking lot directly across the street from where the Volkswagen was parked. While observing that car, they saw a black male walk up to the car, open the driver's door and get in the car and sit there briefly. This individual, who was later identified as Graves, then got out of the vehicle but reached through the left rear window of the vehicle and retrieved an item from the back of the vehicle, which was approximately four by six inches. The Officers could not identify what the item was but did note that the individual who got into the car walked to the trunk area of the car, opened the trunk, and put the object that he had taken from the interior of the vehicle into the trunk. This individual then got back into the driver's seat and shortly thereafter was joined by another individual who got into the front passenger seat and two more individuals, who got into the back seat of this vehicle. The vehicle took off and proceeded along Hamilton Avenue until it reached the intersection of East Liberty Boulevard. Once the vehicle left the Serenity Club, Officers Schweitzer and Poling decided to follow the vehicle and when it approached the intersection of Hamilton Avenue and East Liberty Boulevard, it failed to indicate that it was making a turn, when it turned onto East Liberty Boulevard.

When the Officers began to follow Graves' automobile, they activated the camera mounted in the Officers' patrol car. Officer

Schweitzer made a traffic stop for the turn signal violation and since they had previously seen a gun in the vehicle, they ordered all of the occupants out of the vehicle for the Officers' safety so that they could locate the gun. While these individuals were getting out of the car, Officer Livesey who was providing backup protection to Officers Schweitzer and Poling, told Officer Schweitzer that there was a bag of marijuana in the rear pocket of the driver's seat. These Officers illuminated that area and the other Officers saw the bag of marijuana. This was the same pocket where the gun had been observed, but there was no gun in that pocket. Since Officers Schweitzer and Poling had seen Graves take an object from the car and put it in the trunk, the trunk area was searched and the Officers found a forty-four Magnum revolver.

In his initial claim of error, Graves maintains that the evidence should have been suppressed since it resulted from a warrantless search for which the police did not have probable cause. In *Commonwealth v. Gary*, 625 Pa. 183, 91 A.3d 102, 106-187, 138 (2014), the Pennsylvania Supreme Court was once again confronted with the requirements necessary to justify a warrantless search of an automobile.

> The primary objective of the Fourth Amendment to the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution is the protection of privacy. Warden v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (stating that the "principal object of the Fourth Amendment is the protection of privacy"); Jones v. United States, 357 U.S. 493, 498, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958) ("The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy."); Commonwealth v. Waltson, 555 Pa. 223, 724 A.2d 289, 292 (1998) (citing Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887, 897–98 (1991) for the proposition that "this Court has held that embodied in Article I, Section 8 is a strong notion of privacy, which is greater than that of the Fourth Amendment"); Commonwealth v. Gordon, 546 Pa. 65, 683 A.2d 253, 257 (1996) (reiterating that legitimate expectations of privacy are protected by Article I, Section 8); Commonwealth v. Blystone, 519 Pa. 450, 549 A.2d 81, 87 (1988) (reiterating that "Article I, § 8 creates an implicit right to privacy in this Commonwealth"), grant of habeas corpus on a separate issue affirmed by Blystone v. Horn, 664 F.3d 397 (3d Cir.2011); Commonwealth v. Mangini, 478 Pa. 147, 386 A.2d 482 (1978) ("[T]he acknowledged touchstone of the Fourth Amendment [is] to protect one's reasonable expectations of privacy.").
>
> As a general rule, for a search to be reasonable under the Fourth Amendment or Article I, Section 8, police must obtain a warrant, supported by probable cause and issued by an independent judicial officer, prior to conducting the search. This general rule is subject to only a few delineated exceptions, including the existence of exigent circumstances. See Horton v. California, 496 U.S. 128, 134 n. 4, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) ("[I]t is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (citations and quotation marks omitted); United States v. Ross, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (same); Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ("We do not retreat from our holdings that the police must, when practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.") (internal citations omitted); Commonwealth v. Petroll, 558 Pa. 565, 738 A.2d 993, 998–99 (1999) (reiterating that Article I, Section 8 and the Fourth Amendment generally prohibit warrantless searches unless an exception such as exigent circumstances applies); Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101, 106 (1978) (citing an exception to the warrant requirement when exigent circumstances exist, such as where there is a need for prompt police action to preserve evidence or to protect an officer from danger to his or her person).
>
> One exception to the warrant requirement, the precise parameters of which have evolved over time based on decisional law from the U.S. Supreme Court and from this Court, concerns searches and seizures of automobiles. See, e.g., California v. Carney, 471 U.S. 386, 390–91, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). There is no question that automobiles are not per se unprotected by the warrant requirements of the Fourth Amendment and Article I, Section 8. See, e.g., Cady v. Dombrowski, 413 U.S. 433, 439–40, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (stating that "vehicles are 'effects' within the meaning of the Fourth Amendment [even though] for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars"); Commonwealth v. Baker, 518 Pa. 145, 541 A.2d 1381, 1383 (1988), overruled on other grounds, Commonwealth v. Rosario, 538 Pa. 400, 648 A.2d 1172 (1994) ("It is well established that automobiles are not per se unprotected by the warrant requirements of the Fourth Amendment, and of Art. I, § 8 [ ]."); Holzer, supra at 106 ("[C]onstitutional protections are applicable to searches and seizures of a person's car," although the need for a warrant to search a car "is often excused by exigent circumstances."); Commonwealth v. Cockfield, 431 Pa. 639, 246 A.2d 381, 384 (1968) ("And certainly an automobile is not per se unprotected by the warrant procedure of the Fourth Amendment."). However, as we develop infra, the precise parameters of these protections have been difficult not only for this Court, but also for the U.S. Supreme Court to articulate and apply consistently. We first examine the development of the automobile exception to the warrant requirement under federal law, and we then consider the concurrent development of the exception in this Commonwealth.

After an extensive review of the United States Supreme Court cases on warrantless searches of automobiles and also a review of the other jurisdictions, the Court once again concluded that there was a legitimate reason for a warrantless search of a motor vehicle and probable cause existed to compel that search.

> In sum, our review reveals no compelling reason to interpret Article I, Section 8 of the Pennsylvania Constitution as providing greater protection with regard to warrantless searches of motor vehicles than does the Fourth Amendment. Therefore, we hold that, in this Commonwealth, the law governing warrantless searches of motor vehicles is coextensive with federal law under the Fourth Amendment. The prerequisite for a warrantless search of a motor vehicle is probable cause to search; no exigency beyond the inherent mobility of a motor vehicle is required. The consistent and firm requirement for probable cause is a strong and sufficient safeguard against illegal searches of motor vehicles, whose inherent mobility and the endless factual circumstances that such mobility engenders constitute a per se exigency allowing police officers to make the determination of probable cause in the first instance in the field. *Commonwealth v. Gary, supra*. at 242.

In Graves' case, the Police Officers observed in plain view a handgun in the rear pocket of the driver's seat. After observing that handgun, they saw Graves get into the vehicle, sit there momentarily and then after exiting the vehicle, reach back in through the driver's passenger side window and grab an object and then take that object and place it in the trunk. Graves then got back into the vehicle and when his three passengers got in the vehicle, took off and the Police pursued them and noticed a traffic violation and then effectuated a traffic stop. Armed with the knowledge that there was a weapon in the vehicle, they removed all of the occupants of the vehicle to secure that weapon, only to find that the weapon was no longer in the rear pocket of the driver's seat but, rather, a bag of marijuana was in that pocket. The sighting of the weapon and the bag of marijuana provided the police with sufficient probable cause to effectuate a warrantless search of Graves' automobile and, accordingly, it was not in violation of any of his rights under the Constitutions of the United States or the Commonwealth of Pennsylvania.

Graves second claim of error is that the evidence was insufficient as a matter of law to prove beyond a reasonable doubt that he possessed a firearm so as to support his convictions for the crimes of possession of a firearm without a license[3] and person not to possess a firearm.[4] In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), the Pennsylvania Supreme Court set forth the standard for reviewing a claim of the insufficiency of the evidence as follows:

> 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.*

In examining the record in the light most favorable to the Commonwealth and all the reasonable inferences drawn therefrom, it is clear that the Commonwealth established beyond a reasonable doubt that Graves was guilty of both of these crimes. Officers Schweitzer and Poling were patrolling an area near the Serenity Night Club in light of the fact that there had been numerous incidents involving fights and shootings around that facility. While walking the streets, they illuminated cars that were parked there to see if there were any weapons in sight. When they came to a four-door Volkswagen automobile, they noticed a 44 magnum in the pocket of the back of the driver's seat. These Officers took up surveillance of that motor vehicle to see who would come to that vehicle and saw Graves go to the vehicle, get in and sit in the driver's seat for a brief period of time, and then exit the vehicle and then lean through the rear passenger window and take a small object out of the back of the vehicle and then place that object in the trunk of that vehicle. Graves then got back into the driver's seat and was joined by three other individuals. As a result of a traffic violation, a stop was made and a search of the car then ensued. The Officers were concerned with locating the weapon, however, it was no longer in the pocket of the driver's seat but rather the Officers found a bag of marijuana, which was in plain view. When the Officers looked into the trunk, they found the 44 magnum revolver which they had originally seen in the pocket of the driver's seat.

The Commonwealth can prove its case by both direct and circumstantial evidence and it is clear that the evidence demonstrated that there was a gun in this vehicle, that after Graves had reached into the back seat area and placed an object in the trunk of the car, the gun was no longer in the interior of the car but, rather, was in the trunk. The gun was in the interior prior to Graves getting into the car and was in the trunk after he had placed an object there. The clear and unmistakable inference to arise therefrom is that Graves took the gun from the interior of the car and placed it in the trunk.

Graves' next claim of error is that this Court erred in re-reading testimony to the jury. After the jury had deliberated for a considerable period of time, it sent several questions to this Court with respect to requesting that the videotape of the incident be replayed for them, this time without stopping, since during the course of the trial, it was stopped at different intervals and also that a portion of Officer Schweitzer's testimony be re-read to them. These questions were shown to both counsel and this Court advised counsel that it intended to play the videotape uninterrupted and then to have the court reporter read back from the very beginning of Officer Schweitzer's testimony as to what time they started their foot patrol and to what time the four individuals went to Graves' car. This was the scope of the request made by the jury. This Court did nothing more than respond to the jury's question and did not provide the jury with any new information. A claim similar to the one currently advanced by Graves, was addressed by the Court in the *Commonwealth v. Antidormi*, 214 Pa. Super. 10, 84 A.3d 736, 754-755 (2014). That Court determined that the Trial Court properly replayed testimony for the jury and did not in any way prejudice the defendant.

> We now consider Appellant's claim that the "the [t]rial [c]ourt should not have allowed the jury to [re]hear the audio testimony of Cody Reck." Brief for Appellant at 22. Appellant's claim refers to the jury's post-deliberation request to rehear the testimony of Reck, which was granted by the trial court. *See* Notes of Testimony Volume II ("N.T. Part IV"), 7/17/2012, at 22. Specifically, Appellant contends that allowing the jury to listen to Reck's testimony for a second time "placed undue emphasis on Reck's words, prejudicing [Appellant]." Brief for Appellant at 23. We disagree.
>
> In reviewing Appellant's claim, we keep the following legal principles in mind regarding jury requests to replay portions of testimony:
>
> > [W]here a jury, in order to refresh their recollection, requests a reading of a portion of the testimony actually given at the trial, it is a matter within the discretion of the trial court whether to grant such request. If the trial court does grant the request, the review of testimony must be conducted in open court in the presence of parties and their counsel and, if the resultant review does not place undue emphasis on one witness' testimony, no reversible error is committed.
>
> *Commonwealth v. Peterman*, 430 Pa. 627, 244 A.2d 723, 726 (1968). Reversible error may occur when the trial court sends the testimony of a particular witness to the jury room, instead of holding such a review in open court. *See Commonwealth v. Ware,* 137 Pa. 465, 20 A. 806, 808 (1890) ("The sending out of a part of the testimony to the jury room ... would have

been a palpable error."); Pa.R.Crim.P. 646(C)(1). "The reason for the prohibition is that the presence in the jury room of the physical embodiment of a portion of the trial testimony in written form may have the effect of increasing the probability that the jury will accept the testimony as credible." *Commonwealth v. Canales*, 454 Pa. 422, 311 A.2d 572, 575 (1973). However, we emphasize that this Court has stated that such error may also be harmless, and does not constitute prejudice *per se. See Commonwealth v. Williams*, 959 A.2d 1272, 1285–86 (Pa.Super.2008). "[T]his inquiry requires us to determine whether providing the [evidence] to the jury was prejudicial: 'If there is a likelihood the importance of the evidence will be skewed, prejudice may be found; if not, there is no prejudice *per se* and the error is harmless.' " *Williams*, 959 A.2d at 1285–86 (quoting *Commonwealth v. Dupre*, 866 A.2d 1089, 1103 (Pa.Super.2005)).

The trial court permissibly replayed Reck's testimony (apparently, both direct and cross examination) in open court. *See* N.T. Part IV at 22 ("JURY TRIAL RECONVENED WITH QUESTION BY THE JURY AT 12:08 P.M., PLAYBACK OF WITNESS, EXAMINATION OF CODY RECK") (capitalization in original). Consequently, the trial court adhered to the procedural requirements of Pennsylvania case law and Pa.R.Crim.P. 646(C)(1). However, our inquiry does not end there. We also must determine whether the trial court abused its discretion in allowing Reck's testimony to be replayed.

Appellant does not present a well-developed argument regarding prejudice; he simply asserts that the jury "should" have been prevented from hearing the testimony of Reck again. Appellant offers no citations to any arguably prejudicial sections of Reck's testimony, nor any cogent argument explaining the contours of the alleged prejudice. The only potentially persuasive citation offered by Appellant is to *Williams*. However, Appellant's reliance upon *Williams* is unavailing. The evidence provided to the jury in *Williams* was sent into the jury room, in an ultimately harmless violation of Pa.R.Crim.P. 602(A). *See Williams*, 959 A.2d at 1283. Here, Appellant does not claim that Reck's testimony improperly was provided to the jury in contravention of any procedural rule.

Even assuming, *arguendo*, that the trial court's treatment of Reck's had violated the Pennsylvania Rules of Criminal Procedure, we are persuaded by our analysis in *Williams* that Appellant's claim, without more development, does not suffice to establish prejudice. In *Williams*, we reasoned that merely replaying an audio recording of prior testimony to a jury was not, by itself, prejudicial:

> The jury did not hear new or different testimony in private, out of the presence of [appellant]. Instead, the jury merely heard a verbatim recording of exactly what transpired in open court.... Moreover, in addition to hearing ... direct testimony again, the jury also heard again ... cross-examination by [appellant's] trial counsel. As such, the jury did not hear any accusations or testimony that did not take place in open court—and [appellant] was not accused of anything in secret.

Williams, 959 A.2d at 1283. Under this reasoning, the mere replay here of Reck's previous testimony in open court falls within the ambit of the trial court's discretion and was not prejudicial. Appellant has made no cogent argument that leads us to conclude otherwise. Consequently, the trial court did not abuse its discretion.

Com. v. Antidormi, 2014 PA Super 10, 84 A.3d 736, 754–55, *appeal denied*, 626 Pa. 681, 95 A.3d 275 (2014)

Graves' final claim of error is that this Court did not give him appropriate credit for his pretrial detention; however, this Court entered an Order on May 17, 2016, giving him credit for the time that he was incarcerated from September 7, 2014 through the date of sentencing. As with Graves' other claims of error, this claim has no merit.

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

Dated: July 28, 2016

---

[1] 18 Pa.C.S.A. §6105.

[2] 18 Pa.C.S.A. §6106.

[3] 18 Pa.C.S.A. §6105.

(a) Offense defined.--

(1) A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.

(2)(i) A person who is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm under paragraph (1) or subsection (b) or (c) shall have a reasonable period of time, not to exceed 60 days from the date of the imposition of the disability under this subsection, in which to sell or transfer that person's firearms to another eligible person who is not a member of the prohibited person's household.

(ii) This paragraph shall not apply to any person whose disability is imposed pursuant to subsection (c)(6).

[4] 18 Pa.C.S.A. §6106:

(a) Offense defined.-- (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

(2) A person who is otherwise eligible to possess a valid license under this chapter but carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.

Commonwealth of Pennsylvania v. Michael Anthony Lapaglia

Criminal Appeal—Homicide—Sufficiency—Weight of the Evidence—Sentencing (Discretionary Aspects)—Juror Taint—Involuntary Confession—Prior Bad Acts

Multiple claims of error in a first-degree homicide case.

No. CC 201410922. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Cashman, A.J.—August 2, 2016.

OPINION

On June 11, 2015, following a jury trial, the appellant, Michael Anthony Lapaglia (hereinafter referred to as "Lapaglia"), was found guilty of first degree murder, robbery and burglary. A presentence report was ordered in aid of sentencing and on December 9, 2015, Lapaglia was sentenced to the mandatory sentence of life without the possibility of parole for his conviction of first degree murder, and a consecutive sentence of ten to twenty years for his conviction of the crime of robbery. No further penalty was imposed upon him for his conviction of the crime of burglary. Lapaglia filed timely post-sentence motions and then filed amended post-sentence motions and a hearing on those motions was continued several times at Lapaglia's request. On January 8, 2016, a hearing was held on his post-sentence motions and those motions were denied on January 12, 2016.

Lapaglia filed a timely appeal to the Superior Court and he was directed, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), to file a concise statement of matters complained of on appeal. In complying with that directive, Lapaglia has raised seven claims of error. Initially, Lapaglia maintains that the evidence was insufficient to support the verdict since there was no eyewitness who testified that Lapaglia was present at the victim's home at the time of the homicide and, further, that if Lapaglia had any interaction with the victim, that it occurred outside of the window of the time of death as established by the medical examiner. Lapaglia next maintains that the verdict was against the weight of the evidence since the jury placed too much emphasis on the testimony of Lapaglia's girlfriend and that it also placed too much emphasis on the tape-recorded confession made of Lapaglia and, finally, the jury placed too much emphasis on the testimony of Theodore Hazlettt, a pawn shop operator. Lapaglia next maintains that this Court, in imposing the statutory maximum penalty of a period of incarceration of not less than ten nor more than twenty years consecutive to the sentence of life without the possibility of parole, abused its discretion since that sentence was manifestly excessive. Lapaglia also asserts that the imposition of a sentence of life without the possibility of parole is excessive and the imposition of the mandatory sentence was illegal. In his next claim of error, Lapaglia suggested that he was entitled to a new trial on the basis that his jury panel was tainted by comments made by a potential juror who was ultimately excused. Lapaglia further maintains that this Court abused its discretion in failing to provide the jury with instructions as to the voluntariness, genuineness and credibility of Lapaglia's videotape confession. Finally, Lapaglia maintains that it was error by this Court to permit evidence of his termination from his position as a teller at Dollar Bank for alleged thefts that he had committed and evidence of a theft that occurred from the victim's home prior to the homicide and burglary of that home in July of 2014.

The victim, Jack Parkes, (hereinafter referred to as "Parkes") and Carol Lapaglia, Lapaglia's aunt, had been romantically involved for more than twenty-six years. In the early part of 2014, Parkes and Carol Lapaglia became engaged and were planning a wedding in the fall of 2014. Neither Parkes nor Carol Lapaglia had any children and they treated her nieces and nephews as their own children. Every Labor Day weekend, they would hold a party at their home at 93 Poplar Avenue, Kennedy Township and invite all of the relatives. At the party held in September of 2013, numerous pieces of jewelry were taken from their home and Lapaglia was accused of committing this theft. After realizing that the theft occurred, Carol Lapaglia and Parkes talked and they came to the conclusion that Lapaglia had committed this theft. Carol Lapaglia called her sister, Marie Lapaglia, appellant's mother and told her of the theft and Marie said that she knew because her own son had stolen jewelry from her. None of that jewelry was ever recovered nor was Lapaglia ever charged with that theft.

After Lapaglia graduated from high school, he enrolled in the military; however, he was dishonorably discharged as a result of him being in possession of synthetic marijuana. Following his discharge, Lapaglia maintained that he suffered from post-traumatic stress disorder and he began to self-medicate and to experiment with other drugs to the point that he became addicted to heroin. On June 7, 2014, Lapaglia obtained employment as a teller for Dollar Bank and following his training, was given an office where he was to work. During an unannounced audit, it was determined that on July 1, 2014, Lapaglia's cash drawer was short by nine hundred twenty-five dollars. A second audit was done on July 9, 2014, and it was determined that his cash drawer was short by eighteen hundred dollars. In light of the two unexplained shortages in such a very short period of time, a decision was made to terminate Lapaglia from his job.

On July 21, 2014, Carol Lapaglia went to work at approximately 5:40 a.m., leaving her fiancée, Parkes, to tend to his normal business. Parkes, who was fifty-nine years old, was not employed, having been laid off from his factory warehouse job. In light of medical conditions that he suffered from, he was unable to find employment and spent most of his day cleaning their house, taking care of his mother and her residence. Parkes' mother died in February of 2014 and he had hired a real estate agent to help in the sale of that residence. At approximately ten minutes to eleven, Carol Lapaglia received a call from the real estate agent indicating that she had a potential buyer for the residence and wanted to see if the buyer could look at the residence later that afternoon. She told the agent that she would contact Parkes who had the key, to make the arrangement for an afternoon visit. The real estate agent told Carol Lapaglia that she had attempted to call Parkes at his home and cell phone but received no answer, although she did leave a message. Carol Lapaglia then began to call Parkes at his residence and on his cell phone and, like the real estate agent, received no answer from him. Over the next several hours she attempted to call him at least a dozen times without receiving a response.

At approximately 2:30 p.m. on July 21, 2014, Carol Lapaglia left work and drove to the residence that she shared with Parkes and arrived there at approximately 3:00 p.m. She went into the residence and saw Parkes lying on the floor between a coffee table and a couch and he was motionless. She also saw a pool of blood. She attempted to perform CPR on Parkes but could not get his mouth open. At that point she made a 911 phone call requesting medical assistance stating that Parkes was unresponsive and that his head was lying in a pool of blood. The paramedics and police arrived and made the determination that Parkes was dead from a single gunshot wound to the head and began their investigation of this homicide. Carol Lapaglia did not go to the upstairs of the residence until the next day when she found it in complete disarray. In doing an inventory of their possessions, she made a determination that Parkes' jewelry, her jewelry, Parkes' mother's jewelry and her mother's jewelry had been stolen. In particular, she

made note of the fact that two very distinctive rings, one was a horseshoe diamond and sapphire ring that she had made for him and another was an ace of spades ring. There were also several watches and a thick herringbone gold chain missing.

Theodore Hazlett was the owner of a pawn shop business known as Cash for Collectibles. On July 21, 2014, a white male and a white female came to his business carrying a large amount of gold jewelry in a pouch, seeking to sell that jewelry to him. Hazlett, in examining the jewelry, saw a horseshoe-shaped ring that had sapphires and diamonds on it, however, it looked like it had been smashed or broken with a pair of pliers. He also saw a herringbone gold chain. After weighing all of the jewelry, he advised the white male that he did not have sufficient money with him to buy all of the gold jewelry that this individual wanted to sell him and that he would have to contact his broker later that day. He asked these individuals to come back the next day at approximately 11:00 a.m. when the sale could be consummated.

A couple of hours after the male and female left Hazlett's business, he called the Sharpsburg Police Department and talked with the Chief of Police advising him that he thought someone was trying to sell him stolen jewelry. The Chief asked Hazlett if he knew the individual that was attempting to sell the jewelry and Hazlett told him he knew that individual as Bryan Gibbons that sold him gold jewelry in the past.

Hazlett learned that the individual who was attempting to sell him the jewelry was not Bryan Gibbons but, rather was Lapaglia, when he saw the broadcast of Lapaglia being taken into custody.

On August 5, 2014, Lapaglia was taken into custody by the Allegheny County Police and advised that he was being charged with the crime of criminal homicide. Lapaglia was given his Miranda rights and acknowledged both orally and in writing that he understood those rights. Lapaglia agreed to talk to the police and during his several interviews, gave four different versions as to what his involvement, if any, was in the death of Parkes. Initially, Lapaglia maintained that he had no involvement with the death and knew nothing about that homicide. After denying any involvement with this homicide, the police confronted him with the fact that he was identified as an individual who was at a Downtown pawn shop, pawning items of jewelry that were owned by Parkes. Lapaglia then gave a second version of what happened when he said that he met with an individual known as Big Black Bro as this individual had called him and wanted the money that Lapaglia owed him for heroin that Big Black Bro had previously supplied to him. He agreed to meet Big Black Bro in McKees Rocks and at that meeting, Big Black Bro gave him a Crown Royal bag containing numerous pieces of jewelry and told him to pawn the jewelry and then give Big Black Bro the money. Lapaglia then went to Sharpsburg in an attempt to pawn the jewelry but was unable to sell the jewelry at that pawn shop and ultimately went to another pawn shop in Pittsburgh the next day and received approximately one thousand dollars for the jewelry and he gave that money to Big Black Bro.

The police then confronted Lapaglia with the records from his phone which indicated that his phone was pinging off a cellular tower that was closest to the home of the victim at approximately 10:07 a.m. on the day of the shooting. Lapaglia, in response to this information, then gave his third version of what happened and told the police that he went to Sheldon Park Apartments in Natrona Heights to meet an individual he knew by the name of Stink for the purpose of purchasing drugs. During his conversation with Stink, he told them that Parkes was a bookie and had plenty of money and Stink and two of his associates decided to rob Parkes. He then drove Stink and these two other black males to Parkes' home and they went in and he waited in the car. A short time later Stink and these two other individuals left Parkes' residence, got in the car with Lapaglia and told him that shots had been fired and things did not go well. Stink then gave Lapaglia a Crown Royal bag full of jewelry and told him to pawn that jewelry and give Stink the money.

Following the third version of what happened at Parkes' home, Lapaglia asked for a bathroom break and when he came back from that break, he told the police that he wanted to talk to them and come clean and tell them what actually happened. Lapaglia mentioned that he had been recently discharged from the Army and that he suffered from post-traumatic stress disorder and that he was depressed and as a result of his depression, attempted to self-medicate himself by using heroin. As a result of his heroin use, he needed money and when the jewelry was stolen from the victim a year prior to his death, he was accused of stealing that jewelry to satisfy his heroin habit. On the morning of the homicide he called his girlfriend, Melanie Gigliotti, and asked her to go on a ride with him and they drove to Parkes' residence, however, he parked several blocks away from the residence and told Gigliotti to stay in the car and that he would be back shortly. Lapaglia then walked to Parkes' residence and saw that Parkes was standing at the front door, apparently having seen Lapaglia approach his house. When he got inside the house a fight ensued and Parkes put Lapaglia in a headlock and Lapaglia drew a thirty-eight caliber handgun and shot Parkes in the head. Knowing that he had killed him, he then took all of Parkes' jewelry and money and went back to his car where Gigliotti was waiting. They then proceeded to Sharpsburg in an attempt to pawn the jewelry, however, he was unsuccessful in selling that jewelry to the pawn shop. From there he proceeded to the VA Hospital for a 1:00 appointment to discuss his claim that he suffered from post-traumatic stress disorder. The next day he went to a pawn shop in the City of Pittsburgh and pawned Parkes' jewelry and coins and received approximately one thousand dollars for them.

In his first claim of error, Lapaglia maintains that the evidence was insufficient to support his convictions for the crimes of criminal homicide, robbery and burglary in that no eyewitness placed Lapaglia inside Parkes' residence and further that if Lapaglia had any interaction with the victim it occurred outside the time of death established by the coroner. The standard for reviewing a claim that the evidence was insufficient to support the verdicts have been set forth in *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), the Pennsylvania Supreme Court set forth the standard for reviewing a claim of the insufficiency of the evidence as follows:

> 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.*

In reviewing the evidence in the light most favorable to the Commonwealth and using all of the reasonable inferences drawn therefrom, it is abundantly clear that the Commonwealth has met its burden of proving the elements of the offenses charged beyond a reasonable doubt. Lapaglia is incorrect that there was no witness who placed him inside of Parkes' residence at the time the homicide was committed. When questioned by the police, Lapaglia gave four different stories as to what involvement, if any, he had in Parkes' death and finally told the police that he wished to come clean and placed a confession on tape so that the jury could not only hear but also see Lapaglia tell the police how and why Parkes died. The Commonwealth also presented the testimony of Gigliotti, Lapaglia's then girlfriend, who testified that sometime between seven thirty and eight thirty in the morning, she called her employer and told him that she was ill and she would not be in to work that day. This was an excuse so that Gigliotti and Lapaglia could do drugs that day. Sometime between nine, ten or eleven a.m., Lapaglia drove to Kennedy Township and parked a couple of blocks away from Parkes' residence and Lapaglia told her to stay in the car and that he would be back in twenty minutes. If he was not back in that time period, then she was to leave the area. When Lapaglia returned to the vehicle, he was carrying a Crown Royal bag which contained jewelry and coins, which were owned by Parkes. The Commonwealth also presented information that Lapaglia's phone was pinging off of a cell tower close to Parkes' house at 10:07 a.m. on July 21, 2014. All of this information was more than sufficient to establish that Lapaglia had killed Parkes.

Lapaglia also maintains that the evidence was insufficient to show that he was at Parkes' residence during the time that Parkes was killed. Dr. AbdulRezak Shakir testified that he estimated that the time of death occurred sometime between 11:30 and 3:00 p.m. Those time parameters were established by information that he received as to the last person who had seen Parkes alive and when the body was discovered by Carol Lapaglia. Bradley Johnson testified that on July 21, 2014, he went to Parkes' house to talk to him because he was interested in possibly buying Parkes' mother's house for Johnson's mother. While he did not have a watch on, he estimated that he was there at approximately 10:00 a.m. and left at approximately 11:20 a.m. Carol Lapaglia testified that she left for work at approximately 5:40 a.m. and while she was at work, received a phone call from the real estate agent that had listed Parkes' mother's home who informed her that she had a potential buyer for that residence and that individual wanted to come and see the home. She recalled that she received the phone call at 10:50 a.m. The real estate agent also informed her that she had attempted to call Parkes but received no answer. Carol Lapaglia called the residence and Parkes' cell phone at approximately 11:55 a.m. and received no answer and continued to make numerous phone calls until she left work. When she returned home at approximately 3:00 p.m., she discovered Parkes' body. It is abundantly clear from all of the testimony that Parkes was dead by noon and the fact that Lapaglia was at the VA Hospital at 1:00 p.m. is of no moment since the testimony of the other witnesses allowed him a window of opportunity to go to Parkes' home and murder him.

Lapaglia next maintains that the verdicts were against the weight of the evidence in that the jury placed too much emphasis on the testimony of Lapaglia's girlfriend, Gigliotti; that it also placed too much emphasis on Lapaglia's tape-recorded statement and, finally, that it placed too much emphasis on the identification made by one of the pawnbrokers to whom Lapaglia was attempting to sell Parkes' jewelry. In *Commonwealth v. Antidormi*, 2014 Pa. Super. 10, 84 A.3d 736, 757-758 (2014) the Court set forth the standard to be employed when viewing a claim that the verdicts were against the weight of the evidence.

> We turn now to Appellant's claim challenging the weight of the evidence. Our review is guided by the following legal principles:19
>
> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Widmer*, 744 A.2d at 751–52; *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177, 1189 (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. *Widmer*, 744 A.2d at 752. 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.* at 320, 744 A.2d at 752 (citation omitted). It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Brown*, 648 A.2d at 1189.
>
> An appellate court's standard of review when presented with a weight of the evidence claim 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 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[.]
>
> *Widmer*, 744 A.2d at 753 (internal citations truncated for continuity, emphasis added).
>
> *Commonwealth v. Clay*, 64 A.3d 1049, 1054–55 (Pa.2013) (citations modified).
>
> *Com. v. Antidormi*, 2014 PA Super 10, 84 A.3d 736, 757–58, *appeal denied,* 626 Pa. 681, 95 A.3d 275 (2014)

All of the Lapaglia's claims that the verdicts were against the weight of the evidence are predicated upon Lapaglia's belief that the jury must have placed too much emphasis of the testimony of certain witnesses. There is nothing in the record that would enable any individual to determine what, if any, emphasis the jury placed on any of the testimony that was presented to them. Lapaglia was permitted the opportunity to cross-examine his girlfriend and to demonstrate that she was fearful about losing custody of his children because of her own drug addiction and the fact that she cohabited with another drug user. The jury was able to weigh this evidence along with all of the other evidence presented to it to make a determination as to whether not Gigliotti was a credible witness. The jury further was permitted the opportunity not only to hear, but also to see, Lapaglia's taped statement given to the police. While he was in custody and at times while he was shackled, this was done in accordance with normal police

policy. The jury had the full opportunity to assess Lapaglia's credibility and also to determine whether or not he was being truthful with respect to this statement given to the police on tape and the other statements that he had previously given to them. With respect to the testimony of Theodore Hazlettt, the owner of Coins for Cash in the Sharpsburg area, Hazlettt did not identify Lapaglia when he reported to the Sharpsburg police that he thought an individual was attempting to pawn stolen goods to him. It was only after he had seen a newscast where Lapaglia had been taken into custody and charged with the crime of criminal homicide, that he identified Lapaglia as the individual who attempted to pawn those items on the day of the homicide. As with the testimony of the other witnesses, the jury had the opportunity to see and to view all of that testimony and make a determination as to whether or not those individuals were credible individuals and whether or not their testimony was supported by the evidence in this case, which it was.

Lapaglia's next claim of error is that his sentence of a period of incarceration of not less than ten nor more than twenty years for his conviction of the crime of robbery which would run consecutive to his sentence of life without the possibility of parole for his conviction of first degree murder was manifestly excessive and, therefore, an abuse of discretion. In formulating Lapaglia's sentence, this Court complied with the requirements of the Sentencing Code which provides in 42 Pa.C.S.A. §9721(b) that the following standards must be used:

> **(a) General rule.—**In determining the sentence to be imposed the court shall, except as provided in subsection (a.1), consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:
>
> (1) An order of probation.
>
> (2) A determination of guilt without further penalty.
>
> (3) Partial confinement.
>
> (4) Total confinement.
>
> (5) A fine.
>
> (6) County intermediate punishment.
>
> (7) State intermediate punishment.
>
> **(a.1) Exception.—**
>
> (1) Unless specifically authorized under section 9763 (relating to a sentence of county intermediate punishment) or 61 Pa.C.S. Ch. 41 (relating to State intermediate punishment), subsection (a) shall not apply where a mandatory minimum sentence is otherwise provided by law.
>
> (2) An eligible offender may be sentenced to State intermediate punishment pursuant to subsection (a)(7) and as described in 61 Pa.C.S. Ch. 41 or to State motivational boot camp as described in 61 Pa. C.S. Ch. 39 (relating to motivational boot camp), even if a mandatory minimum sentence would otherwise be provided by law.
>
> (3) An eligible offender may be sentenced to total confinement pursuant to subsection (a)(4) and a recidivism risk reduction incentive minimum sentence pursuant to section 9756(b.1) (relating to sentence of total confinement), even if a mandatory minimum sentence would otherwise be provided by law.
>
> **(b) General standards.—**In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole and recommitment ranges following revocation).1 In every case in which the court imposes a sentence for a felony or misdemeanor, modifies a sentence, resentences an offender following revocation of probation, county intermediate punishment or State intermediate punishment or resentences following remand, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence or resentence outside the guidelines adopted by the Pennsylvania Commission on Sentencing under sections 2154 (relating to adoption of guidelines for sentencing), 2154.1 (relating to adoption of guidelines for county intermediate punishment), 2154.2 (relating to adoption of guidelines for State intermediate punishment), 2154.3 (relating to adoption of guidelines for fines), 2154.4 (relating to adoption of guidelines for resentencing) and 2154.5 (relating to adoption of guidelines for parole) and made effective under section 2155, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines to the commission, as established under section 2153(a)(14) (relating to powers and duties). Failure to comply shall be grounds for vacating the sentence or resentence and resentencing the defendant.
>
> 42 Pa. Stat. and Cons. Stat. Ann. § 9721 (West)

It is abundantly clear that the sentence of life without the possibility of parole took into consideration the need for the protection of the public, the gravity of the offenses committed by Lapaglia, the impact upon the life of the victim and his community and the rehabilitative needs of Lapaglia. This Court in order to insure that that sentence of life without the possibility of parole would meet those needs, deemed it appropriate to impose a consecutive sentence of a period of incarceration of not less than ten nor more than twenty years for his conviction of the crime of robbery. The record reflected that this was the second time that Lapaglia had burglarized the victim's home and stolen the victim's jewelry. The sentence being imposed upon him as a consecutive sentence was done so to meet all of the requirements of the Sentencing Code.

Lapaglia next maintains that the imposition of a sentence of life without the possibility of parole is excessive and the imposition of a mandatory sentence was illegal. In an attempt to suggest that there is a legal basis for these assertions, Lapaglia has attempted to rely on the series of cases decided by the United States Supreme Court with respect to the imposition of life sentences

without the possibility of parole on minors, including *Miller v. Alabama* and *Monroe v. Louisiana*. Lapaglia maintains that while he is not a minor, he is only several years older than those individuals and should be afforded the same benefits. Lapaglia was twenty-three years old when he killed Parkes and, accordingly, he was not eligible to have a lesser sentence imposed upon him than the one mandated by statute, that being life without the possibility of parole.

Lapaglia next maintains that he is entitled to a new trial on the basis of his claim that the jury panel was tainted by comments made by a potential juror. During jury selection, a potential juror completed his jury panel questionnaire in such a fashion as to demonstrate that he could not be a fair and impartial juror. Illustrative of this fact was he stated that he would believe a police officer over any other witness and he could not follow the Court's instruction that any individual accused of crime is presumed innocent. The manner in which this potential juror completed the form was intentionally designed to get him excused from jury duty. To insure that that objective was achieved, when that potential juror was brought up to be interrogated, he leaned across the table, pointed directly at Lapaglia and said "You did it, didn't you, admit it." This juror was removed from the jury panel and the Court took appropriate action to address his willful disregard for the criminal justice system. As a result of this potential juror's conduct, each and every one of the jurors selected in Lapaglia's case was asked if they had heard anything that this potential juror had said or did they observe any of his activities. Almost all of the jurors said that they had not heard anything and even those who did hear it, said they could be fair and impartial jurors and his actions and words would not be part of their jury deliberations.

Lapaglia next maintains that this Court erred in failing to provide the jury with instructions concerning Lapaglia's confession, including the instructions on the general consideration of a defendant's confession, the genuineness of his confession, the voluntariness of his confession and the credibility and weight to consider in analyzing someone's confession. Lapaglia never requested any of these instructions and he acknowledged that his confession was voluntarily made when he signed his Miranda rights form and indicated to the police orally that he understood his rights. When Lapaglia told the police that he wanted to tell them the truth, he agreed to give a videotaped confession which enabled the jury to not only hear, but also to see Lapaglia. This Court viewed that confession and it was clear that he was not coerced into making that confession and that he freely and voluntarily made that confession.

Finally, Lapaglia has suggested that this Court erred in allowing evidence of prior bad acts with respect to his termination from employment at Dollar Savings Bank and a prior theft from Parkes' residence. The Commonwealth presented evidence that Lapaglia was employed as a teller by Dollar Savings Bank and over a very short period of time had two shortfalls in his cash drawer. They also provided the testimony from Carol Lapaglia that at a Labor Day party a year prior to Parkes' death, that a number of pieces of Parkes' jewelry and her jewelry were stolen and that Lapaglia had committed those thefts. The Commonwealth filed a motion to produce evidence pursuant to Pennsylvania Rule of Evidence 404.b of prior bad acts in order to establish the motive, plan and opportunity that Lapaglia had to commit the crimes for which he was on trial. In particular, the Commonwealth wanted to show the fact that he had been fired from his job at Dollar Savings Bank for theft because of his need for money to support his drug habit and that he knew that the victim had a considerable amount of jewelry and coins which could easily be pawned. In reviewing Pennsylvania Rule of Evidence 404(b), it provides as follows:

> (b) Other crimes, wrongs or acts.
>
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
>
> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
>
> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.
>
> (4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

It has additionally been held that evidence of such prior bad act is admissible if relevant to show any one of five things: 1) motive; 2) intent or knowledge; 3) absent a mistake or accident; 4) common scheme or plan; and, 5) identity. The evidence presented by the Commonwealth of Lapaglia's bad acts was designed to prove motive, intent and common plan. It was offered for the purpose of showing Lapaglia's need for money to support his heroin addiction and the fact that he would commit criminal activity to support that addiction. As with all of his other claims of error, this claim is also without merit.

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

Dated: August 2, 2016

Commonwealth of Pennsylvania v. Andre Taylor

Criminal Appeal—Suppression—Traffic Stop—Reasonable Suspicion—Nervousness of Driver—Fruit of the Poisonous Tree

A traffic stop is not deemed unduly delayed when police asked nervous occupants leaving high crime area to step out of the car for "officer safety."

No. CC 201506230. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—August 31, 2016.

OPINION

On April 28, 2015, Appellant, Andre Taylor, was arrested and charged with one count of Possession with Intent to Deliver a Controlled Substance (PWID)[1], two counts of Possession of a Controlled Substance[2], one count of Possession of Marijuana,[3] and one count of Possession of Drug Paraphernalia.[4] The Possession of Drug Paraphernalia was dismissed at the Preliminary Hearing.

Appellant filed a Motion to Suppress on September 2, 2016. After a hearing on the motion and careful consideration of Appellant's Brief and the Commonwealth's Memorandum of Law filed on the issue, this Court denied the Motion to Suppress on December 14, 2015. The case proceeded to a stipulated nonjury after which this Court found Appellant guilty of the remaining charges.[5] Appellant was sentenced on March 15, 2015 to 25 to 65 months of incarceration with three years consecutive probation at the PWID count and no further penalty on the rest of the charges. Appellant filed a Notice of Appeal on April 14, 2016 and a Statement of Errors Complained of on Appeal on May 6, 2016.

MATTERS COMPLAINED OF ON APPEAL

Appellant alleges this Court erred in denying Appellant's motion to suppress. Appellant alleges that police officers extended a traffic stop without reasonable suspicion of criminal activity. Appellant alleges that because the search violated his constitutional rights, this Court erred in failing to suppress the drugs subsequently recovered as fruit of the poisonous tree. (Concise Statement of Errors to be Raised on Appeal at 3-4).

SUMMARY OF THE CASE

Detective Schelley Gould of the McKeesport Police Department, a police officer with twenty-one years experience, testified that he was working in a plain clothes capacity on April 28, 2015. (Transcript of Suppression Hearing of October 1, 2015, hereinafter ST 3-4) At approximately 5:30 p.m., he observed a grey Suzuki with an expired inspection sticker in the opposing lane of traffic. (ST 4-5) The Suzuki was driving away from the 500 block of Fifth Avenue, an area the Detective described as a "high drug trafficking area." (ST 5) Det. Gould initiated a traffic stop and identified Joseph Heiresdt as the driver and Appellant as the front seat passenger. *Id.* Det. Gould observed Heiresdt and Appellant shaking considerably, and concluded that they appeared more nervous than a normal traffic stop would warrant. (ST 6) Detective Gould twice told Appellant to stop moving around the vehicle, but Appellant did not comply with this request. (ST 7) Det. Gould believed a weapon may have been in the car, and called for backup. (ST 8)

Once Officer Zuber arrived as backup "a couple minutes later," the officers asked Appellant to exit the vehicle. *Id.* Det. Gould asked Appellant if he had anything on his person that the Detective needed to know about. *Id.* The Detective testified that the primary reason he asked that question was out of a concern that Appellant may have been armed. *Id.* Appellant responded that he had "a little bit of weed" on him. (ST 9) Officer Zuber then recovered 6.698 grams of marijuana from Appellant's pocket.[6] *Id.* As a result, the officers arrested Appellant and searched him incident to arrest. *Id.* The officers' search incident to arrest of Appellant yielded eight bricks of heroin, two cell phones and $700 in cash.

DISCUSSION

Appellant claims that this Court erred in denying Appellant's Motion to Suppress. The standard of review in determining whether the trial court appropriately denied the suppression motion is whether the record supports the factual findings and whether the legal conclusions drawn from these facts are correct. *Commonwealth v. Stevenson*, 894 A.2d 759, 769 (Pa. Super. 2006). Appellant asserts that Det. Gould extended the traffic stop longer than reasonably necessary, without reasonable suspicion that criminal activity was afoot. The Commonwealth argued that the detective had reasonable suspicion of criminal activity, which justified and supported Appellant's detention, removal from the vehicle, and pat down. The test for reasonable suspicion to support an investigative detention is as follows:

> To establish grounds for "reasonable suspicion" sufficient to justify an investigative detention, the officer must articulate specific observations which, in conjunction with reasonable inference derived from these observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity. *Commonwealth v. Cook*, 558 Pa. 50, 735 A.2d 673, 676 (1999). Mere hunches on the part of the officer are insufficient to meet this burden; however, "...a combination of innocent facts, when taken together, may warrant further investigation by the police officer." *Id.*
>
> *Commonwealth v. Bennett*, 827 A.2d 469, 477 (Pa.Super.2003) (emphasis added). "Our courts have mandated that law enforcement officers, prior to subjecting a citizen to investigatory detention, must harbor at least a reasonable suspicion that the person seized is then engaged in unlawful activity." *Commonwealth v. Beasley*, 761 A.2d 621, 625 (Pa.Super.2000). "[E]ven where the circumstances surrounding an individual's conduct suggest ongoing illegality, the individual may not be detained unless his or her personal conduct substantiates involvement in that activity." *Id.* at 626.

Commonwealth v. Wood, 833 A.2d 740, 747–48 (Pa. Super 2003), *aff'd*, 862 A.2d 589 (Pa. 2004).

A police officer may stop a vehicle for any violation of the Motor Vehicle Code. *Commonwealth v. Pless*, 679 A.2d 232, 233 (Pa. Super. 1996). At a traffic stop, police officers also have the right to compel a driver to exit the vehicle. *Commonwealth v. Parker*, 957 A.2d 311 (Pa. Super. 2008), *appeal denied*, 976 A.2d 571 (Pa. 2009). A police officer may order passengers, in addition to drivers, to exit a vehicle if the officer can "articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity." *Commonwealth v. Reppert*, 814 A.2d 1196, 1202 (Pa. Super. 2002).

Considering the totality of the circumstances, this Court concluded that the officers had reasonable suspicion that criminal activity was afoot at the time Det. Gould asked Appellant to exit the vehicle. The car in which Appellant was riding had just left a high drug trafficking area. Appellant would not stop moving inside the vehicle despite twice being instructed to sit still. The Detective noted that, based on his experience, Appellant and the driver were overly nervous for a minor traffic stop. These facts, interpreted through the training and experience of a seasoned police officer, led him to believe that Appellant may have been armed. Even innocent facts, taken together and in the light of an experienced police officer, may create a reasonable suspicion of criminal activity. *Commonwealth v. Cook*, 735 A.2d 673, 678 (Pa. 1999).

Out of concern for officer safety, while the Officers had reasonable suspicion that criminal activity was afoot, Detective Gould asked Appellant, "Is there was anything on your person I need to be concerned about?" (ST 8) A similar question asked by a police officer to a suspect removed from his vehicle "whether he had any weapons ... or anything [the police] should be aware of," was deemed to be "no more intrusive and no more of a nature that would tend to yield incriminating evidence than an unquestionably permissible request to alight from a vehicle during a traffic stop." *Commonwealth v. Clinton*, 905 A.2d 1026, 1030, 1032 (Pa. Super 2006). Appellant replied that he possessed marijuana, which was seized and Appellant was lawfully arrested. Once arrested, Appellant was legally searched incident to arrest and the drugs, money, and cell phones were recovered.

Lastly, Appellant's reliance on *Rodriguez v. U.S.*, 135 S.Ct. 1609 (2015) is misplaced. *Rodriguez* held that a traffic stop may not be prolonged to investigate unrelated criminal activity. 135 S.Ct. at 1615. Specifically, a dog sniff, which is not related to roadway or officer safety, may not be conducted "in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* In the matter *sub judice*, however, the initial stop of the vehicle, the removal of Appellant from the vehicle, and the question asked by the Detective were related to immediate roadway and officer safety, and not for the purpose of investigating a separate offense. Furthermore, the traffic stop was not unduly delayed by asking the occupants to exit the vehicle due to justifiable concerns for officer safety. As such, *Rodriguez* is inapplicable and this Court did not err.

CONCLUSION

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

BY THE COURT:
/s/Rangos, J.

[1] 35 Pa.C.S. § 780-113 (a) (30).

[2] 35 Pa.C.S. § 780-113 (a) (16).

[3] 35 Pa.C.S. § 780-113 (a) (31).

[4] 35 Pa.C.S. § 780-113 (a) (32).

[5] The Possession of Marijuana charge was withdrawn.

[6] Officer Zuber could not recall if Appellant stated the location of the marijuana or if detective Gould found it during a pat down. *Id.*

Commonwealth of Pennsylvania v. Shane Lafferty

Criminal Appeal—Evidence—Sufficiency—Weight of the Evidence—Prosecutorial Misconduct—Sentencing (Discretionary Aspects)—Waiver—Child Pornography—Mistrial

Commonwealth witness entered jury room to play audio recording during deliberation, but also answered jury's questions about audio, court finds this was harmless error.

No. CC 201404063. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Rangos, J.—September 26, 2016.

OPINION

On February 20, 2015, a jury convicted Appellant, Shane Lafferty, of two counts of Possession of Child Pornography[1]. Appellant was sentenced to two to four years of incarceration with six years consecutive probation. Post Sentence Motions were denied on March 10, 2015 and Appellant filed a Notice of Appeal on October 15, 2012. Appellant filed a Statement of Errors Complained of on Appeal on April 9, 2015. A considerable delay ensued as the trial transcript was not filed in a timely manner. Appellant obtained the transcript on August 18, 2016 and filed a Concise Statement of Matters Complained of on Appeal on September 7, 2016.

MATTERS COMPLAINED OF ON APPEAL

Appellant, in his Concise Statement, raised the following eight issues on appeal. Appellant alleges this Court erred in permitting the Commonwealth to introduce into evidence and send out with the jury a power point presentation which improperly summarized witness testimony. Next Appellant alleges the evidence was insufficient to sustain the verdicts. Appellant also alleges that the verdicts were contrary to the weight of the evidence. Appellant's next allegation of error is that the Assistant District Attorney ("ADA") committed prosecutorial misconduct during his closing argument by making improper statements to the jury. Appellant alleges his Due Process rights were violated when a Commonwealth witness twice entered the jury room during deliberations and answered questions from the jurors. Appellant alleges this Court further erred by failing to hold a hearing to determine the prejudicial impact of the witness' contact with the jury. Appellant additionally alleges this Court erred in failing to give a cautionary or curative instruction to the jury regarding the witness' contact with the jury. Lastly, Appellant alleges this Court abused its discretion by imposing a manifestly excessive, unreasonable sentence. Concise Statement of Errors to be Raised on Appeal, pp. 3-8.

SUMMARY OF THE CASE

Corporal Gerhard Goodyear of the Pennsylvania State Police Southwest Computer Crime Task Force testified that his duties include undercover investigations into the possession and distribution of child pornography and forensic examinations of any kind of electronic device that can contain data. (Transcript of Jury Trial 2/17-20/15, hereinafter TT 54-55) He testified that he has received training in BitTorrent/eMule and various other file sharing networks, and has personally initiated between fifty and seventy-five undercover investigations. (TT 55) BitTorrent is a network that the State Police monitor for the distribution of child pornography. (TT 57) The parties stipulated that Corporal Goodyear could testify as an expert in computer forensics and peer-to-peer file sharing investigations. (TT 71)

Appellant conceded that his computer contained child pornography but alleged that others had access to the computer and may have downloaded child pornography without his consent or knowledge. The parties also stipulated that between April 5, 2013, and June 27, 2013, Appellant did not have access to his computer. (TT 223)

Corporal John Roche testified that his investigation led him to obtain a warrant to search 1331 Fallowfield Avenue. (TT 154) On October 29, 2013, he and a number of other officers executed the warrant. (TT 155) After knocking loudly for over a minute, police kicked in the door. (TT 158) Corporal Roche encountered Appellant exiting an upstairs bedroom. (TT 160) Corporal Roche observed Appellant's laptop computer on the bed, open to a forty-five degree angle with a file sharing program running. (TT 161) No other person was in the room at that time, and Corporal Roche found no evidence that anyone else stayed in that room. (TT 162)

The Commonwealth presented evidence to explain to the jury the procedure the State Police used to determine the presence of child pornography on the laptop computer owned by Appellant. Corporal Roche testified that he created a PowerPoint presentation to explain his forensic examination of Appellant's computer. (TT 153) The PowerPoint was used as demonstrative evidence but was never offered or admitted into evidence. Corporal Roche examined Appellant's computer and found approximately forty-three downloads with Appellant's name associated with it[2]. (TT 179-180) Corporal Roche listed the downloads chronologically and testified that the activity of creating downloaded files ended on March 10, 2013 and resumed on June 29, 2013. (TT 181) The Corporal's search results also included a handful of downloads associated with either Wendy Cross or Amy Cross, other residents of Appellant's home. (TT 180-181) None of the downloads associated with Wendy or Amy Cross contained child pornography.[3] (TT 181)

Corporal Roche gave as an example of the computer's activity the files indexed on Appellant's computer on July 9, 2013. Corporal Roche testified that on July 9, 2013, at 4:50 p.m., a text file was created on Appellant's computer called "Shane's food stamp app.number.text." (TT 185) File sharing of child pornography occurred on the same date at 4:37 p.m. and at 5:05 p.m. (TT 186) Corporal Roche concluded that the same person who created the document "Shane's food stamp app.number.text" was at the same time sharing child pornography through BitTorrent. (TT 186-187) On December 23, 2013, Corporal Roche obtained an arrest warrant and asked Appellant to turn himself in to Magistrate Court as an arrest by appointment. (TT 187) Appellant agreed but failed to appear, and was subsequently arrested by Pittsburgh Police on March 9, 2014. (TT 188)

Officer Dennis Baker of the City of Pittsburgh Police Department testified that on March 9, 2014 he was dispatched to a residence on Fallowfield Avenue to execute an arrest warrant for Appellant. (TT 234-235) Officer Baker knocked on the door and a man answered and identified himself as Brian Wells. (TT 236) The officer identified Appellant in court as the individual who said he was Brian Wells. (TT 237) "Brian Wells" told the officer that Appellant resided in the home but was not present at that time. *Id.* Officer Baker asked Appellant to provide any identification, such as a driver's license or a piece of mail with his name on it, but Appellant could not produce these items. (TT 238) Appellant was asked his date of birth by three different officers and Appellant gave three different responses. (TT 239) Officer Baker arrested him, at which point Appellant said, "I'm Shane Lafferty. I'm the one you're looking for." (TT 239)

Appellant called several witnesses in an effort to cast blame on David Cross for the child pornography on Appellant's computer. Thomas Betker testified that he lived at 1331 Fallowfield Avenue in the summer of 2013 with his girlfriend Jordan Thomas, Appellant, Amy Cross (Appellant's ex-girlfriend), and her mother Wendy Cross, and said that during that summer David Cross periodically resided there as well. Betker testified that he never saw Appellant access child pornography, that other individuals had access to Appellant's laptop computer during the relevant time frame, and that one of those individuals was David Cross. David would take the computer to a more private area of the home when he used it and at one point indicated a desire to destroy the computer. (TT 263-267) Jordan Thomas and a neighbor, Bridget Aber, testified similarly. (TT 292-298, 325-335) In addition, Aber testified that David Cross confided to her that he had a sexual predilection toward children. (TT 335)

Amy Cross, David's sister, gave testimony that mirrored that of Betker, Thomas and Aber, but added that she had observed David Cross looking at child pornography when he was fourteen years old. (TT 370-374) Amy Cross testified that David Cross has prescription medication for a medical condition but he told her that he doesn't like to take it because it negatively affects his ability to control sexual urges he has towards children. (TT 375-376)

Nathaniel Wells, a high school friend of David Cross, testified that he observed David Cross looking at child pornography twelve years ago when Cross would have been seventeen years old. (TT 403) Wells further testified that he and Cross argued on Facebook over what Wells referred to as Cross' use of scripture to justify Cross' pedophilia. (TT 404)

David Cross testified on rebuttal under a grant of immunity. (TT 420) He denied using Appellant's computer to access child pornography. (TT 425) He denied having any conversation with Aber regarding an interest in having sex with young girls. (TT 425-426) He denied having been caught looking at child pornography by Wells twelve years ago. (TT 431) He stated that he was not at the Fallowfield address on the relevant dates and at the relevant times: July 3, 2013, at 6:00 a.m., on July 8, 2013 at 3:00 a.m., or on July 9, 2013 at 12:35 p.m. (TT 432) Further, he stated that he resided at the Fallowfield address in 2012 but had moved out by Christmas 2012 and was not residing there during the summer of 2013. (TT 422-423)

Amy Cross was called as a surrebuttal witness. (TT 460) She testified that David Cross once explained to her that a person interested in child pornography can use a "Pedobear" which is an otherwise innocuous image such as the cartoon pony from "My Little Pony" to express that person's pedophilic predilections. *Id.*

DISCUSSION

Appellant first alleges this Court erred in permitting the Commonwealth to use a PowerPoint presentation which had not been provided to Appellant prior to trial. Corporal Goodyear prepared the PowerPoint presentation "to educate the jury on the operation of a computer file sharing technique, the investigative techniques that the Pennsylvania State Police use." (TT 6) The ADA informed counsel for Appellant of the existence of the PowerPoint but did not provide counsel with a copy of it prior to trial. *Id.* The ADA also indicated to Appellant's counsel that two additional PowerPoints would be used during the testimony of Corporals Goodyear and Roche. (TT 18) The ADA made a proffer that the purpose of the PowerPoints was to illustrate certain technical points of testimony regarding computer downloads, file names, and file sharing. *Id.* This Court ruled that "[t]o the extent that [the Troopers] first testify and the testimony supports the information in the PowerPoint, then it can be used as demonstrative evidence for the jury to better understand the testimony." *Id.*

Counsel for Appellant objected to the use of the PowerPoints on the basis that they had not been provided in advance. (TT 56) Counsel for Appellant conceded that all of the information in the PowerPoint had been provided to counsel in advance, but not in the format of a PowerPoint presentation. (TT 178) This Court permitted the use of the PowerPoints as demonstrative evidence. (TT 56-57) The PowerPoints were not admitted as evidence and were not initially sent out to jury during deliberations. (TT 508) After a written request from the jury, counsel for Appellant agreed to permit the jury to see portions of one PowerPoint presentation pertaining to file sharing. (TT 513) Counsel later agreed to permit the jury to review all of the PowerPoints without the subject pornographic downloaded or shared images. (TT 527)[4]

> An important function of an expert witness is to educate the jury on a subject about which the witness has specialized knowledge but the jury does not. *See* Binder on Pennsylvania Evidence, Third Ed., § 7.02, p. 314 (Pa.Bar.Inst. 2003). To help perform the function of educating a jury, an expert witness may use various forms of demonstrative evidence.

Commonwealth v. Serge, 896 A.2d 1170, 1177 (Pa. 2006).

> Pa.R.E. 702 permits expert testimony if it 'will assist the trier of fact to understand the evidence or to determine a fact in issue [.]' Such expert testimony is not limited to that which is purely verbal; rather, it includes pertinent illustrative adjuncts that help explain the testimony of one or more expert witnesses.

Serge, 896 A.2d at 1178.

Both of the Troopers testified as expert witnesses and both used the PowerPoints to explain highly technical matters to the jury that would have otherwise been difficult for the average jury to comprehend. Appellant's only objection was that he had not been provided before trial with the format in which the information was being presented. Appellant did not object to the underlying information itself. This Court overruled Appellant's objection as the Commonwealth was not required to provide the PowerPoint itself in advance of trial so long as all of the underlying information had been provided to Appellant in advance of trial.

Appellant next claims that the evidence was insufficient to support the verdict. The test for reviewing a sufficiency of the evidence claim is well settled:

> [W]hether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt... This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.

Commonwealth v. Hardcastle, 546 A.2d 1101, 1105 (Pa. 1988) (citations omitted).

Appellant alleges that the Commonwealth offered no evidence that Appellant used the laptop to share/download files of child pornography. This Court respectfully disagrees. Appellant's laptop was recovered from his bed, with a file sharing program running on it at that time. Appellant admitted that the computer was his and that the images on his computer constituted child pornography. Corporal Roche's testimony established that child pornography was downloaded during a time that someone with Appellant's first name created a document entitled "Shane's food stamp app.number.text." Furthermore, Corporal Roche's testimony established that no child pornography was downloaded for months while Appellant was out of the residence and unable to access the laptop, but upon his return into the home, child pornography was downloaded. When informed of his arrest warrant and given the opportunity to self-report, Appellant agreed to do so but did not. Subsequently, after police arrived at his residence to arrest him, Appellant's lied to the police regarding his identity. A jury could reasonably have concluded based on the evidence that Appellant had downloaded and shared child pornography. Appellant's claim regarding the sufficiency of the evidence is without merit.

Appellant's next issue, that the verdict was against the weight of the evidence, is also without merit. The standard for a "weight of the evidence" claim is as follows:

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

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

Appellant's theory of the case was that David Cross or another individual used Appellant's computer to download child pornography. Based on the evidence presented at trial, the verdict does not so shock the conscience as to necessitate a new trial. The testimony, if believed, that David Cross viewed child pornography over ten years prior, held unconventional opinions regarding free love, and may have expressed a desire to destroy certain computers[5] pales in the face of the Commonwealth's evidence that the child pornography on Appellant's computer was downloaded coincident with Appellant's return to the home and not with a visit by Cross to the home. Furthermore, Appellant's name was associated with the downloads and no testimony placed Cross in the home at or immediately preceding the downloads. The jury could reasonably conclude that Appellant used his computer to download child pornography. As such, Appellant's claim is without merit.

Appellant alleges prosecutorial misconduct when, during his closing argument, the ADA discussed matters not in evidence and testified about his thoughts about David Cross, the ADA's conversations with the Troopers and the process the ADA used in order to have Cross appear and testify at Appellant's trial. The legal principles relevant to a claim of prosecutorial misconduct are well established. Actions or inactions by a prosecutor rise to the level of prosecutorial misconduct only where their unavoidable effect is to prejudice the jury, forming in the jurors' minds a fixed bias and hostility toward the defendant such that the jury could not weigh the evidence objectively and render a fair verdict. *Commonwealth v. Hutchinson*, 25 A.3d 277, 307 (Pa. 2011).

Appellant neither objected to the alleged misconduct nor raised the issue in his Post-Sentence Motion. As such, this issued is waived. "Appellant's [ ] claim of prosecutorial misconduct is waived because it was not raised at trial." *Commonwealth v. Ligons*, 971 A.2d 1125, 1157 (Pa. 2009). Had this issue not been waived, this claim would fail on its merits. The ADA's statements consist of little more than an analysis of the evidence and oratorical flair. The portion of the closing argument to which Appellant now objects merely rebuts Appellant's argument that David Cross is a pedophile and a liar. Nothing the ADA said in that portion of his closing argument would form in the jurors' minds a fixed bias and hostility toward Appellant such that the jury could not weigh the evidence objectively and render a fair verdict.

Appellant's next three issues all relate to two instances where a Commonwealth witness, Corporal Goodyear, entered the jury room during deliberations to play an audio recording. Appellant alleges his right to an impartial jury was impinged, that this Court erred in failing to hold a hearing to determine the prejudicial impact of having a Commonwealth witness enter the jury room, and that this Court erred in failing to issue cautionary or curative instructions to the jury regarding this situation.[6] It appears from the record that Corporal Goodyear entered the jury room on two separate occasions to play an audio file of the police interview with Appellant that was on the Commonwealth's laptop. (TT 539) Counsel was informed that Corporal Goodyear was going to play the audio for the jury but counsel mistakenly presumed a technician from the Office of the District Attorney, and not the Trooper who

had testified, would be the individual who entered the jury room. (TT 542)[7]

After learning that the Trooper had entered the jury room to play the audio file requested by the jury, Appellant's counsel placed an objection of the record. Counsel for Appellant was given an opportunity to develop a record by calling Corporal Goodyear and this Court's tipstaff, George Nichols, to explain the circumstances of how a Commonwealth witness ended up in the jury room. Nichols testified that on the first occasion, Corporal Goodyear entered the jury room and played the audio file for the jury without Nichols in the room. (TT 545) The second time the jury asked to hear the interview, Nichols testified that the Corporal played the audio file for the jury in his presence. (TT 546) Nichols testified that he did not hear the jury ask the Trooper any questions. (TT 545)

Corporal Goodyear testified that when he was in the jury room the first time to play the audio file, the jury asked if they could play the recording without the Corporal being present. *Id.* He replied that either he or George had to be present because the thumb drive that contained the interview also contained other items which were not introduced into evidence. (TT 546-547) The jury asked if they could have a transcript of the interview and the Corporal replied that no transcript was available. (TT 547) The Corporal testified that no other discussions occurred while he was in the jury room.

"It is well established that '[w]hen an event prejudicial to a defendant occurs at trial, he may either object, requesting curative instructions, or move for a mistrial.' " *Commonwealth v. Boring*, 453 Pa. Super. 600, 684 A.2d 561, 568, *app. denied*, 547 Pa. 723, 689 A.2d 230 (Pa. 1997), *quoting Commonwealth v. Meekins*, 403 A.2d 591, 596 (Pa. Super. 1979). In order for a mistrial motion to be deemed timely, it must be made when the alleged prejudicial event occurs. *Boring*, 684 A.2d at 568. Counsel for Appellant consulted his client and decided not to move for a mistrial. (TT 548) While this Court acknowledges the impropriety of breaching the jury room, it would appear that the contact was minimal and harmless to Appellant. Furthermore, after consulting with his client, counsel for Appellant failed to request a mistrial or a curative instruction. Appellant's request for relief is now untimely and deemed to be waived. *See Boring*, 453 Pa. Super. at 568; *Ligons*, 971 A.2d at 1157.

Lastly, Appellant alleges this Court erred in imposing a sentence that was manifestly excessive, unreasonable and an abuse of discretion in that the sentence was not consistent with the norms underlying the sentencing code and failed to consider all relevant sentencing factors. Before addressing the substantive issue, Appellant must raise a substantial question that his sentence is not appropriate under the Sentencing Code. 42 P.S. § 9781(b); *Commonwealth v. Urrutia*, 653 A.2d 706, 710 (Pa.Super. 1995). The determination of whether a particular issue constitutes a "substantial question" can only be evaluated on a case by case basis. *Commonwealth v. House*, 537 A.2d 361, 364 (Pa.Super. 1988). It is appropriate to allow an appeal "where an appellant advances a colorable argument that the trial judge's actions were: (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process." *Commonwealth v. Losch*, 535 A.2d 115, 119-120 n. 7 (Pa.Super. 1987). Although Appellant's Concise Statement fails to specifically allege which provision applies, and makes only vague assertions as to deviation from the fundamental norms underlying the sentencing process, out of an abundance of caution, this Court shall dispose of Appellant's claim on its merits.

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

When imposing a sentence, this Court is required to consider, among other things, the protection of the public, the gravity of the offence in relation to the impact on the victims and community and the rehabilitative needs of the defendant. 42 P.S. § 9721(b). This Court imposed a sentence in the standard range of the Sentencing Guidelines at one count and a below the mitigated range sentence on the second count. When a Court imposes a standard range sentence or a below standard range sentence, the sentence is presumed to be reasonable. *Commonwealth v. Walls*, 926 A.2d 957, 964-965 (Pa. 2007).

Although Appellant was charged with two counts of Possession of Child Pornography, the testimony elicited indicated hundreds, perhaps thousands of images of child pornography, representing a vast pool of child victims. Appellant's probationary status from 1994 to sentencing strongly suggests that Appellant is a poor candidate for community supervision. If anything, this Court would have been justified in imposing a significantly longer sentence. Appellant's argument, that his sentence is manifestly unreasonable, is without merit.

CONCLUSION

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

BY THE COURT:
/s/Rangos, J.

---

[1] Appellant was acquitted on two counts of Dissemination of Photo/Film of Child Sex Acts and one count of Criminal Use of a Communication Facility.

[2] Corporal Roche testified that he ran a program on Appellant's computer that alphabetized every single indexable file. Next, he searched for every file name on the computer that starts with s-h-a-n-e, Appellant's name.

[3] The BitTorrent downloads associated with Wendy and Amy Cross were non-pornographic Hollywood movies.

[4] Due to a family obligation, this Court was unavailable during deliberations and, while consulted on the record via telephone, deferred to the sound discretion of a colleague regarding questions that arose during jury deliberations.

[5] Even if Cross used Appellant's computer at some point, that does not preclude the possibility that Appellant downloaded the child pornography in question.

[6] Again, this Court notes that at this point in the proceedings, another judge assisted this Court in answering jury questions and issues arising during deliberations, as this Court was unable to be present. This Court was contacted by telephone and participated to a limited extent in the proceedings via speakerphone.

[7] This Court's practice at the time was that, when evidence contained on a Commonwealth laptop was requested by a jury, with the consent of counsel a technician from the Office of the District Attorney would enter the jury room with the tipstaff to operate the laptop.

Commonwealth of Pennsylvania v. Tex Ortiz

Criminal Appeal—Sufficiency—Sentencing (Discretionary Aspects)—Kidnapping—Interference with Custody of Child

Parent who left area with his child to avoid losing custody was convicted of kidnapping and sentenced to 8-22 years' imprisonment.

No. CC 201500547. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
McDaniel, J.—September 8, 2016.

OPINION

The Defendant has appealed from the judgment of sentence entered on September 14, 2015. 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 at the above-captioned information with Kidnapping,[1] Concealment of the Whereabouts of a Child[2] and Interference with Custody of Children.[3] He appeared before this Court from May 18-21, 2015 for a jury trial, and at its conclusion was found Not Guilty of Concealment of the Whereabouts of a Child and Guilty of Kidnapping and Interference with Custody of Children. He next appeared before this Court on September 14, 2015 and was sentenced to consecutive terms of imprisonment of six (6) to 18 years and two (2) to four (4) years, for an aggregate sentence of eight (8) to 22 years. A lifetime term of registration pursuant to SORNA was also imposed. Timely Post-Sentence Motions were filed and were denied by operation of law on January 19, 2016. This appeal followed.

On appeal, the Defendant raises several claims of error[4] relating to the sufficiency of the evidence, the term of registration and the excessiveness of the sentence imposed. They are addressed as follows:

1. Sufficiency of the Evidence

Initially, the Defendant argues that the evidence was insufficient to support both the Kidnapping and Interference with Custody of Children convictions. However, a review of the record reveals that his claims are meritless.

The evidence presented at trial established that Jaleeyah Ortiz, born on July 9, 2012, (two and a half years of age at the time of the events in question), is the daughter of Larae Clark and the Defendant. On October 20, 2014, Larae Clark passed away and the Defendant became a single father to Jaleeyah. After Larae's death, her mother Lori Clark (Jaleeyah's grandmother) cared for Jaleeyah several days a week. In December, 2014, Lori Clark became concerned for Jaleeyah for various reasons including the Defendant's placement on electronic monitoring on an unrelated parole matter and the presence of drug paraphernalia in his home as observed by the Defendant's parole officer and Ms. Clark's ex-husband. On December 16, 2014, Ms. Clark filed a Petition for Custody in the Family Division of this Court and went to the Defendant's home with her niece, LaToya McClendon, the same day to give him notice of the upcoming hearing on December 19, 2014. When the Defendant was not home, Ms. McClendon took the custody Petition and returned to the Defendant's home the next day, December 17, 2014, when she saw and spoke to the Defendant and served him with a copy of the custody Petition.

On December 18, 2014, the Defendant texted Ms. Clark and told her that Jaleeyah had already been taken to New York.

Despite having been given notice of the hearing by Ms. McClendon, the Defendant did not appear at the custody hearing on December 19, 2014. At that hearing, Judge Tranquilli of the Family Division of this Court entered an Interim Custody Order granting Ms. Clark interim primary physical and legal custody of Jaleeyah. Following the entry of the Order, Ms. Clark took the Order to the Wilkinsburg Police Department, where the Defendant lives and then attempted to locate the Defendant and Jaleeyah on her own. She texted the Defendant's sister, Jennifer, who lives in New York, and asked her to tell the Defendant that the custody order was in place and to send Jaleeyah back. On December 22, 2014, when Ms. Clark had not received a response, she contacted the Penn Hills Police Department where she lived, and asked for their assistance. Officer Patrick Ford of the Penn Hills Police Department called the Defendant multiple times and left a voice mail regarding the custody order. The Defendant called Officer Ford back and told him that Jaleeyah was safe in New York, that no one was going to get her and that he didn't care about the custody order. The same day, Detective Hamlin from the Wilkinsburg Police Department forced entry into the Defendant's home and while no one was there, he found signs of recent activity including lights and a television on and a computer with the internet up. The Defendant's electronic monitoring ankle bracelet had been cut off and was later found in the yard of a neighbor's home.

Thereafter, the Allegheny County Child Abduction Response Team was activated with assistance from the FBI. On January 5, 2015, after an extensive investigation in Pennsylvania and New York, the Defendant was located at at a residence at 146 Third Avenue in Altoona, Pennsylvania. The residence was surrounded by 30 Altoona Police Officers as well as officers from the Pennsylvania State Police, the Altoona School District, the Logan Township Police Department and the Altoona Police SWAT Team. As the residence was near a school, the students were held inside the building. A hostage negotiator was able to make contact with the Defendant and was eventually able to convince him to release Jaleeyah and surrender peacefully. Jaleeyah was taken to Children's Hospital in Pittsburgh where she was found to be uninjured.

When reviewing a challenge to the sufficiency of the evidence, the court must determine "whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt…[An appellate court] may not weigh the evidence and substitute [its] judgment for the fact finder. In addition…the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding appellant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances…Furthermore, the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." *Commonwealth v. Lewis*, 911 A.2d 558, 563 (Pa.Super. 2006).

Initially, with regard to the kidnapping charge, our Crimes Code defines kidnapping as follows:

> *§2901. Kidnapping*
>
> *(a.1) Kidnapping of a minor. - A person is guilty of kidnapping of a minor if he unlawfully removes a person under 18 years of age a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines a person under 18 years of age for a substantial period in a place of isolation, with any of the following intentions:*
>
> *…(4) To interfere with the performance by public officials of any governmental or political function.*

18 Pa.C.S.A. §2901.

The evidence presented at trial was clearly sufficient to support the conviction on the kidnapping charge. Despite the Defendant's mighty effort to convince this Court that the kidnapping charge should not apply, it is clear that the facts of this case are sufficient to support the conviction. As summarized above, the Defendant was given notice of the custody hearing and subsequent Order and indicated that he did not care. He also stated that the child had been taken out of the Commonwealth to avoid turning her over to her grandmother. He cut off his electronic monitoring ankle bracelet and engaged numerous police departments, the Allegheny County Child Abduction Response Team and the FBI in a multi-state investigation lasting two (2) weeks which eventually led to a SWAT team and hostage response and caused a nearby school to go into lock-down.

The Defendant relies heavily on *Commonwealth v. Barfield*, 768 A.2d 343 (Pa.Super. 2001) for the proposition that a parent who takes his own child out of affection cannot be charged with kidnapping. In *Barfield*, a mother was charged with kidnapping after failing to return her two (2) children from an unsupervised weekend visit from foster care. The mother returned to the jurisdiction and told the caseworker that the children were safe and had been taken into the custody of a religious group, although they had not been found by the time the criminal case was decided. *Barfield* was charged with kidnapping and interference with custody of children and was convicted by the jury, but the trial court granted the defendant's post-verdict Motion for Judgment of Acquittal on the kidnapping charges. The Superior Court affirmed the trial court's decision and found that the circumstances of this case were appropriately classified as interference with custody. However, the *Barfield* Court concluded that "clearly the drafters of our present Crimes Code intended to differentiate between the varying types of unlawful removal and restraint based upon the degrees of harm potentially involved with such actions." *Commonwealth v. Barfield*, 768 A.2d 343, 348 (Pa.Super. 2001). Later, in *Commonwealth v. Rivera*, 828 A.2d 1094 (Pa.Super. 2003), our Superior Court held that "a parent may be convicted of kidnapping his own child." *Commonwealth v. Rivera*, 828 A.2d 1094, 1096 (Pa.Super. 2003).

The facts of this case are clearly distinguishable from the scenario presented in *Barfield*. Here, the Defendant absconded from parole with his two-year old daughter in tow, and stated a desire to take her out of the Commonwealth so her grandmother - who had been granted emergency legal and physical custody due to the Defendant's actions - could not "get her." He transported the child a substantial distance and possibly out of state, changing cell phones three (3) times to avoid detection. He allowed the child to be subjected to a lengthy SWAT team standoff which required a hostage negotiator to resolve - though the SWAT team was planning to force entry into the home if the hostage negotiation had not been successful. The facts of this case clearly rise to a higher level and presented more danger to the child than the scenario in *Barfield*. Notwithstanding Barfield, the evidence in this case was clearly sufficient to support the conviction for kidnapping. This claim must fail.

The Defendant also argues that the evidence was insufficient to support the conviction for Interference with Custody of Children because he did not know about the interim custody Order. Again, this claim is meritless.

Our Crimes Code defines Interference with Custody of Children as follows:

> *§2904. Interference with custody of children*
>
> *(a) Offense defined. - A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so.*

18 Pa.C.S.A. §2904.

At trial, the Commonwealth presented the testimony of Penn Hills Police Officer Patrick Ford, who had discussed the custody Order with the Defendant:

Q. (Ms. Goldfarb): Approximately how many times do you think you called the number for the defendant?

A. (Officer Patrick Ford): I believe around three or four.

Q. Did you leave a voicemail?

A. Yes, I did.

Q. What did your voicemail say?

A. I left my name, police department and what I'm calling for.

Q. And what was the reason you were calling?

A. The whereabouts of his daughter, Jaleeyah.

Q. At this point in time when you're calling and leaving voicemails, were you given a copy of the court order?

A. Yes.

Q. And was it your understanding upon review of that that custody had been given to Ms. Lori Clark?

A. Yes.

Q. Did you inform the defendant when you left this voicemail as to the status of the court order?

A. Yes.

Q. So you told him that you had that in your hands?

A. Yes.

Q. Did you ever actually have a phone conversation with the defendant?

A. Yes, I did.

Q. How did that happen? Did you call him or did he call you?

A. He called me. I actually texted him, and he called me.

Q. Did you text him after you had left the voicemail?

A. Yes.

Q. And what did your text message say?

A. "This is Officer Ford, Penn Hills Police. Please contact me."

Q. So then he calls you.

A. Yes.

Q. And how does that conversation go? What do you say to him? What's he say to you?

A. He basically told me that he doesn't know where his daughter's at but he's sure that she's in New York. That's all he tells me. "No one's going to get her."

Q. He said "No one's going to get her?"

A. "No one's going to get her."

Q. Did you have a conversation again at that point in time about the existence of the court order?

A. Yes.

Q. Did you tell him that it existed?

A. Yes.

Q. And how did he respond when you told him that there was a court order taking custody away?

A. He does not care.

(Trial Transcript, p. 95-97).

The Commonwealth also presented the testimony of Detective Sergeant Ashley Day, the hostage negotiator for the Altoona Police Department, who testified on cross-examination that he had discussed the custody order with the Defendant:

Q. (Ms. Owens): Just a few questions. In regards to the conversation that you had with Mr. Ortiz, can you tell us a little more in detail of that conversation? You said he felt comfortable with you. How did you build that comfortable -

A. (Det. Sgt. Day): Well, me and Mr. Ortiz have had contact before, and I've spoken to him on occasion before. I've never had a problem with him. And, unfortunately, I'm the only minority police officer in that whole jurisdiction, so most people feel comfortable with me because I am a minority.

He was scared, and I told him, you know, he had a right to be scared because it was a serious situation and I wanted to make sure that he got out and the fact that I wanted to make sure his daughter also got out safely. That was my main concern.

Q. And he expressed his concerns about his daughter as well?

A. Oh, yes. He was concerned that he wouldn't get to see his daughter again because he believed he was going away for a long time due to his actions.

Q. Did he express that he knew about a custody order -

A. Yes.

Q. - at that time?

A. Yes, he knew about the custody issue at that time.

(T.T. p. 140-141).

The evidence presented by the Commonwealth clearly established that the Defendant was aware of the custody order granting custody to Ms. Clark. As such, the evidence was more than sufficient to support the conviction for Interference with Custody of Children. This claim must also fail.

2. SORNA Registration

Next, the Defendant argues that this Court erred in imposing a lifetime term of registration under SORNA because the evidence was insufficient to support the kidnapping charge. Again, this claim is meritless.

Pennsylvania's SORNA (Sex Offender Registration and Notification Act) provides a three-tier system which determines the length of registration required upon conviction. It states, in relevant part:

§9799.14. Sexual offenses and tier system

(a) Tier system established. – Sexual offenses shall be classified in a three-tiered system composed of Tier 1 sexual offenses, Tier II sexual offenses and Tier III sexual offenses…

…(d) Tier III sexual offenses. – The following offenses shall be classified as Tier III sexual offenses:

(1) 18 Pa.C.S. §2901(a.1) (relating to kidnapping).

42 Pa.C.S.A. §9799.14.

§9799.15. Period of registration

(a) Period of registration. – Subject to subsection (c), an individual specified in section 9799.13 (relating to applicability) shall register with the Pennsylvania State Police as follows:

…(3) An individual convicted of a Tier III sexual offense shall register for the life of the individual.

42 Pa.C.S.A. §9799.15

As the record reflects, the Defendant was convicted of kidnapping which is classified as a Tier III sexual offense for purposes of SORNA. Therefore, this Court appropriately imposed a lifetime term of registration pursuant to the statute. This claim is meritless.

3. Excessive Sentence

Finally, the Defendant argues that this Court erred in imposing an excessive sentence without proper consideration of the appropriate sentencing factors. This claim is meritless.

It is well-established that "sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent an abuse of discretion. *Commonwealth v. Hardy*, 939 A.2d 974, 980 (Pa.Super. 2007). "An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. In more expansive terms… an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness or partiality, prejudice, bias or ill-will, or such lack of support as to be clearly erroneous." *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa.Super. 2008).

At the sentencing hearing, this Court noted that it had read and considered a Pre-Sentence Investigation report prepared on behalf of the Defendant. (Sentencing Hearing Transcript, p. 2). "Where pre-sentence reports exist, [the appellate court] shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. *Commonwealth v. Macias*, 968 A.2d 773, 778 (Pa.Super. 2009). This Court then placed its reasons for imposing sentence on the record. It stated:

> THE COURT: Well, I agree that Mr. Ortiz did violate the No-Contact Order when he wrote the letter to Ms. Clark. However, I don't know that he's threatening to come back and hurt them. I think he's threatening to come back and take his daughter which is disturbing on its own, in its own right. But I also think that it's probably a letter from an angry, desperate father.
>
> But overall, this case involves a serious offense which is subjecting a two-year-old child to being taken from its lawful place of custody. I am assuming there was an Amber Alert out. You subjected your daughter to a SWAT team surrounding the house in Altoona. You've been previously convicted of firearm violations. I think four drug violations that were felonies and a theft.
>
> I do find it interesting that you did not mention your other two children when you were telling me how much you loved your child Jaleeyah. I reviewed the presentence report. You did poorly on the supervision. You've been in and out of jail. Prior incarceration did not deter you from committing a new crime. You have [sic] doing drugs and guns together are certainly a sign of danger and violence, and I've seen no evidence of you trying to rehabilitate yourself.

(S.H.T., p, 12-13).

As the record reflects, this Court appropriately read and considered the pre-sentence investigation report, considered the factors and severity of the present offense, evaluated the Defendant's potential for rehabilitation and imposed a sentence which took all of these factors into consideration. Moreover, the record reflects great deliberation and consideration in the formulation of the sentence. The Defendant's unhappiness with the length of his sentence does not mean it is excessive or is otherwise inappropriate.

Given the facts of this case, the sentence imposed was appropriate, not excessive and well within this Court's discretion. This claim must fail.

Accordingly, for the above reasons of fact and law, the judgment of sentence entered on September 14, 2015 must be affirmed.

BY THE COURT:
/s/McDaniel, J.

Dated: September 8, 2016

---

[1] 18 Pa.C.S.A. §2901(a.1)(2)

[2] 18 Pa.C.S.A. §2909(a)

[3] 18 Pa.C.S.A. §2904(a)

[4] Defense counsel's preparation and filing the Concise Statement of Matters Complained of on Appeal (and, consequently, the preparation of this Opinion) was deferred at great length due to an extreme delay in the preparation of the trial transcript, which was ordered on February 17, 2016 and not produced until July 11, 2016. Counsel appropriately sought and was granted extensions of time due to the delay in the transcription, however the almost five (5) month delay in simply obtaining the transcript impeded both appellate counsel's timely review of the matter as well as the expediency with which the instant Opinion could be prepared.