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PLJ

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Commonwealth of Pennsylvania v. Dorian Lamore

Criminal Appeal—Homicide—Sentencing—Juvenile Lifer

Juvenile lifer challenges new sentence of 35 years to life on Constitutional grounds.

No. CC 199313461 & 199311572. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division. Manning, P.J.—July 5, 2018.

OPINION OF THE COURT

The defendant, Dorian Lamore, appeals from the imposed by this Court at his December 5, 2017 resentencing. The defendant was resentenced because he was a juvenile originally sentenced to life imprisonment without the possibility of parole following his conviction on the charge of murder in the first degree. This Court granted his PRCA Petition challenging that sentence pursuant to *Miller v. Alabama*, 567 US 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016). On December 5, the defendant was sentenced to 35 years to life on the murder count at CC No. 199311572. At CC No. 199313461, he was sentenced to not less than five (5) nor more than ten (10) years at counts 5[1] and 6[2], consecutive to one another but concurrent to the life sentence. At count 7, for which a sentence had been imposed in 1994, no further penalty was imposed at the resentencing.

Sentencing counsel filed a Notice of Appeal but later requested leave to withdraw. The Superior Court remanded the matter to this Court to address the withdrawal request and take other action to protect the defendants' right to appeal. Counsel was permitted to withdraw and new counsel appointed.

On May 18, 2018, counsel filed a Concise Statement of Matters Complained of on Appeal, claiming the following errors by the Court:

> 1. In failing to give the defendant time credit from September 10, 1993 to the present;
>
> 2. In imposing the maximum sentence of life imprisonment where such a sentence is unconstitutional pursuant to the 8th Amendment to the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution, both *per se* and as applied to Defendant; and
>
> 3. In imposing a maximum sentence of life imprisonment where the Pennsylvania Sentencing Code does not provide for imposition of a legal sentence for defendants convicted prior to the enactment of 18 Pa.C.S.A. § 1102.1 in 2012.

The first claim was rendered moot when this Court issued an Order on May 15, 2018, giving the defendant for credit for time served from September 10, 1993, the date on which he was first committed to the Allegheny County Jail in this case.[3]

The remaining two claims are wholly without merit. The sentence imposed by the defendant, which provided for a maximum sentence of life imprisonment, is not unconstitutional under either the United States or Pennsylvania Constitutions.

In *Miller v. Alabama*, 567 US 460 (2012), the United States Supreme Court held that ***mandatory*** sentences of life imprisonment without the possibility of parole for individuals who committed their crime prior to reaching the age of 18 violated the 8th Amendment's prohibition on cruel and unusual punishment. Only those life sentences that were mandated by law were invalidated by the Supreme Court when imposed on juveniles. The Court did not hold that a sentence of life without parole could never be imposed on a juvenile, though the Court did suggest that such a sentence should be imposed in the rarest of circumstances. Moreover, the Supreme Court did not hold that a sentence with a minimum term of incarceration of a certain number of years followed by parole for life was cruel and unusual.

Similarly, the Pennsylvania Constitution does not bar the imposition of a sentence, the maximum term of which is life. In *Commonwealth v. Batts*, 163 A.3d 410 (Pa.2017), the Pennsylvania Supreme Court recognized that, under certain circumstances, a sentence of life imprisonment without the possibility of parole, could be imposed upon a juvenile defendant. The Court wrote:

> Pursuant to our grant of allowance of appeal, we further conclude that to effectuate the mandate of *Miller* and *Montgomery*, procedural safeguards are required to ensure that life-without-parole sentences are meted out only to "the rarest of juvenile offenders" whose crimes reflect "permanent incorrigibility," "irreparable corruption" and "irretrievable depravity," as required by *Miller* and *Montgomery*. Thus, as fully developed in this Opinion, we recognize a presumption against the imposition of a sentence of life without parole for a juvenile offender. To rebut the presumption, the Commonwealth bears the burden of proving, beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation.

(At 415-416.) Accordingly, in that the Pennsylvania Supreme Court recognized the juvenile offenders could be sentenced to life in prison without parole upon the proper showing by the Commonwealth, it is clearly not unconstitutional to sentence a juvenile offender, as this offender was sentenced, to thirty-five (35) years to life imprisonment.

The defendant's final claim is that his sentence is illegal because Pennsylvania Sentencing Code does not provide for imposition of a legal sentence for defendants convicted prior to the enactment of 18 Pa.C.S.A. § 1102.1 in 2012. In essence, he is claiming that because the statute that provided for sentencing for those convicted of first degree murder was declared invalid, at least with regard to the imposition of mandatory life sentences on juveniles, and the statute that provides for the sentence to be imposed on juveniles convicted of first degree murder enacted in 2012 was not retroactive, there is no legal sentence available to be imposed on the defendant. This is an absurd argument and has been rejected by both the Supreme and Superior Courts of this Commonwealth.

In *Commonwealth v. Brooker*, 103 A.3d 325 (Pa. Super. 2014), the defendant claimed that imposing a sentence on him pursuant to 18 Pa. C.S.A. §1102.1 would violate the *ex post facto* clause of the United States Constitution, USCA Const. Art. 1, § 10. The defendant in *Brooker*, like the defendant here, committed his murder before 18 Pa C.S.A. § 1102.1 became effective. He was convicted and sentenced, however, after the statute's effective date. He claimed, therefore, that "... no constitutional statutory sentence existed for him ..." when he committed the offense. *Booker*, 342. The defendant makes essentially the same argument here, although, in *Booker*, the defendant claimed that he should have been subject to the sentence for the only offense that provided a constitutional sentence, the lesser-included offense of third degree murder. In rejecting this argument, the Court held:

> However, like in *Dobbert*, the very **existence** of the old statute requiring life without parole, put Appellant on notice that the Commonwealth would seek to impose a sentence of life imprisonment without the possibility of parole for the crime of murder in the first degree.[15] *See 18 Pa.C.S.A. § 1102(a)(1)*. This was sufficient to serve as Appellant's "fair warning" as to what Pennsylvania's considered judgment of a proper sentence would be in such a case. *See Weaver, supra; Dobbert, supra*. The fact that the old statute, *Section 1102*, would later be declared constitutionally void as applied to him on Eighth Amendment grounds is of no moment.[16] *See Dobbert, supra*. Rather, as we have explained in great detail, the underpinnings of the *Ex Post Facto* Clause protect fairness, fair warning and notice. *See Carmell, supra; Weaver, supra.* Because *Section 1102* provided Appellant with fair notice and warning that he would receive life without the possibility of parole, he cannot complain of a retroactive imposition of a 35-year mandatory minimum ...

at 342 (Emphasis in original). This defendant, like the defendant in Booker, had notice, when he committed the offense in 1994, that he faced a sentence of life imprisonment if convicted of first or second degree murder. That he is now subject to a lesser sentence does not render that sentence invalid.

In addition, in order to comply with the mandate from *Montgomery* to apply *Miller* retroactively, our Supreme Court, in *Commonwealth v. Batts*, 66 A.3d 286 (2013) (***Batts I***), held that the language from the sentencing statute, 18 Pa. C.S.A. § 1102, which prohibited parole for persons serving sentences of life imprisonment, would be severed from the statute with regard to persons who committed first or second degree murder as juveniles. The Court rejected the argument, essentially advanced here by the defendant, that the entire statute was invalid, holding:

> Appellant's argument that the entire statutory sentencing scheme for first-degree murder has been rendered unconstitutional as applied to juvenile offenders is not buttressed by either the language of the relevant statutory provisions or the holding in *Miller*. *Section 1102*, which mandates the imposition of a life sentence upon conviction for first-degree murder, *see 18 Pa.C.S. § 1102(a)*, does not itself contradict *Miller*; it is only when that mandate becomes a sentence of life-without-parole as applied to a juvenile offender-which occurs as a result of the interaction between *Section 1102*, the Parole Code, *see 61 Pa.C.S. § 6137(a)(1)*, and the Juvenile Act, *see 42 Pa.C.S. § 6302*—that *Miller*'s proscription squarely is triggered. *See Miller,* --- U.S. at----, 132 *S.Ct. at 2469*. *Miller* neither barred imposition of a life-without-parole sentence on a juvenile categorically nor indicated that a life sentence with the possibility of parole could never be mandatorily imposed on a juvenile. *See id. at ----, 132 S.Ct. at 2469.* Rather, *Miller* requires only that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile. *See id. at ---, 132 S.Ct. at 2467-68.*

66 A.2d at 295-296. The sentence imposed on the defendant in this matter was constitutional. Accordingly, the judgment of sentence should be affirmed.

BY THE COURT:
/s/Manning, P.J.

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[1] Criminal Conspiracy, 18 Pa. C.S.A. § 903.

[2] Robbery, 18 Pa. C.S.A. § 3701.

[3] Although this matter was pending before the Superior Court which would generally deprive a Trial Court of the authority to act on the matter, Pa. R. App. P. 1701 (b) (1) allows a Trial Court to "... take such action as may be necessary to .... correct formal errors in papers." Correcting the commitment to reflect the proper credit for time served is the kind of "error" a Trial Court retains the authority to correct.

Commonwealth of Pennsylvania v. Abdula J. Richardson

Criminal Appeal—Sufficiency—Evidence—Relevancy

Defendant engaged in persistent pattern of misconduct by, along with his wife and kids, making 128 false 911 calls to city police.

No. CC 2014-05607. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—June 20, 2018.

OPINION

This is a direct appeal wherein the defendant appeals the Judgment of Sentence of August 23, 2017, that became final on July 24, 2017, when his post-sentence motions were denied. After a jury trial, the defendant was convicted of conspiring to violate 18 Pa.C.S.A. §4905 (False Alarms to Agencies of Public Safety), two counts of False Reports, in violation of 18 Pa.C.S.A §4906, Retaliation Against Witness or Victim, in violation of 18 Pa.C.S.A §4953, three other counts of Conspiracy in violation of 18 Pa.C.S.A §903, and Disorderly Conduct, in violation of 18 Pa.C.S.A. §5503. Relative to the conviction for conspiring to violate 18 Pa.C.S.A. §4905, this Court sentenced the defendant to a term of imprisonment of not less than two and one-half years nor more than five years. Relative to the conviction for violating 18 Pa.C.S.A §4953, this Court sentenced the defendant to a term of imprisonment of not less than one year nor more than two years, consecutive to the other sentence. No further penalty was imposed at the remaining counts. The defendant was sentenced to an aggregate term of imprisonment of not less than three and one-half years nor more than seven years. This direct appeal followed.

The evidence admitted at trial established that between February 1, 2014 through April 12, 2014, 128 false 911 calls were made from the residence located at 3056 Bergman Street in the City of Pittsburgh. The defendant resided at this residence with his wife, co-defendant Felecia Richardson, and his three younger sons. The credible evidence established that all of the 911 calls were false and that the calls were usually made by the defendant's fifteen-year-old son with a few of the calls made by his twelve-year-old son. City of Pittsburgh police officers responded to all of the 911 calls that involved actual complaints. A number of the 911 calls were simple hang-up calls that did not resolve in a formal request for emergency action.

A substantial number of the 911 calls were traced to landline telephones at the 3056 Bergman address. At all times relevant to this matter, there was no more than one landline at the residence. Initially, the landline 911 calls were traced to telephone number 412-000-0000. On March 13, 2014, the landline telephone number associated with the defendant was changed to 412-000-0000. On March 29, 2014, law enforcement officers executed a search warrant at the 3056 Bergman address and seized the landline telephone. After that date, on March 31, 2014 through April 4, 2014, additional false 911 calls were made by a cellular phone subscribed to by the defendant. Officers attempted to locate the cellular phone that made these calls but the defendant and his wife initially denied the existence of the cellular phone. The Richardsons later accused police officers of stealing the cellular phone. When police officers responded to the 911 calls, on every single occasion, there was no emergency and the officers cleared the incident and left the scene.

Over the time period of the false 911 calls, many different police officers responded to the calls. The defendant and his wife steadfastly denied that the 911 calls originated from their residence or cell phones owned by them. They claimed that someone must have been pranking them or tapping or spoofing their telephones. Verizon and Sprint telephone records and expert testimony, however, contradicted these claims and proved that the 911 calls originated from their residence and/or cell phones. Additionally, a "chirping" sound could be heard on the 911 calls. When officers responded to the false 911 calls at 3056 Bergman, they heard the same chirping sound being emitted from a fire alarm inside the residence. Similarly, a barking dog could be heard on the 911 calls. The same barking dog was present at the residence when officers were at the residence responding to the 911 calls. On one false 911 call made by one of the defendant's sons, an adult male was heard sneezing in the background.

Typically, officers responding to the 911 calls would be greeted by a barking dog and the Richardsons would come out from the house onto the porch and would take video of the police officers with their cell phones. Sometimes only the defendant would come onto the porch. Sometimes it was the defendant's wife and sometimes it was his entire family who appeared. The interactions were hostile and aggressive. The defendant and his family would degrade the officers and call them profane, vulgar and racist names. Often times the calls would come at night and the Richardsons would have items in their hands that couldn't be identified. The officers feared for their safety. The defendant would not permit his children to be interviewed by law enforcement so officers could investigate the substance of the complaints. The complaint ranged from violent domestic assaults to injuries being sustained by the children. Neither the defendant nor his wife would permit law enforcement officers to enter the residence. Often, the defendant and his family members were already on the porch of the residence awaiting the arrival of the police officers wielding their cellular phones and taking video of the police officers.

The evidence also established that the defendant was incarcerated for intermittent periods while awaiting trial. The false 911 calls stopped when the defendant was incarcerated. However, they resumed when he was released from jail and returned to his residence 3056 Bergman.

The evidence further established that the City of Pittsburgh Bureau of Police expended substantial man hours responding to the false 911 calls and that the false calls resulted in a shortfall of officers available to respond to other, serious calls. Evidence was admitted that 259 police reporting units were required to respond to the false 911 calls over the span of 22 days. A total of 430 hours were spent responding to the false 911 calls. The cost associated with the false 911 calls was approximately $11,000.

Additional evidence, jail calls of the defendant, established that his intent was to bait the officers into doing something that would permit him to sue the City of Pittsburgh. The defendant was angry after he was arrested in September, 2013 and charged with assault. He made numerous claims that he was being set up by the police. He threatened the police officer who made the September arrest. The defendant posted the video of officer responding to the false 911 calls on social media pages criticizing the police officers. During the time period of the false 911 calls, the defendant had been seeking election as the mayor of the City of Pittsburgh and he wanted to use his exchanges with the police officers as part of his election campaign.

The Commonwealth also presented evidence that the defendant eventually moved from 3056 Bergman Street to 217 Bessemer Street, Apartment #2 in the East Pittsburgh section of the City of Pittsburgh during the pendency of the instant case. False 911 calls were made from that residence after the defendant moved to that area.

While officers where at 3056 Bergman responding to a 911 call, they would sometimes contact the 911 call center and ask for a "call back" to the number that made the 911 call. The 911 dispatcher would call the number that originated the 911 call. Officers could hear the landline telephone inside 3056 Bergman ring and, at least on one occasion, even answered it.

On March 29, 2014 officers obtained a search warrant and seized the landline telephone from the residence. The very same day, after the landline phone had been seized, another 911 call was placed from 3056 Bergman, this time from a cell phone. Upon arriving at the scene, officers questioned the defendant and his wife about the telephone number that made the 911 call. The defendant claimed he didn't recognize the number from which the 911 call was made. His wife claimed that they did not have a telephone that had a 412 area code. However, as set forth above, subsequent investigation determined the number that made the false 911 calls was a cell phone that was subscribed to by the defendant.

The Allegheny County 911 system recorded various information when a 911 call would be made. When a 911 call was placed from a landline, the 911 system would record the home telephone number, the address from which the call was made and the identity of the person to whom the telephone line is registered. The information obtained from a landline-based 911 call is 99.9% accurate. If the 911 call was made from a cell phone, the information obtained depended on the type of cell phone used to make the 911 call. If the cell phone was a "phase one" phone, which is an older cellular phone (typically five or more years old), the nearest cellular tower would be disclosed. If the phone was a "phase two" cell phone, a newer phone equipped with global positional satellite ("GPS") technology, the location of the call would be disclosed within 50 meters of the actual location of the call 66% of them time. The location of the call would be accurate within 150 meters 95% of the time. The evidence established that the false 911 calls were either made from landlines telephones or cellular phones subscribed to by the defendant.

It was clear that the defendant and his family anxiously awaited the arrival of police officers responding to the false 911 calls. The family usually had their telephones ready for the police before the police officers even responded to the calls. Officers who responded to the calls were repeatedly met with offensive insults. Officers were called "white devil" and the "N word". They were claimed to have "bloody fangs" and family members claimed that they "were going to win in the end". Officers repeatedly asked the defendant and his wife to listen to the calls in an effort to resolve the issues. Both the defendant and his wife refused to listen to the calls. Officers asked them for permission to push the redial button on the landline phone to show the defendant and his wife that the 911 calls emanated from their residence. The defendant and his wife refused to permit officers to do it. On most occasions, the defendant would not permit officers to speak to his family members about the origins of the 911 calls. Neither the defendant nor his wife would cooperate with the police officers and they repeatedly denied that the calls were coming from their residence.

Responding officers began filming the interactions because the interactions were so unusual.

The following paragraphs details examples of some of the false 911 calls:

On March 11, 2014, officers responded to 3056 Bergman for unknown trouble. Upon arriving at the scene, the defendant advised the responding officers that there was no emergency at his residence. He advised the officers that his telephone was being tapped due to the fact that he was planning to run for mayor of the City of Pittsburgh. The officers advised the defendant to call the phone company to check his line.

On March 14, 2014, officers responded to 3056 Bergman for a call from a woman claiming to being assaulted by her husband who had a gun. When the officers arrived, two of the defendant's children were the only residents at home. Just after the officers appeared at the residence, the defendant came running down the street screaming at the officers. The defendant began speaking in an aggressive tone and demanded to know why the officers were there. Officer Luff, one of the responding officers, was a victim on the September, 2013, assault case that was pending against the defendant. The defendant yelled to Officer Luff that, "I know you are behind these bogus calls. I won't rest till I get you." Officers check the residence and no females were found in the residence. After the officers left, three additional false 911 calls were made that day.

On March 23, 2014, officers responded to 3056 Bergman for a hang up call. The defendant and his family exited the residence videotaping the officers. The defendant stated that nobody in his residence called 911 and accused the officers of harassment. After the officers left, two more false 911 calls were made that day.

On March 30, 2014, officers responded to 3056 Bergman for a domestic violence call. The caller claimed to be the defendant's wife and claimed that the defendant was assaulting her. The caller claimed that there was a machete in the closet. From prior calls, officers knew that there were machetes in the residence. As they arrived on scene, officers were being videotaped by the defendant and his family. After officers left, two more 911 calls were made alleging similar acts of domestic violence. The calls were made from a cellular phone. The defendant falsely denied that he or anyone in his family had a cellular phone.

Defendant's first two claims attack the sufficiency of evidence to convict. The standard of review for sufficiency of the evidence claims is well settled:

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

Commonwealth v. Lehman, 820 A.2d 766, 772 (Pa. Super. 2003). In addition, "[a]ny doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances." *Commonwealth v. Cassidy*, 668 A.2d 1143, 1144 (Pa.Super. 1995).

Defendant's first claim is that the evidence was legally insufficient to convict him of violating 18 Pa.C.S.A. §4953. That statute states:

> A person commits an offense if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness, victim or a party in a civil matter.

The defendant bases his challenge by advocating the novel theory that to be convicted under this statute the "witness", "victim" or "party" against whom a defendant retaliates must arise only in the context of a "civil matter". He offers no other challenge to his conviction pursuant to 18 Pa.C.S.A. §4953. Though novel, the claim is nevertheless frivolous. There is no legal authority in Pennsylvania that limits the applicability of the statute to witnesses, victims or parties in civil matters. On the contrary, there is authority in Pennsylvania acknowledging that witnesses to or victims of criminal activity are contemplated by the statute. See *Commonwealth v. Blackwell*, 647 A.2d 914 (Pa.Super. (1994))(rape victim in a criminal case); *Commonwealth v. Perrillo*, 626 A.2d 163 (Pa.Super. 1993)(victim in criminal terroristic threats and harassment case).[1] Accordingly, this claim fails.

Defendant's second claim is that the evidence was insufficient to demonstrate that he "was engaged in a conspiratorial arrangement to perpetuate the offense codified in Section 4905 of the Crimes Code." In *Commonwealth v. Bricker*, 882 A.2d 1008, 1017 (Pa. Super. 2005), the Superior Court stated that to sustain a conviction of criminal conspiracy:

> The Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent, and (3) an overt act done in furtherance of the conspiracy. Circumstantial evidence may provide proof of the conspiracy. The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt.
>
> Additionally, an agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish a conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

Additionally, an overt act need not be committed by the defendant; it need only be committed by a co-conspirator. *Commonwealth v. Hennigan*, 753 A.2d 245, 253 (Pa. Super. 2002).

Pursuant to 18 Pa.C.S.A. §4905,

> [a] person commits an offense if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, for dealing with emergencies involving danger to life or property.

This Court believes that the evidence was sufficient to convict the defendant of the charged conspiracy. There was ample evidence admitted at trial supporting the Commonwealth's contention that the defendant agreed with his wife and sons to cause false 911 calls to be made. The evidence admitted at trial established that during the relevant time period, 128 911 calls were made from the residence located at 3056 Bergman Street in the City of Pittsburgh. The defendant resided at this residence with his wife, co-defendant Felecia Richardson, and his three younger sons. One son was fifteen years old, one son was 12 years old and one son was younger. The credible evidence established that all of the 911 calls were false and that the calls were usually made by the defendant's fifteen-year-old son with a few of the calls made by his twelve-year-old son. All of the false 911 calls were traced to telephones that were subscribed to the defendant. When police officers responded to the 911 calls, on every single occasion, there was no emergency and the officers cleared the incident and left the scene. The defendant and/or his wife were always at the residence when police officers responded to the calls. They repeatedly and steadfastly denied that the 911 calls originated from their residence or cell phones owned by them. They lied to the police and claimed that someone must have been pranking them or tapping or spoofing their telephones.

The actions of the defendant and his family, when police officers were at the residence responding to the false 911 calls, provided clear evidence of a conspiratorial relationship. On virtually every occasion that officers responded, the defendant and/or his family members were very hostile toward the police officers. Police officers were subjected to vulgar, profane and racial insults by the defendant and his family members. Defendant and his wife would not permit their children to be interviewed by law enforcement. They generally wouldn't permit law enforcement officers to enter their residence. Defendant and his wife falsely claimed that police officers had stolen the cellular phone that made some of the false 911 calls. The defendant and his family members were frequently already on the porch of the residence awaiting the arrival of the police officers, wielding their cellular phones and taking video of the police officers. Defendant's wife was recorded on jail telephone calls encouraging the placing of the false 911 calls to buttress the defendant's chances of being elected mayor of the City of Pittsburgh.

Defendant next claims that this Court erred in admitting evidence of an incident that occurred between the defendant and a police officer on September 3, 2013, such that admission of the evidence prejudiced the outcome of defendant's trial. Without any objection, Officer Jason Lloyd testified at trial that he responded to a 911 call on March 24, 2014. According to Officer Lloyd, the defendant told him on that date that he wanted to prove that an incident that occurred September 3, 2013, was a set-up by the police officers. When the Commonwealth asked Officer Lloyd to elaborate on what transpired on that date, the defendant objected to admission of that evidence. This Court overruled the objection and permitted Officer Lloyd to testify that the defendant had been arrested by Officer Luff on September 3, 2013. Officer Lloyd testified that there was a scuffle between Officer Luff and the defendant at the time and the defendant was also charged with assault for his actions toward Officer Luff. The charges for the September 3, 2013, incident were pending at the time the false 911 calls were made.

"The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion." *Commonwealth v. Cunningham*, 805 A.2d 566, 572 (Pa.Super. 2002), appeal denied, 573 Pa. 663, 573 Pa. 663, 820 A.2d 703 (2003). As a result, rulings regarding the admissibility of evidence will not be disturbed for an abuse of discretion "unless that ruling reflects 'manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.'" *Commonwealth v. Einhorn*, 911 A.2d 960, 972 (Pa. Super. 2006).

It is axiomatic that evidence that is not relevant is not admissible. Pa.R.E. 402; *Commonwealth v. Robinson*, 554 Pa. 293, 304-305, 721 A.2d 344, 350 (1998) ("The threshold inquiry with admission of evidence is whether the evidence is relevant."). Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. See also *Commonwealth v. Edwards*, 588 Pa. 151, 181, 903 A.2d 1139, 1156 (2006) (evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact).

In *Commonwealth v. Broaster*, 863 A.2d 588, 592 (Pa. Super. 2004), the Superior Court explained that "[r]elevant evidence may nevertheless be excluded 'if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" See also *Commonwealth v. Dejesus*, 584 Pa. 29, 880 A.2d 608, 614-615 (Pa. Super. 2005).

As set forth in *Commonwealth v. Owens*, 929 A.2d 1187, 1191 (Pa. Super.2007) quoting *Broaster*, 863 A.2d at 592,

> Because all relevant Commonwealth evidence is meant to prejudice a defendant, [however] exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case. As this Court has noted, a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events and offenses with which [a] defendant is charged.

Importantly, the erroneous admission of evidence does not necessarily entitle a defendant to relief if the error is harmless. As set forth in *Commonwealth v. Williams*, 554 Pa. 1, 19, 720 A.2d 679, 687-688 (1998) (citing *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 162 (Pa. 1978)):

> Harmless error is established where either the error did not prejudice the defendant; or the erroneously admitted evidence was merely cumulative of other untainted evidence; or where the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

The evidence about the arrest of the defendant on September 3, 2013, was relevant evidence and was properly admitted at trial. This Court believed that this evidence was probative of the defendant's motive for his involvement in the conspiracy to make the false 911 calls because he was retaliating against the police officers for "setting him up" relative to the September 3, 2013, incident. Additionally, the defendant was charged with retaliating against Officer Luff by making the false 911 calls. Evidence of the criminal case initiated by Officer Luff's arrest was directly probative of the elements of that charge. This Court did not believe that the prejudicial impact of the evidence substantially outweighed the probative value of the evidence and the evidence was, therefore, properly admitted at trial.[2]

The defendant next claims that this Court abused its discretion in sentencing the defendant by imposing an excessive sentence. The sentence imposed in this case was above the aggravated range of the sentencing guidelines. This claim is without merit.

A sentencing judge is given a great deal of discretion in the determination of a sentence, and that sentence will not be disturbed on appeal unless the sentencing court manifestly abused its discretion." *Commonwealth v. Boyer*, 856 A2d 149, 153 (Pa. Super. 2004), citing *Commonwealth v. Kenner*, 784 A.2d 808, 811 (Pa.Super. 2001) appeal denied, 568 Pa. 695, 796 A.2d 979 (2002); 42 Pa.C.S.A. §9721. An abuse of discretion is not a mere error of judgment; it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. See *Commonwealth v. Flores*, 921 A.2d 517, 525 (Pa.Super. 2007), citing *Commonwealth v. Busanet*, 817 A.2d 1060, 1076 (Pa. 2002).

Furthermore, the "[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." *Boyer*, supra, quoting *Commonwealth v. Moore*, 617 A.2d 8, 12 (1992). Discretion is limited, however, by 42 Pa.C.S.A. §9721(b), which provides that a sentencing court must formulate a sentence individualized to that particular case and that particular defendant. Section 9721(b) provides: "[t]he 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 . . . . " *Boyer*, supra at 153, citing 42 Pa.C.S.A. §9721(b). Furthermore,

> In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a presentence investigative report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

Boyer, supra at 154, citing *Commonwealth v. Burns*, 765 A.2d 1144, 1150-1151 (Pa.Super. 2000) (citations omitted).

In fashioning an appropriate sentence, courts must be mindful that the sentencing guidelines "have no binding effect, in that they do not predominate over individualized sentencing factors and that they include standardized recommendations, rather than mandates, for a particular sentence." *Commonwealth v. Walls*, 592 Pa. 557, 567, 926 A.2d 957, 964 (2007). A sentencing court is, therefore, permitted to impose a sentence outside the recommended guidelines. If it does so, however, it "must provide a written statement setting forth the reasons for the deviation...." *Id.*, 926 A.2d at 963.

A sentencing judge can satisfy the requirement of placing reasons for a particular sentence on the record by indicating that he or she has been informed by the pre-sentencing report; thus properly considering and weighing all relevant factors. *Boyer*, supra, citing *Burns*, supra, citing *Commonwealth v. Egan*, 451 Pa.Super. 219, 679 A.2d 237 (1996). See also *Commonwealth v. Tirado*, 870 A.2d 362, 368 (Pa.Super. 2005) (if sentencing court has benefit of pre-sentence investigation, law expects court was aware of relevant information regarding defendant's character and weighed those considerations along with any mitigating factors).

The record in this case supports the sentence imposed by this Court. The defendant's conduct can only be described as willful, deliberate, repeated and designed to wreak havoc on the City of Pittsburgh Police Bureau. The defendant participated in conduct that resulted in over 100 false 911 calls being made without any legitimate purpose. Many police officers were dispatched to the scene to respond to the false 911 calls. Police officers responding to the calls were unable to respond to legitimate 911 calls. The false calls cost the city of Pittsburgh in excess of $11,000 to compensate the officers and 911 technicians to process the false 911 calls. This Court took particular note that the defendant did not stop his unlawful conduct while the instant charges were pending. Incredibly, the defendant continued to participate in a conspiracy to make false 911 calls during the pretrial course of this case. He ultimately pled guilty to the charges of making the additional false 911 calls. In this Court's view, the defendant thumbed his nose at this Court, law enforcement and the law and continued his affront after he was placed on formal notice of criminal charges for making false 911 calls.

This Court considered the fact that the defendant was a very intelligent man. He used his children to participate in the criminal conduct. The defendant encouraged his wife and children to further his personal animus toward the City of Pittsburgh Police Department. He facilitated a complete lack of respect and authority for the police officers who responded to the false 911 calls. He even made false accusations that police officers stole his cell phone. The defendant orchestrated and encouraged a deluge of vulgar, hostile and racial slurs toward the officers. The criminal conduct was a persistent pattern of conduct that lasted over time and continued despite the best efforts of the police officers to convince the defendant and his wife to stop their unlawful behavior. The evidence was clear that the defendant's conduct was fueled by a desire for retaliation for his arrest on September 3, 2013.

This Court could also not ignore the fact that every time a false 911 call was made, officers rushed to 3056 Bergman. During each call, officers travelled at high speeds risking their own safety as well as the safety of the local community and motorists. Police officers were dispatched to 3056 Bergman rather than being available for legitimate 911 calls. Based on the totality of the circumstances, this Court believed the defendant was a danger to the community and his removal from the community for a substantial period of time was necessary. This Court considered the defendant's rehabilitative needs, protection of the public, deterring the defendant from engaging in future similar conduct, deterring the pubic from committing such crimes, retribution and the impact on the victim. The sentence imposed in this case was not unduly harsh and properly reflected the defendant's culpability in this case.

Accordingly, the judgment should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: June 20, 2018

[1] There is ample non-precedential authority that similarly includes victims of and witnesses to criminal activity as a class of persons protected by this statute. See. *Commonwealth v. Myers*, 2018 WL 1959752; *Commonwealth v. Gray*, 2016 WL 5266626; *Commonwealth v. Gakhal*, 2016 WL 4919842; *Commonwealth v. Cruz*, 2016 WL 490156; *Commonwealth v. Woods*, 2015 WL 7078105; *Commonwealth v. Nicholson*, 2015 WL 7301925; and *Commonwealth v. Lee-Purvis*, 2014 WL 10986255.

[2] Even assuming that this Court would find that admission of this evidence was improper, the overwhelming other evidence in this case would render such admission harmless error.

Commonwealth of Pennsylvania v. Devlin Jake Jones, Jr.

Criminal Appeal—Weight of the Evidence—Aggravated Assault—Child Neglect/Abuse—Justification Defense

Parent of seven-year-old disciplined by beatings with a wire hanger is sentenced to six to twelve months of imprisonment.

No. CC 05739-2016. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—July 9, 2018.

OPINION

This is a direct appeal wherein the defendant appeals the Judgment of Sentence of August 10, 2017 that became final on March 26, 2018 when his post-sentence motions were denied. After a non-jury trial, Defendant was convicted of aggravated assault and endangering the welfare of children. He was sentenced to a term of imprisonment of not less than 6 months nor more than 12 months relative to the aggravated assault conviction. No further penalty was imposed at the remaining count. This direct appeal followed.

At trial, Defendant's seven-year-old son ("the child-victim") testified that he would get "beaten" by the defendant when he would break the rules.[1] The child-victim testified that the defendant would hit him on the "bum" and sometimes on his legs with "a hanger." The child-victim testified that "it hurted" when the defendant would hit him with the hanger.

There was evidence that there was little food in the house and that the child-victim was frequently hungry. He was very small. The trial evidence was that the child would be "whupped" when he took food from the refrigerator.

Trial testimony of Kaitlyn Leo, a family services caseworker for the Allegheny County Department of Children, Youth and Families, established that she was assigned to the defendant's family in 2015. According to Ms. Leo, "unexplainable injuries" were observed on the child-witness in April, 2015 . At that time, intensive in-home services were introduced into the family. The Commonwealth also presented the videotaped testimony of Dr. Adelaide Eichman, an expert witness affiliated with the Childrens' Hospital of Pittsburgh. Dr. Eichman is an expert in the field of physical abuse and neglect. Dr. Eichman testified that she examined the child-victim on September 21, 2015 and observed various injuries on the child-victim. Dr. Eichman observed multiple linear marks on the child-victim's back and loop marks on the child-victim's right outer thigh. Dr. Eichman opined that the injuries sustained by the child-victim were "pattern marks" caused by an implement of some sort and that they would have caused substantial pain when they were inflicted. Dr. Eichman had reviewed records of relating to the examination of the child-victim at the Children's Hospital of Pittsburgh in April of 2015. Dr. Eichman opined that the child-victim was the victim of physical abuse.

Defendant first claims that the evidence relied on to convict him was legally insufficient because the Commonwealth failed to disprove the defense of justification. In relation to this case, 18 Ps.C.S.A. §509 provides:

> The use of force upon or toward the person of another is justifiable if:
>
> (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:
>
> (i) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the preventing or punishment of his misconduct; and
>
> (ii) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

In *Commonwealth v. Ogin*, 540 A.2d 549 (Pa.Super.1988), the Superior Court held that the relevant inquiry is whether a defendant used force which was known to create at least a substantial risk of extreme pain or mental distress within the meaning of section 509(1)(ii). The term "extreme" in section 509(1)(ii) is synonymous with excessive. *Commonwealth v. Douglass*, 588 A.2d 53, 56 (Pa.Super.1991). "The statute simply says pain inflicted as a result of discipline must not be excessive. The punishment must be justifiable and fit the misconduct. Excessive discipline is contrary to the welfare of the child, even when discipline is justifiable." *Id.*

This Court considered all evidence admitted in this case and rejected the defense of justification. The evidence in this case demonstrated that the child-victim was struck with a hanger when he was told he did something wrong. The child had scars, bruises and other marks on his body consistent with being struck by some sort of implement. This Court was convinced that the defendant's conduct in striking the child-victim with an implement such as a hangar inflicted extreme pain or mental distress to the child-victim. This Court did not view the punishment inflicted by the defendant as appropriate response to the alleged misdoings of his child. In short, this Court did not believe that the force used by the defendant on his young child "fit the misconduct" the child was alleged to have committed.[2]

Defendant also argues that he was entitled to an acquittal because the Commonwealth failed to prove that the allegations against him occurred during the time alleged in the Information, i.e, between March 1, 2015 and April 30, 2015. This Court believes the testimony of Ms. Leo that "unexplainable injuries" were observed on the child-victim in April of 2015. Taken in conjunction with Dr. Eichman's testimony, this Court believes that the evidence in this case was sufficient to prove that the abuse occurred within the time period set forth in the Information. This claim, thus, fails.

Defendant finally claims the verdict was against the weight of the evidence for the same reason he claimed the evidence was insufficient to convict, i.e. because the Commonwealth failed to disprove the defense of justification. As forth in *Criswell v. King*, 834 A.2d 505, 512. (Pa. 2003):

> Given the primary role of the jury in determining questions of credibility and evidentiary weight, the settled but extraordinary power vested in trial judges to upset a jury verdict on grounds of evidentiary weight is very narrowly circumscribed. A new trial is warranted on weight of the evidence grounds only in truly extraordinary circumstances, i.e., when the jury's verdict is so contrary to the evidence that it shocks one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. The only trial entity capable of vindicating a claim that the jury's verdict was contrary to the weight of the evidence claim is the trial judge -- decidedly not the jury.

834 A.2d at 512. *Armbruster v. Horowitz*, 572 Pa. 1, 813 A.2d 698, 703 (Pa. 2002); *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177, 1189 (Pa. 1994)). Although *Criswell* spoke in terms of a jury verdict, there is no distinction relative to a non-jury verdict.

The initial determination regarding the weight of the evidence is for the fact-finder. *Commonwealth v. Jarowecki*, 923 A.2d 425, 433 (Pa.Super. 2007). The trier of fact is free to believe all, some or none of the evidence. *Id.* A reviewing court is not permitted to substitute its judgment for that of the fact-finder. *Commonwealth v. Small*, 741 A.2d 666, 672 (Pa. 1999). A verdict should only be reversed based on a weight claim if that verdict was so contrary to the evidence as to shock one's sense of justice. *Id.* See also *Commonwealth v. Habay*, 934 A.2d 732, 736-737 (Pa.Super. 2007). Importantly "[a] motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but claims that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Commonwealth v. Widmer*, 744 A.2d 745 (Pa. 2000). When the challenge to the weight of the evidence is predicated on the credibility of trial testimony, appellate review of a trial court's decision is extremely limited. Unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, weight of evidence claims shall be rejected. *Commonwealth v. Rossetti*, 2004 PA Super 465, 863 A.2d 1185, 1191 (Pa. Super. 2004). The fact-finder's rejection of a defendant's version of events or the rejection of an affirmative defense is within its discretion and not a valid basis for a weight of evidence attack. *Commonwealth v. Bowen*, 55 A.3d 1254, 1262 (Pa.Super. 2011). Initially, this Court does not believe that the claim made by defendant is a proper challenge to the weight of the evidence. He is claiming that the Commonwealth failed to disprove an affirmative defense. This is a challenge to the sufficiency of the evidence, as discussed above. However, even assuming a weight challenge could be made, this Court has reviewed the record and assessed the trial evidence. The verdict does not shock any sense of justice.

For the foregoing reasons, the judgment should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: July 9, 2018

[1] The defendant's wife, Linda Jones, was a co-defendant at trial. She was convicted of aggravated assault and endangering the welfare of a child based on testimony from the child-victim that Ms. Jones would strike the child-victim on the "bum" with an electrical cord.

[2] A hungry child's going into the refrigerator to get food, if that is somehow viewed as misconduct, is hardly deserving of his getting "whupped" with a hanger.

Commonwealth of Pennsylvania v. Erica Harris

Criminal Appeal—Homicide (3rd Degree)—Sentencing (Discretionary Aspects)—Motion to Withdraw Plea—Kidnapping

A shooting over a marijuana deal gone wrong results in a sentence of 20 to 45 years.

No. CC 2016005275. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Mariani, J.—July 11, 2018.

OPINION

This is a direct appeal wherein the defendant, Erica Harris, appeals from the judgment of sentence of August 2, 2017 which became final upon this Court's denial of her post-sentencing motions on February 13, 2018. On May 8, 2017, the defendant pled guilty before this Court to one count of Third Degree Murder and one count of Kidnapping of a Minor. Relative to the conviction for Third Degree Murder, this Court sentenced the defendant to a term of imprisonment of not less than 15 years nor more than 30 years. Relative to the conviction for Kidnapping a Minor, this Court sentenced the defendant to a consecutive term of imprisonment of not less than five years nor more than 15 years. The aggregate sentence imposed on the defendant was a term of imprisonment of not less than 20 years nor more than 45 years. The defendant filed post-sentencing motions claiming that her sentence was too harsh and seeking to withdraw her guilty plea. This Court denied those motions and this timely appeal followed.

The facts underlying this matter were set forth during the defendant's guilty plea colloquy, in the presentence report and at sentencing. The defendant stipulated to the facts contained in the affidavit of probable cause that was filed in support of the criminal complaint. On March 24, 2016, the defendant drove a vehicle registered to her to a residence on Boggs Avenue in the Mt. Washington section of the City of Pittsburgh where the victim, Saevon Scott Ponder, was located. The defendant had originally attempted to purchase marijuana from the victim. When the victim didn't meet the defendant's demand, she contacted her boyfriend and one of his friends to help her obtain the marijuana. The three of them returned to the Boggs Avenue residence. A witness at that residence reported that the victim had been with the witness at the Boggs Avenue residence. There was a knock on the door and the victim went outside with the person or persons who knocked on the door. The victim came back inside and grabbed some Xanax bars (illegal narcotics). The victim went back outside and left with the defendant and the two other males. A short time later, the victim called the witness and asked the witness to come outside. The witness came outside and observed the victim fleeing from inside the vehicle and running away from the area. Shortly thereafter, the two males were seen leading the victim to an area in Beltzhoover section of the City of Pittsburgh adjacent to Mt. Washington. Gunshots were heard and the victim was found lying dead on the street. Video surveillance confirmed the circumstances of the incident including the fact that the defendant had been driving the vehicle that transported the shooters and the victim to the scene of the homicide. One of the shooters, when questioned, confirmed that the defendant had driven them to the Boggs Avenue residence and to the scene of the shooting.

Without actually claiming that the defendant's sentence was manifestly excessive, the defendant's first claim criticizes the sentence imposed by this Court. The defendant filed post-sentencing motions and a Concise Statement of Errors Complained of on Appeal Pursuant to Rule 1925(b) of Rules of Appellate Procedure [sic] claiming that this Court based the sentence on incorrect interpretations of the factual record. This claim is without merit.

A sentencing judge is given a great deal of discretion in the determination of a sentence, and that sentence will not be disturbed on appeal unless the sentencing court manifestly abused its discretion." *Commonwealth v. Boyer*, 856 A2d 149, 153 (Pa. Super. 2004), citing *Commonwealth v. Kenner*, 784 A.2d 808, 811 (Pa.Super. 2001) appeal denied, 568 Pa. 695, 796 A.2d 979 (2002); 42 Pa.C.S.A. §9721. An abuse of discretion is not a mere error of judgment; it involves bias, partiality, prejudice, ill-will, or manifest unreasonableness. See *Commonwealth v. Flores*, 921 A.2d 517, 525 (Pa.Super. 2007), citing *Commonwealth v. Busanet*, 817 A.2d 1060, 1076 (Pa. 2002).

Furthermore, the "[s]entencing court has broad discretion in choosing the range of permissible confinements which best suits a particular defendant and the circumstances surrounding his crime." *Boyer*, supra, quoting *Commonwealth v. Moore*, 617 A.2d 8, 12 (1992). Discretion is limited, however, by 42 Pa.C.S.A. §9721(b), which provides that a sentencing court must formulate a sentence individualized to that particular case and that particular defendant. Section 9721(b) provides: "[t]he 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 . . . . " *Boyer*, supra at 153, citing 42 Pa.C.S.A. §9721(b). Furthermore,

> In imposing sentence, the trial court is required to consider the particular circumstances of the offense and the character of the defendant. The trial court should refer to the defendant's prior criminal record, age, personal characteristics, and potential for rehabilitation. However, where the sentencing judge had the benefit of a pre-sentence investigative report, it will be presumed that he or she was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

Boyer, supra at 154, citing *Commonwealth v. Burns*, 765 A.2d 1144, 1150-1151 (Pa.Super. 2000) (citations omitted).

In fashioning an appropriate sentence, courts must be mindful that the sentencing guidelines "have no binding effect, in that they do not predominate over individualized sentencing factors and that they include standardized recommendations, rather than mandates, for a particular sentence." *Commonwealth v. Walls*, 592 Pa. 557, 567, 926 A.2d 957, 964 (2007). A sentencing court is, therefore, permitted to impose a sentence outside the recommended guidelines. If it does so, however, it "must provide a written statement setting forth the reasons for the deviation…." *Id.*, 926 A.2d at 963.

A sentencing judge can satisfy the requirement of placing reasons for a particular sentence on the record by indicating that he or she has been informed by the presentencing report; thus properly considering and weighing all relevant factors. *Boyer*, supra, citing *Burns*, supra, citing *Commonwealth v. Egan*, 451 Pa.Super. 219, 679 A.2d 237 (1996). See also *Commonwealth v. Tirado*, 870 A.2d 362, 368 (Pa.Super. 2005) (if sentencing court has benefit of presentence investigation, law expects court was aware of relevant information regarding defendant's character and weighed those considerations along with any mitigating factors). In *Commonwealth v. Moury*, 992 A.2d 162, 171 (Pa.Super. 2010), the Superior Court explained that where a sentencing court imposes a standard-range sentence with the benefit of a presentence report, a reviewing court will not consider a sentence excessive.

Moreover, the imposition of consecutive, rather than concurrent, sentences lies within the sound discretion of the sentencing court. *Commonwealth v. Lloyd*, 878 A.2d 867, 873 (Pa. Super. 2005), appeal denied, 585 Pa. 687, 887 A.2d 1240 (2005) (citing *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. 1995). Title 42 Pa.C.S.A. § 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. *Commonwealth v. Marts*, 889 A.2d 608, 612 (Pa. Super. 2005) (citing *Commonwealth v. Graham*, 661 A.2d 1367, 1373 (1995)). "In imposing a sentence, the trial judge may determine whether, given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." *Commonwealth v. Perry*, 883 A.2d 599 (Pa. Super. 2005), quoting *Commonwealth v. Wright*, 832 A.2d 1104, 1107 (Pa.Super.2003); see also *Commonwealth v. L.N.*, 787 A.2d 1064, 1071 (Pa.Super.2001), appeal denied 569 Pa. 680, 800 A.2d 931 (2002).

The record in this case supports the sentence imposed by this Court. The sentences imposed by this Court at each count were within the standard range of the sentencing guidelines. The record reflects that this Court was guided by the presentence report and that the defendant did not object to the contents of that report. Most importantly, the facts presented at sentencing demonstrated that the entire chain of events that led to the murder of the victim was precipitated by the defendant. The defendant brought the two males that shot the victim to the Boggs Avenue residence and enlisted their participation in the events that led to the victim's death. The defendant was the only person who knew where to find the victim. She drove the two males and the victim away from the residence. After the victim attempted to flee the vehicle and was kidnapped, the defendant drove the victim and the two men to the scene of the victim's homicide. Even after her arrest, the defendant purported to cooperate in the investigation of the homicide. However, she violated the terms of her cooperation agreement and maintained contact with the person who shot the victim. In this Court's view, the defendant deserved the same sentence as the other two participants in the homicide of the victim. She deserved separate, consecutive sentences for each offense. The sentence in this case was proper.

The defendant next claims that this Court erred by denying her motion to withdraw her guilty plea. Two different standards exist for reviewing requests to withdraw a guilty plea, one for presentence requests to withdraw and one for post-sentence requests to withdraw. *Commonwealth v. Flick*, 2002 PA Super 189, 802 A.2d 620, 623 (Pa. Super. 2002). The Supreme Court has explained that there is no absolute right to withdraw a guilty plea however, a presentence request to withdraw a guilty plea should be liberally granted when there exists any fair and just reason for the withdrawal. *Commonwealth v. McLaughlin*, 469 Pa. 407, 366 A.2d 238 (1976); *Commonwealth v. Forbes*, 450 Pa. 185, 299 A.2d 268, 271 (1973). Post-sentence motions for withdrawal, however, are subject to a higher standard. As set forth in *Commonwealth v. Kehr*, 180 A.3d 754, 756-757 (Pa.Super. 2018) quoting *Commonwealth v. Broaden*, 980 A.3d 124 (Pa.Super. 2009):

> [P]ost-sentence motions for withdrawal are subject to higher scrutiny since courts strive to discourage entry of guilty pleas as sentence-testing devices. A defendant must demonstrate that manifest injustice would result if the court were to deny his post-sentence motion to withdraw a guilty plea. Manifest injustice may be established if the plea was not tendered knowingly, intelligently, and voluntarily. In determining whether a plea is valid, the court must examine the totality of circumstances surrounding the plea. A deficient plea does not *per se* establish prejudice on the order of manifest injustice.

See also *Flick*, 802 A.2d at 623; *Commonwealth v. Gunter*, 565 Pa. 79, 771 A.2d 767 (2001). Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly. *Commonwealth v. Persinger*, 532 Pa. 317, 615 A.2d 1305 (1992). In *Commonwealth v. Rosmon*, 477 Pa. 540, 542, 384 A.2d 1221, 1222 (1978), the Supreme Court recognized that a

manifest injustice occurs if a guilty plea is entered by a defendant who lacks full knowledge and understanding of the charge against him. "The law does not require that [a defendant] be pleased with the outcome of his decision to enter a plea of guilty: 'All that is required is that [a defendant's] decision to plead guilty be knowingly, voluntarily and intelligently made.'" *Commonwealth v. Yager,* 454 Pa. Super. 428, 685 A.2d 1000, 1004 (Pa. Super. 1996) (*en banc*), *appeal denied*, 549 Pa. 716, 701 A.2d 577 (1997) (quotation omitted). An on-the-record colloquy is required by Rule Pa.R.Crim.P. 319(a); *Commonwealth v. Schultz*, 505 Pa. 188, 477 A.2d 1328, 1329-30 (1984).

In *Commonwealth v. McCauley*, 797 A.2d 920 (Pa.Super. 2001) the Superior Court, citing *Commonwealth v. Stork*, 737 A.2d 789, 790-791 (Pa. Super. 1999), appeal denied, 564 Pa. 709, 764 A.2d 1068 (2000) explained that

> [o]nce a defendant has entered a plea of guilty, it is presumed that he was aware of what he was doing, and the burden of proving involuntariness is upon him. Therefore, where the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established. Determining whether a defendant understood the connotations of his plea and its consequences requires an examination of the totality of the circumstances surrounding the plea.

The minimum inquiry required of a trial court must include the following six areas: (1) Does the defendant understand the nature of the charges to which [s]he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the defendant understand that [s]he has a right to trial by jury? (4) Does the defendant understand that [s]he is presumed innocent until [s]he is found guilty? (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged? (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement? *McCauley*, 797 A.2d at 920; *Commonwealth v. Young*, 695 A.2d 414, 417 (Pa. Super. 1997).

This examination may be conducted by defense counsel or the attorney for the Commonwealth, as permitted by the judge. Pa. R. Crim. P. 590. Moreover, the examination does not have to be solely oral. Nothing precludes the use of a written colloquy that is read, completed, and signed by the defendant, made part of the record, and supplemented by some on-the-record oral examination. *Commonwealth v. Moser*, 921 A.2d 526, 529 (Pa.Super. 2007); see also Comment to Pa.R.Crim.P 590.

The record in this case is clear that the defendant understood the nature of the charges to which she ultimately pled guilty and, therefore, her guilty plea was entered knowingly and intelligently. The Court reviewed all of the charges filed against the defendant as well as the charges to which she ultimately pled guilty. The Assistant District Attorney presented a factual basis for the guilty plea and the defendant did not object to the presentation of the Assistant District Attorney. The defendant completed an exhaustive written guilty plea colloquy clearly evidencing her awareness of her pertinent constitutional rights including, but not limited to, her right to a jury trial, the presumption of innocence and the fact that this Court was not bound by the terms of the plea agreement. This colloquy is part of the trial court record. The Court went over some of these rights during an on-the-record colloquy at the sentencing hearing. The Court discussed the original charges contained in the Information with the defendant and the charges to which she pled guilty and the defendant indicated that she discussed those charges with her trial counsel. The Court specifically outlined the proposed plea agreement and the defendant orally indicated that her understanding of the plea agreement. The Court clearly explained the defendant's rights relating to a jury trial. The defendant acknowledged on the record her decision to waive that right. The defendant also indicated that she was aware of the maximum potential penalties that could be imposed. The Court also asked the defendant if anyone had forced her to enter the plea agreement. She responded, "No". The defendant stated that she had enough time to speak with her attorney about her case and that she was satisfied with the advice provided by her counsel. The defendant explained that her decision to plead guilty was motivated by the fact that she was guilty of the offenses to which she pled guilty. The totality of the trial court record indicates that the defendant knowingly and voluntarily entered her guilty plea. Thus, no manifest injustice has occurred and the motion to withdraw guilty plea was properly denied. Accordingly, the judgment in this case should be affirmed.

BY THE COURT:
/s/Mariani, J.

Date: July 11, 2018