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# OPINIONS

## ALLEGHENY COUNTY COURT OF COMMON PLEAS

# PLJ

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# Opinions

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## Commonwealth of Pennsylvania v. Heath E. Miller

*Criminal Appeal—Probation Violation—Sentencing (Discretionary Aspects)—Burglary—Mental Health Court—Taunting Police on Facebook*

*After 8 burglaries, probation violations, continued drug use, and taunting police on Facebook, a 6 to 12 year sentence is warranted.*

No. CC 2016-7999; 2016-6379; 2014-7169; 2010-15148; 2010-15147; 2010-15145; 2010-14928; 2014-8943. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Lazzara, J.—August 23, 2017.

**OPINION**

This is a direct appeal from the judgment of sentence entered on October 18, 2016, following a negotiated plea entered on September 27, 2016, at CC Nos. 2016-7999 and 2016-6379. The Defendant pled guilty to one (1) count of Burglary (18 Pa. C.S.A. §3502) in exchange for a two (2) to four (4) year sentence of imprisonment with a probationary tail at CC No. 2016-7999. The Defendant also pled guilty at CC No. 2016-6379 to one (1) count of Burglary (18 Pa. C.S.A. §3502) in exchange for a two (2) to four (4) year sentence of imprisonment with a probationary tail. Sentencing was deferred to October 18, 2016, so that the court could sentence the Defendant on his 2016 cases at the same time that it resentenced the Defendant for his probation violations on his six (6) other mental health court cases at CC Nos. 2014-7169, 2010-14928, 2010-15145, 2010-15147, 2010-15148, and 2014-8943.

On October 18, 2016, the court sentenced the Defendant in accordance with the plea agreements entered into at CC Nos. 2016-7999 and 2016-6379, and an aggregate sentence of two (2) to four (4) years of imprisonment, followed by a five (5) year term of probation, was imposed. The court then revoked the Defendant's probationary terms on his six (6) other cases at CC Nos. 2014-7169, 2010-14928, 2010-15145, 2010-15147, 2010-15148, and 2014-8943. For these mental health court violations, the Defendant received an aggregate sentence of four (4) to eight (8) years of imprisonment to be served consecutively to the sentence of imprisonment that he received for his 2016 cases. In sum, the Defendant received a total aggregate sentence of imprisonment of six (6) to twelve (12) years of imprisonment, with a five (5) year term of probation to follow.

On October 27, 2016, a Motion to Reconsider Sentence was filed. On March 6, 2017, the Defendant filed a *pro se* motion for appointment of counsel and requested reinstatement of his direct appeal rights. On March 8, 2017, the court reinstated the Defendant's appellate rights and appointed counsel to represent the Defendant in his appeal. A Notice of Appeal was filed on April 7, 2017. Counsel was ordered to file a Concise Statement of Errors Complained of on Appeal ("Concise Statement") by May 3, 2017. Counsel requested and received one extension of time to file the Concise Statement.

On July 5, 2017, the Defendant, by way of counsel, filed a timely Concise Statement, raising the following issue for review:

> A. The total aggregate sentence of 6 to 12 years' imprisonment followed by a 5 year term of probation is unreasonable, manifestly excessive, and contrary to the dictates of the Sentence Code and 42 Pa. C.S.A. §9721 (b). More specifically, the sentence was contrary to (1) the specific need for protection of the public in relation to Mr. Miller's actions, (2) the gravity or the offense as it relates to impact on the lives of the victims, and (3) Mr. Miller's need for rehabilitation. Despite his mental illness, Mr. Miller had been working hard to rehabilitate himself. His new charges were the result of a period of drug addiction regression. Such regression is not uncommon in the recovery process, [and] should not be a basis for imposing a lengthy period of incarceration. Mr. Miller expressed deep remorse for his actions, and made a statement showing critical insight into his problems, and his strong commitment to rehabilitating himself. While incarcerated awaiting sentencing, Mr. Miller made the most of his time doing pod work, Bible study, and doing all that was asked of him. He had no misconducts and was moved from maximum to minimum security. As such, Mr. Miller demonstrated that he is on the road to recovery, and that a lengthy period of incarceration is not warranted; rather, he would benefit most from a shorter period of incarceration, and participation in community treatment programs.
>
> (Concise Statement, pp. 2-3).

The Defendant's allegation of error on appeal is without merit. The court respectfully requests that the Defendant's sentence be upheld for the reasons that follow.

I. DISCUSSION

It is well-settled that "[s]entencing is a matter vested in the sound discretion of the sentencing judge and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003). "To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive." *Commonwealth v. Gaddis*, 639 A.2d 462, 469 (Pa. Super. 1994) (citations omitted). To that end, "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 so as to be clearly erroneous." *Commonwealth v. Greer*, 951 A.2d 346, 355 (Pa. 2008). "In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion." *Mouzon, supra*, at 1128. This deferential standard of review acknowledges that the sentencing court is "in the best position to view the defendant's character, displays of remorse, defiance, indifference, and the overall effect and nature of the crime." *Commonwealth v. Allen*, 24 A.3d 1058, 1065 (Pa. Super. 2011) (internal citations omitted).

The Defendant's sentencing argument seeks to challenge the discretionary aspects of sentencing. The court notes that "[t]he right to appeal a discretionary aspect of sentence is not absolute." *Commonwealth v. Martin*, 727 A.2d 1136, 1143 (Pa. Super. 1999). A defendant "challenging the discretionary aspects of his sentence must invoke [appellate] jurisdiction by satisfying a four-part test." *Commonwealth v. Moury*, 992 A.2d 162, 170 (Pa. Super. 2010). In conducting the four-part test, the appellate court analyzes

> (1) whether appellant has filed a timely notice of appeal, see Pa. R. A. P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa. R. Crim. P. [708]; (3) whether appellant's brief has a fatal defect, Pa. R. A. P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa. C. S. A. § 9781(b). *Id.* at 170.

"The determination of whether there is a substantial question is made on a case-by-case basis, and [the appellate court] will grant the appeal only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process."

*Commonwealth v. Haynes*, 125 A.3d 800, 807 (Pa. Super. 2015).

Our courts have "held on numerous occasions that a claim of inadequate consideration of [mitigating] factors does not raise a substantial question for[] review." *Haynes, supra*, at 807; *Commonwealth v. Buterbaugh*, 91 A.3d 1247, 1266 (Pa. Super. 2014). Furthermore, "a sentencing court generally has discretion to impose multiple sentences concurrently or consecutively, and a challenge to the exercise of that discretion does not ordinarily raise a substantial question." *Commonwealth v. Raven*, 97 A.3d 1244, 1253 (Pa. Super. 2014). Moreover, "bald claims of excessiveness due to the consecutive nature of sentences imposed will not raise a substantial question." *Commonwealth v. Dodge*, 77 A.3d 1263, 1270 (Pa. Super. 2013). Rather, "[t]he imposition of consecutive, rather than concurrent, sentences may raise a substantial question in only the most extreme circumstances, such as where the aggregate sentence is unduly harsh, considering the nature of the crimes and the length of imprisonment." *Moury, supra*, at 171-72.

Respectfully, the reviewing court should find that the Defendant has failed to raise a substantial question for review of his sentence. The Defendant's aggregate sentence was consistent with the sentencing provisions of the Sentencing Code, and it did not conflict with the fundamental norms that underlie the sentencing process. However, should the reviewing court conclude that there exists a substantial question as to the appropriateness of the sentence, the reviewing court respectfully should find that the Defendant's allegation of error is without merit because the aggregate sentence imposed was justified by the totality of the circumstances in this case.

First, and most importantly, the Defendant was no stranger to this court. The Defendant became a participant in this court's Mental Health Court ("MHC") program on November 18, 2014, when he pled into the program on two (2) burglary cases that were before this court at CC Nos. 2014-7169 and 2014-8943. At that time, the Defendant was already on probation with the Honorable Kevin G. Sasinoski at CC Nos. 2010-15145, 2010-15147, 2010-15148, and 2010-14928 for four (4) other burglary cases.[1] On December 4, 2014, Judge Sasinoski transferred the Defendant's 2010 cases to this court so that it could assume supervision of the probationary sentences through MHC court.

This court spent almost two (2) years supervising the Defendant on his six (6) separate burglary cases.[1] During the course of that supervision, the court met with the Defendant almost two (2) dozen times, and it became well-familiar with his behavior, personal background, criminal history, and need for rehabilitation. The Defendant claims that his 2016 charges were only the result of a period of drug regression and that such regression "is not uncommon in the recovery process" and "should not be a basis for imposing a lengthy period of incarceration." (Concise Statement, p. 3). Respectfully, this argument minimizes the nature of the Defendant's willful conduct, and it substantially overlooks the various other reasons that the sentence was imposed.

The Defendant's lengthy sentence was not imposed to punish the Defendant merely because he relapsed. Indeed, the Defendant relapsed several times throughout his time in the MHC program, and he repeatedly violated various conditions of the treatment programs in which he was participating. For example, at his MHC Review Hearing on April 13, 2015, the court learned that the Defendant was unsuccessfully discharged from the Lafayette House, a halfway house, for "continued violations" of their behavioral policy. Specifically, the Defendant refused to provide a drug screen and also had a female visitor who was not permitted to be at the facility. The Defendant then left the Lafayette House and ultimately admitted to his probation officer that he had relapsed, using Vicodin. (Review Hearing ("RH"), 4/13/15, p. 2). His probation officer also learned from the police that there was possible drug paraphernalia and urine at the residence where the Defendant had been staying. The urine was thought to be someone other than that of the Defendant to be used by the Defendant to pass a urine screen. The use of this "fake" or fraudulent urine would have resulted in immediate expulsion from the MHC program. The Defendant was not expelled on this basis because the evidence of the fake urine was no longer present by the time the probation officer went to recover it at Lafayette House. (*Id.* at 2-3, 12-13).

When the court confronted the Defendant about his behavior, the Defendant apologized for his mistakes and attempted to make excuses for his violations. (*Id.* at 3-5, 7, 10). The court instructed the Defendant that his recent conduct would not be tolerated, and it specifically warned the Defendant that, if he continued to violate the terms of the MHC program, he would be revoked out of the program and given a lengthy state sentence due to his six (6) burglary convictions. (*Id*. at 3, 9-10, 12-13). The Defendant told the court that he understood the potential consequences of his actions and assured the court that he wanted to stay in the MHC program. (*Id*. at 10, 13). The court then afforded the Defendant another opportunity to participate in a different treatment program, this time at the Cash Club, with the hopes that the Defendant's behavior would improve and that he would take the MHC program more seriously.

Not even two (2) months later, the Defendant's probation officer informed the court via email on May 13, 2015, that the Defendant tested positive for opiates at the Cash Club. The Defendant admitted to the Cash Club that he used Percocet on May 8, 2015, and the Defendant also tested positive for Morphine on May 12, 2015. The court also learned that the Defendant had left the Cash Club several times without permission. However, instead of incarcerating him or revoking the Defendant out of the MHC program for his drug use and violation of the program rules, the court ordered the Defendant to undergo more intensive drug and alcohol treatment and gave him yet another chance to work on and overcome his addiction issues. (RH, 5/18/15, pp. 2-3, 7-10).

Despite some indication that the Defendant was making headway in his recovery, his probation officer again informed the court via email on June 2, 2015, that the Defendant once again tested positive for opiates on June 1, 2015 at the Cash Club. The providers at the Cash Club found a bottle of urine in his possession, and the Defendant absconded from the Cash Club without permission after he provided a drug-positive urine sample. A warrant was issued for the Defendant's arrest because his whereabouts were unknown, and he was considered to be a danger to himself and others. The Defendant was arrested on the warrant on June 3, 2015. Despite the Defendant's drug use, behavior at Cash Club, and a second allegation of a "fake" urine sample, this court provided the Defendant with yet another opportunity to pursue treatment, placing him on the waiting list for another treatment program, this one a longterm (six (6) month) intensive program known as CORE.

The Defendant showed some improvement over the course of the next few months, and he was appearing to do well at the CORE program. He had positive reviews at his MHC hearings on October 13, 2015 and November 23, 2015. Unfortunately, however, shortly thereafter, the Defendant relapsed and admitted to using K-2, a synthetic marijuana substitute, while at CORE. The Defendant's drug use had even caused him to be found unconscious at the Waterfront one evening, which resulted in him being transported to the hospital. (RH, 1/11/16, pp. 2-3). This development caused the Defendant to lose privileges at CORE, but this court, as well as the CORE program, agreed to give him yet another chance to rehabilitate himself. The Defendant again apologized for his mistakes and indicated that he understood that this would be his last opportunity to address his addiction issues. (*Id*. at 3-4, 6-8).

Thereafter, the Defendant applied himself to his recovery, receiving certificates of recognition and achievement from the CORE program. On February 22, 2016, the Defendant successfully completed the CORE program and was discharged. The Defendant was

immediately moved into a recovery house, the Mt. Washington Recovery House, to continue addressing his addiction. He also began working part-time. While the Defendant appeared to be doing well at the Recovery House, on a superficial basis, there were deep concerns about him because he was missing his peer mentoring meetings, which were arranged through CORE. A scant two (2) months after arriving at the recovery house, on April 29, 2016, the court was informed via email that the Defendant was smoking K-2 at the Recovery House and that he had been inappropriately running around the neighborhood during the late night/early morning hours of April 28, 2016 and April 29, 2016. (RH, 5/31/16, pp.2-3). The Defendant's behavior had frightened the neighbors and the residents of the recovery house, and he was considered to be a high risk in the community. A warrant was issued for his arrest on May 2, 2016 because he had again violated the terms of his MHC probation by using illegal substances and leaving his court-ordered placement at the recovery house.

Before the Defendant could be picked up on his MHC probation violation warrant, he committed two (2) new burglaries on May 9, 2016. This criminal conduct resulted in the charges that were filed at CC Nos. 2016- 7999 and 2016-6379. (RH, 5/31/16, p.3). As if his commission of two (2) additional burglary crimes was not serious enough, the Defendant had the audacity to publicly taunt the police in Facebook posts dated May 9, 2016 and May 10, 2016. (Id. at 5). The May 9, 2016 post read as follows: "Th[]y call m[] th[] ging[]rbr[]ad man. Catch m[] if u can. I'm running as fast as I can. Tim[] for n[]w sc[]n[]ry and a n[]w stat[] fuck Pgh.[2] The May 10, 2016 post stated: **You gotta b[] quick[]r th[]n that lol. Ging[]rbr[]ad man I told y'all moth[]rfuck[]rs just l[]av[] m[] alon[].**" (*Id.* at 5). To be sure, the Defendant famously made the news headlines with his new crimes and Facebook postings.[3] (*Id.* at 3, 5). Given the egregious nature of the Defendant's new criminal conduct, and his overall behavior in the MHC program, the MHC team unanimously agreed to revoke him out of the MHC program.

Having headed the MHC program for more than five (5) years, this court is intimately and uniquely aware of the struggles that its MHC participants experience when trying to battle their addictions, as well as address their mental health issues. For this reason, this court not only sympathizes with their struggles, but also works especially hard to assist its participants during their relapses by offering support, by attempting to specifically tailor recovery treatment to the individual's unique needs, and by providing appropriate monitoring to assist the defendant in his or her recovery. The court does not resentence its participants out of the MHC program unless the court has convinced itself that the participant is unwilling or genuinely unable to transition to a sober, law-abiding lifestyle. This determination that a defendant is unwilling or unable to make a positive change is not made until this court has satisfied itself that every available and appropriate treatment opportunity has been afforded the defendant. While it is always upsetting to see participants fail out of the program, the court takes comfort in knowing that it attempted to utilize every applicable resource to help its people, prior to revoking them from MHC.

Accordingly, despite the Defendant's multiple relapses and technical violations of the program, the court persisted in its attempts to work with the Defendant and help him attain his treatment goals. In doing so, this court repeatedly warned the Defendant that his failure to abide by the program rules and his failure to take advantage of his treatment opportunities would result in serious consequences, perhaps including consecutive sentences and state prison time. (RH, 4/13/15, pp. 3, 9-13); (RH, 5/18/15, pp. 3-4). However, despite his full awareness of the consequences of any new and serious violations, the Defendant's drug use continued and his behavior escalated to the point that he committed two (2) new burglaries in May of 2016. He took advantage of this court's willingness to work with him, while he repeatedly demonstrated an unwillingness to take his treatment and recovery seriously.

Moreover, the Defendant's behavior placed society at risk and resulted in the victimization of innocent members of the public. His new criminal conduct also demonstrated a complete and utter disregard for the law and authority figures. The Defendant not only committed new and serious crimes while he was on probation and while he had a warrant out for his arrest, he boldly put his crimes on public display, mocking and taunting the police. It is hard to believe that his behavior was motivated by a simple relapse given that he generally acknowledged prior relapses and accepted the court's treatment assistance. In this instance, however, the Defendant remained on the run, committed new burglaries, actively hid from law enforcement, did not seek treatment assistance and publicly lashed out at law enforcement. By doing so, the Defendant highlighted his complete lack of respect for the law, this court, and his treatment providers and demonstrated a substantial lack of remorse for his crimes. This was criminal behavior, not relapse behavior.

For these reasons, the Defendant's allocution at his sentencing on October 13, 2016 had little impact on this court. This court focused more on the Defendant's actions over the course of his MHC participation, as opposed to his proffered excuses for his behavior. (Sentencing Hearing, 10/13/16, pp. 6-16). The Defendant's actions communicated that he is either unwilling or incapable of transitioning to a law-abiding life. Whichever might be the case, the Defendant's failure to transition into a sober, law-abiding citizen despite the numerous opportunities that he was afforded makes him a threat to both himself and society. The Defendant's continued use and abuse of illegal substances subjects him to risk of overdose and violence from others. As far as society is impacted, this court noted at the time of sentencing that the Defendant's new crimes take from his victims not only their material possessions, but their sense of security and safety as well, in the place that they should feel those things most acutely, their homes. (*Id.* at 14-16, 26). The Defendant's repeated burglaries, despite receiving drug and alcohol treatment, mental health treatment and the support of Justice Related Services, probation and this court, make it clear that he has made the conscious choice to engage in criminal behavior and continue to victimize individuals and society as a whole.

The Defendant's prior, more lenient sentences for his past criminal conduct clearly failed to deter him from criminal activity, and that is yet another reason why a lengthier sentence was warranted at this time. The Defendant had been convicted of eight (8) burglary cases in a span of only a few years, and his demonstrated failure to be deterred from criminal activity, even though he was fully aware that much lengthier sentences awaited him if he continued his criminal behavior, further makes him a danger to society.

Finally, the court notes that a defendant is not entitled to a concurrent sentencing scheme, and the Defendant in this case certainly was not deserving of a "volume discount" for committing serious crimes that involved, *inter alia*, breaking into a victim's apartment, repeatedly beating him over the head with a brick, and then robbing him of his belongings. See *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. 1995) ("The general rule in Pennsylvania is that in imposing a sentence the court has discretion to determine whether to make it concurrent with or consecutive to other sentences then being imposed or other sentences previously imposed."); *Commonwealth v. Anderson*, 650 A.2d 20, 22 (Pa. 1994) (raising a concern that defendants not be given "volume discounts" for multiple criminal acts that arose out of one larger criminal transaction).

Accordingly, the aggregate sentence of six (6) to twelve (12) years of imprisonment was justified by the totality of the circumstances in this case. In determining what sentence would be appropriate for the eight (8) burglary cases that were before this court for sentencing, the court considered the statutory factors set forth in 42 Pa. C.S.A. §9721 (b). Given its detailed knowledge of the Defendant's history, background, behavior, and rehabilitative needs, this court made an informed decision that a lengthy sentence was appropriate and necessary to address the Defendant's continued criminal conduct, as well as provide him with the necessary

time to address his mental health and addiction issues, without the distractions and temptations of the community at large. While the court considered the Defendant's allocution at sentencing and the mitigating aspects of the Defendant's circumstances, it found that the mitigating factors did not outweigh other relevant considerations outlined above. (Sentencing Transcript, 10/18/16, pp. 10-14). The Defendant's overall conduct demonstrated a serious disregard for the law and a disinterest in meaningfully addressing his rehabilitative needs, and this, in turn, created a substantial need to protect the public from his behavior. The Defendant's demonstrated failure to be deterred from criminal activity highlights the danger that he poses to society. For all of these reasons, this court did not abuse its discretion in imposing sentence.

II. CONCLUSION

The Defendant's contention on appeal is without merit. Based on the foregoing, the sentence imposed was not an abuse of discretion. Accordingly, this court respectfully requests that the sentence in this case be upheld.

BY THE COURT:
/s/Lazzara, J.

August 23, 2017

[1] On December 13, 2011, Judge Sasinoski sentenced the Defendant on his 2010 cases as follows: At CC# 2010-15145, the Defendant was placed into the state intermediate punishment ("SIP") program for a period of 24 months and was ordered to serve a five (5) year term of probation. The Defendant received the same sentence at CC Nos. 2010-15147, 2010-15148, and 2010-14928. The SIP sentences were all ordered to be served concurrently with one another. The sentences of probation were ordered to run concurrently with one another as well.

[2] Posts retrieved from the Defendant's Facebook page at (https://www.facebook.com/profile.php?id=100009760920629&fref=ts) (emphasis added).

[3] http://pittsburgh.cbslocal.com/2016/05/11 /burglary-suspect-accused-of-taunting-police-on-facebook-found-hiding-in-attic-arrested/ (last visited 8/3/17); http://www.post-gazette.com/local/north/2016/05/19/Mount-Washington-burglary-suspect-known-as-Gingerbread-Man-to-stand-trial-pittsburgh/stories/201605190142 (last visited 8/3/17); http://www.wtae.com/article/pittsburgh-s-slippery-gingerbread-man-fugitive-tracked-down-after-throwing-shade-on-facebook/7480034 (last visited 8/3/17).

## Commonwealth of Pennsylvania v. Eric Taylor

*Criminal Appeal—Homicide (Attempt)—Weight of the Evidence—Sentencing (Discretionary Aspects)—Confrontation—Batson Challenge—Leading Questions*

*Multiple evidentiary claims following convictions connected with shooting of a pregnant woman that killed her unborn child.*

No. CC 201410212. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—November 16, 2017.

**OPINION**

On May 5, 2016, following a jury trial, the appellant, Eric Taylor, (hereinafter referred to as "Taylor"), was found guilty of the charge of criminal homicide of an unborn child, criminal attempt to commit criminal homicide, aggravated assault, one count of recklessly endangering another person and possession of a firearm without a license. Taylor was acquitted of one count of recklessly endangering another person and in a non-jury trial held in conjunction with this jury trial, this Court found him guilty of person not to possess a firearm. A presentence report was ordered and on August 3, 2016, Taylor was sentenced to a period of incarceration of not less than one hundred eighty and not more than three hundred sixty months for his conviction of criminal homicide of an unborn child and a sentence of ninety to one hundred eighty months for his conviction of criminal attempt to commit criminal homicide which was to run consecutive to the sentence imposed upon him for the criminal homicide of an unborn child. There were no further penalties imposed with respect to his remaining convictions in light of the sentences imposed upon him for his convictions of count one and count two.

Taylor filed timely post-sentence motions and a hearing was held on those motions on November 29, 2016, after which hearing his motions were denied. Taylor filed a timely notice of appeal on December 2, 2016, and was directed to file a concise statement of matters complained of on appeal. Taylor's appellate counsel requested several continuances to file that statement and did file that statement on June 5, 2017.

In the concise statement of matters complained of on appeal, Taylor has alleged eight claims of error. Initially, he maintains that this Court erred in allowing the Commonwealth to introduce the preliminary hearing testimony of a witness as well as a video recorded statement made by that witness prior to the preliminary hearing, thereby violating his right to confront his witnesses under Article I, Section 9 of the Pennsylvania Constitution. Taylor also maintains that this Court erred in allowing the Commonwealth to strike an African-American juror while implying there was a racial reason for striking her in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). Taylor next maintains that the Court erred in allowing the jury to view large colored images of the dead fetus. Taylor next maintains that the Court erred in allowing the Commonwealth to ask leading questions to try to impeach certain witness and in allowing the Commonwealth to play two videotapes of interviews with those witnesses. Taylor also maintains that the Court erred in allowing the jury to have the full transcript of the preliminary hearing and be able to read the arguments of counsel that were contained in those transcripts. Taylor next maintains that the verdicts that were rendered was inconsistent, however, he does not suggest how they were inconsistent. Taylor also maintains that the verdicts were against the weight of the evidence as the evidence was legally insufficient to support the verdicts that were rendered. Finally, Taylor maintains that the sentence imposed was excessive and unreasonable in light of the facts and circumstances of the case and the defendant's background.

On May 26, 2014, at approximately 12:30 a.m., Taylor told Leroy Powell that he was going to go up the old girl's house to do a bang, which Powell understood to be a shooting. Taylor, Powell, Daniel Bracey and Calvonte Moore (hereinafter referred to as "Moore"), all walked up to the home of DaRae Delgado, who lived at 135 Friendship Street in the City of Duquesne. Taylor, Bracey

and Powell went onto the porch of Delgado's home which was unlit and knocked on the door. Delgado went to the front door, asked who was there, received no response but opened the door and Delgado was shot four times. Her assailants ran from her home, however, their images were captured on surveillance video cameras mounted on several telephone poles. At the time of the shooting, Delgado was thirty-one weeks pregnant and while she survived the shooting, her unborn child did not. While Delgado was in the hospital she was interviewed by the police and based upon information that they had, they believed that Naisreal "Iggy" Owens, (hereinafter referred to as "Owens"), was the possible shooter. A photo array was put together and shown to Delgado and she was asked whether or not she knew anyone in the photo array and at the time of trial, she indicated that she told the police that she knew Owens because he had once asked her for a light for his cigarette. She denied that she ever told the police that Owens was the individual that shot her. The police obtained a search warrant for Owens' residence and went to that residence and found Owens but nothing that would link him to the shooting. Owens denied that he was the shooter, although he did tell the police that he was with Taylor shortly before the shooting occurred. Owens phoned some relatives of the victim in an attempt to tell them that he was not the shooter. The police then continued their investigation and talked to Moore and Leroy Powell in order to focus on Taylor as the defendant. In talking to Leroy Powell, he told the police that Taylor admitted to him that he had shot the girl and told him not to tell anybody. The Commonwealth also presented the testimony of Owens and Moore in addition to their video statements to the police. Their testimony at trial was inconsistent with the testimony they gave on videotape.

Taylor initially maintains that this Court erred in permitting the introduction of the testimony of Leroy Powell given at the time of the preliminary hearing and the playing of the video-recorded statement that he made to the police prior to that preliminary hearing since it was in violation of the hearsay rule and violated Taylor's rights to confront his witnesses under Article I, Section 9 of the Pennsylvania Constitution.[1] Prior to the commencement of trial, the Commonwealth indicated that it was going to present the testimony of Leroy Powell by use of his recorded testimony at the preliminary hearing since Powell was deceased. Although Powell was the victim of a homicide, the jury was only advised that he was deceased and, accordingly, he was unavailable to testify. Taylor maintains that Powell's testimony violates the hearsay rule. Pennsylvania Rule of Evidence 804 which specifically provides for the production of the recorded testimony of an individual when an individual is deceased. That rule provides as follows:

**Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness**

**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
(2) refuses to testify about the subject matter despite a court order to do so;
(3) testifies to not remembering the subject matter, except as provided in Rule 803.1(4);
(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this paragraph (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

*Comment*: Pa.R.E. 804(a)(3) differs from F.R.E. 804(a)(3) in that it excepts from this rule instances where a declarant-witness's claim of an inability to remember the subject matter of a prior statement is not credible, provided the statement meets the requirements found in Pa.R.E. 803.1(4). This rule is otherwise identical to F.R.E. 804(a). A declarant-witness with credible memory loss about the subject matter of a prior statement may be subject to this rule.

**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony*. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

*Comment*: Pa.R.E. 804(b)(1) is identical to F.R.E. 804(b)(1).

In criminal cases the Supreme Court has held that former testimony is admissible against the defendant only if the defendant had a "full and fair" opportunity to examine the witness. *See Commonwealth v. Bazemore*, 614 A.2d 684 (Pa. 1992).

Depositions

Depositions are the most common form of former testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.E. 804(b)(1), but also by statute and rules of procedure promulgated by the Pennsylvania Supreme Court.

The Judicial Code provides for the use of depositions in criminal cases. 42 Pa.C.S. § 5919 provides:

Depositions in criminal matters. The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence upon the trial of any criminal matter unless it shall appear at the trial that the witness whose deposition has been taken is in attendance, or has been or can be served with a subpoena to testify, or his attendance otherwise procured, in which case the deposition shall not be admissible.

42 Pa.C.S. § 5325 sets forth the procedure for taking depositions, by either prosecution or defendant, outside Pennsylvania.

In civil cases, the introduction of depositions, or parts thereof, at trial is provided for by Pa.R.C.P. No. 4020(a)(3) and (5).

A video deposition of a medical witness, or any expert witness, other than a party to the case, may be introduced in evidence at trial, regardless of the witness's availability, pursuant to Pa.R.C.P. No. 4017.1(g).

42 Pa.C.S. § 5936 provides that the testimony of a licensed physician taken by deposition in accordance with the Pennsylvania Rules of Civil Procedure is admissible in a civil case. There is no requirement that the physician testify as an expert witness.

(2) *Statement Under Belief of Imminent Death*. A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

*Comment*: Pa.R.E. 804(b)(2) differs from F.R.E. 804(b)(2) in that the Federal Rule is applicable in criminal cases only if the defendant is charged with homicide. The Pennsylvania Rule is applicable in all civil and criminal cases, subject to the defendant's right to confrontation in criminal cases.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court interpreted the Confrontation Cause in the Sixth Amendment of the United States Constitution to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule. However, in footnote 6, the Supreme Court said that there may be an exception, *sui generis*, for those dying declarations that are testimonial.

(3) *Statement Against Interest*. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

*Comment*: This rule is identical to F.R.E. 804(b)(3).

(4) *Statement of Personal or Family History.* A statement made before the controversy arose about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

*Comment*: Pa.R.E. 804(b)(4) differs from F.R.E. 804(b)(4) by requiring that the statement be made before the controversy arose. *See In re McClain's Estate*, 392 A.2d 1371 (Pa. 1978). This requirement is not imposed by the Federal Rule.

(5) *Other exceptions (Not Adopted)*

*Comment*: Pennsylvania has not adopted F.R.E. 804(b)(5) (now F.R.E. 807).

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

Powell testified at the preliminary hearing and he was cross-examined by Taylor's attorney, Blaine Jones. In his preliminary hearing testimony, reference was made to the fact that prior to that testimony, approximately two months earlier to the preliminary hearing, that he had made a video-recorded statement with the police. That video was played for the jury in light of the fact that it was part of the examination of the witness and that it was admissible pursuant to Pennsylvania Rule of Evidence 803.1, (3) which provides as follows:

**(3) Recorded Recollection of Declarant-Witness.** A memorandum or record made or adopted by a declarant-witness that:

(A) is on a matter the declarant-witness once knew about but now cannot recall well enough to testify fully and accurately;
(B) was made or adopted by the declarant-witness when the matter was fresh in his or her memory; and
(C) the declarant-witness testifies accurately reflects his or her knowledge at the time when made.

If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

The videotape could and would be substantiated by the preliminary hearing transcript when Powell did not dispute that anything that he said in the video was inaccurate. This information was given to the jury so that they could fully understand and make sense of the investigation that was undertaken as a result of this homicide.

Taylor next maintains that this Court erred in allowing the Commonwealth to strike an African-American juror without, at a minimum, inquiring whether or not there was a non-racial reason for striking the juror. In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L .Ed. 2d 69 (1986), the Supreme Court set forth the standard in making a determination as to whether or not purposeful discrimination had been demonstrated in the selection of the jury as follows:

> The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. See *Castaneda v. Partida, supra,* 430 U.S., at 494-495, 97 S.Ct., at 1280; *Washington v. Davis*, 426 U.S., at 241-242, 96 S.Ct., at 2048-2049; *Alexander v. Louisiana, supra*, 405 U.S., at 629-631, 92 S.Ct., at 1224-1226. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's

trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida, supra*, 430 U.S., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

The panel of 44 people who comprised the jury pool from which Taylor selected his jury contained only two African-American females. During the jury selection the Commonwealth exercised one of its preemptory challenges to remove one of the African-American females. Taylor's trial counsel raised a challenge under *Batson* claiming that the removal of this juror was racially motivated, however, the Commonwealth maintained that Taylor had not shown a pattern since the Commonwealth had only removed one juror and was willing to offer an explanation as to why it did that. This Court agreed with the Commonwealth that a racial bias was not demonstrated since only one juror had been removed and in the use of its other two preemptory challenges at that time, the Commonwealth had removed two white males. It should be noted that Taylor is an African-American and Delgado is also an African-American. In looking at the record that was generated in this case, it is clear that the defense did not establish a pattern so as to require the Commonwealth to disclose a reason for the use of its preemptory challenge in accordance with the dictates of *Batson v. Kentucky, supra.*

Taylor next maintains that this Court erred when the Commonwealth displayed on a large movie screen, color images of the dead fetus. It should be noted that because of the size of this movie screen, the images contained in the photographs were enlarged and somewhat blurry, however, those images were also shown to the jury on the computer screens that were in front of them in the jury box and the display was sharp and clear. The standard for reviewing the admission of autopsy photographs is set forth in *Commonwealth v. Pruitt*, 597 Pa. 307, 951 A.2d 307, 327-328 (2008) wherein the Supreme Court acknowledged that it was an abuse of discretion standard that one must consider the claim that photographic evidence was improperly admitted.

We review a challenge to the trial court's admission of photographs under the standard of abuse of discretion. *Commonwealth v. Solano*, 588 Pa. 716, 906 A.2d 1180, 1191 (2006), *cert. denied*, --- U.S. ----, 127 S.Ct. 2247, 167 L.Ed.2d 1096 (2007). When considering the admissibility of photographs of a homicide victim, which by their very nature can be unpleasant, disturbing, and even brutal, the trial court must engage in a two-step analysis:

First a [trial] court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

*Commonwealth v. Tharp*, 574 Pa. 202, 830 A.2d 519, 531 (2003) (citation omitted).

As we have repeatedly recognized, photographic images of a homicide victim are often relevant to the intent element of the crime of first-degree murder. *Solano, supra* at 1191; *Tharp, supra* at 531. Indeed, in some cases, the condition of the victim's body may be the only evidence of the defendant's intent. *Commonwealth v. McCutchen*, 499 Pa. 597, 454 A.2d 547, 550 (1982). In *McCutchen*, we affirmed a trial court's admission of photographs of a murder victim that illustrated the brutality of the beating and sexual assault he sustained, in order to allow an inference of the defendant's intent to kill. We stated that the depiction of the victim's deep and gaping injuries "was essential as evidence of intent beyond mere infliction of bodily injury." *Id.* at 549. As made clear in *McCutchen*, we will not sanction a sanitizing of the evidence that deprives the Commonwealth of the opportunity to prove intent to kill beyond a reasonable doubt. *See id.; Tharp, supra* at 531.

The fact that a medical examiner or other comparable expert witness has conveyed to the jury, in appropriate clinical language, the nature of the victim's injuries and the cause of death does not render photographic evidence merely duplicative. *See McCutchen, supra* at 550. The meaning of words, particularly the clinical words employed by a pathologist, can be properly and usefully illustrated and explained to a lay jury via photographic images. In determining the intent of the defendant in a criminal homicide case, the fact-finder "must be aided to every extent possible." *Id.* at 549.

Although the possibility of inflaming the passions of the jury is not to be lightly dismissed, a trial judge can minimize this danger with an appropriate instruction, warning the jury members not to be swayed emotionally by the disturbing images, but to view them only for their evidentiary value. *Solano, supra* at 1192; *McCutchen, supra* at 548 n. 4.

Although Taylor does not allege that the autopsy photographs were displayed for the purpose of prejudicing him and inflaming the jury, the sole purpose that these photographs were permitted to be introduced was so the jury could understand how the fetus died and could understand the mechanics of death. Prior to allowing the jury to view these photographs, this Court, in accordance with the instructions provided by *Commonwealth v. Solano*, 588 Pa. 716, 906 A.2d 1180 (2006), cautioned the jury that the photographs that they were going to see could be best described as unsettling and they were not to allow any bias, prejudice or emotion to prevent them from dispassionately viewing these photographs for their evidentiary value. Again, during this Court's final instructions, the jury was reminded that the photographs were given for a very limited purpose and that was to understand the mechanics of death. Recently in *Commonwealth v. Hutchinson*, 164 A.3d 494, 500-01 (Pa. Super. 2017), the Court stated the process to be used, as required by the Supreme Court, in making the examination as to the admissibility of these autopsy photographs:

> Our Supreme Court has explained that when considering the admission of photographs of a victim's body, a trial court must employ a two-step process.
>
> > First, the trial court must examine whether the particular photograph is inflammatory. If the photograph is not inflammatory, it may be admitted if it is relevant and can serve to assist the jury in understanding the facts of the case. If the photograph is inflammatory, the trial court must determine whether the photograph is of such essential evidentiary value that its need clearly outweighs the *501 likelihood of inflaming the minds and passions of the jurors.
>
> *Commonwealth v. Woodard*, 129 A.3d 480, 494 (Pa. 2015) (internal citations omitted).

This Court engaged in that process and made the determination that there was great evidentiary value in the photographs and that they were not so inflammatory so as to prevent their admission.

Taylor maintains that this Court erred in allowing the Commonwealth to ask leading questions to try to impeach two witnesses and by playing videotapes of their interviews with the police and allowing them to be introduced as substitute evidence. Although Taylor does not name the two witnesses, it is apparent from a review of the record that they are Moore and Owens. When Moore was called to testify, he initially maintained that he did not recall what, if anything, he told the police when he was interviewed. He was shown a police report of his interview and said that that did not refresh his recollection. When he was asked individual questions about certain statements that he made to the police he would either say that he did not recall them or that the statement was not true. Moore met with the police twice and both times his statements were video-recorded. The Commonwealth authenticated those video-recordings and offered them into evidence as substantive evidence of what Moore had told the police during these interviews since Moore's testimony was inconsistent with his prior statement. Those statements were permitted to be introduced as substantive evidence in accordance with the dictates of *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7, 10 (1992), where the Pennsylvania Supreme Court set forth the standard that was used in the determination as to whether or not prior inconsistent statements could be used as substantive evidence.

> In an effort to ensure that only those hearsay declarations that are demonstrably reliable and trustworthy are considered as substantive evidence, we now hold that a prior inconsistent statement may be used as substantive evidence only when the statement is given under oath at a formal legal proceeding; or the statement had been reduced to a writing signed and adopted by the witness; or a statement that is a contemporaneous verbatim recording of the witness's statements. See Note, *Substantive Admissibility of a Non–Party Witness' Prior Inconsistent Statements: Pennsylvania Adopts the Modern View*, 32 Vill.L.Rev. 471 (1987).

The second witness that Taylor made reference to was Owens. When he was initially called to testify, he said that he did not remember the shooting but it was all on tape. When he was presented with the police reports, he indicated that they were of no use to him because he could not read. When asked specific questions about the case, he was equivocal at best, saying that he did not remember and it was all on the tape, which meant his taped interview with the police. Court was recessed before Owens testimony was completed and he was given the police reports and he had somebody read them to him and the next day he was able to answer more of the questions, however, it became apparent that it was necessary that his recorded interview be played to understand his Court testimony. His recorded testimony was admissible not only because of *Commonwealth v. Lively, supra.*, but pursuant to Rule 803.1, 3 of the Pennsylvania Rules of Evidence. It is abundantly clear from reading the transcript that Owens once knew about the occurrence but could not recall it accurately. It was also clear that the recorded statement that was made contemporaneous with the beginning of the investigation of the shooting and that Owens testified accurately with respect to his knowledge at the time that he talked to the police and had that interview videotaped.

Taylor next maintains that this Court erred when it permitted the jury to have the full transcripts of the preliminary hearing so that they had the ability to read the arguments of counsel, following the conclusion of testimony. This claim of error is patently false. At no time was the jury ever given a transcript of the preliminary hearing and, in fact, the preliminary hearing transcript was read to the jury by the assistant district attorney and she read all of the parts, which included the questions by the Commonwealth and the defense lawyer and Powell's answers. The only transcript that was given to the jury was the transcript with respect to Powell's recorded statement and that was given to them as an aid so that they could follow along with the video transcript. Those transcripts were collected and were never given to the jury for the purpose of deliberations. This Court further instructed the jury that the evidence that was derived from Powell's statement came from his video statements and his testimony at the preliminary hearing and not any transcript of the proceedings.

Taylor maintains that the verdicts that were entered were inconsistent. This blatant assertion provides no basis from which one can attempt to surmise how the verdicts were inconsistent. When one looks at the record, it is clear that the Commonwealth proved beyond a reasonable doubt that Taylor was the shooter that caused the death of Delgado's unborn child and also attempted to cause Delgado's death, in addition to placing others of danger of serious bodily injury or death. Taylor was acquitted of one count of recklessly endangering another person when the Commonwealth presented no testimony that Ronald Graham was in any way in danger as a result of the shooting that occurred on the Delgado porch. There was more than sufficient evidence that Taylor was the shooter, possessed a firearm from which he was disqualified of possessing as a result of his two-armed robbery convictions as a thirteen-year-old.

Taylor also maintains that the verdict was against the weight of the evidence and the evidence was legally insufficient to support his convictions. In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751-752 (2000), the Pennsylvania Supreme Court set forth the standard to be used in examining a claim that the evidence was insufficient to support the verdict.

> Appelant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to *how* the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.
>
> In order to address this claim, we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975). When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).
>
> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211.[FN3] An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson, supra*. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Id.*
>
> FN3. In *Tibbs*, the United States Supreme Court found the following explanation of the critical distinction between a weight and sufficiency review noteworthy:
>
> When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different.... The [trial] court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.
> *Tibbs* 457 U.S. at 38 n. 11, 102 S.Ct. 2211 *quoting United States v. Lincoln*, 630 F.2d 1313 (Cir. 8 th 1980).

The Commonwealth established beyond a reasonable doubt that Taylor was in possession of a thirty-eight caliber handgun and that he told three other people that he was going to do a bang which they all knew meant that he was going to do a shooting, that he went to Delgado's home, knocked on the door and when she attempted to see who was on the porch, placed his hand over the window so that she could not, thereby requiring Delgado to open the door to see who was on her porch at 12:30 in the evening. When she opened the door, he then shot her at least four times in the abdomen, which caused the death of her unborn child. The following day he told people not to tell the police he was the shooter. The record is abundantly clear that the evidence was more than sufficient to support the convictions with respect to the claim that the verdicts were against the weight of the evidence, nothing about the verdicts that were rendered in this case would shock someone's conscious. The verdicts were consistent with the facts that were presented and amply displayed that Taylor was responsible for all of the crimes for which he was convicted.

Finally, Taylor maintains that the sentences imposed up him were excessive and unreasonable in light of the facts and the circumstances of the case and the defendant. Taylor's claim of error with respect to the sentences imposed upon him is a challenge to the discretionary aspect of sentencing and he is required to demonstrate a substantial question in order for appellate review to apply. While this Court does not believe that a substantial question has been presented, for the purpose of this appeal, it will address this issue assuming that Taylor did, in fact, frame this issue properly. In *Commonwealth v. Dodge*, 77 A.3d 1263, 1268 (Pa. Super. 2013), the Court noted that:

> A defendant presents a substantial question when he "sets forth a plausible argument that the sentence violates a provision of the sentencing code or is contrary to the fundamental norms of the sentencing process."

Assuming for the sake of argument that Taylor had in fact presented such a substantial question, the standard of review of an Appellate Court has been recently set forth in *Commonwealth v. Luketic*, 162 A.3d 1149, 1162-1163 (Pa. Super. 2017) as follows:

> Our standard of review follows: "Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." *Commonwealth v. Bricker*, 41 A.3d 872, 875 (Pa. Super. 2012) (citation omitted). "In order to establish that the sentencing court abused its discretion, [the defendant] must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." *Williams*, 69 A.3d at 741 (quotation marks and citation omitted). "The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." *Id.* at 740 (quotation marks and citation omitted). To determine whether the trial court made the proper considerations during sentencing, "an appellate court must, of necessity, review all of the judge's comments." *Commonwealth v. Bethea*, 474 Pa. 571, 379 A.2d 102, 106 (1977); *see also Commonwealth v. Ritchey*, 779 A.2d 1183, 1187 (Pa. Super. 2001) ("As this Court has stated, the judge's statement must clearly show that he has given individualized consideration to the character of the defendant" (quotation marks and citation omitted)).

At the time of sentencing, this Court had the benefit of the facts of Taylor's case, the guidelines applicable to his case and a presentence report. The Court noted that in fashioning the sentence it was required to look upon the impact of the victim, the protection of society and the rehabilitative needs of the defendant. (Sentencing Transcript, page 8). It was also noted that it was particularly troubling that he had two armed robberies at the age of thirteen. It also knew from the presentence report that despite placement in George Jr. Republic during one of his adjudications for armed robbery, he was still non-compliant with the conditions imposed upon him.

When this Court sentenced Taylor on the charge of murder of an unborn child, he was sentenced to one hundred eighty to three hundred sixty months, which was in the middle of the standard range. The consecutive sentence of ninety to one hundred eighty months on the charge of attempted murder was the bottom end of the standard range. In making a determination to run the sentences consecutively, this Court noted that Taylor was a very dangerous individual since he had previously committed two robberies and was armed with a gun, and had the specific intent to cause first degree murder since he declared his intention to go up to Delgado's house and bang somebody. The attempt to be rehabilitated in the Juvenile Court system obviously failed since this was a dangerous individual who possessed a deadly weapon. This Court believed that because of the nature of the crimes that he continued to commit and the nature of the crimes for which he was convicted in this case, that it was necessary to impose a consecutive sentence upon him.

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

Dated: October 16, 2017

[1] **Rights of Accused in Criminal Prosecutions**

*In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to [meet the witnesses face to face] be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.*

## Western Pennsylvania Annual Conference of the United Methodist Church v. City of Pittsburgh

*Historic Designation Pittsburgh HRC—Evidence—Constitutional Religious Rights Violation—Jurisdiction*

*Historic Review Commission accepted and prosecuted historic nomination of church, designating church as historic structure over church objection to nomination. Court determined only the owner of the church may nominate for historic designation and designation over objection of property owner (church) violated City Ordinance and Constitution.*

No. SA 16-000823. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Della Vecchia, J.—November 20, 2017.

**OPINION**

This matter comes before the Commonwealth Court on the appeal of the City of Pittsburgh from this Court's Order of September 6, 2017, sustaining the appeal of the Western Pennsylvania Annual Conference of the United Methodist Church filed at the above number.

I. BACKROUND

The case is one of three matters in litigation in Allegheny County involving the Albright Community United Methodist Church within the City of Pittsburgh. The property is also the subject of SA 15-000919, involving a Zoning Board of Adjustment Appeal, which denied a variance for a drive-through retail store which included the demolition of the subject property. Additionally, at GD-16-003397, the Western Annual Conference of the United Methodist Church (hereinafter "Methodist Church"), also the Plaintiff in this matter, sought to deny the City subject matter jurisdiction for the historic nomination underlying the case *sub judice*.

This particular litigation involves the City of Pittsburgh's approval of the historic designation of property located within the City of Pittsburgh, Allegheny County, Pennsylvania. The property is commonly referred to as 486 S. Graham Street, Pittsburgh, PA 15232, and is designated as Lot and Block 51-M-155. The property is a place for religious worship known as the Albright Community United Methodist Church. Due to declining membership, in November of 2013, the Methodist Church found itself financially unable to maintain the property, reduced use of the 'church building'[1], and saw the property's need for repair increasing.[2]

When the local members were no longer financially able to support the property, the Methodist Church, as the true owners of the property, began to lend financial support by covering certain costs and expenses. Although the individual churches are typically held in their local name, all Methodist Church property is encumbered by a trust imposed by church law and recognized by this Commonwealth's highest court.[3]

The Methodist Church asserts that in August of 2015, "certain individuals" submitted a nomination to designate the subject property as 'historic' to the Historic Review Commission (hereinafter "HRC") unbeknownst to the owner of record, the Methodist Church. This first nomination included a letter on Albright Community United Methodist Church stationary that purported to show the "consent of the property owner". When made aware of this nomination, the Methodist Church contacted the City Law Department to notify it that the Methodist Church was in fact the true owner of the property. Based on this finding, the HRC declined to accept the first nomination.

On January 20, 2016, a second nomination was later filed by one Lindsay Patross for the property to be designated a historic designation by the HRC. The Patross nomination was one regarding the property as "not a historic structure", based on her assertion that the property was no longer being used for "divine worship".[4]

The Methodist Church refuted Patross' determinations and objected to her nomination, considering any potential nomination of a property still engaging in divine worship a violation of the City Code. Despite the Methodist Church's objection, the HRC accepted the second nomination and notified the Methodist Church that it would be prohibited from exercising its property rights, specifically, any altering of the exterior of the property.

The HRC conducted a public meeting on February 3, 2016, at which time, representatives of the Methodist Church attended and further objected to the nomination, citing *inter alia*, that the nomination was violative of the City Code. Despite the objection as to the council's jurisdiction over this matter, the HRC proceeded to accept testimony regarding the nomination and later found that the property met the standard to be considered 'historic'. On March 2, 2016, a public hearing was conducted, and again represen-

tatives of the Methodist Church attended and objected to the nomination. Despite and over these objections, the HRC elected to impose upon the property a historic designation.

On May 2, 2016, a public hearing on the second nomination was held before the City Planning Commission, and again the Methodist Church objected to the jurisdiction of the Planning Commission and the City over the second nomination. Over objection, the Planning Commission voted to approve the second nomination. This decision was later transmitted to the Pittsburgh City Council.

On June 1, 2016, a resolution regarding the second nomination was introduced before the Pittsburgh City Council, read and referred to committee. The Methodist Church, as the recorded owner of the property, submitted an objection to the nomination in writing to the City Clerk on July 8, 2016.

A public hearing was held regarding same on July 25, 2016. Despite the Methodist Church's objections to both the City's jurisdiction to deem the property as historic, as well as the process used for nomination, on September 26, 2016, the City Clerk entered an official disposition reflecting the status of the nomination legislation as "Passed Finally" and "Passed pursuant to Case Law."

II. PROCEDURAL HISTORY

On October 25, 2016, this matter was initiated by a Statutory Appeal filed by the Methodist Church. Following a Writ of Certiorari and upon assignment to this writer, an order of court was issued on November 3, 2016, directing the parties to appear before this writer for a status conference on November 17, 2016.

Following said conference, this writer issued an order directing the plaintiff to file the record in regards to this matter prior to December 15, 2016. A briefing schedule was determined with deadlines of February 15, 2017, with an oral argument to follow on March 14, 2017. Due to delays in reproducing the record, arguments were delayed and postponed until June 12, 2017.

This writer, after review of the case file, the parties' briefs, and oral arguments, issued an Order dated September 6, 2017, in which this Court sustained the appeal filed by the Methodist Church and vacated Albright's designation as a historic structure.

On October 5, 2017, the City filed a Notice of Appeal to the Higher Court. In response, on October 16, 2017, this Court directed the City to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. §1925(b). Said statement was timely filed on October 20, 2017, placing this matter properly before the Commonwealth Court of Pennsylvania.

III. ISSUE RAISED ON APPEAL

The City presents the following claims of error with this Court's determinations:

1. The Common Pleas Court abused its discretion by not deferring to the findings of fact and conclusions of law by the Historic Review Comminnio0n ("HRC"). There was ample evidence in the record for the HRC to find that the deconsecrated building in this case was no longer being used for religious worship, and thus was not eligible for the narrowly tailored self-nomination exception for historic designation of religious structures per Pittsburgh Code of Ordinances Title 11 – Historic Preservation.

2. The Common Pleas Court abused its discretion by not deferring to the HRC's interpretation and application of Title 11 and the City's precedence for accepting and approving historic nomination of deconsecrated religious structures in the past.

3. The Common Pleas made an error of law when it failed to follow the rules of statutory construction, pursuant to 1 Pa.C.S.A. §§ 1901, 1903, 1921, 1922, 1923, 1932 and 1934 (1972), which require the Court to consider, among other things, the occasion and necessity for the Ordinance under review here, the circumstances under which this Ordinance was enacted, the technical use of the word: religious structure" in historic nomination proceedings in the City of Pittsburgh, and the administrative interpretations of Pittsburgh Code of Ordinances Title 11. The passage of The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-2000cc-5 ("RLUIPA") in 200 and the Religious Freedom Protection Act, 71 P.S. § 2401, et seq. ("RFPA"), in 2002 were the circumstances that crested the occasion and necessity for the City of Pittsburgh to pass the narrowly tailored self-nomination exception for historic designation of religious structures :" used as a place of worship" in Title 11, Chapter §1101.02(h) and §1101.03(a)(1)(a)(7)(2003) because RLUIPA and RFPA provides that a land-use regulation cannot substantially burden religious exercise unless the government can show the regulation furthers a compelling governmental interest and is the least restrictive means of furthering that interest. The intent of the legislature was to ensure that religious operations, for purposes of worship, were not unduly burdened by historical designation, not to exempt all religious structures from historic designation altogether based on the structure's architectural type. Further, there is precedence from 2008, for non-owners of record to nominate and successfully gain approval for the historic designation of deconsecrated religious structures under the relevant section of Title 11 at issue here.

IV. DISCUSSION

Where a full and complete record is made before the local agency, a reviewing court shall hear the appeal on the record supplied, and shall affirm the local agency's adjudication *unless* it violates constitutional rights, the local agency committed an error of law, the decision violates the provisions of the Law, or necessary findings of fact are not supported by substantial evidence (*In re Nevling*, 907 A.2d 672, (Pa. Cmlth. 2006), emphasis added).

The City first raises err with this Court's failure to blindly accept the findings of the HRC, in that the property was no longer being used for religious worship and has been since deconsecrated despite the testimonial evidence to the contrary and the continuing claims of procedural errors asserting that the HRC's nomination was and is a nullity.

No temporal authority, be it the City of Pittsburgh, Commonwealth of Pennsylvania or the government of the United States has the power to consecrate or deconsecrate a house of worship. That authority lies solely with the religion that owns and/or occupies said house of worship. For the City of Pittsburgh to even attempt to assert the power to consecrate or deconsecrate a house of worship is a direct violation of the United States and Pennsylvania constitutions' prohibition against the establishment of a state religion.[5]

Over objection, the HRC conducted a public hearing on February 3, 2016 regarding a nomination advanced by a member of the general community; that the property should be bestowed with a historic nomination. Despite the Methodist Church's objection that the HRC had no subject matter jurisdiction as to this particular property, the hearing continued. At said time, Pastor Paul D. Taylor, the Pittsburgh District Superintendent for the western Pennsylvania Conference of the United Methodist Church, tasked with the responsibility of all Methodist churches in the Pittsburgh region, testified that the church's conference secretary, John Wilson had led worship in September, October, November, and December of 2015, and further that Pastor George Porter was lead-

ing services on a weekly basis in 2016 (Exhibit 11, Tr. at p. 38-39, hearing of February 3, 2016, *see also*, Exhibit 12, Tr. at p. 21-22).

The City suggests that this writer should reject the testimony of these pastors and accept its argument that the property was abandoned and deconsecrated despite the testimony of clergy to the contrary. It must be stated that the testimony was not that the property was being used in its full capacity or as it once was, in that the pastors were still preforming full services. To the contrary, the testimony was that the Church's financial constraints had left only a portion of the Church still serviceable for religious worship (*See* Exhibit 12, Tr. at 22).

The City raises further err with this Court's decision, in that it failed to follow the precedent established for accepting and approving the historic nomination of deconsecrated religious structures in the past (emphasis added). As the Church has continually maintained through competent evidence and testimony, the structure has not been deconsecrated and remains a place of religious worship (*See id.*).

The City further suggests that this writer ignored nearly the entire body of law governing the City's actions in reaching his determination. This writer rejects this claim and points to City Code itself for support of this court's determination.

The relevant law governing the City's actions is contained in the City Code, specifically §1101, which states in part:

> Title Eleven – Historic Preservation
>
> 1101.02 - Definitions.
>
> (h) Religious Structure. Any or all of the following: church, cathedral, mosque, temple, rectory, convent, or similar structure used as a place of religious worship.
>
> 1101.03 – Designation of Historic Structures, Districts, Sites and Objects.
>
> (a) The Council of the City of Pittsburgh may designate Historic Structures, Historic Districts, historic Sites and Historic Objects upon request or upon its own initiative.
>
> (1) Nomination.
>
> a. Nomination of an area, property, site, structure, or object for consideration and designation as a Historic Structure, Historic District, Historic Site, or Historic Object shall be submitted to the Historic Review Commission on a form prepared by the Commission, and may be submitted by any of the following:
>
> **7. Nomination of a religious structure shall only be made by the owner(s) of record of the religious structure.**

It is undisputed and further supported by a deed entered into evidence that the Methodist Church is the owner of record for the subject property. This writer found the City's decision to hold the property as, 'no longer a Religious Structure' contrary to testimonial evidence and thus, violative of the City Code in addition to both the Pennsylvania and United States Constitutions.

The City Code is clear in that, where the owner of a nominated property objects to the proposed historic designation, the designation of a nominated structure, site, or object shall require the affirmative vote of six (6) members of City Council. Despite the Church's continuous objections at each and every step of these proceedings, the City erroneously and unconstitutionally concluded that a deemed approval occurred despite written opposition by the owner.

An approval without City Council action is only appropriate if the owner of the property failed to object to the recommendations made by the HRC and Planning Commission. In the case *sub judice*, the Church has strenuously and consistently objected to the City's recommendation. The City Code provides that, "[t]he designation of a nominated structure, site, or object shall require the affirmative vote of six (6) members of Council if the owner or record of the property has submitted to Council his or her written and signed opposition to the designation of the property".[7] An affirmative vote by six (6) members of City Council has yet to occur.

V. CONCLUSION

Based on this writer's findings; that the Methodist Church was the legal owner of the property, and that the evidence presented at public hearing established that the property has continually served as a place of religious worship for no less than one hundred (100) years, that any decision contrary would be a violative of the Pittsburgh City Code as well as the mandate of a separation of church and state, as set forth in the Pennsylvania and the United States Constitutions. For the aforesaid reasons, this writer respectfully requests the Commonwealth Court of Pennsylvania to affirm this Court's Order dated, September 6, 2017.

BY THE COURT:
/s/Della Vecchia, J.

Date: November 20, 2017

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[1] The property includes a separate structure once used as a rectory.

[2] It must be noted that the Methodist Church never deconsecrated this structure.

[3] *Western Pennsylvania Annual Conference of the United Methodist Church v. Everson Evangelical Church of North America*, 312 A.2d 35 (Pa. 1973).

[4] Tr.at p. 28, Exhibit 11, Hearing of February 3, 2016.

[5] See Pennsylvania Constitution, Article 1, Section 3, See also United States Constitution, Amendment 1, Amendment 5

[6] The designation of a nomination structure, site, or object shall require the affirmative vote of six (6) members of Council if the owner of record of the property has submitted to Council his or her written and signed opposition to the designation of the property. City Code 1101.3(j)(2), Designation of Historic Structures, Districts, Sites and Objects.

[7] Pittsburgh City Code, Title Eleven, Historic Preservation, §1101.03(j)(2).